

Judgment 53/2007

**Masood et al v Zahoor et al – Royal Court (Civil
Action File 938) – 9 July 2007**

Companies (Guernsey) Law, 1994 (s.75) – allegation of prejudice to minority shareholders – claim to entitlement to shareholdings and rectification of share register – related actions ongoing in various other jurisdictions – forum non conveniens – principles to be applied – Guernsey proceedings stayed subject to undertakings by the parties

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 938

**The 9th July 2007, before Richard Charles Southwell QC,
Lieutenant Bailiff, sitting alone.**

Between:

SOHAIL MASOOD

NEWPORT FINANCIAL HOLDINGS LIMITED

MOHAMMAD ALI

The Plaintiffs

- v -

MOHAMMAD ZAHOOR

INTERNATIONAL STEEL AND TUBE INDUSTRIES LIMITED

METALSUKRAINE CORPORATION LIMITED

AZOT LIMITED

WASEEM MAHBOOB

PARVEEN SALEEMI

The Defendants

Whereas on the 9th of October 2006 the Lieutenant Bailiff considered the Exceptions Déclinatoires pleaded by the Defendants relating to lis alibi pendens and forum non conveniens and heard thereon Advocates J.M. Wessels and A.M. Ozanne Counsel for the Plaintiffs and Defendants respectively and whereas on 3rd November 2006 the Lt

Bailiff handed down judgment in the terms attached hereto and directed Counsel to agree the terms of the order emanating from the said judgment the Lieutenant Bailiff this day approved the said order in the terms set out as follows;

UPON the Defendants by their Counsel undertaking:-

1. To submit to the jurisdiction of the High Court of Justice of England and Wales (“the English Court”) for the determination of the claims brought against them in this Action (“the Guernsey Action”);
2. To consent to the Plaintiffs’ amending the Particulars of Claim in the proceedings in the High Court of Justice Chancery Division No HC04C0331 (“the English Action”) so as to incorporate their Amended Cause in the Guernsey Action in the English Action with the exception of the grant of relief under the Companies (Guernsey) Law 1994 provided that unless the Circuit Court of the State of Oregon has ruled that the Claimants are entitled to do so, the Claimants shall not without further order of the English Court or the consent of the First Defendant adduce evidence of or rely at trial on the deposition made by the 1st Defendant in proceedings in the English Court referred to in paragraph 137 of the Re-Amended Particulars of Claim. For the avoidance of doubt the Defendants will not take in the English Action any limitation point arising in the Guernsey proceedings that was not in existence on the date the Guernsey Action was filed. The Defendants reserve all rights in relation to the costs associated with the Guernsey Action regardless of the final outcome of that action.
3. To cooperate with the Claimants in the English Action in seeking a Case Management Conference at the earliest opportunity in order to ensure that the claims made in the Guernsey Action be determined together with the existing claims in the English Action as soon as possible;
4. Not to object to Applications in the English Action for the following:
 - a. The addition as a Claimant of Mohammad Ali the third Plaintiff in the Guernsey Action
 - b. The addition as Defendants of Metalsukraine Corporation Limited (incorporated in the British Virgin Islands), Azot Limited, Waseem

Mahboob and Parveen Saleemi, the Third, Fourth, Fifth and Sixth Defendants in the Guernsey Action

- c. The amendment of the Claim Form in the English Action so as to include the relief sought in the Guernsey Action other than relief under the Companies (Guernsey) Law 1994.
- d. Procedure in the English Action to be governed by the Procedural Rules of the English Court.

AND UPON the Sixth Defendant by her Counsel undertaking:-

5. To submit to the jurisdiction of the English Court in relation to the claims brought against her in an action in the US Federal District Court for the Western District of Washington Case No. C06-1104 JLR (“the Washington Action”);
6. To submit to the jurisdiction of the English Court in relation to the claims brought against her in the High Court of Sindh at Karachi Suit no 108 of 2003 (“the Pakistan Action”);
7. Not to object to the amendment of the Claim Form and the pleadings in the English Action so as to incorporate in them the claims against the Sixth Defendant in the Pakistan Action and the Washington Action which relate only to the matters in issue in the Guernsey Action; and
8. To cooperate in seeking a Case Management Conference in the English Action at the earliest opportunity in order to ensure that the claims against the Sixth Defendant in the Pakistan Action and the Washington Action which relate to the matters in issue in the Guernsey Action are determined together with the claims in the English Action.

AND UPON the Second Defendant by its Counsel in the Guernsey Action undertaking:-

9. To consent to a stay of all further proceedings in the action in this Court No 907 issued on 16 June 2003 (“the Guernsey EGM Action”);
10. To commence proceedings in the English Court either by a new action or as part 20 claim in the English Action (using the text of the current pleadings,

and discovery lists in the Guernsey EGM Action as the pleadings, witness statements and disclosure lists to such extent as is practicable);

11. Subject to the existence of any costs orders already made in the Guernsey EGM Action, to submit the question of the incidence of the costs of the Guernsey EGM Action for the period from its commencement until the issue of the Second Defendant's claim or part 20 claim as the case may be to the determination of the English Court;
12. Not to claim any costs incurred prior to the date of commencement of proceedings in the English Court in relation to the Guernsey EGM Action on an assessment by the English Court in excess of the applicable recoverable cost rates in Guernsey; and
13. Forthwith upon determination by the English Court of the issues relating to the ownership of shares in the Second Defendant or the expiry of the time for appealing such determination or the disposal of any such appeal (whichever is latest) to amend its share register in accordance with that determination.

AND UPON the Plaintiffs by their Counsel undertaking:-

14. To consent to a permanent stay of the Washington Action and the Pakistan Action so far as relates to matters in issue in the Guernsey Action;
15. To cooperate with the Defendants to ensure that the claims in the Guernsey EGM Action (using the text of the current pleadings, and discovery lists in the Guernsey EGM Action to such extent as is practicable) are determined in tandem with the existing London Action as soon as possible; (and for the avoidance of doubt "in tandem" means that they be heard at the same trial, whether in separate proceedings or in one set of proceedings);
16. That they will not plead a defence of limitation in the London Action or in any new action brought by the second defendant (as described in paragraph 11 above) not already accrued in the Guernsey EGM Action on the date the Guernsey EGM action was commenced.

AND UPON the Plaintiffs and the Defendants by their Counsel undertaking:-

17. That they will each respectively not challenge in any further proceedings in this Court any findings of fact in the English Action as amended and in the

part 20 claim of the First Defendant in the action in the High Court of Justice Chancery Division No HC02C02711 and will treat all such findings as res judicata before the Royal Court in Guernsey when determining the Plaintiffs' claim for relief for unfair prejudice under s. 75 of the Companies (Guernsey) Law 1994.

IT IS NOW ORDERED AS FOLLOWS:

18. THAT all further proceedings in this Action be stayed save that:
 - a. The stay shall in respect of the Plaintiffs' claims pursuant to section 75 of the Companies (Guernsey) Law 1994 cease without further order upon the determination in the English Action of the issues which are relevant to those claims or the expiry of the time for appealing or the disposal of any appeal from that determination whichever is later; and
 - b. The Plaintiffs shall have liberty to apply to the Royal Court for interim relief pursuant to section 1 of the Law Reform (Miscellaneous Provisions)(Guernsey) Law 1987 and/or the inherent jurisdiction of the Royal Court in respect only of the relief claimed by the Plaintiffs pursuant to section 75 of the Companies (Guernsey) Law 1994 without prejudice to the right of the Second Defendant to contest any such application on such grounds as may be available to the Second Defendant including any challenge to the Plaintiffs' locus; and
 - c. The parties shall have liberty to apply to the Royal Court for the purpose of giving effect to this Order and the undertakings herein
19. THAT the Defendants shall pay forthwith to the Plaintiffs the costs of and occasioned by the First Exceptions Declinatoire brought by the Defendants and determined by Lieutenant Bailiff Hancox on 21 June 2006 to be taxed if not agreed and the Plaintiffs shall pay forthwith one third of the costs of the Defendants of and occasioned by the determination of the remaining Exceptions all such costs to be taxed if not agreed.

S M D ROSS
H.M. Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between:

**(1)SOHAIL MASOOD
(2)NEWPORT FINANCIAL HOLDINGS LTD
(3)MOHAMMAD ALI** **Plaintiffs**

V

**(1)MOHAMMAD ZAHOOR
(2)INTERNATIONAL STEEL AND TUBE
INDUSTRIES LIMITED
(3)ISTIL GROUP INC
(4)AZOT LIMITED
(5)WASEEM MAHBOOB
(6)PARVEEN SALEEMI** **Defendants**

Judgment of Lieutenant Bailiff Southwell QC

Advocate A Ozanne appeared for the Defendants.

Advocate J Wessels appeared for the Plaintiff.

Hearing date: 9th October 2006
Judgment handed down: 3rd November 2006

Cases, Texts and Legislation referred to:

Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 HL (E)
Australian Commercial Research & Development Ltd v ANZ McCaughan Merchant Bank Ltd [1989] 2 All ER 65
Royal Court Civil Rules 1989, Rule 7
Vardinoyannis v Ansol Ltd et al (unreported, 24 May 2002) Newman LB
Luis Vicente Barros Mattos Junior et al v Macdaniels Ltd et al [2003] EW HC 1173 (Ch) Unreported
States of Guernsey v Helyar (unreported, Guernsey Court of Appeal, 6 July 2001)
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1WLR 896 HL(E)

The Lieutenant Bailiff set out the relevant legal principles in paragraphs 49 to 55 of his Judgment

The Law

49. Both Advocate Ozanne for the six Defendants and Advocate Wessels for the three Plaintiffs submitted that the primary authority in relation to forum non conveniens is the decision of the House of Lords in *Spiliada Maritime*

Corporation v Cansulex Ltd [1987] AC 460 (“Spiliada”) HL (E) which has been applied in the Guernsey Courts in a number of cases. The main speech was that of Lord Goff of Chieveley in which he expressed his opinion with his customary clarity and felicity of language (see his Postscript at page 488), and in which he summarised the relevant legal principles at pages 476 – 484. As my judgment is in any event of no little length it is convenient, I believe, to cite from Lord Goff’s speech rather fully, because my summary of his summary would not do justice to his careful assessment of the relevant points. I therefore begin the quotation at page 474B:

“(5) *The fundamental principle*

*In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called forum non conveniens. That principle has for long been recognised in Scots law; but it has only been recognised comparatively recently in this country. In *The Abidin Daver* [1984] A.C. 398, 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinneir in *Sim v Robinow* (1892) 19 R 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:*

“the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.”

*For earlier statements of the principle, in similar terms, see *Longworth v Hope* (1865) 3 Macph. 1049, 1053, per Lord President McNeill, and *Clements v Macaulay* (1866) 4 Macph. 583, 592, per Lord Justice-Clerk Inglis, and for a later statement, also in similar terms, see *Société du Gaz de Paris v Société Anonyme de Navigation “Les Armateurs Français,”* 1926 S.C. (H.L.) 13, 22, per Lord Sumner.*

*I feel bound to say that I doubt whether the Latin tag forum non conveniens is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However the Latin tag (sometimes expressed as forum non conveniens and sometimes as forum conveniens) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of “mere practical convenience.” Such a suggestion was emphatically rejected by Lord Kinneir in *Sim v Robinow*, 19 R. 665, 668, and by Lord Dunedin, Lord Shaw of Dunfermline and Lord Sumner in the *Société du Gaz* case, 1926 S.C. (H.L.) 13,18,19, and 22 respectively. Lord Dunedin, with reference to the expressions forum non competens and forum non conveniens said, at p.18:*

“In my view, ‘competent’ is just as bad a translation for ‘competens’ as ‘convenient’ is for ‘conveniens’. The proper translation for these Latin words, so far as this plea is concerned, is ‘appropriate’.

Lord Sumner referred to a phrase used by Lord Cowan in Clements v Macaulay (1866) 4 Macph. 583, 594, viz. “more convenient and preferable for securing the ends of justice, “ and said, at p.22:

“one cannot think of convenience apart from the convenience of the pursuer or the defender or the court; and the convenience of all these three, as the cases show, is of little, if any, importance. If you read it as ‘more convenient, that is to say, preferable, for securing the ends of justice,’ I think the true meaning of the doctrine is arrived at. The object, under the words ‘forum non conveniens’ is to find that forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends.”

In the light of these authoritative statements of the Scottish doctrine, I cannot help thinking that it is wiser to avoid use of the word “convenience” and to refer rather, as Lord Dunedin did, to the appropriate forum.

(6) *How the principle is applied in cases of stay of proceedings*

When the principle was first recognised in England, as it was (after a breakthrough in The Atlantic Star [1974] A.C. 436) in MacShannon v Rockware Glass Ltd. [1978] A.C. 795, it cannot be said that the members of the Judicial Committee of this House spoke with one voice. This is not surprising; because the law on this topic was then in an early stage of a still continuing development. The leading speech was delivered by Lord Diplock. He put the matter as follows, at p.812:

“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 there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.”

The passage has been quoted on a number of occasions in later cases in your Lordships’ House. Even so, I do not think that Lord Diplock himself would have regarded this passage as constituting an immutable statement of the law, but rather as a tentative statement at an early stage of a period of development. I say this for three reasons. First, Lord Diplock himself subsequently recognised that the mere existence of “a legitimate personal or juridical advantage” of the plaintiff in the English jurisdiction would not be decisive: see The Abidin Daver [1984] A.C. 398, 410, where he recognised that a balance must be struck. Second, Lord Diplock also subsequently recognised that no distinction is now to be drawn between Scottish and English law on this topic, and that it can now be said that English law has adopted the Scottish principle of forum non conveniens:

see *The Abidin Daver* [1984] A.C. 398, 411. It is necessary therefore now to have regard to the Scottish authorities; and in this connection I refer in particular, not only to statements of the fundamental principle, but also to the decision of your Lordships' House in the *Société du Gaz* case, 1926 S.C. (H.L.) 13. Third, it is necessary to strike a note of caution regarding the prominence given to "a legitimate personal or juridical advantage" of the plaintiff, having regard to the decision of your Lordships' House in *Trendtex Trading Corporation v. Credit Suisse* [1982] A.C. 679, in which your Lordships unanimously approved the decision of the trial judge to exercise his discretion to stay an action brought in this country where there existed another appropriate forum, i.e., Switzerland, for the trial of the action, even though by so doing he deprived the plaintiffs of an important advantage, viz, the more generous English procedure of discovery, in an action involving allegations of fraud against the defendants.

In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.

- (a) The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
- (b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the *Société du Gaz* case, 1926 S.C. (H.L.) 13, 21, per Lord Sumner; and *Anton, Private International Law* (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).
- (c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, *ex hypothesi*, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where "the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favour of the defendant, ": see *Scoles and Hay, Conflict of Laws* (1982), p. 366, and cases there

cited; and also in Canada, where it has been stated (see Castel, Conflict of Laws (1974), p. 282) that “unless the balance is strongly in favour of the defendant, the plaintiff’s choice of forum should rarely be disturbed”. This is strong language. However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff upon which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions.

A more neutral position was adopted by Lord Sumner in the Société du Gaz case, 1926 S.C. (H.L.) 13, 21, where he said:

“All that has been arrived at so far is that the burden of proof is upon the defender to maintain that plea. I cannot see that there is any presumption in favour of the pursuer.”

However I think it right to comment that that observation was made in the context of a case where jurisdiction had been founded by the pursuer by invoking the Scottish principle that, in actions in personam, exceptionally jurisdiction may be founded by arrest of the defender’s goods within the Scottish jurisdiction. Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, e.g., European Asian Bank A.g. v Punjab and Sind Bank [1982] 2 Lloyd’s Rep. 356, or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English case where a stay has been granted, there has been another clearly more appropriate forum – in The Atlantic Star [1974] A.C. 436 (Belgium); in MacShannon’s case [1978] A.C. 795 (Scotland); in Trendtex [1982] A.C. 679 (Switzerland); and in the The Abidin Daver [1984] A.C. 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see MacShannon’s case [1978] A.C. 795, per Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

- (d) *Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the Société du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin Daver [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Crédit Chimique v James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.*
- (e) *If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay; see, e.g., the decision of the Court of Appeal in European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356. It is difficult to imagine circumstances where, in such a case, a stay may be granted.*
- (f) *If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the The Abidin Daver [1984] A.C. 398, 411, per Lord Diplock, a passage which now makes plain that, on this inquiry the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage.*
- (7) *How the principle is applied in cases where the court exercises its discretionary power under R.S.C., Ord. 11"*

[I interpose here that the previous English RSC Order 11 was the equivalent of the Royal Court Civil Rules 1989, Rule 7. Further, I omit a long passage in which Lord Goff discussed the differing views in this connection of Lords

Diplock and Wilberforce, and pick up the quotation again at page 480F, where Lord Goff concluded that the principle where leave to serve out was sought bore “a marked resemblance to the principles applicable in forum non conveniens cases”, and Lord Goff continued:]

“It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in Sim v Robinow, 19 R. 665, 668, viz. to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. That being said, it is desirable to identify the distinctions between the two groups of cases. These, as I see it, are threefold. The first is that, as Lord Wilberforce indicated, in the Order 11 cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the Order 11 cases the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside the jurisdiction....

Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the Amin Rasheed case [1984] A.C. 50, 65, that the jurisdiction exercised under Order 11 may be “exorbitant.”

The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right.

Even so, a word of caution is necessary. I myself feel that the word “exorbitant” is, as used in the present context, an old-fashioned word which perhaps carries unfortunate overtones: it means no more than that the exercise of the jurisdiction is extraordinary in the sense explained by Lord Diplock in the Amin Rasheed case [1984] A.C. 50, 65. Furthermore, in Order 11 cases, the defendant’s place of residence may be no more than a tax haven to which no great importance should be attached. It is also significant to observe that the circumstances specified in Order 11, r. 1(1), as those in which the court may exercise its discretion to grant leave to serve proceedings on the defendant outside the jurisdiction, are of great variety, ranging from cases where, one would have thought, the discretion would normally be exercised in favour of granting leave (e.g., where the relief sought is an injunction ordering the defendant to do or refrain from doing something within the jurisdiction) to cases where the grant of leave is far more problematical. In addition, the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance (as in B.P. Exploration Co. (Libya) Ltd. v. Hunt [1976] 1 W.L.R. 788, where, in my opinion, Kerr J. rightly granted leave to serve proceedings on the defendant out of the jurisdiction); or it may be of little importance as seen in the context of the whole case. In these circumstances, it is, in my judgment, necessary to include both the residence or place of business of the defendant and the

relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the weight which, in all the circumstances of the case, it considers to be appropriate.

(8) *Treatment of “a legitimate personal or juridical advantage”*

Clearly, the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive. As Lord Sumner said of the parties in the Société du Gaz case, 1926 S.C. (H.L.) 13, 22:

“I do not see how one can guide oneself profitably by endeavouring to conciliate and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the interests of both that the case should be tried in the best way and in the best tribunal, and that the best man should win.”

Indeed, as Oliver L.J. [1985] 2 Lloyd’s Rep. 116, 135, pointed out in his judgment in the present case, an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach inherent in Lord Kinnear’s statement of principle in Sim v Robinow, 19 R. 665, 668.

The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried “suitably for the interests of all the parties and for the ends of justice.” Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum. Take, for example, discovery. We know that there is a spectrum of systems of discovery applicable in various jurisdictions, ranging from the limited discovery available in civil law countries on the continent of Europe to the very generous pre-trial oral discovery procedure applicable in the United States of America. Our procedure lies somewhere in the middle of this spectrum. No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas.....

But the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to a different conclusion in other cases. For example, it would not, I think, normally be wrong to allow a plaintiff to keep the benefit of security obtained by commencing proceedings here, while at the same time granting a stay of proceedings in this country to enable the action to

proceed in the appropriate forum. Again, take the example of cases concerned with time bars. Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country. This approach is consistent with that of Sheen J. in The Blue Wave [1982] 1 Lloyd's Rep. 151. It is not to be forgotten that, by making its jurisdiction available to the plaintiff – even the discretionary jurisdiction under R.S. C., Ord. 11 – the courts of this country have provided the plaintiff with an opportunity to start proceedings here; accordingly, if justice demands, the court should not deprive the plaintiff of the benefit of having complied with the time bar in this country. Furthermore, as the applicable principles become more clearly established and better known, it will, I suspect, become increasingly difficult for plaintiffs to prove lack of negligence in this respect. The fact that the court has been asked to exercise its discretion under R.S.C., Ord. 11, rather than that the plaintiff has served proceedings upon the defendant in this country as of right, is, I consider, only relevant to consideration of the plaintiff's conduct in failing to save the time bar in the other relevant alternative jurisdiction. The appropriate order, where the application of the time bar in the foreign jurisdiction is dependent upon its invocation by the defendant, may well be to make it a condition of the grant of a stay, or the exercise of discretion against giving leave to serve out of the jurisdiction, that the defendant should waive the time bar in the foreign jurisdiction; this is apparently the practice in the United States of America.”

Burden of Proof

50. These are the principles this Court has to apply in the present case. I have included the passages in which Lord Goff considered the burden of proof. As he indicated, the burden is usually on the defendant when applying to stay on forum non conveniens principles, the burden being to show that there is clearly another available jurisdiction, competent to determine the case, in which the case may be tried more suitably for the interests of all the parties and the ends of justice. Once the defendant has succeeded in showing this, the burden shifts to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in Guernsey. But where the plaintiff is seeking leave to serve the defendant out of Guernsey, though the issues may be substantially the same as where an application to stay is made, the burden is from the beginning on the plaintiff to show that Guernsey is an available and suitable forum. In reliance on this Miss Ozanne submitted that in the present proceedings the burden is on Masood and the other plaintiffs, and not on her clients.
- 51 I am doubtful whether this submission is correct. Questions arising under Rule 7, as to whether leave to serve out should have been granted, have been decided by Hancox LB and there has been no appeal from his decision. Prima facie the present issues arise as in any other case where a stay is sought by the defendants, and the initial burden is here on the defendants. But it is unnecessary for me to reach any conclusion on this point, and I refrain from doing so, because in the present case I do not find it necessary to place any weight on burdens of proof in reaching my decision.

Other Cases

52. Miss Ozanne placed reliance on the decision of Vice-Chancellor Browne-Wilkinson in *Australian Commercial Research & Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 2 All ER 65 (“ANZ McCaughan”). In that case a plaintiff had started actions against the same defendant in two separate jurisdictions in respect of the same subject matter, and the Court required the plaintiff to elect which action in which jurisdiction he wished to pursue. Once the plaintiff had elected in favour of the action in Queensland, Australia, the English Court dismissed the action in England with an order for indemnity costs.
53. Miss Ozanne also relied on a number of Guernsey cases, including *Vardinoyannis* referred to above; but those cases do not add materially to the speech of Lord Goff in *Spiliada*, except that they show a consistent pattern of adoption of the *Spiliada* principles by the Courts of Guernsey.
54. Mr Wessels for the Plaintiffs referred to *Luis Vicente Barros Mattos Junior et al v Macdaniels Ltd et al* [2003] EW HC 1173 (Ch) Unreported Vice-Chancellor Morritt (“*Barros Mattos*”). In that case one of the main defendants, a Mr Vaswani, was joined as the 42nd defendant to an action in which the plaintiffs were claiming in respect of the misapplication of large sums belonging to a Brazilian bank. Mr Vaswani sought a stay as regards the claim against him on

the ground that the appropriate forum was in Nigeria. His counsel submitted that (para. 47 of the judgment)

“in a multi-party claim such as this the court should pay little, if any, regard to the consequences for the action as a whole if part of it is stayed so as to require the claimant to sue a particular defendant in a foreign jurisdiction.”

At para 48 of his judgment Morritt VC said this:

*“I reject the submission of Counsel for Mr Vaswani. First the contention is inconsistent with what Lord Goff actually said. He referred throughout to the trial of the action, not to a particular issue. Second, at page 485B-E, Lord Goff referred expressly to the judge having been entitled to give weight to the consideration that the interests of justice required the claims against two defendants to be tried in one action. Third, it is apparent from **The Golden Mariner** [1989] 2 Lloyd’s Rep 390, 400, **Citi-March Ltd v Neptune Orient Lines Ltd** [1996] 1 WLR 1367 and Dicey & Morris 13th Ed. Para 12-027 that the court does consider the efficient conduct of litigation against a number of defendants.”*

As will become clear later in this judgment, that point – that Lord Goff was referring to an action and not a particular issue – raises a significant question for this court in the present case.

The multiplicity of proceedings

55. The recital above of the proceedings current or past in six jurisdictions shows, in my judgment, that the parties (primarily Masood, but also Zahoor) have engaged in a very regrettable process of forum-shopping, which is in truth contrary to the interests of all the parties, and certainly does not meet “the ends of justice”. When I first read the papers in this case it seemed to me that the parties needed in any event to take steps to reduce the number of ongoing actions. To that end (amongst others) through HM Deputy Greffier the parties were asked what undertakings they might wish to give to the Court in the event that they succeeded. The undertakings offered, in the event, went through a process of amendment as the hearing progressed. I will refer to the undertakings in the context of the submissions of the parties to which I now turn.