

Judgment 2/2012

Credit Suisse Trust Limited (as trustee of the Settlement) and Nemni et al
Civil Action File No 1564 - The Royal Court
- 26th January 2012

Application for an anti-suit injunction to restrain the first defendant from continuing to pursue substantial parts of proceedings in Italy. Application granted.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 26th day of January 2012 before Patrick John Talbot Esquire, QC, sitting alone

In the matter of an application by Credit Suisse Trust Limited in respect of the Translux Financing Trust ("the TFT")

BETWEEN:

(1) CREDIT SUISSE TRUST LIMITED (as trustee of the Settlement)

Plaintiff

- and -

(1) GUISEPPE NEMNI
(2) SIMON E. HAGGIAG
(3) MICHAEL HAGGIAG
(4) MIRELLA PETTENI HAGGIAG

Defendants

Whereas the on 23rd and 24th February 2011 the Lieutenant Bailiff considered an application by the Plaintiff trustee company for an anti-suit injunction against the First Defendant Giuseppe Nemni to restrain him from continuing to pursue substantial parts of proceedings brought in the Corte di Appello in Rome, Italy, and heard thereon Advocate I Swan for the Plaintiff and Advocate K Le Cras for the 2nd to 4th Defendants, the first Defendant Giuseppe Nemni not appearing, the Lieutenant Bailiff this day handed down judgment in the terms attached hereto and GRANTED the said application and made orders in the following terms;

1. That the First Defendant (Giuseppe Nemni) is hereby restrained until further Order of this Court from continuing proceedings brought against the Second to Fourth Defendants (Simon E. Haggiag, Michael Haggiag and Mirella Petteni) in the courts of the Republic of Italy based upon or arising out of the subject matter of the allegations contained in his *Atto di Citazione* before the *Tribunale di Roma* dated 3 January 2011 ("the Italian Action") (a copy of which, together with a translation thereof into English, is appended to this Order);
2. That the First Defendant pay the costs of the Plaintiff and of the Second to Fourth Defendants of this Application on a basis to be determined hereafter if not agreed.

S. M. D. Ross
H.M. Deputy Greffier

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

In the matter of an application by Credit Suisse Trust Limited in respect of the Translux Financing Trust ("the TFT")

BETWEEN:

(1) CREDIT SUISSE TRUST LIMITED (as trustee of the Settlement)

Plaintiff

- and -

**(1) GUISEPPE NEMNI
(2) SIMON E. HAGGIAG
(3) MICHAEL HAGGIAG
(4) MIRELLA PETTENI HAGGIAG**

Defendants

Advocate Ian Swan for the Plaintiff
Advocate Karen Le Cras for the 2nd to 4th Defendants
The First Defendant, **Giuseppe Nemni**, not appearing

Hearing 23 and 24 February 2011

J U D G M E N T

of

Lieutenant Bailiff Patrick John Talbot QC

26 January 2012

Introduction

1. By an application dated 7 January 2011 the Plaintiff trustee company, which is the present trustee of the Translux Financing Trust dated 14 November 2005, ("the TFT"), sought an anti-suit injunction against the First Defendant Giuseppe Nemni ("Mr Nemni") to restrain him from continuing to pursue substantial parts of proceedings brought by Mr Nemni in the Corte di Appello in Rome, Italy, ("the Italian proceedings"), on about 3 or 4 January 2011 on the ground that the pursuance of those parts of the Italian proceedings is an abuse of this Court. Advocate Ian Swan appears for the Plaintiff.

2. The application is supported by the Second to Fourth Defendants, for whom Advocate Karen Le Cras appears. Her clients are respectively the sons and widow of the late Robert Haggiag Senior ("Mr Haggiag"), who was born in Tripoli, Libya, on 18 March 1913 and died on 27 February 2009. Mr Haggiag was a well-known film producer and international businessman and died aged 95. In the Italian proceedings Mr Nemni sues the Second to Fourth Defendants as the alleged heirs of Mr Haggiag, but it appears that the Fourth Defendant, Mr Haggiag's widow, does not claim to be one of his heirs since she and Mr Haggiag had entered into pre-

nuptial arrangements which have the effect of excluding her from inheriting any part of his estate.

3. It is important to note at the outset that the parties in the Italian proceedings presently did *not* originally include the Plaintiff, (although I have been informed that the Plaintiff was joined as a party late in 2011,) and that they do not, in substance, purport to relate to the TFT at all; the only reference to the TFT found in the claim in the Italian proceedings is a suggestion that the TFT, which is a very substantial Guernsey trust, may be some sort of sham trust vis-a-vis the Italian tax authorities. It seems to me that in the Italian proceedings the TFT appears to be regarded by Mr Nemni and his Italian lawyers as almost wholly irrelevant to those proceedings.
4. Mr Swan stressed this point in his oral argument as indicating an intention on Mr Nemni's part to ignore the TFT and to ignore any interest which the Plaintiff may have in what appears on the evidence contained in the 4th, 6th and 7th affidavits of Mr Geoffrey Le Poidevin, a director of the Plaintiff, to form the very great majority of Mr Haggiag's former assets, which have been held by the Plaintiff as trustee upon the trusts of the TFT from its inception on 14 November 2005. Mr Swan referred, in particular, to the careful explanation in Mr Le Poidevin's 4th affidavit of Mr Haggiag's vesting in another Guernsey settlement, the United Prod Foundation, of almost all his assets between 1994 and the very moment before the making of the TFT on 14 November 2005.
5. A fuller history of the making of the United Prod Foundation and the TFT is set out in detail in my Judgment on the trial in this action which I delivered on 18 November 2011, (the approved version of which was released by me on 20 December 2011). Suffice it to say, that I concluded that under Guernsey law the TFT is a valid, binding Guernsey trust subject to the overall jurisdiction of the Royal Court of Guernsey.
6. In his relatively short written skeleton argument in support of the application Mr Swan put his case on the facts as shortly as this:

1.3 The Plaintiff's case is that Mr Nemni threatened to bring, and has now brought, against the 2nd to 4th Defendants ("the Haggiag Parties") proceedings in Italy which are wholly groundless and without foundation. If the remedy of strike-out were available in Italy, this would be a case for that peremptory remedy.

1.4 However, there is no scope to bring about an early termination under Italian procedural law: all such issues must await the eventual trial. If Mr Nemni's case in Italy were permitted to proceed, it would be likely to cause huge and irrecoverable loss to the Trustee and to the Haggiag Parties.

1.4 In short, Mr Nemni's Italian proceedings are designed to be, and are, oppressive and vexatious to the Trustee and to the Haggiag Parties, and it is therefore appropriate to restrain Mr Nemni from continuing with them.

7. As I decided in my main judgment, I am satisfied on the basis of Mr Le Poidevin's evidence that a very large proportion indeed of the free assets of Mr Haggiag were settled by him on the terms of the TFT on 14 November 2005 and so are legally vested in the Plaintiff as trustee of the TFT, which I repeat is a Guernsey trust. Any powers of disposition or other more limited transfer were, therefore, vested in the Plaintiff as such trustee from the date of the TFT and still remain so vested.
8. The Plaintiff has been the sole trustee of the TFT during all its existence as a Guernsey trust and was the sole trustee of the United Prod Foundation, (which was formerly called the Roberto Haggiag Foundation,) during its entire existence between 1994 and 14 November 2005. It is helpful, I believe, to remember that the governance and administration of Guernsey trusts are ultimately within the jurisdiction of this Court and that the experience of Guernsey corporate trustee companies, including the Plaintiff, enables Guernsey trusts to be administered effectively within the Bailiwick and assists the maintenance of Guernsey as a respected international financial centre and jurisdiction.
9. The application is supported by the 4th affidavit of Mr Geoffrey Le Poidevin, a director of the Plaintiff, which was sworn on 7 January 2011, and by the 6th affidavit of Mr Le Poidevin, which was sworn on 18 February 2011. It is also supported by the 3rd affidavit of Mr Neville Paul Byford, an English solicitor, sworn on 28 February 2011 on behalf of the Second to Fourth Defendants, together with exhibit NPB5; although this affidavit was sworn after the oral hearing of the application it is, in my view, appropriate for me to consider it as part of the evidence in support of the application.
10. Mr Nemni is an Italian resident who was born on 10 August 1923 and is, therefore, now aged 88. Over quite a long period, and especially during the last years of Mr Haggiag's life, Mr Nemni was a close friend, confidant and business associate of Mr Haggiag. Indeed, Mr Haggiag appears in his last years to have used Mr Nemni, who was about 10 years his junior, as one of the persons through whom his instructions relating to his personal affairs would be carried into effect and through whom his proposals for the investment of the funds of the United Prod Foundation and, from and after November 2005, the funds of the TFT would be communicated to, and discussed with, the Plaintiff as trustee of the two Guernsey trusts. Again, further details of the relationship between Mr Haggiag and Mr Nemni appear in my Judgment on the trial of this action to which reference can be made.

11. Mr Nemni, who is, in a legal sense, amenable to the jurisdiction of this Court, as I found in my main judgment, did not appear on the oral hearing of the application on 23 and 24 February 2011. His Advocate, Advocate Gareth Bell of Collas Day and, with effect from about May 2011 of Collas Crill, whose office address is Mr Nemni's address for service within the jurisdiction of the Royal Court, was duly notified of the application hearing date. He explained to the Court by letter dated 22 February 2011, *i.e.* the day before the start of the oral hearing on this application, that he had no instructions to attend and so, at his request, I released him from attending on the hearing. In these circumstances, I direct that a copy of this Judgment be supplied to Advocate Bell on behalf of Mr Nemni.

Jurisdiction

12. As has been explained in many cases elsewhere, including in recent cases in England, and as is clear from the application in this case for an anti-suit injunction against Mr Nemni, such an injunction is only ever granted against a litigant personally, and not against the foreign Court in which he is pursuing relief either against the applicant for the injunction or against others. Accordingly, the Plaintiff seeks an injunction to restrain Mr Nemni from pursuing specific parts of the Italian proceedings, and not against either the Italian Court or any judge or other judicial officer of that Court. Such an injunction can, therefore, only be granted, and thereafter enforced, against Mr Nemni *in personam*.

13. As Mr Justice Floyd said at paragraph 59 of his judgment in the High Court in England in ***Royal Bank of Scotland plc v Hicks & others*** [2011] EWHC 287 (Ch), 17 February 2011:

There are two broad categories of case in which [a Court] can

be prevailed on to [grant injunctions restraining the commencement or pursuit of proceedings in a foreign court]. The first is where there is some legal or equitable right, such as an exclusive jurisdiction clause, for proceedings to be brought here, and therefore not in the foreign court. The second is where it would be vexatious or oppressive for the foreign proceedings to be commenced or pursued: see ***Turner v Grovit*** [2001] UKHL 65; [2002] 1 WLR 107 per Lord Hobhouse at [25].

14. The Plaintiff's application against Mr Nemni is made under the second category of case alone. In relation to such a case Mr Justice Floyd said at paragraph 62, *ibid.*,

In the second class of case, the court intervenes not because of the existence of any enforceable right, but because the commencement or continuation of proceedings in the foreign jurisdiction would be unconscionable or vexatious and oppressive. As Hoffmann J (as he then was) pointed out in ***Barclays Bank plc v Homan and others***

[1993] BCLC 680 at 686h-688c, these very general words have to be qualified by considerations of comity. He made this point succinctly by pointing out that the right not to be sued abroad arises only if the *English* court must intervene to prevent injustice” (his emphasis). The foreign judge was “*usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue.*”

15. It is also valuable, in my judgment, to pay close attention to the exposition by Lord Justice Toulson in the English Court of Appeal in *Highland Crusader Offshore Partners L.P. & others v Deutsche Bank A.G. & others* [2010] 1 WLR 1023 of the relevant legal principles applicable in this area of the law in England, so far as may be material to this case:

Anti-suit injunctions and forum non conveniens – key principles

49. Although the ground has been well travelled on many occasions, I think that it is helpful to start by identifying key principles. ...

50. Leaving aside the provisions of the Brussels 1 Regulation and previous conventions, which are not relevant in this case, I would summarise the relevant key principles as follows:

1. Under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do.
2. It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression, but, where a matter is justiciable in an English and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive.
3. The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of *forum non conveniens*, it is generally necessary to show that
 - (a) England is clearly the more appropriate forum (“the natural forum”), and
 - (b) justice requires that the claimant in the foreign court should be restrained from proceeding there.
4. If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign

proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity.

5. An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.

6. The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive.

...

8. The decision whether or not to grant an anti-suit injunction involves an exercise of discretion and the principles governing it contain an element of flexibility.

51. To make good those propositions I should comment on them.

Propositions 1 to 3

52. These appear from a number of authorities including the speech of Lord Goff in the leading case of *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871, 892-896, in which he reviewed the more important earlier authorities.

Propositions 4 and 5

53. Authoritative exposition of these important principles can be found in a number of cases, particularly the speech of Lord Goff in *Aérospatiale*, the judgment of Hoffmann J in *Re Maxwell Communications Corporation plc (No 2)* [1992] BCC 757 (whose statement of the law was approved in the same case by the Court of Appeal), and the speech of Lord Goff in *Airbus Industrie GIE v Patel* [1999] 1 AC 119.

54. In *Aérospatiale*, at 895, Lord Goff said that where parties are in dispute whether an action should proceed in an English or foreign court, and the English court concludes that England is the natural forum, it would be wrong for the English court to restrain a party from proceeding in the foreign court “*on that ground alone*” (Lord Goff’s emphasis). For that would be to conclude that where there is simply a difference of view between the English court and the foreign court as to which is the natural forum, the English court can arrogate to itself, by the grant of an injunction, the power to resolve that dispute. Such a conclusion would be inconsistent with comity.

55. This is a convenient point for making a comment about the meaning of the phrase “the natural forum”. In *Aérospatiale* Lord Goff was using that phrase (as is apparent from the preceding paragraphs of the judgment at 893) in the sense in which he had used the term in *Spiliada Maritime Corp v Cansulex Limited* [1987] 1 AC 460, 478, *i.e.* as denoting a forum which is clearly more appropriate for the trial of the action than any alternative jurisdiction. Dicey, Morris and Collins (14th Ed) 206, Vol 1, para 12-005 similarly use the phrase “the natural forum” as shorthand for the court identified by reference to the criteria laid down in *Spiliada*, which is the sense in which it is generally used, and I will follow suit. (*Spiliada* decided that in cases where leave is required to serve proceedings out of the jurisdiction, as in cases where an application is made to stay English proceedings on *forum non conveniens* grounds, the English court has to consider whether one or other court is clearly the more appropriate for determining the dispute. The difference is that in an application to stay an English action, the applicant has to show that the foreign court is clearly the more appropriate forum; in an application for permission to serve out of the jurisdiction, the claimant has to show that England is clearly the more appropriate forum). The reason for making these remarks is that the cases sometimes refer to a country being “a natural forum”. That is different; it denotes a country which is not inappropriate, *i.e.* clearly less appropriate than another.

56. In *Re Maxwell* at 761-2 Hoffmann J observed that the theory that an anti-suit injunction is not an intended interference with the affairs of a foreign court, because it merely operates *in personam* upon a person subject to the jurisdiction of the English court, is a more realistic description in some cases than in others. It is a fair description where the injunction is intended to enforce a contractual submission to the exclusive jurisdiction of the English court. But where the court is not enforcing a contractual right under English law, the normal assumption is that an English court has no superiority over a foreign court in deciding what justice between the parties requires and, in particular, that both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should

accept or decline jurisdiction, stay proceedings or allow them to continue. In other words, there must be a good reason why the decision to stop the foreign proceedings should be made by an English judge rather than a foreign judge, and cases where justice requires the English court to intervene will be exceptional. Hoffmann J recognised that exceptional cases cannot be categorised, but he instanced cases where a foreign court has by its own jurisprudence a long arm jurisdiction so extensive that to English notions it appears contrary to accepted principles of international law, and where the English court may feel it necessary to intervene by injunction to protect a party from the injustice of having to litigate in a jurisdiction with which he or the subject matter had little connection. There may also be cases in which the judicial or legislative policies of England and the foreign court are so at variance that comity is overridden by a need to protect British interests or to prevent what the English court regards as a violation of the principles of customary international law.

57. In *Airbus* Lord Goff noted that since, as between common law jurisdictions, there was no international treaty governing jurisdiction issues, the basic principle was that each jurisdiction is independent and there is no embargo on concurrent proceedings in the same matter in more than one jurisdiction. The weapons for determining jurisdiction disputes are a stay (or dismissal) of proceedings and an anti-suit injunction, but each has its limitations. The former depends on its voluntary adoption by the state in question and the latter is inhibited by respect for comity.

58. Lord Goff then conducted a *tour d'horizon* in which he surveyed the extent to which common law jurisdictions had come to adopt similar *forum non conveniens* principles. He noted that there was a large measure of similarity between English law and the law of Canada, Australia and a number of states of the USA. He paid particular tribute to the judgment of Judge Wilkey in the District of Columbia Court of Appeals in *Laker Airways Limited v Sabena, Belgian World Airlines* (1984) 731 F. 2d 909, 926-7, where he observed that anti-suit injunctions are most often necessary to protect the jurisdiction of the enjoining court or to prevent the litigant's evasion of important public policies of the forum.

59. Lord Goff also discussed in some detail the requirements of comity. He expressed the following general principle at 138:

“As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case [an alternative forum case], comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question

to justify the indirect interference with the foreign court which an anti-suit injunction entails. In an alternative forum case, this will involve consideration of the question whether the English court is the natural forum for the resolution of the dispute.”

60. As to the proper approach in such cases, Lord Goff cited the judgment of Sopinka J in *Amchem Products Inc v British Columbia (Workers' Compensation Board)* [1993] SCR 897, 932-932, including the following passage:

“If, applying the principles relating to *forum non conveniens*...,the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. Where there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions...In a case in which the domestic court concludes that the foreign court assumed jurisdiction on a basis that is inconsistent with principles relation to *forum non conveniens* and that the foreign court’s conclusion could not reasonably have been reached had it applied those principles, it must then go on to the second step of the [Aérospatiale] test [*i.e.* whether to grant an injunction on the ground that the ends of justice require it].”

61. Lord Goff described this exposition as being of considerable interest. He added that the general principle which he had outlined was consistent with the approach adopted by the Supreme Court of Canada in *Amchem* and that it was also close to the approach by the US Court of Appeals for the Second Circuit, the Sixth Circuit and the District of Columbia Circuit, derived from Judge Wilkey’s judgment in the *Laker Airways* case. This approach (as he had noted at 136) requires that a court should only grant an anti-suit injunction to protect its own jurisdiction or to prevent evasion of its public policies.

62. We were referred to *Turner v Grovit* [2001] UKHL 65, [2002] 1 WLR 107, where Lord Hobhouse said, at para 25, that an anti-suit injunction “*is the obverse of an order for the stay of proceedings before the forum itself*”, but I do not take him to have meant that a conclusion by the English court that England is the natural forum would of itself justify the grant of an anti-suit injunction, for that would be contrary to *Aérospatiale* and *Airbus* and there is no suggestion in *Turner v Grovit* that the House of Lords was intending to depart from the principles laid down in those cases. On the contrary, Lord Hobhouse said, at the end of para 27, that it is not sufficient for the applicant for an anti-suit injunction to say that there is another forum which is the

appropriate forum; and in the next paragraph he went on to stress, by reference to *Airbus*, that English law attaches a high importance to international comity.

Proposition 6

63. This proposition is supported by *Airbus* at 132-133 (“parallel proceedings in different jurisdictions are not of themselves regarded as unacceptable”, per Lord Goff), *Credit Suisse First Boston (Europe) Limited v MLC (Bermuda) Limited* [1999] 1 Lloyd’s Rep. 767,781, and *Royal Bank of Canada v Centrale Raiffeisen-Boerenleenbank* [2004] 1 Lloyd’s Rep 471, 475. It also links with propositions 4 and 5. It is perfectly possible to envisage a scenario in which there are parallel proceedings and each court considers itself to be clearly the more appropriate forum, the difference of opinion arising from the courts taking different views of the weight of the relevant connecting factors. This scenario was envisaged by Hoffmann J in *Re Maxwell*. It is unfortunate if this should arise, but the possibility is inevitable. If in that situation the English court were to decide to impose its view on the foreign court by granting an anti-suit injunction, and the foreign court for the same reason decided to impose its view on the English court by an anti-suit injunction, the parties would then find themselves subject to mutual anti-suit injunctions. This would not solve the problem; it would add a further dimension, and it would run counter to the principle of comity. Hence the reason for an English court not ordinarily granting an anti-suit injunction in such circumstances, although there may be exceptions in circumstances such as those considered by Hoffmann J and by Sopinka J and Judge Wilkey in the judgments referred to by Lord Goff in *Airbus*.

...

Proposition 8

65. This proposition was stressed by Lord Goff in *Airbus* at p 140 and by Lord Bingham in [2001] UKHL 64 [2002] 1 Lloyd’s Rep 425 at para 24.

16. The Plaintiff, therefore, has to establish that the continued pursuit by Mr Nemni of the identified parts of his proceedings in the Italian Court to which I shall refer later in this Judgment would be unconscionable or vexatious or oppressive and so an abuse of the Royal Court of Guernsey and that the grant of an anti-suit injunction restraining him from doing so would not offend principles of comity between Courts of different jurisdictions, *i.e.*, quoting from Mr Justice Hoffmann in England, in cases in this Court “*the right not to be sued abroad arises only if the [Royal Court] must intervene to prevent injustice.*”

17. There is also helpful, binding guidance relating to an application for an anti-suit injunction in the Royal Court of Guernsey to be found in the decision of the Court of Appeal in *Winnekta*

Trading Corporation v Bank Julius Baer (2009-10) GLR 260, where the Court adopted English law principles in this area of the law as equally applicable in Guernsey. In that case Judge of Appeal Michael Beloff QC set out what he called “*the legal backcloth*” in this way - (I have only cited the passages in paragraphs 38 and 40-42 of his judgment which I consider are relevant to this application):

38. 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 s.37(1) of the Supreme Court Act 1981 (“SCA”), which recognizes 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 ed., at 395 (2004)).

...

40 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. ...

41 A useful summary of the principles applied by the courts of England and Wales is to be found in the judgment of Teare, J. in *Standard Bank v. Agrinvest Intl. Inc.* (11) ([2008] 1 Lloyd’s Rep. 532, at para. 25), which I would endorse as representing the law of Guernsey:

“The relevant principles for the grant of an anti-suit injunction are set out in *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak* [1987] A.C. 871 and *Turner v. Grovit* [2002] 1 W.L.R. 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 [2007] 1 Lloyd’s Rep. 669 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 W.L.R. 107 at paras. 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 Lloyd’s Rep. 67 at paras. 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 *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak* [1987] A.C. 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 [a] 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 A.C. 119).

(v) English law attaches a high importance to international comity and the 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 (*Société Nationale Industrielle Aérospatiale v. Lee Kui Jak* (*ibid.*) at p. 896).”

42 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.

18. Finally, Mr Swan properly reminded me that it is incumbent upon a party seeking an anti-suit injunction to do so promptly before the foreign proceedings are too far advanced: see the judgment of Mr Justice Blair in *Rec Wafer Norway AS v Moser Baer Photo Voltaic Ltd* [2010] EWHC (Comm) 2581, [2011] 1 Lloyd’s Rep. 410, at paragraphs 46-48. This issue does not arise here since the Plaintiff issued its application for leave to serve these proceedings on Mr Nemni out of the jurisdiction promptly, on 18 October 2010, though for completeness’ sake I quote what the learned Judge said at paragraph 46:

This brings me to the most substantial point made by Moser Baer, which relates to the timing of the application. As Mr Qureshi QC rightly submitted, it is incumbent upon a party seeking an anti-suit injunction to do so “promptly and before the foreign

proceedings are too far advanced”: see *Transfield* at [71], citing *The Angelic Grace*, *ibid*, and *The Skier Star* [2008] 1 Lloyd’s Rep 652, Teare J. In *Transfield*, an application for an anti-suit injunction which was made a week before the trial in the foreign court was refused.

The effect of the final judgment delivered on 18 November 2011

19. I now turn to an important issue which arises since I have already given on 18 November 2011 a full, reasoned and final judgment in this Court. Can and, if so, should, an anti-suit injunction be granted at such a stage? Since I have decided each of these questions in the affirmative, I did not find it necessary to ask Advocates Swan and Le Cras to address me on these questions.

20. In referring to the decision of the Court of Appeal (England) in *Masri v Consolidated Contractors International Co. SAL (No. 3)* [2009] QB 503 the editors of *Dicey, Morris & Collins, The Conflict of Laws*, 14th edition, 4th cumulative supplement, paragraph 12-069, said that the Court had

“... upheld the grant of a post-judgment anti-suit injunction [restraining] the judgment debtor from taking steps overseas to undermine an English judgment or its enforcement. Such an order was to be understood as ancillary to the exercise of jurisdiction to determine the merits of the dispute. This brought it within the requirement in *Turner v Grovit* ... that it protect the jurisdiction of the court. ...

The basis for the exercise of discretion was that the behaviour of the respondent was unconscionable and that this was sufficient to render it liable to restraint. It was possible to say that the applicant had an equitable “right” not to be vexed by the overseas action if it was understood that “right” in this sense meant no more than a “thing which gives rise to a remedy”.

21. I respectfully agree with the approach taken by the Court of Appeal (England) in *Masri*, especially per Sir Anthony Clarke MR (as he then was) at paragraphs 85 and 99-100, where he said:

(part of 85.)

But the present case is not a case where the foreign court has given a judgment with which an English injunction will be inconsistent. It is simply a case in which the judgment debtors are seeking to re-litigate abroad the merits of a case which, after a long trial, they have lost in England. In my judgment it is a classic case of vexation and oppression, and of conduct which is designed to interfere with the process of the English court in litigation to which the judgment debtors submitted.

...

Overall conclusions

99. Where a party is properly before a court, an anti-suit injunction is not a separate claim requiring its own basis of jurisdiction. In alternative forum cases, such as the present, it is not necessary for the applicant to rely on a cause of action establishing a separate right not to be sued. The right to apply for an injunction is not of itself the cause of action but is ancillary and incidental to the existing proceedings. The judgment debtors' submission to the English jurisdiction in those proceedings is a sufficient basis for the imposition of the anti-suit injunction, and the claim for the injunction does not require any amendment

100. The discretion was properly exercised in this case, consistently with the dictates of comity. It is consistent with principle for an English court to restrain re-litigation abroad of a claim which has already been subject of an English judgment. There is long-established authority that protection of the jurisdiction of the English court, its process and its judgments by injunction is a legitimate ground for the grant of an anti-suit injunction.

The approach taken by the Court of Appeal (England) is, in my view, both persuasive and consistent with the maintenance of the final nature of a judgment given by a Court after a full trial in the Royal Court on the merits. In my judgment, this approach is equally applicable to a full trial on the merits, like the present case, where, for whatever reason, the main Defendant, *i.e.* Mr Nemni, has chosen not to take any part in the trial. I remind myself that Mr Nemni had elected not to attend the trial and not to instruct his Advocate to make any submissions on his part; but those facts do not change the character or nature of the trial, which I conducted in open Court between 14 and 16 November 2011. The trial was conducted as a full trial of the action and evidence was given in support of the Trustee's case. This is apparent from my reasoned judgment delivered in open Court on 18 November 2011, as approved by me in the final version of my judgment released to the parties, including Mr Nemni via his Advocate, on 21 December 2011. Accordingly, I conclude that under Guernsey law an anti-suit injunction may be granted, if it is otherwise appropriate to grant one, after judgment has been given. The question remains whether or not, in the exercise of my judicial discretion, I should grant such an injunction.

22. Advocate Ian Swan for the trustee has limited his submissions to the issue whether or not the continuation of identified parts of Mr Nemni's Italian proceedings would be unconscionable, vexatious or oppressive and accordingly an abuse of this Court and that the grant of an anti-suit injunction to prevent Mr Nemni continuing with those parts of his case in the Italian Court would prevent what would otherwise amount to a clear injustice. Mr Swan submitted that the key to the application is that Mr Nemni's conduct in relation to the Italian proceedings is unconscionable in the sense of being vexatious and oppressive and that the proceedings in this Court require protection by the grant of an anti-suit injunction.

23. Mr Swan demonstrated in oral argument that Mr Nemni had been selective in what he had pleaded in the Italian proceedings in omitting these important matters, namely, (i) the making of powers of attorney by the Plaintiff as trustee of the TFT under which Mr Nemni became the attorney and fiduciary agent of the Plaintiff, (ii) the involvement of the Plaintiff as trustee of the TFT in the Russian project, (iii) the Trustee's requests made in May 2007 and May 2008 for reports from Mr Nemni on his work as the Trustee's attorney, which, in fact, led to a detailed report from Mr Nemni to the Plaintiff in 2008. Mr Swan submitted that these omissions constituted a wilful, *i.e.* intentional, refusal or omission by Mr Nemni to tell the Italian Court the full picture, which amounted to vexatious or oppressive conduct on his part. I agree with this submission and consider that, although the jurisdiction is exceptional and it is likely to be rare for such an injunction to be granted, it would be inequitable to refuse the application for an anti-suit injunction against Mr Nemni in respect of those parts of the Italian proceedings which largely replicate the main issues in the proceedings before this Court upon which issues I have already given judgment.
24. Nearly all the matters mentioned in the Italian proceedings relate to issues which have been determined by me in my main judgment in Guernsey, which I found was the proper forum for the dispute relating to those issues. With regard to those issues Mr Nemni could have counter-claimed in the Royal Court, against the Plaintiff, as trustee of the TFT, but did not do so. Equally, he could have counter-claimed, if he had chosen to do so, on the basis of his claims in the Italian proceedings against the 2nd to 4th Defendants. There could, in my judgment, have been no ground of opposition to him taking such a course if he had decided there was some merit in doing so.
25. Although different definitions are used by Mr Nemni in the Italian proceedings than those used by the Plaintiff in the Cause in these proceedings, *e.g.* the Russian project/the Botanic Garden project, the main part of the Italian proceedings appears to me to relate to Mr Nemni's work as attorney and fiduciary agent for the Plaintiff, as trustee of the TFT, during the period from about February 2005 until Mr Haggiag's death on 27 February 2009. At the heart of the Italian proceedings, as I read them, lies a claim by Mr Nemni that he was a partner of Mr Haggiag in the Russian project, which is an issue which I consider I have determined by concluding, after a full trial in November 2011, that the Russian project was a 50/50% project of the Plaintiff as trustee of the TFT and Mr Nemni, and, therefore, not a partnership between Mr Haggiag and Mr Nemni – see paragraphs 128-142 of my main judgment (as approved). (For the sake of completeness, I note, as Mr Swan showed me during oral argument, that the Italian proceedings do not include claims relating to the issues called in the Guernsey proceedings the Spanish project, the Iuliani loan and the household accounts, upon which issues I also gave judgment in November 2011 after a full trial.)

26. I agree with Advocate Swan that it is correct to describe the large majority of the Italian proceedings, with the exception of the claim relating to the apartments mentioned in the previous paragraph, as vexatiously brought by Mr Nemni and that the intention appears to have been to drag the Plaintiff, as trustee of the TFT, into expensive and lengthy proceedings in Italy which have no realistic prospect of success, thereby putting wrongful pressure on the TFT and its trustee, the Plaintiff, so as to improve Mr Nemni's perceived bargaining position now that he is faced with a reasoned decision of this Court, which is binding on him, reached after a full trial. In my judgment, the way in which Mr Nemni has framed his claim in the Italian proceedings is seriously misleading, and especially so in that there is no proper analysis of the true legal position which arose as between the plaintiff, as trustee of the TFT, and Mr Nemni as a result of the 'Proxies'. To have framed his claim in such a way amounts, in my judgment, to vexatious, oppressive and unconscionable conduct on his part. Furthermore, in doing so, Mr Nemni must have intended to tie up a large proportion of the assets of all the other parties to these proceedings, *i.e.* the Plaintiff and the 2nd to 4th Defendants, in defending what I consider to be proceedings very largely without merit.
27. In my judgment, the continuation by Mr Nemni of most of the Italian proceedings against all the parties to the proceedings before this Court would be unconscionable and contrary to the basic principle of justice and there is a clear need of protection of these proceedings which still remain before this Court. As Sir Anthony Clarke MR decided on the facts in *Masri (supra)*, at paragraph 85, I consider that the continuation by Mr Nemni of his claims in the Italian proceedings is "a classic case of vexation and oppression, and of conduct which is designed to interfere with the process of the [Guernsey] court in litigation to which the judgment debtor submitted."
28. On behalf of the Plaintiff Mr Swan also argued that it was oppressive of Mr Nemni to have brought the Italian proceedings rather than counterclaiming in Guernsey. He relied upon evidence from an Italian lawyer, Virginia Ripa di Meana, a member of the Rome Bar since January 1996, whose affidavit on Italian law sworn on 23 February 2011 was exhibited as exhibit NPB 4 to Mr Byford's 2nd affidavit sworn on 24 February 2011. She is the lawyer for the 2nd to 4th Defendants in the Italian proceedings.
29. Her evidence establishes to my satisfaction that "there is no procedure under Italian law for the early resolution of the claim by for example striking out the claim." She has also proved to my satisfaction that Italian proceedings usually take a very long time, perhaps as much as three years to reach trial, with an automatic right to appeal, and that such appeals "normally take a further four years to be heard." This argument relates, therefore, both to differences between Italian and Guernsey civil procedure and to the time it takes a trial of proceedings like the Italian proceedings to be heard in Italy. On their own such arguments would not have persuaded me that it was right to grant an anti-suit injunction, but I have accepted, in reaching

my decision to grant an injunction, that such factors as Dr di Meana has proved are further supporting reasons for what I consider to be the main plank of, or, to use Mr Swan's words, the key to, the application.

30. I shall therefore grant the Plaintiff an anti-suit injunction restraining the continuation by Mr Nemni of all parts of the Italian proceedings except the one claim to which I shall refer in the next paragraph of this Judgment. I invite Advocates Swan and Le Cras to lodge a proposed Order in draft form. I shall also make an Order that Mr Nemni pays the costs of both the Plaintiff and the 2nd to 4th Defendants on the recoverable basis.
31. The only claim, which, in substance, forms part of the Italian proceedings and which does not form part of the proceedings before this Court, appear to me to be an issue relating to apartments 5 and 6 Via Francesco Siacci 6, Rome. This claim may apparently relate to a trust company, Dear SpA, and, if so, the relevant respondent party to a claim by Mr Nemni relating to the apartments would, in my view, be the Plaintiff, as trustee of the TFT, and not the 2nd to 4th Defendants in these proceedings, who are the original parties to the Italian proceedings. Since the Plaintiff is now a party to the Italian proceedings, I do not propose to restrain Mr Nemni from pursuing the part of the Italian proceedings which relates to the two apartments in Rome.
32. I regret that it has taken me such a long time to give judgment in this matter and I apologise to the parties for the delay.

PATRICK TALBOT QC

Lieutenant Bailiff

26 January 2012