D & L Properties Limited and Yolanda Limited **JUDGMENT 11/2014**
Royal Court
10th February, 2014

Application for stay of proceedings on the grounds of "Forum Non Conveniens".

Approved Text
10.02.2014

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between: **D & L PROPERTIES LIMITED:** **Plaintiff**

-and-

YOLANDA LIMITED: **Defendant**

Application for stay of proceedings on the grounds of "*Forum Non Conveniens*"
Application heard on: 24th & 27th January, 2014
Judgment handed down on: 11th February, 2014

Before: John Russell Finch, Esq., Judge of the Royal Court

Counsel for the Plaintiff: **Advocate T W McGuffin**
Counsel for the Defendant: **Advocate J P Greenfield**

Cases and Materials referred to in Judgment:

Guernsey Cases:
Carlyle Capital Corporation Limited & Others v Conway and Others 2011 – 12 GLR 562;
Fir Trading Limited v McKenzie and Another (Royal Court, 19th August, 1999);
Healthspan v Healthy Direct 2003-4 GLR 193;
Masood and Others v Zahoor and Others (Royal Court, 3rd November, 2006);
Technocom Ltd v Roscomm and Klabin (Royal Court, 13th February, 2003);
Vardinoyannis v Ansol Ltd (Royal Court, 24th May 2002).

English Cases:

Batthyany v Walford (1887) 36 Ch.D. 269 (CA);

Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt. Ltd and Another [2011] 1 WLR 2575;

Spiliada Maritime Corporation v Cansulex Limited (The Spiliada) [1987] AC 460;

VTB Capital plc v Nutritek International Corporation [2013] 3 WLR 398;

Zebrarise Ltd and another v de Nieffe [2005] 2 All ER 816.

Textbook:

Dicey and Morris: Conflict of Laws (11th ed. 1987) Vol 2, r 180

JUDGMENT

Introduction

1. This is the Defendant's ("D's") application for a Stay of the Plaintiff's ("P's") action on the ground that Guernsey is "*Forum non conveniens*". All references are to the joint bundle, which is in two volumes: A, skeletons and documents, B authorities. D's application is at A5, the Cause is at A4. The application is resisted and it is suggested that Guernsey or England are appropriate forums. D submits that the Republic of Ireland is the correct venue.

2. In summary, P alleges that it entered into an agreement with D, dated 4th November, 2008, by which P agreed to loan D €2.2 million with a possibility of advancing to €3.8 million in order to develop a property at 12 Palace Street, London SW1. P also claims interest in excess of €4.2 million and costs. There is no lawyer's formal agreement, that documentary record is, for the purposes of this hearing, at pages 30-32 of exhibit TJC1 at A7. D will defend on the ground that the Plaintiff is the wrong person - it should be a Mr Derek O'Leary. There will be other defences (see paragraph 14 of D's first skeleton). A hefty counterclaim is also envisaged on the basis of breach of contract or misrepresentation. The Cause sets out the alleged breach of the loan agreement, failure to repay and unjust enrichment.

3. P is a company registered in Ireland. Mr O'Leary was a director, but was declared bankrupt by the High Court on 7th January, 2013. This Court was told that he was discharged on 14th January, 2014. During the gap he was not a director, but his wife and children were. He is now again a director. He and his wife are the ultimate beneficial shareholders. D is a Guernsey-registered company with Guernsey corporate directors provided by Intertrust International Management Limited. D is a special purpose vehicle for the development of the Palace Street property. The current structure and that in existence on 20th November, 2008 are shown at pages 26 and 73 of A7 respectively.

4. The basis of D's case is found in the two affidavits of Mr Coyle (A6 and A12), who is a property developer authorized on behalf of Yolanda. P relies upon affidavits from Mr O'Leary (A10) and Mrs O'Leary (A8). A number of documentary exhibits feature in these affidavits, but the paperwork has been kept within reasonable bounds, thus avoiding the problems that vexed the Supreme Court in VTB Capital plc v Nutritek International Corporation [2013] 2 WLR 398, paragraphs 82 and 86, and for which counsel are worthy of thanks. This case is technically at an early procedural stage, so the summary of the facts has been pruned to a bare minimum. One early point which emerged in the oral hearing was an objection by P to parts of Mr Coyle's affidavits. The first two points are found in P's Advocates' letter of 23 January, 2014: first affidavit, paragraph 11, second affidavit, paragraph 15. Both passages allude to assumptions, which should not generally appear in affidavit evidence and are therefore disregarded. Further objection was taken to paragraph 29 of the first affidavit, where it is stated that various persons other than the maker expressed no

concern about parts of a draft loan agreement and a reference in paragraph 8 of the second affidavit to a website associated with Mr O'Leary's business no longer being available "*no doubt"* as a result of his bankruptcy. The former is not objectionable, as it is a statement of alleged fact, and the second is relatively innocuous, but will not be afforded any weight.

Legal Authorities

5. It is necessary to start with the masterly exposition of the principles relating to *Forum non Conveniens* contained in the speech of Lord Goff in the leading case of Spiliada Maritime Corporation v Cansulex Limited (The Spiliada) [1987] AC 460, at Tab 25 of the authorities bundle ("Spiliada"). The formulation starts at 474 and extends to 484, with the main principles set out at 476-C to 478-E. This case has been followed in Guernsey and Jersey. As in Masood and Others v Zahoor and Others (Royal Court, 3rd November, 2006), it is necessary to quote the relevant parts of Lord Goff's speech before proceeding further, because as Southwell LB said in his judgment: "*My summary of his summary would not do justice to his careful assessment of the relevant points"* (at paragraph 49) (Southwell LB's citing and interposed observations are followed here):

> *"(5) The fundamental principle*
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> *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 Kinnear in Sim v Robinow (1892) 19 R 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:*
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> > *"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."*
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> *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 Societé du Gaz de Paris v Societé 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 Kinnear 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 how 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."*

6. A helpful distillation of the guidance afforded in Spiliada was given by Newman LB in Vardinoyannis v Ansol Ltd (Royal Court 24th May, 2002) and approved and followed by Carey B in Healthspan v Healthy Direct 2003-4 GLR 193 at paragraph 7:

> "*The authorities on **forum non conveniens** in the context of an application for the grant of leave to serve proceedings out of the jurisdiction, as well as the principles applicable to a Stay, were reviewed by the House of Lords in Spiliada Maritime Corp v Consulex, and the leading judgment was given by Lord Goff of Chieveley. The fundamental principle applicable to both types of application is that the court should choose the forum in which the case can be tried most suitably in the interests of all the parties and the ends of justice. In an application to serve out, the burden is on the plaintiff (the claimant) to show that leave should be granted, and the court considers the residence and the place of business of the defendant, and the relevant ground which is invoked by the plaintiff in deciding whether or not to exercise his discretion to grant leave.*
>
> *The claimant must not only show that Guernsey is the appropriate forum for the trial of the action, but that it is clearly the appropriate forum; and in discharging that burden the claimant is not confined to showing that justice cannot be obtained*

> *somewhere else or can only be obtained at excessive cost or delay or inconvenience, but is also entitled to rely on the nature of the dispute and the legal and practical issues involved in such questions as local knowledge, availability of witnesses and their evidence and expertise. The mere fact that the Guernsey system, or wherever, may have a different system of discovery or a different system for rules of damages or costs does not necessarily govern the position, but it is definitely a matter which ought to be taken into account."*

It is worth noting that there is no expert evidence as to Irish law in the present case.

7. The burden of proof in applications of this nature has been clearly laid down from Spiliada onwards. In Masood Southwell LB put it as follows:

> "*... 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 ...."*

There is no dispute between the parties in the present case on the allocation of the burden of proof, which is as set out in the cases, whether from Guernsey, Jersey or England.

8. Having considered the various authorities, in particular the leading Spiliada case, it seems that a number of factors may exist that are relevant in determining the forum question. Account is taken of the observation by Carey DB in Fir Trading Limited v McKenzie and Another (Royal Court, 19th August, 1999) at 5-B:

> "*Whilst we can get general principles from that case, it is important to keep separate and distinct the facts of the case, which does not present so many jurisdictional problems as cases like The Spiliada do ...."*

A helpful summary of a practical approach that a court resolving this issue might usefully take is found at paragraph 65 of Southwell LB's lucid judgment in the Masood case; the relevant part reads:

> *"In deciding this issue the Court has to decide whether the other available forum is one with which the issues in the Guernsey Action have the most real and substantial connection. In most cases, as Lord Goff observed, such connection is to be found in the place of residence or business of the parties, the location and availability of the witnesses, the law or laws governing the relevant transactions, and similar specific factors ....."*

It is necessary to stress the very important point (implicit in the quote from Carey DB above) that each case varies on its own individual facts and has to be resolved on the merits that can be discerned from the affidavits and arguments. Of course no final finding of fact can be made in the present case at this stage, or attempted.

9. In their respective skeletons and oral submissions the parties list differing relevant factors. D, in the first skeleton refers simply to convenience and expense, governing law, and the place where the parties carry out business (paragraph 26). On the other hand P lists eight factors: commencement as of right, costs, governing law, witnesses, residence of the parties, place of commission, the "Cambridgeshire Factor" and timing. Certain of these factors can be telescoped, but having been advanced, it is easier to assess them separately in the order given. Despite this, it is still worth observing that the Masood formula referred to at paragraph 8 above does seem to meet most situations, and does not differ in practical terms from Newman LB's more extensive guidance cited at paragraph 6 above.

The Factors Put Forward

10. Commencement as of right: P argues that the fact proceedings have been commenced in Guernsey is a strong indication favouring Guernsey as the most appropriate forum. D is a Guernsey registered company, carrying on activities in Guernsey. In support of this contention the case of Healthspan v Healthy Direct 2003-4 GLR 193 was cited. At paragraph 19 Carey B said:

> "*The defendant is a Guernsey company. A Guernsey judgment would, Mr Shepherd suggests, be more effective and easier to enforce than an English one, which would have to be enforced under the reciprocal enforcement legislation. Mr Greenfield disputes this, claiming reciprocal enforcement would not be difficult. This is not a big point, but again it adds weight against the argument that England is the more appropriate forum."*

It should be noted that in the Fir Trading case, which also involved Ireland as a potential forum, Carey DB had said (in answer, interestingly enough to submissions by Advocate Greenfield) at p6-B:

> *"He was unable to show me any authority to support the view that the availability or non availability of relief under Reciprocal Judgment legislation was a material factor to be introduced into the judicial balancing act …"*

And continued later on:

> *"…I think that this court would be able to deal with any perceived unfairness, either by expediting trial or, if there was thought to be a real risk of the Defendants, notwithstanding their strong local connections, leaving the island or dissipating their assets Mr. Greenfield would be in a strong position to ask for relief and protection once he had his Irish judgment. I accordingly do not think the problem is as great as Mr Greenfield suggests."*

D also draws attention to the counterclaim, details of which are not yet available, but which could potentially be resolved in their favour.

11. In Masood Southwell LB also addressed this issue. At paragraph 64 he said:

> "*The mere fact that a plaintiff has founded jurisdiction as of right in Guernsey… does not of itself give rise to any presumption that the plaintiff's choice of forum should be upheld. It may affect the burden of proof, as Lord Goff explained. But the central issue remains (without any presumption either way) whether there is another available forum which is clearly or distinctly more appropriate than the Guernsey forum*."

Southwell LB then went on to set out the valuable test referred to at paragraph 8 above.

12. The Fir Trading case is only one of a number of examples from this jurisdiction where a Stay has been granted where a Guernsey company or resident is involved. The approach which will be followed is to consider this factor in the light of the particular circumstances of the case and evaluate its weight when resolving the overall question of (using Southwell LB's summary) "*whether there is another available forum which is clearly or distinctly more appropriate than the Guernsey forum"*. In all the circumstances the words of Carey B quoted at paragraph 10 above are apposite: "*this is not a big point"*. In other words no substantial injustice would be visited on P in enforcing an Irish judgment in Guernsey.

13. Costs: Costs are, on what has been put forward, very much a peripheral point. If any further analysis is necessary, the costs would be a neutral factor. Of course Irish counsel would need to be instructed in Ireland, but expert evidence on Irish law may well be required in Guernsey proceedings as well as a number of witnesses travelling. Wherever this case ends up costs are not a hugely significant aspect of the matter that need to be considered in the present context.

14. Guernsey Law: P submits that the governing law of the alleged loan agreement is Guernsey, or, alternatively England. The loan monies were paid into a Guernsey bank account of a Guernsey company. Under the agreement no place for repayment was expressly agreed between the parties. Guidance can be found in the English case of Zebrarise Ltd and Another v de Nieffe [2005] 2 All ER (Comm) 816 where Judge Havelock-Allan QC, sitting as a judge of the High Court said (at [30] F-G):

> "*… It is well established that as a general rule the debtor must seek out his creditor in order to repay him. So, in the absence of agreement to the contrary, a debt is repayable where the creditor resides ……"*

And (at [31]-B):

> *"…If no place of repayment has been expressly selected, the next question is to ask whether a place of repayment can be inferred. If asked, where would the creditor have wanted the loan repaid? If there is an obvious answer to that question, that is the place of repayment …."*

P, of course, is an Irish company, making the payment from an Irish account in Euros, with repayment to be in the same currency. The place of repayment is a significant consideration in determining what the proper law is.

15. In Zebrarise Judge Havelock-Allan described the English common law position on ascertaining the proper law of a contract. There is no reason why this should not be followed in Guernsey. He set out rule 180 from *Dicey and Morris on the Conflict of Laws* (11th edition, 1987) Vol. 2. This reads:

> *"The term "proper law of a contract" means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection…*
>
> *(2) When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.*
>
> *(3) Where the intention of the parties to a contract with regard to the law governing it is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection."*

So paraphrasing what the judgment goes on to say at 32 D-E, sub-rule (2) deals with inferred intention, what the parties would have said if asked at the time; sub-rule (3) is an objective test of the closest and most real connection.

16. One goes to the affidavits to see what went on at the relevant time. A good place to start is in the exhibits attached to Mr Coyle's first affidavit (A7) pages 30-31. At page 30 is the written remark "*Agreed in Principle"* followed by "*4/11/08*" and signed by Messrs Carey, Dowling, O'Leary and Coyle. The substance of the agreement is in the messages dated 30th and 31st October, 2008 on those pages. The writing is in the hand of Mr Carey, an accountant involved in the transaction. This was done at Mr Carey's office in Dublin (see paragraph 27

of Mr Coyle's affidavit). On 4th November, 2008 a formalized draft agreement prepared by an in-house lawyer was set out, but for some reason never signed. Clauses 24 and 25 provided for Irish law to govern the agreement and Irish courts to have exclusive jurisdiction. This is noted, but as it was never executed is only of limited value. In his affidavit (A10), paragraph 14, Mr O'Leary states "*the governing law or jurisdiction terms were not discussed and were not agreed. At no point did I agree to Irish Law being the governing law"*. It is also to be noted, as a minor point of detail, that the subsequent Mezzanine Loan in May 2010 was professionally drafted with Irish governing law (page 95 of the exhibit to Mr Coyle's first affidavit). Mr O'Leary was very well involved in this (page 86).

17. Recourse may be made to the character beloved in earlier contract cases, the "Officious Bystander". Had this individual been privileged to have been present at the meeting in Dublin on 4th November 2008 and piped up words to the effect "*Is this contract to be under Irish law?"* the response would surely have been a firm "*Of course"*. The parties were then resident in Ireland and carrying on their activities there. Mr O'Leary is silent, understandably it may be thought, as to what other system of law would have been engaged. This is an approach intended to be consistent with that taken in paragraph [33] of the Zebrarise judgment. It is worth noting that this is one of those classic situations where a legally-drafted agreement would have solved a good number of problems, saved time and money and avoided the shoals and reefs of protracted litigation. Far from complicating a situation a legal input would have greatly simplified it.

18. In relation to the unjust enrichment claim (set out in paragraph 21 of the Cause), P submits that the proper law of the development is English law. The old case of Batthyany v Walford (1887) 36 Ch. D. 269 (CA) – Tab 24, is cited in support. However, this matter concerned deterioration (or waste) allegedly caused by a testator on land situated in Austria. It is rather difficult to extract anything much that would assist in the present case from that decision and the observation made on behalf of D that we are not concerned with a transaction involving land (and therefore involving *lex situs*) but an investment account is correct. The factual situation in the 1887 case is, with respect, very different from what is now before this Court.

19. At paragraph 45 of P's skeleton it is stated that in Technocom Ltd v Roscomm Ltd and Klabin (Royal Court, 13th February, 2003) (Tab 19), Guernsey was the appropriate forum in a case involving disputes in Russian law. However, this matter concerned the internal governance of a Guernsey company with a bitter dispute on the removal of a director. The facts there were also wholly different from those existing in the present case and plainly required resolution in the Guernsey courts.

20. The alternative forum of England was argued, very much as a subsidiary point. The development was in England and, it is again noted, the alleged Loan Agreement was an investment agreement, not a building contract. The connections with England from a legal perspective are tenuous and Mr O'Leary attended in pursuance of his consultancy rôle. A list of meetings in Dublin is given at paragraph 19 of Mr Coyle's second affidavit, pages 6-7. There were apparently 27 as against half a dozen in England. In the list of possible venues England, in respect of this aspect of the case, comes in a poor third.

21. It was suggested on behalf of P and set out at paragraph 38 of their skeleton:

> *"To the extent that Yolanda argues that the closest and most real connection is with Ireland, they are asking the Royal Court to ignore the corporate governance requirements of Guernsey companies and the regulation of decisions and activities undertaken by those who direct a Guernsey company."*

That would indeed be relevant in the circumstances set out by Beloff JA in Carlyle Capital Corporation Limited & Others v Conway and Others 2011-12 GLR 562 at 583:

> *"… where the principal issues are those of the internal management of a corporation and correlative breaches of duty, the place of incorporation will presumptively be*

> *the appropriate forum because of its ability to judge matters by its own standards of business conduct ….”*

Indeed, that case was concerned with such matters – liquidators seeking to remove directors from office and recover monies allegedly obtained in breach of their fiduciary duties. Beloff JA's observations in paragraph 42 of his judgment relate to that type of situation. If the present case related to such issues the whole of Beloff JA's incisive analysis would be very relevant, but it does not.

22. Witnesses: The availability of witnesses, as P submits (paragraph 46 of the skeleton) is a factor in determining an application on the grounds of *forum non conveniens*. Five of the witnesses live in Ireland: Mrs O'Leary, Mr Carey, Mr Barry, Mr McIntyre and Mr O'Donovan. Mr Coyle, Mr Dowling and Mr Orr live in England. Mr Coyle retains family and other interests in Ireland and he states (paragraph 48(c) of first affidavit) that it would be easier and more cost effective for him to travel and stay in Ireland to assist in the preparation of D's defence and give evidence. Mr O'Leary travels regularly to Ireland from Portugal, indeed it might well be that he travels more now his bankruptcy is discharged. Mr Schreibke, the person from Intertrust Guernsey responsible for Yolanda, lives in Guernsey. It seems, considering these circumstances, that the largest connection here is with Ireland, then England, followed by Guernsey. Whilst the observation made by P (in paragraph 49 of the skeleton) that it is not simply a question of numbers is correct, it is no part of this Court's function to assess weight at this stage unless strikingly obvious on the papers.

23. Residence of the Parties: Paragraph 59 of P's skeleton puts forward the following proposition:

> "*D&L submits that Guernsey companies should be accountable for their actions in Guernsey. Guernsey's reputation as an international financial centre is advanced when entities incorporated in Guernsey owned by Guernsey companies and administered by Guernsey companies are not permitted to avoid being held to account for their actions in Guernsey by what is described in the Defendant's Skeleton Argument (at paragraph 49) [Tab 1] as 'a reality in the offshore financial world in which Yolanda was nothing more than part of a 'tax effective structure'."*

This is described by D in the second skeleton at paragraph 48 as a "*bold assertion"*. It is not a regulatory case and it does not follow that cases involving Guernsey companies have to be tried in Guernsey. This is not the best point put forward.

24. Place of Commission: At paragraph 62 of the skeleton P asserts that where the dispute concerns the actions of one party giving rise to a claim "*the place of commission is a relevant starting point when considering the appropriate forum"*. At paragraph 63 P goes on to say that P's claim is based upon D's failure to repay the €2.2 million plus interest and thus the place of commission is Guernsey. The quote comes from the Nutritek case (Supra) [Tab 30], paragraph 51 of Lord Mance's judgment. The whole sentence reads (at 420):

> "*The place of commission is a relevant starting point when considering the appropriate forum for a tort claim."*

Nutritek involved deceit and conspiracy actions, it was therefore a tort case. It should be noted that the majority in the Supreme Court recognized that the place of the commission of the torts was a starting-point, rather than a presumption, and although the alleged torts have been committed in England, the fundamental focus was in Russia and the bulk of the evidence would come from Russian witnesses. England was therefore not established as the appropriate venue for the trial. Be that as it may, and it is possibly only of interest en passant, the words quoted refer plainly to tort, not contract.

25. Acquired Knowledge: The *"Cambridgeshire Factor"* is one of those phrases which like "*Mesher Orders*", "*Calderbank Offers"* and "*Newton Hearings"* are known to the Priests and Levites of the Temple of the Law, but not generally by the congregation. It is set out in Lord

Goff's speech in Spiliada at 470–F onwards, quoting Staughton J at first instance, and refers to specialised knowledge gained in similar proceedings. Even on P's account this is not an especially relevant factor in the present case and, in the context of these proceedings, it cannot be regarded as having any appreciable weight.

26. Timing: P, at paragraph 66 of the skeleton, claims that delay in the determination of proceedings is a factor for *forum non conveniens*. The English case cited in support is a decision of Christopher Clarke J in Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd and Another [2011] 1 WLR 2575 (Tab 29). P adds at paragraph 67 that they are "*not aware of any significant backlog in the Irish courts that would delay the proceedings"*. When the judgment in this case referred to is examined eventually paragraph 158 is reached. The relevant part of that reads:

> "*There is also evidence … in part supported by a recent article in the Times of India, that because of the heavy backlog of cases at Panaji it would take between four and ten years for the case to proceed to trial at first instance alone. This militates against an Indian hearing."*

Plainly that was a decision based on the particular facts of that case and timing is not a significant factor in this present matter.

Conclusions

27. On the facts available D has discharged the civil burden in the application that Ireland is the more appropriate forum. This is based largely on the perceived governing law, the nature of the transaction and D's role in it, the location of the witnesses as well as the place where negotiations were concluded. The burden of proof then passes to P to demonstrate why this venue would be an unjust one to proceed in. That, in this case, is closely linked with the first question and very little of weight has been put up to support such a contention. D will submit to the jurisdiction of the Irish courts and an undertaking will be given to that effect. No evidence on the Irish legal system was put forward by either party. Judicial notice, however, can take account of the fact it is a common law system, and has a Supreme Court whose decisions are worthy of the highest respect quoted in other common-law courts; a perusal, for example, of the British and Irish Legal Information Institute site will bear this out. It follows that D's application succeeds and a Stay is granted.

Costs

28. These should follow the event. However, if either side wishes to make written representations otherwise then they should do so within seven working days of the handing-down of this judgment.

Order

29. Counsel are asked to draw up the appropriate Order in draft for the Court to consider, please.

J R Finch

Judge of the Royal Court

