



In the Royal Court of the Island of Guernsey

The 18th day of January, 2001 before Andrew Christopher King Day, Esquire,
Deputy Bailiff; sitting alone.

(1) SILVER FALCON ENTERPRISES LIMITED Plaintiffs
(2) WALID AMIN SAFFOURI

v.

(1) EDWARD DENZIL DUNDONALD COCHRANE Defendants
(2) JOHN ROBERT COLLEY COCHRANE
(3) STEVEN DAVID COCHRANE
(4) UNA PATRICIA COCHRANE

WHEREAS on 23rd – 26th October, 2000

inclusive and 6th December, 2000 the Deputy Bailiff considered an application by the

Defendants for the following orders:

1. that the Court make such declaration or order or otherwise in connection with peremption in relation to the proceedings issued by the Plaintiffs against the Defendants (without prejudice to any argument that may be put, the period of peremption particularly relied upon is from the 6th October, 1998 to the 16th March, 2000); and/or
2. that the Plaintiffs' action against the Defendants be struck out under the provisions of Rule 36 of the Royal Court Civil Rules 1989 and/or under the inherent jurisdiction of the Court for want of prosecution and/or on the ground that the action is an abuse of the process of the Court; and/or because the Plaintiffs failed to take such action as was reasonable to comply with paragraph (d) of the Court of Appeal's Order dated 20th October, 1994; and
3. that the arrest order granted in favour of the Plaintiffs on 7th February, 1989, and any variations thereto, be forthwith discharged; and

4. that the Plaintiffs be ordered to pay the costs of and incidental to these proceedings from the 7th February, 1989 onwards on a full indemnity basis and/or on such other basis that the Court deems appropriate;
5. without prejudice to the orders sought above that the Plaintiffs, within fourteen days from the date of any order of the Court, or within such other period as the Court may deem appropriate:
 - (a) File an amended cause incorporating, insofar as the same is possible, all responses to orders made against the Plaintiffs previously in respect of requests for further and better particulars and, where the same is not possible, to provide additionally to the amended cause, updated further and better particulars; and
 - (b) to amend the cause generally so that it only contains and makes reference to and names as Defendants the fourth, fifth, seventh and eighth Defendants;"

and an application by the Plaintiff for the following orders:

1. For a timetable as to the service of a Defence and any Reply.
2. An order for the mutual discovery and inspection of documents and for a timetable as to the same.
3. Such further and other directions as the Court may think fit.
4. That the costs of this application be the costs in the cause.

THE DEPUTY BAILIFF having heard Advocates J.P. Greenfield and P.T.R. Ferbrache counsel for the Plaintiff and Defendants respectively this day handed down Judgment in the terms attached hereto; and

- (i) STRUCK-OUT the Plaintiffs' cause for want of prosecution;
- (ii) FOUND that the Plaintiffs' cause became perempt on 7th October, 1999;
- (iii) REFUSED to restore the Plaintiffs' cause to the Rôle des Causes à Plaider; and

- (iv) DISCHARGED the Arrêt of 7th day of February, 1989 – stayed for 24 hours.

Her Majesty's Deputy Greffier.

IN THE ROYAL COURT OF GUERNEY
ORDINARY DIVISION

B Between

- (1) SILVER FALCON ENTERPRISES LIMITED
- (2) WALID AMIN SAFFOURI
- (3) SOLON ANTONIOU PIITARIDES

Plaintiffs

C and

- (1) INTERNATIONAL HELLENIC OPERATIONS LIMITED (formerly International Technology Operations Limited)
- (2) INTERNATIONAL TECHNOLOGY OPERATIONS LIMITED (formerly International Technology Limited)
- (3) T.P. ENTERPRISES LIMITED (formerly International Technology Limited)
- (4) EDWARD DENZIL DUNDONALD COCHRANE
- (5) JOHN ROBERT COLLEY COCHRANE
- (6) WILLIAM THOMAS COCHRANE
- (7) STEVEN DAVID COCHRANE
- (8) UNA PATRICIA COCHRANE
- (9) COCHRANE FAMILY HOLDINGS (PTY) LIMITED
- (10) PMM TRUST COMPANY LIMITED As Trustees of THE COCHRANE FAMILY SETTLEMENT
- (11) JAMES BEVERLEY PORTMAN
- (12) GORDON JOSEPH DANIEL MACDONALD
- (13) MICHAEL J. WILSON

Defendants

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The Deputy Bailiff's Judgment in respect of (i) the Defendants' applications regarding peremption, striking out the Plaintiffs' action, etc., and (ii) the Plaintiffs' application for directions regarding the service of defences, discovery and inspection, etc., and to restore the Cause to the Rôle.

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Hearing dates – 23rd to 26th October, 2000 (inclusive) and 6th December, 2000
Judgment handed down 18th January, 2001

Legislation referred to:-

The Royal Court Civil Rules, 1989

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A Texts referred to:-

The Supreme Court Practice 1999 (the White Book)
Terrien. *Commentaires du Droit Civil*
Gallienne. *Traité de la Renonciation par loi Outrée, etc*

B Cases referred to:-

1. Allen v. Sir Alfred McAlpine & Sons Limited and Another (1968) 2 QB 229.
2. Dunne v. Rowe, 29th August 1998, Royal Court.
3. Willow v. van Leuven and Others, 11th December, 1998, Royal Court.

C 4. Smith v. Walter Property Limited and Grange Offices Limited, 15th October, 1999, Royal Court.

5. Birkett v. James (1978) AC 297.
6. Sparrow v. Sovereign Chicken Limited, June 1994 CA unreported.

D 7. Trill and Another v. Sacher and Others (1993) 1 WLR 1379.

8. Roebuck v. Mungovin (1994) 2 WLR 290 HL.
9. Shtun v. Zalejska (1996) 1 WLR 1270.
10. Hobart v. British Gas plc and Another, CA unreported, (Lexis transcript) 7th March 1997.

E 11. Biss v. Lambeth, Southwark and Lewisham Area Health Authority (Teaching) (1978) 1 WLR 382.

12. Department of Transport v. Chris Smaller (Transport) Ltd. (1989) AC 1197.

F 13. O'Donnell and Others v. Charly Holdings Inc. and Another, Transcript Report – Judgment of Court of Appeal (Civil Division) 14th March 2000.

14. Hunter v. Skingley (1997) 1 WLR 1466.
15. Leniston v. Phipps (trading as Broxbourne Zoo) English Court of Appeal unreported, 21st October 1998 (Lexis transcript).

G 16. Grovit v. Doctor and Others (1997) 1 WLR 640 HL

17. Lev v. Fagan (Court of Appeal 8.3.88 unreported).
18. Benoit v. Hackney Borough Council (February 11th, 1991 CA unreported)

19. Eagil Trust v. Pigott-Brown (1985) 3 All ER 119 CA.

H 20. Electricity Supply Nominees v. Longstaff, 1986 Const. Law Journal 183 CA.

21. Paal Wilson & Co. v. Partenreederel (1983), AC 854.
22. Kincardine Fisheries Ltd. v. Sunderland Marine Medical Insurance, unreported, 21st January, 1997.

23. Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd. (1998) 1 WLR 1426 CA

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24. Securam Finance Ltd. v. Ashton and Another (2000) 1 WLR 1400
25. Saromaje Ltd. v. Janet Holdings Ltd. 15 GLJ 53.
26. Le Moigne v. Hargetion 20 GLJ 51.
27. Haines v. Guernsey Annandale Tile Co 1980 Ltd. (Decision of Carey DB 23 GLJ 58) (Decision of Court of Appeal 24 GLJ 86).
28. W J Stoneman v. Cummings et al, 19th November 1999, Royal Court.
29. Rastin v. British Steel (1994) 1 WLR 732

Advocate J.P. Greenfield appeared for the Plaintiffs.

Advocate P.T.R. Ferbrache appeared for the Defendants.

The parties are recorded in the above manner to indicate the entities and individuals who have, at one stage or another, been parties in these proceedings, and to facilitate reference to them. The four remaining Defendants at this time (the fourth, fifth, seventh and eighth) are referred to collectively as the "Cochrane Defendants".

Following directions given by the Guernsey Court of Appeal on the 4th July, 2000, both parties in the latter part of July filed applications with this Court.

The Defendants' application was in the following terms:-

"The Fourth, Fifth, Seventh and Eighth Defendants ("the Defendants") whose address for service is 1, Le Marchant Street in the Parish of St. Peter Port, hereby

APPLY TO THE COURT

for the following orders:-

- "1. that the Court make such declaration or order or otherwise in connection with peremption in relation to the proceedings issued by the Plaintiffs against the Defendants (without prejudice to any argument that may be put the period of peremption particularly relied upon is from the 6th October 1998 to the 16th March 2000); and/or*
- 2. that the Plaintiffs' action against the Defendants be struck out under the provisions of Rule 36 of the Royal Court Civil Rules 1989 and/or under the inherent jurisdiction of the Court for want of prosecution and/or on the ground that the action is an abuse of the process of the Court; and/or because the Plaintiffs failed to take such action as was reasonable to comply with paragraph (d) of the Court Appeal's Order dated 20th October, 1994; and*
- 3. that the arrest order granted in favour of the Plaintiffs on 7th February 1989, and any variations thereto, be forthwith discharged; and*
- 4. that the Plaintiffs be ordered to pay the costs of and incidental to these proceedings from the 7th February 1989 onwards on a full indemnity basis and/or on such other basis that the Court deems appropriate;*

- A 5. *without prejudice to the orders sought above that the Plaintiffs, within fourteen days from the date of any order of the Court, or within such other period as the Court may deem appropriate:*
- (a) *File an amended cause incorporating, insofar as the same is possible, all responses to orders made against the Plaintiffs previously in respect of requests for further and better particulars and, where the same is not possible, to provide additionally to the amended cause, updated further and better particulars; and*
- B (b) *to amend the cause generally so that it only contains and makes reference to and names as Defendants the fourth, fifth, seventh and eighth Defendants;”*

The Plaintiffs' application was in these terms:-

- C *“The Plaintiffs whose address for service is at 7 New Street in the parish of Saint Peter Port in the Island of Guernsey hereby*

APPLY TO THE COURT

for the following order:-

- D 1. *For a timetable as to the service of a Defence and any Reply.*
2. *An order for the mutual discovery and inspection of documents and for a timetable as to the same.*
3. *Such further and other directions as the Court may think fit.*
4. *That the costs of this application be the costs in the cause.*

E The two essential matters upon which the Defendants are asking me to order are, firstly, that the Plaintiffs' Cause is preempt, (having regard to the period October, 1998, to March, 2000), and, secondly, that the Plaintiffs' action be struck-out. In the event that either application be granted, then the Plaintiffs' action would be prescribed.

F Accordingly, during the course of the hearing, without anticipating in any way what my conclusions might be with regard to preemption, I invited Mr. Greenfield to make a further application by virtue of Rule 50(b) of the Royal Court Civil Rules, 1989, for an order that the action be restored to the Rôle. Mr. Greenfield accordingly made the necessary application, orally and with the consent of Mr. Ferbrache.

G I have, therefore, potentially three matters to adjudicate upon. It was agreed by Counsel that I should consider each of them, so that in due course, if so invited, superior courts can give their decision on all of these matters, with a judgment at first instance as a basis. It was also agreed that I should deal with these matters in this order:- strike out, preemption, application to restore.

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A Subject to my decisions and those of any superior court, it would then be appropriate to adjudicate upon the Plaintiffs' written application and paragraph 5 of the Defendants' application.

B In February, 2001, it will be 12 years since these proceedings, in effect, started; and in January, 2001, 10 years since the original Cause was placed on the Pleading List. Mr. Ferbrache has said, as an aside, that this must be the longest running "mareva" injunction in the history of the world. He knows far more than I do about such matters, upon which I am not qualified to judge. However, I am sure that this case sets a record in the history of
C Guernsey litigation (at least since the times when saisie proceedings dragged on interminably, and never in future to be challenged, I hope) for the number of applications to, and hearings before, both the Royal Court and the Court of Appeal before defences have even been filed. It would seem that the result of thieves falling out is as nothing compared
D with the situation when arms dealers do so - this case revolving around the alleged involvement of the parties, in the 1980's, in the supply of arms, and commission allegedly due thereon, to Iraq, Saudi Arabia, Jordan, Egypt, Greece and Cyprus. Any opprobrium for such activities must not influence my decision on these applications.

E As will already be apparent, this is not a simple case. Indeed, to describe it even in those terms is misleading; unquestionably, it has been procedurally tortuous, is factually complex, and will be difficult to unravel, in order to do justice. In the circumstances I am particularly grateful to both Counsel for their comprehensive, yet concise submissions, both written and
F oral, which have been presented so professionally. I do not pretend, in this judgment, to have mentioned or addressed each and every point they have made. No discourtesy is intended. I have merely attempted to refer to those of their submissions which seem of the greatest importance.

G **A. The Striking Out Application**

1. The Parties

H The first Plaintiff in this action is a Guernsey registered company owned and controlled by the Second Plaintiff, Mr. Saffouri ("Saffouri") – to adopt the description used by Sir Godfray Le Quesne, QC in delivering the judgment of the Guernsey Court of Appeal on the 21st April, 1993. The Third Plaintiff, Mr. Piitarides, was apparently a business associate of the Second Plaintiff, as also a Mr. El-Faruki, although he has never been a party to these
I proceedings; all these, as respects this case, were engaged in the arms trade. With regard to

A the First Plaintiff I would add that it was incorporated in August, 1984; struck off the Register of Guernsey Companies (for failing to file its statutory returns) in July, 1995; and restored in July, 1997 (on Carey Langlois' application). It did not file its annual return in 2000 until the middle of June, over four months late.

B The first three Defendants are or were all Guernsey registered companies.

C The First Defendant was incorporated in April, 1981, under the name "International Technology Operations Ltd." It changed to its present name ("Hellenic") in September, 1986. In July, 1993, it was dissolved and struck off the register for failing to file its statutory returns. It was restored to the register in September, 1994 (on the application of Ozannes), but again struck off the register, for the same reason, in July, 1999.

D The Second Defendant was incorporated in June, 1980, under the name "International Technology Limited", changing it to its present name in October, 1986. It was dissolved compulsorily in July, 1999, for the same reasons as the First Defendant.

E The third Defendant was incorporated in October, 1986, changing to its present name in August, 1987. It was dissolved compulsorily, for the same reason as the others, in July, 1997.

On 27th October, 2000, the first two Plaintiffs applied to this Court that the first three Defendants be restored to the register. Those applications stand adjourned.

F All of these three companies were, it would seem, controlled for part or all of their existence by members of the Cochrane family (the Fourth to Eighth Defendants).

G These five Defendants were potential beneficiaries under the Cochrane family settlement, and their involvement in the First or Second Defendants was both on their own behalf and on behalf of the Armaments Corporation of South Africa Limited ("Armcor"), so the Plaintiffs allege. The Ninth Defendant is or was a South African Company owned by the Cochrane family and, so I understand, unconnected with Guernsey. The Tenth Defendant is a Jersey trust company which acts as Trustees of the Cochrane family settlement. It originally owned the shares in the First Defendant. These shares were sold in 1986, but wishing to keep the name which up until then had been borne by the First Defendant, International Technology Operations, they transferred this name to the Second Defendant, and the First Defendant was then re-named (as that name appears in the Cause). The Eleventh Defendant was the

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A technical director of the First Defendant, and I quote, “for a divers period”. The Twelfth and Thirteenth Defendants are or were accountants with the firm of Peat Marwick Mitchell (“Peat Marwick”) in Guernsey, and at all material times were apparently directors of the Tenth Defendant

B **2. The Background**

(a) Procedural

C As already indicated, this matter commenced on the 7th February, 1989, when the Royal Court, on an *ex parte* application based on an affidavit sworn by Saffouri, made various orders (the “Arrêt”). They were to the following effect; namely, permitting the arrest by the First Plaintiff of monies, not exceeding U.S. \$495 million, or their equivalent in other currencies, that might be held in Guernsey by Barclays Bank Ltd., or two of its subsidiary companies, in the name of or on behalf of the first three Defendants and all the Cochrane Defendants, as well as various other named entities and individuals (numbering 23 in all); restraining those 23 named entities or persons from removing their assets from this jurisdiction; requiring the Barclays Bank companies within 12 days to provide various information to the First Plaintiff, with similar disclosure by Peat Marwick and Stonehage Ltd.; together with related orders for inspection within one month.

E A number of what I would describe as “tidying-up” interlocutory applications and orders ensued, and on the 7th April the Second Defendant applied, on notice, to the Court to set aside or vary the Arrêt, some of the Cochrane Defendants having sworn affidavits in support of the application (the “1989 Cochrane affidavits”). The Court ordered the Arrêt to stand, and made various supplementary orders relating to disclosure and inspection, together with an order that the first two Plaintiffs institute proceedings by the 7th July, 1989; the Court also gave leave to the Second Defendant to appeal against the basic order.

G On the 13th September, 1989, the First Plaintiff filed an application requesting that the Second, Third and Cochrane Defendants be ordered to disclose particulars of certain contractual matters, and to disclose a large number of documents and information which, inter alia, had been referred to in the 1989 Cochrane affidavits (the “pre-action discovery” application/order). The application was, for the greater part, granted on the 8th November, 1989, when leave to appeal was given to the Second Defendant; this appeal was granted in December, 1993, the reasons for that decision being provided in June, 1994, namely that the Royal Court had no power to make such orders. The Royal Court also ordered on the 8th

A November that the proceedings be commenced by the Plaintiffs within 6 weeks of the date of that order, or within 3 weeks of compliance by the Second Defendant with that order, whichever was the later (the "6 weeks or 3 weeks order").

B Further interlocutory matters followed, including the dismissal on the 16th July, 1990, of the Defendants' application that £20,000 of the money restrained by the Arrêt be released, against which notice of appeal was also lodged, on the 24th October, 1990.

C The Cause was in due course placed on the Pleading List on the 24th January, 1991, that is some 23 months after the Arrêt had been granted.

D On the 13th November, 1991, on the Defendants' application, the Court ordered the provision by the Plaintiffs of further and better particulars of their Cause within 21 days, the Plaintiffs purporting neither to consent nor to oppose such application (for more on which, see the Court of Appeal's judgment of October, 1994).

E On the 12th December, 1991, the Plaintiffs applied to the Court to extend the order which had made on the 13th November, 1991, (relating to further and better particulars of the Cause) to the 6th January, 1992, and on the 14th May, 1992, made a similar application to extend that order, together with an application in respect of the filing of written defences, discovery and inspection. On the 22nd May, 1992, the First Defendant filed an application with the Court seeking to strike out the Plaintiffs' action (that is to say its action as pleaded) and further to dismiss the action because of the Plaintiffs' non-compliance with the order of the 13th November, 1991 (regarding the provision of further particulars). The second to tenth Defendants filed a similar application on the 2nd June, 1992, with regard to strike out and dismissal. All these matters were heard by Dorey B on the 7th October, 1992; he issued judgment thereon on the 5th January, 1993, in which the applications by the Defendants were dismissed with costs, and the applications by the Plaintiffs were adjourned sine die. Nearly 2 years had by now passed since the Cause was filed.

H On the 4th February, 1993, the Defendants failed in their application to the Deputy Bailiff for leave to appeal against his judgments of the 5th January, 1993, (the strike out and dismissal applications), but such leave was granted by the Court of Appeal itself on the 21st April, 1993, (appeal No. 202).

I Additionally on the 4th February, 1993, the Court, on the Plaintiffs' application for directions in respect of the future conduct of the appeals by the Defendants of the Deputy Bailiff's

A decisions of the 8th November, 1989 (pre-action disclosure) and the 16th July, 1990 (release
of part of moneys arrested), ordered that the Defendants forthwith provide written defences,
within 14 days thereafter serve on the Plaintiffs their list of documents, and within seven
days thereafter provide inspection. Such orders were stayed until the 29th March, 1993,
B which date was replaced, on the 26th March, 1993, by the date when, in effect, the Court of
Appeal became seized of the matters.

Also on the 26th March, 1993 – and this is an important matter – the Court ordered that the
proceedings against the Sixth and Ninth Defendants be stayed, the Plaintiffs electing to
C pursue the proceedings which they had instituted against those two Defendants in South
Africa.

On the 2nd December, 1993, on the Plaintiffs' applications, the Court ordered that the
Twelfth and Thirteenth Defendants be joined, and that various and substantial amendments
D to the Cause be allowed. In January, 1994 (or thereabouts) the Defendants sought leave to
appeal against the orders of the 2nd December, 1993, those appeals being described together
as the "joinder appeal" (No. 212).

E On the 28th February, 1994, the Court of Appeal (this was a busy time for them, having spent
4 days in December, 1993, with the pre-action discovery appeal) commenced hearing both
the "strike out appeal", and the "joinder appeal"; that hearing lasted 14 days, and continued
for a further 4 days in June. On the 20th October, 1994, the Court of Appeal handed down its
comprehensive judgments (delivered by Sir Godfray Le Quesne QC). Part of the strike out
F appeal was allowed (i.e. deleting various parts of the Cause and some of the particulars),
otherwise it was dismissed. The joinder appeal was allowed in full, and the orders, both in
respect of joinder and amending the Cause, of the 2nd December, 1993, were set aside; the
Tenth Defendant was also dismissed from the action. The Court of Appeal in addition
G granted leave to the Plaintiffs to appeal to Her Majesty in Council in respect of that part of
the strike out appeal which had been allowed, though this was not pursued by the Plaintiffs.

Most importantly the Court of Appeal gave directions as to the future conduct of the
proceedings. The terms of such directions feature importantly in these proceedings, and it
H would, therefore, be appropriate to quote the precise terms of the Court's order at this stage.
They were as follows:-

*"That defences be filed within 28 days from the relevant date, and mutual discovery be
I made within 28 days of the close of proceedings, the said relevant date to be the date when*

A *the Cause shall have been revised to take account of the foregoing decisions in the present appeals, such date to be agreed between Counsel for the Plaintiffs and for the first to fifth and seventh and eighth Defendants respectively, or, failing agreement, as fixed by further order of the Court of Appeal.*"

B The foregoing review of these proceedings from February, 1989, to October, 1994, is based on and relates only to, the court records relating to the applications which had been made, and the decisions thereon. As such, it is no more than the skeleton of the activity between the parties during that period. The review of the court's involvement from October, 1994, to
C date, is even more skeletal, the courts, surprisingly, being involved in that period only intermittently.

On the 24th July, 1997, the Court started to hear applications, lodged in April, 1997, by the second to ninth Defendants, which sought the discharge of the Arrêt, a declaration as to
D whether the Plaintiffs' Cause was by then preempt or not, and the striking out of the Plaintiffs' action (for want of prosecution, etc., and therefore on terms similar to those contained in the Defendants' present application). That hearing was adjourned until sworn evidence as to the medical condition of the Second Plaintiff was produced, the hearing re-
E commencing on the 3rd September, 1997. On the 24th April, 1998, the Court gave judgment, dismissing both the application to discharge the Arrêt and the strike out application; and further held that preemption had not terminated the Cause. That order, after correspondence from Mr. Ferbrache, was varied by further order of the 6th October, 1998, whereby the Third
F Plaintiff's action was struck out for want of prosecution.

Finally, on the 4th July, 2000, the Court of Appeal gave judgment, by consent of the parties, on applications which had been made by both the Plaintiffs and the Defendants. That of the Plaintiffs, dated the 16th March, 2000, sought an order that the Cochrane Defendants be
G ordered to agree the amended Cause and further and better particulars, to file defences within 28 days and thereafter to provide discovery "by list" within a further 28 days (in default of which judgement was to be granted in favour of the Plaintiffs), and, finally, an order for the release of the security for costs in the sum of £40,000 which had been provided by the
H Plaintiffs by lodging a bank guarantee. The Cochrane Defendants' application, dated the 3rd April, 2000, sought an order, directly from the Court of Appeal, in relation to preemption, that the Plaintiffs' action be struck out (for want of prosecution) for the same reasons as stated in paragraph 2 of the application before me, and that the Arrêt be forthwith
I discharged.

A The consent order made by the Court of Appeal was to the following effect:- that within 28 days the Plaintiffs file a new application with the Royal Court for directions as to the future progress of the action; that the Defendants, if they wished to make any application to strike out the Cause on the grounds of peremption, delay, abuse of process, etc., should do so within 28 days, providing all supporting documentation; that in any such strike out applications the Defendants should particularise any outstanding objections which they had to the Plaintiffs' amended Cause and further and better particulars; and that both parties appear before the Royal Court by the 31st July, 2000, to obtain an early date for the effective hearing of both applications, and thereafter to prosecute the applications with diligence.

C Those applications were duly made by both parties within the prescribed time limits. On the 11th August, 2000, directions, by consent, were given for the lodging of material, by both parties, and a date (the 23rd October) was fixed for the commencement of the hearing, in the first instance, of the Defendants' strike out and related applications.

(b) Factual

E I turn now to the allegations and issues revealed by the Cause and particulars (provided, as amended, in April, 1995).

F It is alleged that an agreement was made on the 12th December, 1982, between Saffouri and the First Defendant, by which the First Defendant appointed Saffouri, or a company to be nominated by him, as their agents in Iraq, Saudi Arabia and Jordan, for what was referred to therein as "Project Victor", a short name for armaments made by the First Defendant or armament technology owned by them. It was the duty of Saffouri to effect introductions to, to assist negotiations with, and do other things set out in Clause 2 thereof in relation to parties introduced by Saffouri with whom the First Defendant would enter into contracts for the supply and manufacture of certain military equipment, for which the First Defendant agreed to pay Saffouri or his nominees 10% of all sums paid to the First Defendant pursuant to such contracts. Similar agreements were made between Saffouri and the First Defendant relating to Egypt (in December, 1982), and Greece (in April, 1983), and by Saffouri and Mr. Piitarides together and the First Defendant relating to Cyprus (in April, 1983).

H It is necessary to state paragraph 5 of the Cause which contains an allegation of the terms to be implied in these agreements.

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- A “(1) That the First Defendant would take no steps and/or not so organise its affairs so as to deprive Saffouri or Saffouri and Piitarides of their commission or to prevent them from earning or receiving commission in respect of relevant contracts entered into with parties introduced by him or them.
- B (2) That where the First Defendant caused or permitted companies, persons or entities other than itself to be the contracting party or to receive payments in respect of relevant contracts entered into with parties introduced to the First Defendant by Saffouri or Saffouri and Piitarides, the First Defendant would pay Saffouri (or in the case of the Cyprus agreement Saffouri and Piitarides) commission in accordance with the terms of the four agreements; and/or
- C (3) That the First Defendants would duly account to Saffouri or Saffouri and Piitarides and/or provide all necessary information to enable him or them to make a claim to and/or be satisfied of his or their entitlement to commission.”.
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With the agreement of the First Defendant Saffouri assigned all his rights and obligations under these four agreements to the First Plaintiff in 1986.

E A written agreement made on the 11th October, 1984, (in Limassol, Cyprus – at the “October 1984 meeting”) between the First Defendant and the First Plaintiff, provided, inter alia, that the commission rate referred to in each of the four agreements would be 11% of gross income accruing to the First Defendant, and “Project Victor” be allegedly modified to extend to all armaments business conducted by the Defendants and various associates.

F Pursuant to the four agreements Saffouri on his own behalf, and after the 11th October, 1984, on behalf of the First and Third Plaintiffs, introduced the First Defendant to and entered into negotiations (as well as acting otherwise in accordance with each of the agreements) with

G representatives of governments and government agencies of countries to whom the agreements relate, with a view to securing contracts between them and the First Defendant or Second Defendant for the supply and manufacture of military equipment and the sale of related materials and services and local rights of manufacture.

H Details of those alleged activities are then particularised with regard to each of the countries in question. What should be noted is that with regard to Iraq and Jordan these activities took place in the years 1982, 1983, 1984, 1985 and 1986; with relation to Greece in 1983, as also Cyprus and Egypt.

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A The Cause then alleges that, by reason of those activities, what are described as substantial contracts (upon which commission was due) were entered into with governments and/or government agencies introduced by the Plaintiffs to the First Defendant. By virtue of the Defendants' failure or refusal to provide proper or any information, the best particulars of the contracts entered into with the parties introduced by the Plaintiffs are limited, at least

B until discovery and/or interrogatories take place.

With regard to Iraq, those contracts involved cluster bombs, training units, air concussion (pressure) bombs and other equipment.

C With regard to the cluster bombs, one contract was allegedly signed in the spring of 1984 ("the SOTI agreement"). The rest of the information obtained by the Plaintiffs derives from various meetings which took place between Saffouri, and his associate Mr. El-Faruki on occasions, and one or more of the Cochrane Defendants. These meetings took place in

D Harare, Zimbabwe, in December, 1985 ("the December 1985 meeting"), in Zurich, Switzerland, on the 23rd June, 1986 ("the June 1986 meeting"), and in London on the 19th February, 1988 ("the February 1988 meeting"). The Plaintiffs also rely for their information upon an affidavit sworn on behalf of the Defendants by one Bruwer on the 29th September,

E 1989.

With regard to the training units and the pressure bombs, the Plaintiffs rely upon conversations which also took place at the June 1986 meeting and the February 1988 meeting; and with regard to other equipment upon what was said at the June, 1986 meeting.

F In relation to Greece and Cyprus, following the contacts that were made in 1983, relevant contracts have been made either with the First or Second Defendants or with their subsidiary company called "Elviemek". In relation to Egypt, following the contacts made in the spring

G in 1983, orders for equipment and components were placed with or through the First Defendant. In respect of all of these countries no further particulars can be given at this stage.

H It is then alleged that the First or Second Defendants have frequently promised to provide the Plaintiffs with full details of all contracts entered into in consequence of the introductions which they had effected pursuant to the agreements, including audited statements of account relating to such contracts. Such promises were made at the June 1986 meeting and subsequently in correspondence in March, April and September of 1988.

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A It was further pleaded by the Plaintiffs that the First or Second Defendants have paid the sum of US\$150,000 by way of commission, but they have failed to account for, or make payments in respect of, what are described as very substantial further sums due to the Plaintiffs as commission.

B In breach of the implied terms, it was alleged that the First and Second Defendants prevented the Plaintiffs earning commission by causing or permitting contracts to be made with companies other than the First or Second Defendants. The companies with which this had taken place are set out in a schedule as being:- one or more of a number of German companies, Elviemek, four other named foreign companies and other companies unknown to the Plaintiffs. No particulars are given of the contracts made with these entities.

C The current allegations made against the Cochrane Defendants are to be found in paragraph 16 of the Cause and are all based in tort. Firstly, the Cochrane Defendants have conspired with each other and with the First, Second and Third Defendants, Armscor and/or Elviemek and others unknown, to deprive the Plaintiffs of commission or to prevent them from earning or receiving commission under the terms of the agreements by unlawful means and/or have unlawfully conspired to injure the Plaintiffs. Secondly, the Cochrane Defendants and each of them and the Second Defendant and/or Third Defendant have unlawfully interfered with the Plaintiffs' business. Thirdly, the Cochrane Defendants have each of them knowingly procured the First and/or Second Defendant to breach the four agreements and/or their obligations thereunder by preventing the Plaintiffs from earning or receiving commission.

D The ways in which the Cochrane Defendants have allegedly committed these torts are, firstly, that they, and through them the First and Second Defendants, each knew or ought to have known the express and/or implied terms of the four agreements; secondly, they have made various false denials in respect of the existence of contracts, have deliberately caused confusion in respect of the identity of the First, Second and Third Defendants, have concealed information relating to relevant contracts and have persistently refused to provide the Plaintiffs with reliable information relating to them; have arranged for parties introduced by the Plaintiffs (in accordance with the four agreements) to enter into contracts with companies other than the First or Second Defendants for the purpose of preventing the Plaintiffs from earning or recovering their proper commission; and have caused or allowed the First or Second Defendants to fail and/or to have assets or receipts to make payment to the Plaintiffs (save for the sum of US\$150,000).

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A Particulars are then given in respect of the allegations made in respect of false denials, confusion of identity, concealment and refusal to provide information, contracts with companies other than the First or Second Defendant, and failure to make payment or have assets. Those further particulars, which are, again, the best that can be provided prior to discovery and/or interrogatories, are based in part upon conversations which allegedly took place at the June 1986 meeting and the February 1988 meeting, in part on affidavits sworn by three of the Cochrane Defendants in 1989, in part from investigations in the Guernsey public records of the shareholding of the First Defendant, and partly by documents which have been disclosed as a result of the Order made against Peat Marwick (in the Arrêt).

B

C Finally, the Plaintiffs allege that, as a result of the torts committed by the Cochrane Defendants, the Plaintiffs have suffered loss and damage in a sum equal to the commissions which ought to have been paid by the First or Second Defendants under the four agreements, or the commission which the Plaintiffs would have been entitled to receive if the contracts had been entered into by the First and Second Defendants rather than by other companies. In the event the best estimate that the Plaintiffs can give of their alleged loss amounts to not less than US \$495 Million.

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E The concluding prayer of the Plaintiffs' Cause claims damages in the sum stated against the Fourth, Fifth, Sixth and Eighth Defendants for procurement of breach of contract and/or damages (against the Seventh Defendant as well) for unlawful interference with business and/or conspiracy.

F I am not certain that the current Cause has still been tidied up satisfactorily.

Extensive further particulars (amounting to some 79 pages) have been provided by the Plaintiffs, relating to many of the substantive matters raised in the Cause – the Plaintiffs' introductory activities (particularly with regard to Iraq), the resulting contracts, the subsequent concealments, breaches of promises to account and provide information, etc; though even now further information must await discovery/interrogatories.

G

(c) Brief summary of issues

H The broad issues in this case can, I believe, be shortly and fairly stated. What contractual relations, rights and obligations were created between the Plaintiffs and the first three Defendants, including any terms to be implied? What did the Plaintiffs do, pursuant to the agreements, to effect introductions, conduct negotiations, and otherwise? What armaments

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A contracts resulted therefrom? What commissions thus became payable by the first three
Defendants to the Plaintiffs? In what way, as the Cause is now pleaded, have the Cochrane
Defendants conspired to deprive the Plaintiffs of any commission rightly due to them, or
unlawfully interfered with the latter's business, or pressured the First and Second Defendants
B to breach their contractual obligations to the Plaintiffs? And what evidence, and what kind
of evidence, will be necessary to establish or refute each of those matters?

3. Legal principles relating to striking out applications

C Rule 36 of the Royal Court Civil Rules, 1989, provides as follows:-

"36.(1) The Court may order any Cause, counterclaim or other pleading, or anything therein, to be struck out or amended on the grounds that –

- D
- (a) *it discloses no reasonable cause of action or defence, as the case may be;*
 - (b) *it is scandalous, frivolous or vexatious;*
 - (c) *it may prejudice, embarrass or delay the fair trial of the action or any other proceedings; or*
 - E (d) *it is otherwise an abuse of the process of the Court;*

and the Court may order the claim or counterclaim to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

F (2) *The Court may also order a Cause or counterclaim to be struck-out for want of prosecution."*

The relevant provisions of this Rule, for present purposes, are those contained in 36(1)(d) ("abuse") and 36(2) ("want of prosecution").

G The "want of prosecution" provisions of Rule 36 reflect not only certain provisions of the Rules of the Supreme Court in England and Wales (that is, prior to the introduction of the Civil Procedure Rules 1998) relating to the power of the Courts to dismiss actions in certain circumstances (for example O.25, r.1(4)), but, more importantly, reflect the inherent power
H of the English Courts to dismiss an action if there has been excessive delay in its prosecution. The Royal Court has a similar inherent jurisdiction, as well as that provided by Rule 36.

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A Rule 36(1)(d) reflects O.18, r.19(1)(d) – as indeed the whole of subsection (1) reflects the provisions of our Rule 36(1). It is also quite clear from the White Book (at paragraphs 18/19/18 and 18/19/26) that the English Courts have an inherent jurisdiction to dismiss an action as being an abuse of the process of the Court, in addition to the particular provisions of Order.18, r.19.

B

(a) Want of prosecution

C It appears that the power to dismiss for want of prosecution was sparingly used in England and Wales until 1968, when it acquired a new and vigorous life, following the decision of the Court of Appeal in three cases which were heard together and are generally referred to by the name of the first, i.e. Allen (1). The Royal Court has invariably followed and applied the principles which have been subsequently established in England and Wales (prior to the Civil Procedure Rules 1998) in relation to “striking out” applications. (For recent examples, see Dunne (2) (Carey DB), Willow (3) (Hancox LB) and Smith (4)(Day DB).

D

The main principles are stated, at paragraph 25/L/2 of the White Book as follows:-

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“Main principle – there are two distinct, though related circumstances in which an action may be dismissed for want of prosecution, namely (a) when a party has been guilty of intentional and contumelious default, and (b) where there has been inordinate and inexcusable delay in the prosecution of the action (Allen v. McAlpine, above approved in Birkett v. James).”

F

The second of those circumstances is the applicable one in this case. From paragraph 25/L/4 and succeeding passages of the White Book, I would extract the following relevant principles (which themselves follow the statement of the law as approved in Birkett) (5).

G

With regard, firstly, to the delay, it must be inordinate, either on the part of a plaintiff or his lawyers; and the burden of establishing that delay to the satisfaction of the court rests on a defendant. Secondly, the delay must be inexcusable; though once inordinate delay has been established, then, in the majority of cases, that will, of itself establish that the delay was also inexcusable. In such circumstances the burden is on a plaintiff to establish reasonable excuse for that delay.

H

Further, however, such inordinate and inexcusable delay must give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is such as is likely to

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A cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party. What will amount to “serious prejudice” must depend upon the facts in any particular case. It should be emphasised that, with regard to prejudice, two distinct situations are envisaged, and that the establishment of either of them is sufficient. In addition, the inordinate and inexcusable delay must be causative of either prejudicial situation.

The stream of appeals arising on want of prosecution since the decisions in Allen (1) and Birkett (5) has been unending (to adopt the words of Lord Bingham MR in Sparrow (6)) with many inconsistent and conflicting decisions, though all necessarily based on their own facts. The principal, more recent, cases from which I have drawn particular assistance are Trill (7) (as advised by the White Book but subject to the ruling in Roebuck (8)), and Shtun (9) (in the words of Henry LJ in Hobart (10) (March 1997) – “*the law on the subject is now to be found in... Shtun*”).

In Trill (7), Neill LJ provided a structured approach (in the words of Hobhouse LJ in Shtun (9) by stating fourteen principles or guidelines, the first two relating to the “basic rule” in Birkett (5) and the burden of proof, principles (iii) – (ix) relating to inordinate and inexcusable delay, (No. (vii) is now replaced by the decision in Roebuck (8)), and principles (x) to (xiii) relating to the second pre-condition of the Birkett (5) basic rule (substantial risk of an unfair trial or serious prejudice to the Defendant).

Peter Gibson LJ conducted a similar exercise in Shtun (9), where he stated six propositions which he considered to be uncontroversial, subject to clarification which he provided in respect of two of them. These propositions, for the main, relate to the question of prejudice (including references to Biss (11) and Smaller (12)). In the same case, Neill LJ, after referring to the leading cases of Allen (1), Birkett (5) and Smaller (12), stated that the first of the pre-conditions set out in Birkett (5) (inordinate and inexcusable delay) was by then well understood, but that the second Birkett (5) pre-condition (substantial risk or prejudice) might still be a source of difficulty. Nevertheless, he stated, two things were plain; firstly, that the burden of satisfying the second pre-condition as well as the first rests of the person seeking the order; secondly, the prejudice or inability to have a fair trial must be caused by the inordinate and inexcusable delay. He then proceeded to state (at p. 1289 G):-

“How then should this second pre-condition be approached?”

A Each case will depend on its own facts and it is not helpful to try to lay down hard and fast rules. One can, however, indicate the facts to be taken into account in evaluating the defendants case. These will include: (1) the issues in the case; (2) the evidence which is or is likely to be available and how far this will be oral or documentary; (3) the time which
B has elapsed since the relevant events; (4) the degree of prejudice which was or is likely to have been suffered in the pre-writ period; (5) the degree of prejudice which has been or is likely to have been caused by the inordinate and inexcusable delay. It is to be remembered that though pre-writ delay cannot be relied on, if the writ is issued late, the additional
C prejudice need not be great compared with that which has already been caused by the time elapsed before the writ was issued: see Lord Diplock in Birkett v. James (1978) A.C. 297, 323 G). It need not be great but it must be more than minimal.

D *Most of these factors will also be relevant where it is said that there is a substantial risk that it is not possible to have a fair trial."*

Neill LJ's further comments on the first two of these factors are also illuminating (to which reference should be made).

E Finally, with regard to this case, Hobhouse LJ, in a concurring judgment, had some trenchant observations to make. For example (at p. 1286 H):-

"In my judgment this case vividly illustrates the excessive intrusion of authority into the decision of factual questions... ."

F He then proceeded to demonstrate how that case illustrated the need for a judge considering a striking out application to consider the particular facts of that case and not let himself become over burdened by statements in other cases, which necessarily related to their own particular facts, as if they were statements of law.

G *"Each case turns on its own facts and whether or not, in any given case, it is appropriate to draw the inference depends upon all the circumstances of that case."* (That inference, to which he refers, related to the question of prejudice).

H English judges have repeatedly had to address, in relation to prejudice, the difficulties of examining witnesses in respect of matters which had taken place very many years before. In the case of O'Donnell (13) for example, Lord Woolf said this:-

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A *"Any trial dependant upon the examination of the witnesses who would have to deal with*
matters which took place up to 16 years ago is going to be extraordinarily difficult. It is
going to be almost impossible now to carry out any form of satisfactory account of the
relationship between the claimants and the second defendant prior to 1990. The
B *claimants, having allowed this action to dawdle forward for over 10 years, are in a*
situation where they cannot complain if the Court takes a view that enough is enough and
that this is a case which should now be brought to an end."

Whilst in Hunter (14), Hirst LJ stated:-

C *"I first consider diminution or dimming of memory. That is essentially a function of time.*
The first period, 1988 to 1990, over two years, is clearly very important in this context, as
that would be the time when memories would be freshest and when full statements can and
D *should have been taken from the witnesses by the defendant's solicitors... For that*
important period in this context the defendant only has himself to blame."

And in Birkett (5), Lord Salmon stated:-

E *"When cases (as they often do) depend predominantly on the recollection of witnesses*
delay can often be most prejudicial to defendants and to plaintiffs also. Witnesses'
recollections grow dim with the passage of time and the evidence of honest men differs
sharply on the relevant facts. In some cases it is sometimes impossible for justice to be
F *done because of the extreme difficulty in deciding which version of the facts is to be*
preferred;... "

Personally, I find this to be the most helpful of such statements, as it is one of general
application, and not based on the particular facts of a case (for which see Hobhouse LJ's
comments in Shtun (9), previously referred to).

G On want of prosecution, Counsel also referred me to Leniston (15), Hobart (10) and
Hunter (14).

H I would add that it is very much at the discretion of the Judge whether or not to strike out an
action for want of prosecution (see Neill LJ in Shtun (9) and Lord Browne-Wilkinson in
Roebuck (8)), subject to that discretion being judicially exercised. Further, it should be
noted that many of the English cases refer to the relevance of "statutory timetables", and
whether they have been ignored or complied with; in this jurisdiction we do not have such

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A timetables, save for our provisions with regard to a Cause becoming “rayée” or “périmée”. The latter, of course, is also a separate matter for consideration in this case.

(b) Abuse of process

B In this regard, I would merely state that, in my view, abuse of process is a separate ground for striking out an action, and that the circumstances in which it can be properly held that abuse of process has arisen, must be various and varied and will depend upon the facts in any particular case. For this I would refer to the two paragraphs in the White Book which I have already cited (18/19/18 and 18/19/26), bearing in mind also the considerations of public policy and the interests of justice. I would also refer to the comments of Lord Woolf in Grovit (16) and particularly (at p. 642H):-

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D *“...the prevention of abuse of process has by itself long been a ground for the court striking out or staying actions by virtue of their inherent jurisdiction irrespective of the question of delay and Lord Diplock’s statement of the principles does not affect this separate ground to striking out or staying proceedings.”*

E Whilst the Grovit (16) case concerned a plaintiff who commenced and continued litigation which he had no intention of bringing to a conclusion, thus amounting to an abuse of process, it is merely one example of circumstances in which an abuse of process may be established.

(c) Previous decisions in the same case

F Finally, Mr. Ferbrache also referred me to O’Donnell (13); although admittedly a post-CPR case, passages to which he drew my attention still had relevance for this case. Lord Woolf MR in that case considered the recorder’s view that if the question of striking out had been considered by a tribunal in one particular piece of litigation and decided in the sense that there should be no strike out, it was not appropriate for another judge of the court on a later occasion to go over the same ground and be invited to make a contrary decision.

H On that Lord Woolf had this to say:-

I *“In that respect, I have no doubt that the learned Recorder was in error. It often happens that a judge will form a conclusion that, on the history of a case, it should not be struck out, but that does not prevent a judge at a later date looking at the history again and coming to the conclusion that, on the basis of the previous history which was before the*

A *judge who made the earlier decision and the events which had taken place subsequently, the case is one which it is appropriate to strike out."*

**4. The Alleged Periods of Inordinate and Inexcusable Delay
and Counsels Submissions thereon**

B I turn now to the four periods during which the Defendants allege the Plaintiffs have been
guilty of culpable delay. I use that expression merely as shorthand for the proper description
of the delay being both inordinate and inexcusable, as outlined by the authorities. Mr.
C Ferbrache has identified, and limited his submissions to, four periods, as follows:- from the
7th February, 1989, to the 24th January, 1991; from the 20th October, 1994, to the 18th April,
1995; from the 26th April, 1995, to the 15th April, 1997, and finally the period from the 6th
October, 1998, to the 16th March, 2000. I will deal with each period in turn.

(a) The First Period of Delay: 7th February, 1989 to 24th January, 1991

D This period starts with the obtaining of the Arrêt and concludes with the filing of the Cause.

E Mr. Ferbrache submitted that having obtained the equivalent of a mareva injunction on the
7th February, 1989, it was remarkable that the Plaintiffs did not commence their substantive
proceedings until nearly 2 years later. No explanation had ever been given for this delay.
Given the draconian nature of the relief which the Plaintiffs had obtained against the
Defendants, the delay was plainly inordinate and, as a result, self- evidently inexcusable. In
his submission, the Plaintiffs should have commenced substantive proceedings immediately
F after obtaining the Arrêt, that is by the end of March, 1989, at the latest.

G For his part, Mr. Greenfield prefaced his remarks on this period by making three general
points, all of which had application to each of the first 3 periods of alleged delay. Firstly, he
submitted that Mr. Ferbrache's argument, that the whole of this period (in effect) was one of
inordinate and inexcusable delay, was unreasonable. No allowance had been made for at
least some inevitable, natural and blameless delay on the part of the Plaintiffs. Such an
extreme stance had to be without justification. Secondly, he argued, the Defendants had to
accept the results of their own conduct, rather than attributing the blame for all that delay to
H the Plaintiffs, regardless of the facts. Thirdly, by virtue of the Bailiff's judgment of April,
1998, the Defendants were seeking to re-litigate issues in the same action which had already
been determined. Whilst the Bailiff's judgment had been primarily concerned with the third
period of delay (April, 1995, and April, 1997), it necessarily had also covered the first two
I periods. It was only possible for me to re-visit these earlier periods if I was satisfied as to

A the Defendants' argument in respect of the fourth period (post October, 1998); but even in those circumstances (which he denied had any merit in any event), I was bound by the Bailiff's findings as to the previous periods.

B With regard to this first period specifically, Mr. Greenfield argued that Saffouri's affidavit of the 7th February, 1989, upon which the Arrêt was based, set out the core of the Plaintiffs' case. He then proceeded, rightly, and methodically, to take me through the procedural matters in 1989, to which I have already referred, namely those of the 1st, 3rd and 15th March, the 7th April, (the rejection of the Defendants' application to set aside or vary the Arrêt) – fairly pointing out that part of the Deputy Bailiff's order was that the first two Plaintiffs should institute their contemplated proceedings no later than the 7th July, 1989 – the 13th September, and particularly the 8th November, (the decision on the "pre-action discovery" application and the granting of leave to appeal therefrom, including the further 6 weeks or 3 weeks order). It should also be noted that the Deputy Bailiff shared Mr. D Ferbrache's view that the Plaintiffs' advocate (Advocate Allez at that time) should have a very clear idea as to what his clients case was going to be, a view with which Advocate Allez concurred. Mr. Greenfield then referred me to the order of the 18th January, 1990, in which the Arrêt was extended to the 7th February, 1991 (and not 1990 as originally stated in the Act of Court), and then to the dismissal on the 16th July, 1990, of the Defendants' application (originally made I believe in April, 1990), that £20,000 be released to the Defendants of the monies under arrest (notice of appeal being given in relation to this on the 24th October, 1990).

F He then referred me to the affidavits sworn by the Fourth, Fifth and Sixth Defendants in early March, 1989, in support of their application for the Arrêt to be set aside or varied. Those affidavits, Mr. Greenfield submitted, provided considerable detail, and certainly sufficient to suggest that the Plaintiffs' claim was not just "pie in the sky". He then referred G me to Saffouri's affidavit in response of the 14th March, 1989, which indicated that Saffouri only knew part of the story, the rest of which was within the Cochrane Defendants' knowledge. He also referred me to the further affidavits of the three Cochrane Defendants; all of that affidavit evidence of the Cochranes in 1989, Mr. Greenfield submitted, showed H that at that time those Cochranes were clearly addressing their minds in some detail to the facts. All of which was relevant not only to what was actually happening in 1989 to 1991, but to arguments relating to prejudice, and the question as to the importance of having, now, to assess oral evidence which would have to be given in respect of the various meetings, to I which I have earlier referred, in the mid 1980's, or whether in fact there was documentary

A evidence not only by way of the agreements but upon which memories could be satisfactorily refreshed (the affidavits sworn in 1989).

B He, additionally, reminded me that whilst the Defendants put in their notice of appeal on the 11th December, 1989, against the decision of the 8th November that year, such appeal was not dealt with until December, 1993, and the definitive written judgment not issued until June, 1994. None of that delay could be attributed to the Plaintiffs.

C He then drew my attention to the voluminous correspondence which had taken place between Counsel during this period (approaching 150 letters). The particular correspondence to which he referred me related, inter alia, to Peat Marwick's costs of providing copies of documents (in accordance with the Arrêt), the progress of the appeal against the November 1989 order, the Cochrane Defendants' lack of funds, and, not least, to the problems which were arising with regard to identifying and copying relevant Peat
D Marwick documents, (not helped by Mr. Macdonald breaking a leg at Easter 1990), these problems not being resolved until the 8th August, 1990. (The documents from the Barclays Bank Group had been dealt with at an early stage - the summer of 1989). One quandary which the Plaintiffs had to address throughout most of this period was when to issue
E proceedings; should they await yet further information and/or the decision of the Court of Appeal in respect of the November, 1989, Order, or press on with issuing proceedings. In the event, in due course the Plaintiffs resolved to go ahead and issue the proceedings, in January, 1991.

F It would be wrong, Mr. Greenfield argued, to condemn the Plaintiffs for either inordinate or inexcusable delay during this first period, for the greater part of which the Court had given, in effect, permission to defer the issue of proceedings (the "six or three weeks" period of grace).

G In response Mr. Ferbrache, as a general comment, stated that unless he specifically agreed with anything that Mr. Greenfield had said, then he contested it.

H He acknowledged that he was not entitled to describe the whole of the period as being one of inordinate and inexcusable delay, but submitted that I should find that 18 months, as a minimum, of this period amounted to culpable delay. (In passing, I would note that I took Mr. Ferbrache's original submission - that virtually the whole of the first period should be viewed as one of culpable delay - as likely to be refined to some extent in due course).

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A A mareva injunction is a draconian measure and, he submitted, was certainly not new in
1989. Once such an injunction was obtained, it was incumbent upon the Plaintiffs to
undertake to issue substantive proceedings in a specified time. Indeed, he referred to a
B memorandum issued by Dorey DB on the 3rd January, 1992, to the effect that Arrêt
applications had most commonly been delayed for revision because Counsel had not
addressed his/her mind to various matters, including undertakings as to the time within
C which action would be commenced. In that regard, said Mr. Ferbrache, Saffouri's affidavit
of February, 1989, upon which the granting of the Arrêt was based, had given no
undertaking as to the time constraints for the issue of proceedings.

D Far more importantly (I believe), Mr. Ferbrache submitted that the Arrêt of the 7th February,
1989 was in law limited solely to its Mareva effect. That view is based upon the Court of
Appeal's written judgment in June, 1994, overturning the "pre-action discovery" order of the
8th November, 1989, the Court of Appeal concluding that the Royal Court had no power to
make such an order. Insofar as the Arrêt of February, 1989 included orders to similar effect
they also were impugned. Mr. Ferbrache argued that the effect of the Court of Appeal's
E decision of June, 1994, was that the whole of the pre-action discovery application, and
indeed parts of the Arrêt, were inexcusable. Accordingly "appeal" delays which followed
from the Court's ruling of the 8th November, 1989, should be ignored. The truth of the
matter was that the Plaintiffs should have proceeded to issue their summons within a short
period of the granting of the Arrêt.

F **(b) Second Period of Delay: 20th October, 1994 to 18th April, 1995**

This period starts with the judgments of the Court of Appeal being handed down in the
"striking out" and "joinder" appeals, and finishes on the 18th April, 1995, when the Plaintiffs
submitted an amended Cause, and particulars, to the Defendants' Counsel for comment.

G It is convenient at this point to repeat the specific terms of the Court of Appeal's directions:-

H *"As respects the future conduct of the proceedings before the Royal Court between the
Plaintiffs and the First to Fifth, and Seventh and Eighth Defendants, ORDERED that
defences be filed within 28 days from the relevant date, and mutual discovery be made
within 28 days of the close of proceedings, the said relevant date to be the date when the
Cause shall have been revised to take account of the foregoing decisions in the present
I appeals, such date to be agreed between Counsel for the Plaintiffs and the First to Fifth,*

A *and Seventh and Eighth Defendants, respectively, or, failing agreement, as fixed by further order of the Court of Appeal."*

Two matters arose from the judgments of the Court of Appeal. Firstly, the question of the Plaintiffs' appeal to the Judicial Committee of the Privy Council in respect of the Court of Appeal's decision to strike out part of their Cause; and, secondly, the matter of the Plaintiffs preparing a new draft of their Cause, and thereafter submitting it to the Defendants for their comments, etc. Mr. Ferbrache submitted that the whole of this six month period was one of inordinate and inexcusable delay, save for an allowance of perhaps 14 days, which would have been adequate for the Plaintiffs to carry out the necessary proposed revisions for submitting to the Defendants. The delay was inexcusable, given that the Plaintiffs' action had made no progress between January, 1991, and the Court of Appeal's Judgment of October, 1994, thereby requiring the Plaintiffs to move things along very quickly indeed.

D With regard to the possible appeal by the Plaintiffs to the Judicial Committee, it was clear by the middle of February, 1995, or so, that this was not to be pursued.

E With regard to the revision of the Cause, discussions had taken place at a meeting between Counsel on the 18th November, 1994, in respect of suggestions for reform of the Cause which had been made by the Defendants' Counsel (Advocate van Leuven at that stage appearing for the First Defendant, and Advocate Ferbrache appearing for the remainder of those then involved). Thereafter, it would appear, the reason for the delay until the 18th April, 1995, arose from the fact that Advocate Greenfield was consulting with UK Counsel (see Mr. Greenfield's letter to Mr. Ferbrache of the 26th April, 1995).

G For his part, Mr. Greenfield pointed out that the question of revision did not, in fact, merely relate to the Cause, but also to the further and better particulars, which were extensive. He also stressed that it was perfectly proper, during this period, for the Plaintiffs to have also been considering the question of the appeal to the Privy Council, though he accepted that it took two months from their decision (not to proceed with the appeal) until the new Cause and further and better particulars were forwarded to Mr. Ferbrache. In the event, he effectively left it to me to consider how much of this 6 month period of delay could be considered to be both inordinate and inexcusable. Even if, Mr. Greenfield argued, I should find against his client for part of this period, it could only be for a very short time and therefore, in reality, of no significance.

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A In response, Mr. Ferbrache submitted that Mr. Greenfield and his clients could not rely upon
the 3 month period, in which it took them to decide not to appeal to the Privy Council, in
view of the fact that the order of the Court of Appeal with regard to the future conduct of the
proceedings by the Plaintiffs was clear (though I should emphasise that Mr. Greenfield had
argued that the obligations imposed were mutual and not simply confined to the Plaintiffs).
B Mr. Ferbrache further submitted that, in his letters of the 21st April and the 4th May, 1995, he
had specifically asked Mr. Greenfield whether the suggested or requested amendments made
by himself and Mr. van Leuven, back in November, 1994, had indeed been incorporated in
the Plaintiff's revised draft Cause. Overall, he submitted that I should consider a period of
C somewhere between 4 and 6 months as being both inordinate and inexcusable in respect of
this period.

(c) Third Period of Delay: 26th April, 1995 to 15th April, 1997

D This period commenced when Mr. Greenfield informed Mr. Ferbrache that the second period
of delay had arisen because it had taken the lawyers that long to draft the revised Cause, and
concluded on the 15th April, 1997, when the Defendants made their 1997 striking out
application. In my view, the one-week break between the 18th April and the 26th April, 1995,
E is somewhat artificial; what the Defendants are essentially complaining of is a period of
delay from the 20th October, 1994, to the 15th April, 1997. However, because Counsel
argued on the basis of this very short interval, in April, 1995, in this overall period of alleged
culpable delay, I have proceeded accordingly.

F This third period is the one with which the Royal Court was primarily concerned, so I am
told, when it considered the Defendants' striking out application in 1997. I will analyse the
Royal Court's judgment in due course. It is naturally something which I will have to take
into account when reaching my conclusions on the present striking out application. For the
G moment, however, I proceed to consider Counsel's submissions with regard to this period,
Mr. Greenfield's submissions being very much subject to the proviso that I can only take
account of delay in this period (and indeed the two earlier periods), if I am satisfied that
there has been inordinate and inexcusable delay with regard to the fourth period – a
H conclusion which he says in any event I am not entitled to reach.

Mr. Ferbrache repeated and emphasised the arguments advanced by a Mr. Dairmuid
Harcourt Short, a South African attorney acting for the Cochrane Defendants, in paragraphs
34 and 35 of his affidavit sworn on the 9th May, 2000. The two year period of delay was

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A plainly inordinate. During this period it was incumbent upon the Plaintiffs either to take steps to have the revised Cause agreed or, failing agreement, to go back to the Court of Appeal to seek further directions, – the whole in accordance with the terms of that Court’s Order of the 20th October, 1994. This latter course was indeed that which was finally adopted by the Plaintiffs in March, 2000, a course which should have been adopted in the summer of 1995 at the latest. In the event nothing was done until March, 2000, and the delay on the Plaintiffs part in taking appropriate action at any time prior to April, 1997, in view of the delay which had already occurred, was clearly inexcusable.

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C I have noted Mr. Ferbrache’s further arguments, based on (2) and (3) of paragraph 34 of Mr. Short’s affidavit, all of which relate to Mr. Saffouri’s ill-health in the years 1995 to 1997 and, in that context, the lack of instructions which he provided for his Guernsey advocates. Mr. Ferbrache suggested that the real reason why the Plaintiffs had not pursued the action during this period of two years was lack of funds. In that regard he relied upon three particular points:- the failure to pursue the South African proceedings because the required security for costs was not provided; the striking off of the First Plaintiff from the Guernsey Register of companies in July, 1995; and that, the South African proceedings having been dismissed, it was incumbent upon Saffouri to pursue the Guernsey proceedings with vigour – the reason why he was unable to do so again being financial. (I have additionally noted Mr. Greenfield’s argument that impecuniosity does not render a Plaintiff’s delay culpable).

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F In oral argument, Mr. Ferbrache particularly drew my attention to the correspondence which had taken place between himself and Mr. Greenfield during the period from the 21st April, 1995 until the 11th September in that year. That correspondence centred upon:- whether or not Mr. Greenfield, when submitting the revised Cause and further and better particulars, had taken into account the amendments which the Defendants’ advocates had suggested or proposed back in November, 1994; and the striking off of the First Plaintiff from the Guernsey Company Registry in July of that year – a most relevant point with regard to any necessary further amendment to the pleadings. With regard to which, Mr. Ferbrache stressed that there appeared to be an inconsistency between what Mr. Greenfield was saying with regard to any possible restoration of the First Plaintiff to the Guernsey Company Register, namely, whether Mr. Greenfield was awaiting the details of instructions to restore that Company, or whether he was awaiting general instructions. It was important to note that the truth of Mr. Greenfield’s position was that from 1995 until 1997 he was not in receipt of any instructions at all, a fact which was not properly revealed until the 17th June, 1997 (at the interlocutory hearing before Dorey B).

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A For his part, Mr. Greenfield emphasised that on the 26th July, 1995, he had referred to Mr. Ferbrache's letter to HM Greffier of the 12th June, 1995, in which the latter was informed by Mr. Ferbrache that he would be receiving Mr. Ferbrache's comments on the revised Cause "shortly". The fact was, stated Mr. Greenfield, that Mr. Ferbrache had had the revised Cause since the 19th April, 1995, and he had asked when he might expect to receive Mr. B Ferbrache's comments thereon. That letter, so Mr. Greenfield argued, illustrated the first of his two main arguments in respect of this period, namely that the order of the Court of Appeal in October, 1994, had placed upon the parties mutual obligations to progress the case, a point which the Bailiff had indeed accepted, so Mr. Greenfield said, in his judgment C of April, 1998, on the Defendant's application in respect of peremption.

The second main argument advanced by Mr. Greenfield, in respect of this period, was that the Royal Court had already adjudicated upon it, and any collateral attack upon that judgment was improper, because the Defendants had not sought to appeal it. The Bailiff D had, specifically addressed his mind to the question of Saffouri's health, stating:-

"I am satisfied that the (sic) Mr. Saffouri's illness has been a serious handicap to his ability to instruct his advocates."

E Further the Bailiff had earlier stated:-

"I have no reason not to accept Mr. Saffouri's affidavit relating to his health.."

F Accordingly, Mr. Greenfield submitted, that even if there had been inordinate delay during this third period, it was excusable, the Royal Court having already ruled to that effect.

In reply, Advocate Ferbrache re-stated the position that, following his letter of the 11th September, 1995 to Mr. Greenfield, (to which I have already referred), the next matter which G happened was the filing of the Defendants' 1997 striking out application. From September, 1995, to April, 1997, the action had lain fallow, purely at the instance of the Plaintiffs. Mr. Ferbrache also drew my attention to Mr. Saffouri's affidavits of June, 1997, which were sworn to support his opposition to the striking out application, and particularly on medical H grounds. The affidavit of the 12th June, 1997, revealed that in January, 1995, Mr. Saffouri had need to reorganise his finances, for which purpose in February of that year he visited Palestine to visit a rich cousin who had volunteered to assist him. Thereafter, in further pursuit of financial assistance, he had visited Jordan, when various allegedly serious medical I conditions overcame him, which continued in different forms after his arrival in the USA in

A December, 1995. All those medical problems meant that he had been unable to give attention to his claim in Guernsey for most of the previous two years. He stated, however, the wish to pursue his claim actively. In a further affidavit, sworn on the 30th June, Mr. Saffouri acknowledged that over the previous two years he had not been providing instructions to his Guernsey Advocates, by reason of his medical condition.

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(d) Fourth Period of Delay: 6th October, 1998 to 16th March, 2000

C This period starts with the final determination by the Royal Court of the Defendants' 1997 striking out application, and finishes when the Plaintiffs made application to the Court of Appeal for directions, which was subsequently heard and determined on the 4th July, 2000. The Defendants referred to this as the "proper application", in distinction to that which they describe as the "abortive application", namely the application/correspondence with the Registrar of the Court of Appeal of August 1999. I will merely refer to this as the August, 1999 application, my consideration of which is the crux of the peremption argument which I will be dealing with separately.

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E Mr. Ferbrache's submissions in respect of this period, taken in conjunction with the arguments advanced by Mr. Short at paragraphs 36 to 40 (inclusive) of his affidavit, are again expressed in simple terms. The period from April to October, 1998 (about which no complaint is in fact made) were largely concerned with addressing the position of the third Plaintiff in relation to the action – finally resolved on the 6th October, 1998.

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F Thereafter nothing happened, said Mr. Ferbrache, until the 10th March, 1999, when his firm received "out of the blue" a revised Cause. He said that no explanation for this further delay was given. Apart from the August 1999 application, again nothing happened until the 16th March, 2000, that is to say nothing happened between the parties.

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G Nevertheless, certain things had taken place. As already noted, on the 28th July, 1999, the First (for the second time) and Second Defendants were struck off the Guernsey Register of Companies; and on the 15th September, 1999, Mr. Ferbrache's firm came off the record for the remaining, existing Defendants.

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H The whole of the delay of this period of 17 months, said Mr. Ferbrache, was inordinate, and inexcusable, in view, again, of the history of the action and the alleged three previous periods of inordinate and inexcusable delay.

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A The main thrust of Mr. Greenfield's submissions in respect of this period reflect, and extend, one of his main submissions with regard to the third period, namely that the directions of the Court of Appeal of October, 1994, had imposed obligations upon both the parties.

B Mr. Greenfield identified two aspects of the October 1994 order as being of particular importance.

C Firstly, the Court of Appeal stipulated that the relevant date was to be the date when the Cause had been revised to take into account its decisions regarding the 1994 striking out judgment. Because the matter had been remitted to the Royal Court by consent of the parties, by virtue of the Court of Appeal order of the 4th July, 2000, it is now for this Court to determine if and when that date, i.e. the relevant date, has occurred. It was the Plaintiffs' contention that the relevant date was the 18th April, 1995, when the Plaintiffs served the Defendants with a copy of the duly amended Cause; the Plaintiffs accordingly seek my determination to that effect.

D Secondly, with regard to the mutual obligations imposed by the Court of Appeal, the Defendants had singularly failed to comply. They had simply ignored the revised draft of the Cause which had been presented to them in 1995; their lack of co-operation and subsequent silence all illustrated an attitude which they were not entitled to adopt. If they were unable to agree a revised Cause, they should have advised the Plaintiffs to that effect and provided reasons for such inability.

E The history of the Defendants' delay and prevarication was demonstrated by the correspondence. On the 27th May, 1998, Mr. Greenfield wrote to Mr. Ferbrache, this being only one month after the Bailiff had delivered his judgment in respect of the 1997 striking out application (although of course the final order of the Court was not made until October of 1998). I quote from the letter of the 27th May, 1998:-

G *"My clients now wish to proceed on with this action.*

H *Referring to previous correspondence, I note that on 18th April, 1995, we sent to you a revised Cause together with amended further and better particulars with deletions made in accordance with the Court of Appeal's directions. We did not hear from you as to whether those pleadings were agreed or otherwise. Please confirm therefore whether these can now be agreed?*

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A *I await hearing from you."*

Mr. Ferbrache replied on the 1st June, 1998, stating that he could not realistically comment upon the letter of the 27th May until the position with regard to the Third Plaintiff had been resolved formally. It appears that immediately thereafter both Mr. Greenfield and Mr.

B Ferbrache wrote to HM Greffier for the position regarding Mr. Piitarides to be formally resolved by the Bailiff. However, Mr. Greenfield had indicated to Mr. Ferbrache in his further letter of the 4th June, 1998, that subject to the Piitarides situation being clarified, he could see no reason why the matter could not be progressed by finalising the Cause and
C defences. Mr. Ferbrache was asked to confirm his agreement to that.

We now proceed to the 10th March, 1999, when Mr. Greenfield wrote to Mr. Ferbrache noting that as the position of Mr. Piitarides had been resolved back in October, 1998, could
D Mr. Ferbrache now confirm whether the revised Cause was agreed so that Mr. Greenfield's clients could proceed with the action. On the 5th July, 1999, Mr. Greenfield's colleague, Advocate Le Marquand, wrote to Mr. Ferbrache noting that no response had been received to the earlier letter of the 10th March, 1999, adding that, as Mr. Ferbrache had had more than
E reasonable time to consider the question of the revised Cause, then, unless Carey Langlois heard from him within seven days, the Plaintiffs would have no option but to list the matter for directions before the Court of Appeal. A "chasing" letter was further sent by Mr. Le Marquand to Mr. Ferbrache on the 9th August, 1999, and thereafter the August 1999 application to the Registrar of the Court of Appeal was made. On the 13th August, 1999, Mr.
F Le Marquand heard from Mr. Ferbrache's office that he was away from the Island until the 6th September, and on the 15th September, 1999, Mr. Ferbrache advised Mr. Le Marquand that he was no longer instructed by or on behalf of any of the Defendants. Thereafter the next event was the filing of the Plaintiffs' application to the Court of Appeal for directions on the 17th March, 2000.

G All of this correspondence showed, Mr. Greenfield said, a wholly unconstructive attitude on behalf of the Defendants, through their Counsel, which reflected the same position which had been adopted back in 1995 when the revised Cause had first been sent to Mr. Ferbrache.
H In those circumstances, it ill-behoved the Defendants to complain; no culpable delay could be laid at the door of the Plaintiffs during this fourth period.

Nevertheless, with his usual honesty, Mr. Greenfield acknowledged that from September, 1999, to March, 2000, the Plaintiffs could be criticised for not bringing back the matter to

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A the Court earlier. His clients had been taking stock as to their future strategy with regard to
the progress of the proceedings. In addition, Mr. Short's contention that Mr. Ferbrache had
B been taken off the record because the Cochrane Defendants thought that the Plaintiffs were
no longer pursuing their action was unmeritorious. In any event, this last 6 month period
was an extremely short one in view of the very long history which had preceded it, and
therefore should bear little weight vis-à-vis the striking out application.

In response Mr. Ferbrache firstly drew my attention to a letter written to Her Majesty's
C Greffier on the 15th May, 1997, from Lloyds Bank International Private Banking. The letter
was in the following terms:-

*"I refer to the Bank's letter of undertaking dated 29 November 1989 and 18 June 1991
D in respect of payment of any award of costs made against Walid Saffouri and/or Silver
Falcon Enterprises Ltd. and/or Solon Antoniou Piitarides. We are advised by our
principals that these undertakings are no longer required and I should be obliged,
therefore, if you would kindly examine your records and confirm to me as soon as
possible that we are released from all liability."*

E This letter was naturally drawn to the attention of both Counsel, and on the 18th June, 1997,
the Bailiff ordered them to write a joint letter to Lloyds Bank, seeking to discover who had
advised the Bank that the letters of undertaking were no longer required. This joint letter
was duly sent and elicited the following reply (after a holding letter of the 18th July
F explaining that information had to be obtained from Zurich):-

*"Further to my fax of 18 July 1997 I have now been advised by Lloyds Bank Zurich that
they are unable to supply the information requested at the present time due to Swiss
G banking secrecy and that they will let me know as soon as they are able to respond."*

G Following that correspondence Mr. Ferbrache referred me to the letter he had written to Mr.
Greenfield on the 24th July, 1997, and in particular his requests regarding the South African
proceedings; namely, a copy of the relevant pleadings, a full explanation of any orders made
for security for costs against all or any of Mr. Greenfield's clients, details as to why the
H matter had not proceeded to trial in South Africa, and what the current state of the
proceedings was. No substantive reply has been received to these requests.

Mr. Ferbrache acknowledged that it was correct that he had not responded to Mr.
I Greenfield's letter to him of the 10th March, 1999, the "out of the blue letter" with which a

A further revised Cause and particulars were sent to him – taking into account the position of
the Third Plaintiff – and in which Mr. Ferbrache was given 3 weeks to comment on those
revisions), nor to the “chasing” letter from Mr. Le Marquand of the 5th July, 1999. Soon
thereafter Mr. Ferbrache came off the record, and still nothing was done by the Plaintiffs
B between August, 1999, and the 16th March, 2000.

5. Conclusions with regard to delay

C I must preface my conclusions with regard to delay by commenting upon the judgment of
Dorey B delivered on the 24th April, 1998, and the directions of the Court of Appeal given
on the 20th October, 1994.

The judgment of the 24th April, 1998, related to the Defendants’ applications for the
discharge of the Arrêt, for a declaration with regard to peremption, that the Plaintiffs’ action
D be struck out for want of prosecution and/or as an abuse of the process of the Court, and for
costs. I have already noted Mr. Greenfield’s submissions with regard to the significance of
this judgment in relation to the first three periods of alleged delay. It is clear from reading
the judgment of the learned Bailiff that the factor uppermost in his mind, with regard to both
E the discharging of the Arrêt and the strike out application, was the health of Saffouri. With
regard to the Arrêt, he said (at p. 2D) –

*“I have no reason not to accept Mr. Saffouri’s affidavit relating to his health and I
accept that he does intend to pursue his claim. In these circumstances I do not order the
F lifting of the arrest.”*

I would also note in passing, in relation to the Arrêt, that the Bailiff had earlier stated that
lack of further progress on the part of the Plaintiffs would no doubt lead to a further
application for strike out.

G With regard to the strike out application itself, the learned Bailiff stated:-

*“Inordinate and inexcusable delay is normally coupled with further prejudice to the
Defendants as where (a) there is, as a result, a substantial risk that it is not possible to
H have a fair trial of the issues in this action or (b) the late trial of the action is likely to
cause or to have caused serious prejudice to the Defendants. I am not aware of any such
circumstances (a sentence emphasised by Mr. Greenfield). I am satisfied that Mr.
Saffouri’s illness has been a serious handicap to his ability to instruct his advocate.”*

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A (I would again add in passing that when the learned Bailiff, later in his judgment, stated that he trusted that Counsel for the Plaintiffs would be generously furnished with what he required to expedite the Plaintiffs' case, he can only have been referring to a sufficiency of instructions from his client, and not, as Mr. Greenfield sought to argue, to necessary action on the part of the Defendants to agree a revised Cause).

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From the passages I have quoted, and indeed from consideration of the rest of the judgment of the learned Bailiff, it appears to me that he was not expressing any view with regard to the first period of delay which I have to consider. Indeed, the emphasis by the learned Bailiff on C Saffouri's health must be taken as indicating that the period of delay with which he was concerned was the period 1995 to 1997. With regard to the first period of delay, therefore, I do not feel myself bound in any way by any prior determination by the Royal Court.

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With regard to the second and third periods of delay, there is nothing to be derived from the judgment of the learned Bailiff as to whether he considered these delays to be inordinate or otherwise, save drawing the possible inference that because he concentrated upon justification for delay he had considered it to be inordinate. Accordingly, I am not bound by any prior ruling of this Court in that regard. However, the Bailiff's acceptance that any E delay was excusable, for the reason of Saffouri's health, is a finding which, with regard to the third period of delay, I have to respect.

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I turn now to the Court of Appeal's directions, of October, 1994, with regard to the future conduct of the proceedings. I have already quoted these in full. It is self-evident that the Court of Appeal were prescribing two periods in which certain procedural matters had to be completed, namely of the filing of defences and mutual discovery. The periods with regard to both matters were to be determined by "the relevant date". That date was defined as being the date when the Cause, by agreement, had been revised to take into account the decisions of the Court of Appeal, but if there was no such agreement the date should be fixed by G further order of that Court.

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It seems to me to be a perfectly proper inference to draw from that direction that the Court of Appeal were not intending to make such an order as would allow the proceedings to rest in limbo for ever and a day. Exactly the contrary. They were expecting something to be done, and progress to be made. Nor can anything be read into what the Court said as indicating any departure from what must be, and must have been at that time, a fundamental principle - that it is for a plaintiff to display the necessary vigour in pursuing his proceedings. If he is

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A or was obstructed in that objective, then he must seek help from the Court, as indeed the Court of Appeal specifically stated. That fundamental principle is, I believe, supported by that which Miss Elizabeth Gloster QC had to say on behalf of the Court of Appeal on the 4th July, 2000. I quote from her judgment (at p. 4C):-

B *“Finally, the Court wishes to make the point that if parties do not or cannot agree within a reasonable time on a matter on which they or their advocates have been directed by the Court to agree, then it is incumbent upon the party concerned (my emphasis – the Plaintiffs in this case) to remit the matter back before the Court as soon as reasonably practicable. Parties cannot be made by the Court to agree, all that the Court can do is to make orders in default of agreement. But it is not acceptable for parties to litigation to let matters proceed in a dilatory fashion while abortive attempts to agree are made, and then accuse the other party of contempt in failing to agree. The remedy is to make a timely application to the Court for appropriate order.”.*

D I have also taken into account what the learned Bailiff said with regard to the effect of the Court of Appeal’s order on peremption (for the period October, 1994, to April, 1997):-

E *“I accept that this direction referring to agreement between the parties puts a different complexion on the effect in this case of the Court of Appeal order as respects peremption. Essentially inaction of a year on the part of the Plaintiffs’ will, as I have said, trigger peremption. But where action by both parties is required, as is the case here, the question is from what point after this Court order will the year of inaction, that is peremption, run? While it is open to the Defendant to argue that the Cause be struck out for want of prosecution under the Royal Court Civil Rules or under the Court’s inherent jurisdiction, I do not feel able to rule that peremption has terminated this Cause.”.*

G In my view this decision is strictly limited to peremption. It does not have any application as to what the Plaintiff should or should not have done in consequence of the directions of October, 1998; nor does it have any impact upon the striking out application.

H Mr. Greenfield has submitted that the directions of October, 1994, are relevant to all of the last three periods of delay. I agree with him, but not in the way that he would wish. Those directions placed the primary obligation on him and his clients to cause the defences to be filed, and the pleadings closed, as soon as was reasonably possible.

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(a) First period of delay; conclusions

On the face of it, the delay of some 23 months before the Cause was finally filed appears to be both inordinate and inexcusable.

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Nothing, however, in this case is straightforward. Progress was bedevilled and thwarted in a number of ways. Firstly, there were the procedural issues which involved the compliance of the injuncted institutions in providing the necessary documentation, and Peat Marwick in particular. Secondly, and more importantly, there were the number of appeals instituted by

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the Defendants during this period (no criticism is to be implied for that), and in particular the appeal against the "pre-action discovery" order of the 8th November, 1989, which took some 4 years to be heard. Linked to which is the Order of the Royal Court, again of the 8th

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November, 1989, regarding the alternative "six week or three week" periods for commencing the proceedings. On the other hand, on the 7th April, 1989, the Royal Court specifically directed the first two Plaintiffs to institute proceedings by the 7th July in that year, a deadline which they failed to meet; indeed it was not until the 13th September, when the Plaintiffs filed their pre-action discovery application, that the time limit direction was varied to one of six weeks from that date (as subsequently varied to the alternative "six or

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three weeks" period on the 8th November).

I do not accept Mr. Ferbrache's argument that because the Court of Appeal, in June, 1994, held that the pre-action discovery application was fundamentally flawed, that accordingly, with hindsight, it can be said that the making of the application itself was in any way vexatious or an abuse of the process of the Court. After all, the order was originally granted. Accordingly, I reject Mr. Ferbrache's submission that no allowance should be made to the Plaintiffs for the fact that the Defendants from November, 1989 onwards were in the process of instituting this important appeal.

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It should also be remembered that the Plaintiffs did in fact institute their proceedings before that appeal had been resolved, and at a time, strictly speaking, when they were under no obligation to do so by virtue of the "six weeks or three weeks" order of the 8th November, 1989.

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Despite the superficial appearance of culpable delay for most of this period, the Plaintiffs have persuaded me as to their justification for the greater part of it. Overall, I conclude that the Plaintiffs were guilty of inordinate and inexcusable delay for 4 months in this first

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period, being some 2 months between July and September, 1989, when the Plaintiffs were in

A breach of the Court Order of April (with regard to the institution of proceedings), and a further 2 months after August, 1990, when the problems with the Peat Marwick documentation had been resolved.

(b) The second period of delay; conclusions

B In respect of this period, Mr. Greenfield can derive no assistance from his argument that the directions of the Court of Appeal of October, 1994, imposed mutual obligations on the parties and their Counsel. It can only be, in the first place, for a party which has originally
C drafted pleadings to revise them when so ordered. Notwithstanding that the Plaintiffs may have been grappling simultaneously with the question of appealing to the Privy Council, it seems to me that it was plainly inordinate and inexcusable for them to take a full six months in their attempt to revise their own pleadings, and the particulars. I find that in this period there was inordinate and inexcusable delay on the part of the Plaintiffs for a period of 4
D months.

In so finding, I consider that only a period of 2 months was justifiable to enable the Plaintiffs to prepare the first revisions to the pleadings and particulars; nor do I consider that the
E Plaintiffs can derive any support from the learned Bailiff's judgment of April, 1998, regarding justification, his view being based on Saffouri's ill-health, which, on Saffouri's evidence affidavit of the 12th June, 1997, did not start until some time, after April, 1995, when he arrived in Jordan seeking financial assistance. Moreover, it is difficult to see what assistance Saffouri could have provided in the legal task of revising the pleadings and
F particulars in accordance with directions issued by the Court of Appeal.

Finally, the urgency with which the Plaintiffs should have proceeded in this matter at this time must be viewed against the background that by January, 1995, the Cause had already
G been on the Pleading List for some 4 years and the Arrêt in place for nearly 6 years (though I am not apportioning any blame to the Plaintiffs for that period save for the 4 months I have identified prior to the Cause being filed; nor do the Defendants).

(c) The third period of delay; conclusions

H Mr. Greenfield does not, I believe, seriously challenge the complaint that during part, and maybe the greater part of this 2 year period, there was inordinate delay on the part of the Plaintiffs in progressing the proceedings. That is honestly realistic; and must unquestionably
I be the case.

A In my view, Mr. Greenfield's clients are entitled to some allowance for the time spent
waiting for responses from the Defendants' Counsel in respect of the revised pleadings and
particulars submitted in the middle of April, 1995, although it does not appear that Mr.
Greenfield gave any serious attention to the questions raised by those Counsel as to whether
B their suggestions, made in the autumn of 1994, had been taken into account in his revised
draft. If I take the view that defence Counsel were playing a tactical game, in asking the
questions which they did in May, 1995, and by their subsequent silence (which to an extent I
do), that does not absolve the Plaintiffs of their primary responsibility. It is a well
C established principle that a defendant is not bound to do anything, though he must not, of
course, deliberately induce delay by a plaintiff, an issue which, in my view, does not arise in
this case. The Plaintiffs had ample opportunity to remit the matter to the Court of Appeal for
further directions, that Court normally sitting some 4 times a year in Guernsey. It seems to
D me that, at the latest, the Plaintiffs should have returned to the Court of Appeal by the
autumn of 1995. All further delay - some 18 months - to April, 1997, was inordinate.

It should also be borne in mind that the First Plaintiff did not exist for most of this period, it
having been struck off the Guernsey Register of Companies in July, 1995, and it is clear that
Saffouri made no attempt to contact Advocate Greenfield and his firm from 1995 to 1997.
E All those reasons would further support a view that the period of 18 months delay was also
inexcusable - indeed it really speaks for itself, on the general principle. However, I am
bound by the previous decision of the Royal Court that this period of inordinate delay was
excusable on the grounds of Saffouri's health.

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(d) The fourth period of delay; conclusions

It must be remembered - and this is of similar, though perhaps lesser, application to periods
two and three - that a recurring theme throughout the Plaintiffs' Cause is that, in relation to a
G wide range of matters, they are not able yet to give full particulars until discovery and/or
interrogatories. Indeed, the Cause might have to be varied yet again, to a greater or lesser
extent, to accommodate facts which may in due course emerge. Discovery, in the main, and
interrogatories take place after the pleadings are closed. In addition, whilst no complaint is
H made by the Defendants of the period from April to October, 1998, (when the outstanding
matter of the position of the Third Plaintiff was being dealt with) in my view throughout the
period April, 1998, to late summer 1999, defence Counsel were showing exactly the same
attitude, about which the Plaintiffs complain, as they had in 1995.

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A So much the more reason, therefore, on both those grounds, for the Plaintiffs to show short
shrif with Defendants, (as opposed to their Counsel's gentlemanly approach as shown in the
correspondence – worthy as that would be in other circumstances) and to take the matter to
the Court of Appeal, unless they could obtain what they would consider to be some sensible
B progress from the Defendants. Whilst the Plaintiffs may have engaged in some sporadic
correspondence, I am reminded of what Stuart-Smith LJ said in Leniston (15), namely: "...it
is necessary to bear in mind that even in periods when some action was taken, it may be so
desultory and inadequate compared with what is required in the circumstances that the court
C should say it amounts to inordinate and inexcusable delay". He then quoted from May LJ in
Lev (17), to like effect.

That desultory approach - of intermittent correspondence, including a half-hearted
application to the Court of Appeal in August, 1999 - interspersed with periods of complete
D inactivity, characterised the whole of this fourth period; a period when, one would assume,
Saffouri would have wished to pursue his claim "actively", - the serious health problems
which had previously made him unable to give attention to his claim having by then receded
– and not least to reach expeditiously the stage of discovery/interrogatories which is
E apparently so important. I note again Dorey B's comments in April, 1998, that he hoped that
Counsel for the Plaintiffs would be generously furnished (i.e. by Saffouri) with what he
required to expedite the Plaintiffs' case.

The Plaintiffs should have returned to the Court of Appeal by January, 1999, at the very
F latest.

Therefore, I consider that, for the whole of the rest of this period, the delay on the part of the
Plaintiffs was inordinate for 14 months; which (applying the basic principle), no reasonable
excuse having been provided by the Plaintiffs, must also be inexcusable

G **(e) Totality of delay**

In my view, I am entitled to look at the aggregate of these periods of delay, though I accept
Mr. Greenfield's argument that, in determining each, they must be considered on a
H contemporaneous basis. On the premise that I am entitled to start from February, 1989 – and
Mr. Greenfield did not seek to dissuade me otherwise – this amounts in total to some 40
months delay which I consider to be inordinate, of which 22 months I find to be inexcusable.
Even on a more restrictive basis, that is starting from January, 1991, there is a period of 36
I months inordinate delay of which 18 months were in addition inexcusable. On either basis,

A Mr. Greenfield would argue, when that inordinate and inexcusable delay is placed against a background of either nearly 12 years, or 10 years, it is small compared with the totality of the period. That, on a mathematical basis, is undeniably correct. Nevertheless, in my judgment such culpable delay is unacceptable in the circumstances of this case.

B I have to acknowledge, though Mr. Greenfield in his courteous manner did not stress the point in any way, that the delays attributable to various court processes have been greater than those which I have found to have arisen from the culpability of the Plaintiffs.

C I also recognise that there may well be some force in Mr. Greenfield's submission that the Cochrane Defendants have and have had a lot to hide; and that in my view their Counsel (as I have already stated) may have been playing an astute, though not blameworthy tactical hand.

D For a variety of causes, the proceedings hardly progressed from January, 1991, to March, 2000. And from October, 1994, they moved forward not a single pace. For that very reason, the last period of the Plaintiffs' culpable delay assumes even greater importance. All of which is relevant in the context of prejudice, a subject to which I now turn.

E **6. Prejudice and Counsel's Submissions thereon**

F Prejudice is used as shorthand for the two separate circumstances which may arise from culpable delay – substantial risk of the impossibility of a fair trial or serious prejudice to defendants.

G The Defendants' submissions on this matter were put in this way. The starting point was to assess when a trial (likely to last some 3 months) would and should have taken place but for the Plaintiffs' delay. Allowing for a not unrealistic period of about 2 years between filing a Cause in proper form and the commencement of the trial, it should have started in late 1996, at the latest, that is, some 2 years of the Court of Appeal's judgment of October, 1994. As it is, a trial could not now start until the autumn of 2002, at the earliest. That would mean that it would be some 20 years after the making of the agreements between the parties (in 1982), some 18 years after the variation of the Iraq agreement as a result of the meeting in Limassol (in 1984), 17 years after the making of the relevant contract with Iraq (1985), between 14 and 17 years after the meetings between the parties which are allegedly critical to these proceedings (in 1985 to 1988), more than 13 years after the Arrêt, more than 11 years after the original filing of the Cause, and some 8 years after the limitation period had expired (on

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A the basis – which I think must be correct – that the latest date of the accrual of the Plaintiffs' causes of action was in 1988).

Against that background, it was important to identify what would be the main issues at trial. My earlier basic summary of those issues is essentially agreed by the Defendants (as indeed
B also by the Plaintiffs). Central to these fundamental issues, so the Defendants allege, (as also to the cases of both the Plaintiffs and the Defendants) is what took place at four critical meetings between the parties, for evidence on which there is nothing more than the recollection of those who attended them.

C The Limassol meeting was attended by the Fifth Defendant, Mr. Saffouri and the Third Plaintiff at which the two addenda were signed. These documents amended the original written agreements between the parties, but crucial to their understanding and the Defendants' case was what was said at this 2 day meeting between the principal participants,
D and particularly relating, so it is said, to the First Defendant's ability to continue on its own to develop the CB 470 without additional financial assistance (in other words, the Iraqi requirements were becoming far too big for them, if I can put it that way).

E With regard to the other three meetings, it is clear that, as demonstrated in the Cause and the particulars, the Plaintiffs rely very heavily on what was said at them. The principal participants at the 1985 meeting were the Fifth Defendant, Mr. Saffouri and Mr. El-Faruki, at the 1986 meeting the Fourth, Fifth and Sixth Defendants together with Mr. Saffouri and his associate, and at the February, 1988, meeting the Fourth, Fifth, Sixth, Seventh and Eighth
F Defendants, again with Mr. Saffouri and his associate. Mr. Ferbrache stressed that the February, 1988, meeting is used by the Plaintiffs in support of their allegations of conspiracy against the Cochrane Defendants.

G Equally fundamental to the Plaintiffs' case must be what was or was not achieved by Saffouri on his frequent visits to Iraq and Jordan. The Plaintiffs' further allegations relate to the active concealment of contracts, promises to provide information and accounts, the changes of name of companies, and the Elviemek "story" (as Mr. Ferbrache put it).

H Although there is some documentary evidence which is relevant to some of these allegations, and issues involved therein, much of the evidence at trial will again depend upon the recollection of witnesses, not just the Defendants but also witnesses whom either party might wish to call.

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A On all these matters on which oral evidence be required, Mr. Ferbrache referred me at length not only the Cause but to the extensive particulars which had eventually been produced by the Plaintiffs.

B The problems associated with potential witnesses, other than the Cochrane Defendants themselves, are also emphasised by Mr. Ferbrache. Those witnesses might include the Twelfth Defendant, some seven persons involved, to a greater or lesser extent, with Armscor, all of whom left Armscor apparently in 1994 (with the change-over of the South African government), together with others such as the former Defendants William Cochrane and Beverley Portman, and representatives of Cardoen and Corporacion Hispanicas who were allegedly part of the conspiracy against the Plaintiffs. That did not take into account those potential witnesses who had been identified in the Plaintiffs' particulars, as well as others who might be named and who lived, or used to live, in the relevant middle eastern and eastern Mediterranean countries.

D With regard to the potential South African witnesses, the position of the Defendants was made worse by the fact that the Plaintiffs' proceedings in South Africa were aborted; otherwise the evidence of the relevant South African witnesses, and particularly that of the Armscor representatives, might have been established, back in perhaps 1994 or 1995.

E The two most important Cochrane Defendants, in relation to the issues involved, are the Fourth Defendant, who is now some 73 years of age, and the Fifth Defendant who is now 61. Much is made by the Defendants of the current ill-health of both these two, and the inevitable problems with fading memories.

F In all these circumstances, the Defendants say that it is now not possible to have a fair trial, and to proceed with one would cause serious prejudice to the Defendants, all arising from the culpable delay of the Plaintiffs.

G As one would expect, the main thrust of the Plaintiffs' submissions on this matter are very much to the contrary. In support of his contentions, Mr. Greenfield, in addition to the cases which I have already cited, referred me to Benoit (18), Eagil Trust (19), and Electricity Supply Nominees (20), as well as emphasising what was said in Hunter (14) by Hirst LJ (in the passage which I have already cited in respect of the diminution of memory).

H The outline of Mr. Greenfield's submissions was that the outcome of this case would not turn on memory but on the discovery of documents (as well as the use of those which were

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A already to hand), and on broad issues, not the minutiae of the precise words used at specific meetings. Moreover, because the Defendants had at all material times been legally represented, there was no excuse for statements not having been taken from the Defendants and potential witnesses, and for ensuring that all material documents were secured.

B Memory, he argued, was at its freshest in the first few years after the relevant events. Accordingly any potential prejudice to the Defendants caused by the purported delays in this case, particularly the more recent periods complained of, was consequently diminished. As to the reported ill-health of some of the Cochrane Defendants, no expert medical evidence had been submitted to substantiate those claims, and no causal link between the purported
C delay and the Defendant's ill-health had been made out; nor indeed was there any claim by the Defendants that the health problems had caused diminished memory.

The central issue, Mr. Greenfield submitted, would be whether, as the Plaintiffs contend,
D certain contracts exist for the sale of arms to Iraq, and possibly other countries, with respect to which the Plaintiffs are entitled to commission by reason of the various agency agreements which they concluded with the First Defendant. If the contracts alleged by the Plaintiffs exist, that would be powerful evidence of the allegations of wrong-doing pleaded
E against the Defendants, though he accepted that if such documents did not exist then the Plaintiffs could be in difficulties. The best evidence of the existence or non existence of these contracts would be provided on discovery. Moreover, both Armscor and Peat Marwick would have kept records documenting any material involvement on their part, so that the recollection of their present or former staff was correspondingly less important. In any
F event, copies of the Peat Marwick documents were supplied to the Plaintiffs back in 1990, and are available to the Defendants for inspection. It was important, he argued, for the Court to distinguish between a case of this nature, which was a dispute over commercial
G transactions which were the subject of considerable documentation, as compared with, for example, a personal injury action arising from a road traffic or industrial accident, in which the court might be reliant solely or to a large extent on the recollection of witnesses.

In support of the Plaintiffs' contention that the case would turn on broad issues, he gave a number of examples. What was crucial about the 1984 meeting was whether or not the Fifth
H Defendant told Saffouri that the First Defendant's remuneration under the project would change. At the December, 1985, and June, 1986, meetings either the Fifth Defendant told Saffouri that further orders had been received, or expected, or he did not. Similarly, at the June, 1986, meeting either the Fifth Defendant told Saffouri that he would supply the first
I Plaintiff with full details of the business already contracted, or he did not. Again, at the

A February, 1998, meeting either the Defendants tried to persuade the Plaintiffs to enter into a
new agreement or they did not. The resolution of all such matters would not turn on the
minutiae of the precise words used, nor the view that the court forms of the precise reliability
of the recollection of the witnesses, but on the view which it forms of their integrity or
credibility, a word much emphasised in oral argument. Accordingly, on all these matters, the
B passage of years would not have so diminished the memories of the Cochrane Defendants
that they could not deal with the primary issues in the case.

Mr. Greenfield further submitted that this was not a case where the Defendants are now
C being asked for the first time to think about the facts and matters which occurred many years
ago. In 1989 Saffouri had sworn two affidavits, which had dealt at length with factual
matters, as had the Fourth to Sixth Defendants; from which memories could be satisfactorily
refreshed. As an important example, Mr. Greenfield referred me to the First Plaintiff's five
D page letter to the Second Defendant of the 3rd March, 1989, which adequately summarised,
he argued, what had transpired at the 1985, 1986 and February, 1988 meetings. In addition,
the Defendants had known about the terms of the Cause since January, 1991, and were
supplied with a copy of the amended Cause and extensive particulars in April, 1995. To the
extent that statements were not taken at the appropriate time, from the Defendants and
E potential witnesses, and steps not taken to secure all material documents, that was due not to
the conduct of the Plaintiffs but to the Defendants' foolishness or the negligence of their
legal advisors, who have been available to the Defendants at all material times.

F Similar submissions were made as to the Defendants' foolishness or the negligence of their
lawyers, if they had not attempted to identify and to contact potential relevant witnesses
(many of whom had been named in the particulars) and to obtain statements from them many
years ago.

G **7. Prejudice; conclusions**

I preface my remarks on this issue by referring to what Dorey B said in his judgment of
April, 1998, namely that he was not aware of any circumstances in which prejudice (in its
H dual sense) arose. I understand that prejudice was not a matter central to Counsel's
submissions at that time; nor does it appear, apart from the above reference, to have been an
issue in the Bailiff's conclusions. I therefore do not consider myself bound by any definitive
judgment by this Court on prejudice prior to 1997/98.

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A With regard to prejudice, whether in respect of causation, fading memories or otherwise, I repeat that I am guided by Trill (7), Roebuck (8) and, not least, Neill LJ's analysis in Shtun (9) of the factors which in his view should be taken into account in evaluating a defendant's case.

B (a) *The issues in the case*

I have already provided a basic summary of the issues, upon which I should slightly expand.

C As a result of certain written agreements made in 1982 and 1983 (the most important of those being that entered into in October, 1982, relating to Iraq, Saudi Arabia and Jordan), Saffouri was to act as the agent of the Defendants by way of effecting introductions to, and carrying out negotiations with, parties interested in military equipment being supplied to or manufactured for them. It is alleged that certain implied terms must be written into those
D contracts, to the effect that the First Defendant was not to take steps or otherwise to organise its affairs so as to deprive Saffouri of his commission which would otherwise be due for his efforts, and to account to Saffouri (or Saffouri and the Third Plaintiff) and to provide information to them to enable them to claim their due rewards. Certain amendments were
E made to these agreements (the "addenda") which took place at a meeting in Cyprus in 1984 between Saffouri and his associate and the Fifth Defendant (on behalf of the First Defendant); with regard to, firstly, a re-definition of "Project Victor" so as to include not only technology owned by the first two Defendants but also any armaments business (a word
F emphasised by the Plaintiffs) conducted by any of the Defendants and their associates; and, secondly, new commission terms.

According to the Cause and particulars, Saffouri, pursuant to the agreements, proceeded to introduce the First Defendant to, and conduct negotiations on its behalf with, various
G government agencies. He made a large number of visits in the years 1982 to 1984 to Iraq and Jordan, on which occasions he sometimes travelled alone and sometimes he was accompanied by some, or all of, the Fourth, Fifth and Sixth Defendants, the most important contacts being made with representatives of the Iraqi government and those involved in
H military matters. Similarly, the Third Plaintiff in the Spring of 1983 visited Greece and made contact with and made presentations to appropriate officials of that government. He conducted a similar exercise in Cyprus at about the same time. Again at the same time, Mr. Saffouri introduced the Fourth and Eleventh Defendants (and one Petter-Bowyer) to
I representatives of the Egyptian government where a similar presentation was made.

A By reason of the actions which Saffouri (and the Third Plaintiff) had taken pursuant to the agreement, it is alleged that substantial contracts have been entered into, on which commission would be due to the Plaintiffs.

B The crucial issues, therefore, relate, firstly, to the contractual relations between the Plaintiffs and the first two Defendants; secondly, to what action Mr. Saffouri took pursuant to the agreements, to effect introductions to and conduct negotiations with prospective purchasers of military equipment; thirdly, as to what contracts were consequently entered into by the Defendants upon which the Plaintiffs are due commission; and fourthly, as to whether the C Cochran Defendants have deprived the Plaintiffs of their commission by various tortious actions, whether conspiracy, unlawful interference with business or procurement of breach of contract.

D (b) *The evidence which is or is likely to be available and how far this will be oral or documentary.*

E With regard to the first issue, I accept that the original 1982/3 written agreements will or should be available. With regard to the implied terms, I do not consider that the situation at trial would be so straightforward. As Sir Godfray Le Quesne QC said (on giving the judgment of the Court of Appeal in October, 1994, at paragraph 73):-

F *“The nature of the trade (namely, the supply and manufacture of armaments) which the Agreements were designed to promote is likely to have incidents (including secrecy and confidentiality) which may be quite different from those in other classes of agency agreements. The mechanisms for the execution of such contracts, and other factors to be explored at trial, may be such as to justify the implication of the terms contended for. This Court expresses no view at this stage other than that such a contention is on the G face of the pleadings arguable.”.*

H In my view those remarks imply, with which I would respectfully agree, that oral evidence on the arms trade may well be necessary at trial, in order to assist the Court in establishing whether the alleged implied terms in this case are justified or not. Clearly it would be preferable that such expert evidence was provided by those engaged in the arms trade in I and/or between South Africa and the Middle East in the 1980's. Whether such evidence will now be available I cannot say - though I very strongly doubt it - but it was not a matter which was explored in oral argument.

A In relation to the Cyprus "addenda" of 1984, it seems to me a strong probability that oral
evidence will be necessary. I say that, because it seems to me that the Defendants'
contention is that what took place in Cyprus in 1984 fundamentally changed the terms of the
written agreements; in the sense, so the Defendants allege, that they explained that the
B requirements of Iraqi authorities for military equipment was such that the Defendants did not
have the resources to satisfy them. Another, far "larger player", would have to satisfy that
demand (hence the change in the commission terms). And that is the theme, so the
Defendants allege, which runs throughout the discussions which took place at the 1985, 1986
and 1988 meetings, when various of the Cochrane Defendants might have been reporting on
C these new arrangements rather than the former ones.

With regard to the second issue, it seems to me self-evident that oral evidence will be
required to establish exactly what Saffouri (and the Third Plaintiff) achieved by way of
D effecting introductions to and conducting negotiations with the military authorities in Iraq,
Jordan, Greece, Cyprus and Egypt; and with whom. This is an aspect of the case which I
believe cannot be over emphasised. Contracts for military equipment, etc., may have been
concluded by these governments/authorities in the mid or late 1980's; but did they result
E from Saffouri and others fulfilling their contractual obligations, or from other causes? The
oral evidence required will not simply involve Saffouri (and the Third Plaintiff) as well as
some of the Cochrane Defendants, insofar as they were present at meetings, presentations,
etc; it may also be required from the Eleventh Defendant, Mr. Petter-Bowyer, and unnamed
representatives of Armscor, but must surely be necessary from the relevant representatives of
F the various military authorities. Who are they? Well, with regard to involvement with the
Iraqis (much the largest part of Mr. Saffouri's activities), extensive particulars have been
provided in answer to the requests 13(a) and (b) and 15(a) (at pp 15-21) giving details of Mr.
Saffouri's visits to Iraq and Jordan from October 1982 to the early part of 1984. I do not
G propose to review these particulars in detail, save to say that some of the people identified
were the Iraqi Military Attaché in Jordan, a Brigadier General Louaies (who appears to have
featured prominently in the negotiations), as well as other Iraqis, some named and some
unnamed, such as the Directors-General of a Manufacturing Military Establishment near
Baghdad and the Iraqi State Organisation for Technical Industries (SOTI), various senior
H military officers, engineers and representatives of the Ruling Party and Air force. On some
visits Saffouri went alone, on others he was accompanied by some of the Cochrane Defendants
and their colleagues. Even if the identity of all the Iraqis be established, what possible
chance is there that any of them would make themselves available or be able to give

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A evidence (whether in person before the Royal Court or on *commission rogatoire*)? Merely to
pose the question provides the answer. The evidential difficulties on this issue are, in my
view, insurmountable, and based not only on fading memories. It is true that these
difficulties might always have been insurmountable in this case, regardless of when any trial
took place. That, however, is part and parcel of the kind of trade in which the parties were
involved, though those inherent problems are now exacerbated by the passage of time.

With regard to the third issue, it may be that further documentary evidence will be
forthcoming, after discovery and/or interrogatories, with regard to any contracts which were
entered into with the military authorities in the middle east, (in addition to the limited
amount of documentary evidence already available), which establish that they resulted from
the efforts of Saffouri and others. For the greater part, however, as stated in the Cause, and
revealed by the particulars, I consider that much reliance would have to be placed upon what
transpired (to be established solely by oral evidence) at the December 1985, June 1986 and
February 1988 meetings.

Not least, this is true of the agreement supposedly signed in February 1984 with SOTI
(referred to in the Cause). The Plaintiffs own particulars (at reply 15(a) on p. 21) state that,
at the meetings prior to the completion of that agreement, compromise wording was agreed:-

*"ITO (the first two Defendants) demanded \$15 million in consideration of the rights for
local manufacturers and the Iraqi side took note of the request"*

The Defendants refer to this agreement as a Protocol, a mere statement of the negotiating
positions of the parties. Where the truth lies will depend on oral evidence.

The dependence will also, I consider, be largely true on the bases of the further claims that
the Cochrane Defendants have deprived the Plaintiffs of the commission rightly due to them,
by virtue of the alleged tortious actions – false denials, concealments, promises not carried
out, etc.

Notwithstanding Mr. Greenfield's thoughtful submissions to the contrary, I am left in no
doubt that the resolution of vital issues between the parties will very much depend upon oral
evidence, assuming at this stage that any evidence will be forthcoming at all in respect of
many of them.

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A (c) *The degree of prejudice (in both senses) which has been or is likely to have been caused by the inordinate and inexcusable delay.*

It is self-evident how much time has elapsed since the various visits to the Middle East, and the four meetings upon which much reliance will have to be placed, in the 1980's.

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With regard to fading memories, I would, in addition to the authorities I have already cited, also repeat what Neill LJ said in Shtun (9) (at p. 1290C):-

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"In many cases, however, the resolution of the issues will depend upon oral testimony.... There will be cases where the proper assessment of the defendant's position in the nature and degree of any prejudice will not depend primarily on the absence of one or two particular witnesses but on all the circumstances of the case. It is in these cases that the experience of the judge has a crucial part to play in evaluating prejudice and the possibility of a fair trial.... The court is not trying the case. The judge's task is to assess the likely effect on the trial and on the defendant's ability to put his case forward. The judge must therefore draw inferences based on all the materials before him. These inferences will include inferences as to the effect of delay on the recollection of witnesses. It is in this context that I think it is important to keep in mind the words of Lord Browne-Wilkinson in Roebuck where he said that a judge can infer a further loss of recollection from any substantial delay. Whether that further loss of recollection is sufficient in the particular case will be for the judge to evaluate."

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Neill LJ also drew attention to the judgment of Bingham MR in Sparrow (6).

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It seems to me reasonable to suppose that the trial of this case should have taken place, in perhaps, 1997, or more probably 1998. It would be wholly unrealistic to suggest that the trial can now take place before, at the earliest, the middle of 2003. The finalisation of the pleadings must still be some way away, with the allegedly important processes of discovery and interrogatories to come thereafter, as well as all the other preparatory matters. I have in mind, inter alia, the necessity of conducting *commissions rogatoires* in South Africa, to obtain relevant evidence from former members of Armscor, or its successor (so Mr Short says) "Denel" – a forlorn hope in any event, I would have thought; though not as forlorn as obtaining evidence from relevant individuals in the Middle East.

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A The delay of 5 years or more in holding this trial is unquestionably attributable to the Plaintiffs' culpable delay. The additional prejudice which this will cause to the Defendants is far more than merely minimal.

B Fading memories are unquestionably a fact of life, exacerbated by advancing years. At the time of any trial the Fifth Defendant will be well into his 60's and the Fourth Defendant in his mid 70's, both of these Defendants being central to the resolution of the central issues which will largely depend upon oral evidence.

C I acknowledge Mr. Greenfield's submission that the Cochrane Defendants swore affidavits back in 1989 (obviously very much closer to the events in question), from which they can refresh their memories (that sworn in 1997 by the Fourth Defendant is of little assistance in this regard). That is fine in theory, but the problem with fading memories is also applicable in this regard. The Fourth and Fifth Defendants may or will be able to read and understand that to which they deposed in 1989; but after the passing of all of these years, it will surely be more difficult for them to remember why they stated what they did.

All of which reminds me of the classically inept question – *"when did you first forget?"*

E I should add that I have attached little, if any, weight to the reported health problems of the Fourth and Fifth Defendants and have entirely ignored Mr. Short's contentions in this regard; although with regard to all the Cochrane Defendants, I have borne in mind the "Biss"(11) type of prejudice, albeit as a peripheral factor.

F Whilst, as I have already stated, I am not unmindful of the Defendants Counsel's positional play (to continue the sporting metaphor), and have some sympathy with the Plaintiffs' claims that the Cochrane Defendants could have a considerable amount of explaining to do, I am satisfied, for all of the reasons I have stated, that the Plaintiffs' culpable delay is likely to cause and has already caused serious prejudice to those Defendants. Equally, and separately, (though the two are closely linked), I am satisfied that such delay has created a substantial risk that it is not now possible to have a fair trial; that concept being synonymous with a satisfactory trial (see Paal Wilson (21) – Lord Brandon of Oakbrook at 904 F and Lord Diplock at 918 G), that is, one in which there is a reasonable degree of certainty that the Jurats can ascertain what actually happened many years ago.

Accordingly, the Plaintiffs' Cause is struck out for want of prosecution.

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A I would add a few comments on this Court's exercise of its jurisdiction to strike out actions for want of prosecution. I do so, because I raised the matter, briefly, with Counsel during the course of argument, to which they kindly responded. This Court has once again had to undertake the "*deplorably cumbersome analytical exercise*" as described by Coleman J in Kincardine Fisheries Ltd (22). Similar exercises were undertaken by Carey DB in Dunne (2), B Hancox LB in Willow (3) and myself in Smith (4). In that last case, I questioned whether we should necessarily seek to follow all the principles with regard to strike out applications as they had been established since Allen (1) in 1968 in England and Wales, which required, inter alia, the resolution of the apparent inconsistencies in those principles on occasions. C Carey DB in Dunne (2) was invited, but declined, to distance himself from those principles, concluding that the area for judicial discretion within those principles was sufficient in that particular case. I am similarly satisfied in this case. A proper analysis of delay, and the reasons for it, cannot be avoided; nor, too, a similar approach to prejudice/fairness, provided D our courts follow the more flexible approach adopted during the 1990's. In those recent years, prior to the CPR, courts have been increasingly urged to take a "less mechanistic approach" and parties to avoid taking "*points and indulge in refinements which would do credit to a medieval schoolman*" (in the words of Lord Bingham MR in Sparrow (6)). E I would add that, when the occasion arises or requires, the Guernsey Courts should additionally take into account one further factor, not permissible under the Birkett (5) principles, (for which see, inter alia, Arbuthnot Latham (23) and Securam Finance (24)), namely the pressures on a court's resources and the fair apportionment of those resources F between all litigants.

8. Abuse of Process

This could be a separate basis for dismissing an action.

G Bearing in mind that this action effectively commenced in February, 1989, on the granting of an *ex parte* application for the Arrêt, which still subsists, and that substantive proceedings were not issued for a further 23 months, I find the Plaintiffs' failure to take the proceedings H purposively forward after October, 1994 (the Court of Appeal's judgments) with anything but the necessary vigour, to be totally deplorable. But for the fact that this Court has already decided that there was justification, by reason of Mr. Saffouri's health, for this delay from April, 1995 to April 1997, and that 18 months out of nearly 3 years thereafter was taken up with judicial processes, I would have to have thought long and hard whether the Plaintiffs' I

A casual attitude towards this Court verged on the contemptuous (in a non-legal sense) and amounted to an abuse of its process. As I have said, all Courts are entitled to apportion their overstretched time to do justice to all.

B I would also have had to consider more fully the implications of the letter (15.5.97) from Lloyds Bank International regarding their release from financial responsibility in relation to security for costs – a matter about which I am particularly unhappy. (Nor did the matter go unnoticed with regard with the strike out application.)

C In the circumstances, I do not have to submit myself to those mental exercises.

B. Peremption

D For ease of reference, I will repeat the Cochrane Defendants' application for an order in respect of peremption:-

E 1. *That the Court make such declaration or order or otherwise in connection with peremption in relation to the proceedings issued by the Plaintiffs against the Defendants (without prejudice to any argument that may be put the period of peremption particularly relied upon is from the 6th October, 1998 to 16th March, 2000);...*

F Peremption – or to describe it more properly “la péremption d’instance” – is a fundamental principle of Guernsey law, established over many centuries (see Terrien, for example, Livre IX chap. 39); the most recent authoritative statement is to be found in Gallienne (Chapter XIII – section 1 at p.312 et seq):-

G *“La péremption d’instance qui a été introduite pour mettre un terme à la durée des procès, - ne lites fiant penè immortales, - est l’extinction ou l’anéantissement d’une poursuite, par la discontinuation des procédures pendant un certain terme déterminé par la loi.*

H *Cette espèce de prescription n’éteint cependant pas le droit d’action du demandeur; elle ne fait qu’opérer l’extinction de la procédure, et a l’effet de remettre les parties dans la même position, l’une envers l’autre, qu’elles l’étaient avant que l’instance fût entamée; le droit d’action, et la demande faite en justice, qui est l’exercice de ce droit, ne doivent pas être confondus, car la négligence commise par ne pas poursuivre l’action ne doit pas*

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A *en faire perdre le droit. Il est néanmoins un cas où la péremption d'instance éteint, indirectement, tant le droit d'action que la procédure. Comme nous le verrons tout à l'heure, il est de principe qu'une interpellation judiciaire interrompt la prescription; mais quoiqu'une demande soit intentée en justice, si le demandeur discontinue sa*
B *procédure et que la péremption devienne acquise, après que le temps pour prescrire de droit d'action soit accompli, - l'interpellation faite ne produit aucun effet, quant à l'interruption de la prescription.*

.....
C *L'instance, avec nous, est périmée de plein droit par l'accomplissement du temps réglé par la loi, c'est-à-dire, qu'il n'est pas nécessaire que le défendeur forme une demande à voir dire que la péremption lui est acquise: il peut attendre que le demandeur continue ses procédures, et alors lui opposer l'exception.*

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E *La péremption anéantit complètement la procédure, sans que l'on puisse jamais se prévaloir d'aucun des actes, ou les opposer..."*

F Acts of Court have a specific duration. So, for example, Acts of Court by which Causes are placed on the Pleading List or the Witness List last for a year and a day. An interlocutory Act of Court has the same duration. If nothing happens within that time limit, of involving the Court by taking some further judicial step in the proceedings, then the Act automatically lapses and the proceedings are extinguished. Gallienne is unequivocal in this regard –

G *"l'instance.. est périmée de plein droit..".* (With regard to Causes on the Pleading or Witness List, litigants have in the past been assisted by a warning being given of this potential eventuality, by the Causes being *rayées* after 6 months). Our system of controlling proceedings may be somewhat primitive, insofar as further rules and time limits may need to be imposed in respect of increasingly complex interlocutory matters; nevertheless it is a system which our forefathers put in place centuries ago, and have subsequently developed, to ensure that proceedings, in Gallienne's words, do not continue indefinitely. It is certainly a

H system which has the advantage of simplicity.

I I will deal, firstly, with one of Mr. Greenfield's two main arguments. This was to the effect that Dorey B in April, 1998, had ruled that the Plaintiffs' Cause had not become preempt between October, 1994, and the filing of the Defendants' strike out application in April,

A 1987, because the Court of Appeal's directions of October, 1994, had imposed mutual obligations on the parties. Mr. Greenfield accordingly argued that the position, between October, 1994, and April, 1997, remained the same after the Bailiff's order of October, 1998, namely that the mutual obligations continued and, accordingly, peremption could not arise.

B I reject this submission. I respect the fact of the Bailiff's decision, for the period October 1994, to April 1997. I am not, however, bound by the reasoning for that decision. I do not accept that the same reasoning must be extended so as to apply to the period commencing in October, 1998. When the Bailiff had to address the question of peremption during the
C period October 1994, to April 1997, the last Act of Court was that of the Court of Appeal. That is not the position with which I am faced. Whatever may have been the position with regard to the Act of the Court of Appeal in October, 1994, it has been superseded, firstly, by the Act of the Royal Court of April, 1998, and then the subsequent Act of the 6th October, 1998. In my view, time began to run from that Act; and the sole question which I have to
D consider is whether there was a valid interruption within a year and a day of that date.

Mr. Ferbrache's argument can be simply put. It is that between the 6th October, 1998, when Dorey B ordered that the action of the Third Plaintiff be struck out (which supplemented the
E Act of the Royal Court of the 24th April, 1998), until the 16th March, 2000, when the Plaintiffs made application to the Court of Appeal for directions, no "*interpellation judiciaire*" (generally henceforth a "judicial interruption") had taken place; accordingly over a year and a day had elapsed since the order of the 6th October, 1998, and the Cause was accordingly perempt.
F

The application of 16th March, 2000, was a valid "judicial interruption"; formal notice of it was given to the Defendants, with a stated time for appearance before the Court of Appeal, when that Court became seized of the matter. This was in marked contrast to the purported
G application of the 9th August, 1999, which was patently inadequate. This application was in simple terms. Having referred to the first two Plaintiff/Appellants and all thirteen Defendants, it stated:-

H *"IN THE MATTER of the Judgment of the Court of Appeal dated 20th October 1994 (the "Judgment")*

I

A *THE APPELLANTS.....*

APPLY TO THE COURT

For the following orders:-

- B 1. *Directions; alternatively*
 2. *That the First to Ninth Defendants filed Defences; and*
 3. *Costs of the application”.*

C This application was received at the Greffe on 10th August, 1999, and was accompanied by a letter from Mr. Le Marquand to the Registrar of the Court of Appeal. After reviewing, briefly, some of the history of the action, he stated that his firm was seeking to apply to the Court of Appeal for an order for directions, a copy of which would be served on the

D Defendants, and further asked for the Registrar’s confirmation as to when the application could be listed. Also on the 9th August, 1999, Mr. Le Marquand wrote to Mr. Ferbrache, enclosing a copy of his letter to the Registrar and of the application. Mr. Le Marquand requested that Mr. Ferbrache indicate to him whether the latter would require formal service

E of the application or whether he would accept the letter as such notice. As noted earlier, Mr. Ferbrache was away at this time, and by the time that he returned in September he merely informed Advocate Le Marquand that he was no longer “on the record”. Mr. Greenfield had also written to Mr. van Leuven on the 9th August, 1999 (as representing the First Defendant),

F inquiring (yet again) whether Mr. van Leuven could indicate whether the Cause and/or further and better particulars could be agreed, otherwise it would be necessary, so Mr. Greenfield said, to make Mr. van Leuven’s client a party to the application of the Court of Appeal. Mr. van Leuven replied to this letter on the 13th August, much of his response relating to the threatened striking off from the Guernsey Company Register of the First

G Defendant in 1998 and its actual striking off on the 28th July, 1999, but also informing Mr. Greenfield that he did not consider that he had been instructed since about July, 1998.

[It should be noted that, notwithstanding the position of the Defendants’ Counsel in

H August/September 1999, their address for service remained at their advocates’ offices].

The Registrar of the Court of Appeal responded to Mr. Le Marquand on the 13th August, 1999, in the following terms:-

I

A *"Thank you for the your letter of the 9th August, 1999. Please file sufficient*
documentation to enable the Court of Appeal to consider your application. This is a
matter in which some of the corporate parties have changed (and, I believe,
B *exchanged) names, and your application should refer to such changes, giving the*
relevant dates of name changes and citing the company registration number in each
case (which, of course, remains constant) to avoid confusion over the identity of the
parties during the course of this litigation."

This application, Mr. Ferbrache observed, was not proceeded with, a major flaw in itself.
C (And this notwithstanding that the Court of Appeal could no doubt have been seized of the
application in October, 1999). The application was additionally flawed in that it still made
reference to 13 Defendants, although the action against the Sixth and Ninth Defendants had
been stayed in March, 1993 (and not subsequently restored), the Tenth, Twelfth and
D Thirteenth Defendants had been removed from the proceedings by the Court of Appeal in
October, 1994, the Third Defendant had been struck off the Guernsey Register of Companies
in July, 1997, and the First and Second Defendants were struck off that register at the end of
July, 1999.

E In all these circumstances this application of August, 1999, was, to repeat Mr. Ferbrache's
description, "patently inadequate", and was most certainly not a judicial interruption.

For his part, Mr. Greenfield argued that the Plaintiff's application of the 9th August, 1999,
was a perfectly proper one, and a valid judicial interruption. That had been sufficiently
F effected by the lodging of the application with the Registrar of the Court of Appeal, a matter
of which the Defendants had been made fully aware, though not by formal notice. In due
course, in March, 2000, the Plaintiffs had placed an insignificantly amended version of that
application before the appellate Court. Not a new application he argued, but a revised
G version of the August, 1999, application which it merely superseded; the earlier one had not
lapsed.

In my view, the Plaintiffs were required by the 7th October, 1999, to seek, in a proper
H manner, the further involvement of the Court to move the proceedings forward, failing which
those proceedings would fall, with whatever consequences.

What type of action, therefore, is it necessary for a party to take (in this case the Plaintiffs) in
order to interrupt the running of peremption? I would note at this point that Gallienne does
I not specifically refer to an "*interpellation judiciaire*" interrupting peremption, his comments

A relate to interrupting prescription. He does, however, indicate that an Act of Court can be renewed, subject to necessary application and notice. The effect is, in my view, exactly the same. The party concerned must approach the Court in a proper fashion and on giving proper notice.

B In the vast majority of cases before the Royal Court, the appropriate action will be obvious. A Cause must be placed before the Royal Court, the notification of which is achieved by a summons being issued requiring the other party to appear on the specific date. Provided that the summons is issued within the duration of the previous Act of Court, and, the Cause, to which the summons relates, is placed before the Royal Court on the appropriate date, (or otherwise dealt with by agreement of the parties), that is a proper and sufficient *“interpellation judiciaire”*.

D As I have had reason to state earlier, nothing is straightforward in this case. The Act of Court which would have become extinguished on the 7th October, 1999, was that of the Royal Court. However, back in October, 1994, the Court of Appeal had specifically directed that should agreement not be reached determining the “relevant date”, on the revised Cause, - that being the trigger for the prescribed periods for the filing of defences and mutual discovery to be made – the Plaintiffs were obliged to remit the matter to the superior Court. On a proper analysis, as I have already stated, come April, 1998, the Act of Court of October, 1994 was no longer of any relevance, in respect of the running of time. Its only relevance was for providing assistance should the parties not be able to agree the “relevant date”. Nevertheless, the Plaintiffs could, in my view, have sufficiently interrupted peremption by making valid application, prior to the 7th October, 1999, to either the Royal Court or the Court of Appeal. They chose the latter course. Did they do so validly?

E
F
G My conclusion is that the Plaintiffs’ action in August, 1999, was wholly inadequate to interrupt the running of time; for a number of reasons.

H If the Plaintiffs’ submission is correct that the application to the Court of Appeal of the 9th August, 1999, was sufficient to break the running of time, then it would mean that they could file a similar application on the 8th August, 2000, resulting in a similar response from the Registrar of the Court of Appeal; which exercise could then be repeated in subsequent years. That would lead to the absurd position whereby, on the Plaintiffs’ argument, their proceedings would be kept alive indefinitely without the Court having to be involved at all.

I

A This would be a complete negation of the basic principle of “la péremption d’instance” – that a limit must be placed on proceedings.

In his covering letter of the 9th August, 1999, to the Registrar, Advocate Le Marquand stated: “accordingly we seek to apply to the Court of Appeal for an order for directions. I enclose herewith an application that will be served on the Defendants and would be grateful for your confirmation as to when the same can be listed.”. The response of the Registrar, dated the 13th August, 1999, (which I have already cited) could not have been clearer; the application was in unacceptable form. The Plaintiffs were requested to file sufficient documentation (specifically relating to identifying the proper parties) to enable the Court of Appeal to consider an application. The Plaintiffs proceeded to do nothing. No revised application was submitted to the Registrar. No attempt was made to go before the Court of Appeal in the autumn of 1999. No notice was formerly served on the Defendants, requiring their attendance before that Court (having similar effect to a summons before the Royal Court)

D Nor was there anything, either express or implied, in the correspondence with the Defendants’ Counsel in August and September, 1999, which could have led the Plaintiffs to believe that formal notice was not required, and/or that peremption had in any way been waived by the Defendants - a circumstance which Gallienne specifically recognises is sufficient to break peremption.

F “*Interpellation judiciaire*” means what it says, there must be a valid “appeal” to the Court, effected by proper means. This requires the placing before the Court of a meaningful application, of which due notice is given (though that formal notice can be waived by the parties). The matter must then proceed to Court, subject to the other party’s acknowledgement (express or implied) that it need not do so. Subject to those conditions being fulfilled, the appropriate date for breaking peremption is the date of the issue of the notice.

G In my view, prior to the 7th October, 1999, the Plaintiffs failed to establish any proper “*interpellation judiciaire*”. On that date, therefore, the Plaintiffs’ action became extinguished.

H I should state that my conclusion on this matter has not influenced my decision on the strike out application, the latter being based solely on the reasons already given in that regard. My conclusion on peremption, however, can only support, and not detract from, such reasons.

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C. The Plaintiffs' Application to Restore under Rule 50(b)

Rule 50(b) of the 1989 Rules provides –

B

“50. *Where an action becomes périmé-*

(a)

(b) *any party to the action may apply to the Court for an order that the action be restored.”*

C

Guernsey Courts have considered applications to restore under Rule 50 on a number of occasions. See Saromaje (25), Le Moigne (26), Haines (27) (both at first instance – Carey DB - and on appeal), and Stoneman (28). The leading authority is that of Haines (27) and the judgment of the Court of Appeal delivered by Southwell JA. From that judgment I consider certain principles can be stated.

D

(i) The burden is on the Plaintiff.

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As Southwell JA stated in Haines (27) (p. 4):-

“The Deputy Bailiff rejected any comparison with applications to strike out for want of prosecution, because, as he rightly observed, in those applications the burden is on the Defendant to show an appropriate case for striking out, whereas under Rule 50 the burden is on the Plaintiff to show an appropriate case for restoration of the action.”

F

(ii) Rule 50 gives the Royal Court a discretionary jurisdiction as to whether or not to order the restoration of an action.

G

As Southwell JA said in Haines (27) (at the top of p. 5) –

“Rule 50 gives to the Royal Court a discretionary jurisdiction to order the restoration of actions which have become périmée or have in other circumstances been removed from the Rôle. That discretion is not fettered by the terms of Rule 50. It is for the plaintiff to satisfy the Court that in all the circumstances it is just to exercise the discretion in the plaintiffs' favour. I emphasise the words ‘in all the circumstances’. In each case the circumstances will be different, and it would be wrong for the Court of appeal to impose fetters on the exercise of the discretion which had not been included in Rule 50 itself.”

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A I would merely add that (as the Court of Appeal would have taken as read) such discretion must naturally be exercised judicially, that is to say properly within the context in which the discretion arises.

(iii) Matters to be taken into account.

B

The Court of Appeal in Haines (27) provided guidance as to the matters which should be taken into account when considering Rule 50 applications. Those matters are not exhaustive or exclusive. With regard to those matters Southwell JA had this to say (at p.5):-

C

“Naturally the Court will take into account as part of the relevant circumstances:

D

(1) the position of the plaintiff, and the effect on the plaintiff and the plaintiffs' case if the action is not restored;

(2) the history of the action, and the activity or inactivity of the plaintiff, and of the plaintiff's legal representatives, which have lead to the action becoming périmée;

E

(3) the position of the defendant, and the effect on the defendant and the defendants' case if the action is restored;

(4) any other special circumstances relating to the action in its conduct by the parties, including such matters as settlement discussions or any express or implied agreement not to take further steps in the action for the time being;

F

(5) the general circumstances in Guernsey relating to the relevant class of litigation, including, for example, any difficulties in securing legal representation for impecunious plaintiffs, or in securing medical reports for plaintiffs suing for personal injuries.”

G

The general circumstances in Guernsey, and examples thereof, referred to in (5) above, I myself described as the “Guernsey factors” in Stoneman (28), by which I meant not only those of the kind to be found in Le Moigne (26) and Haines (27), but similar factors which should be given equal weight in deciding where justice lies. Notwithstanding that Southwell

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JA in Haines (27) had stressed that the Guernsey Courts should not simply (my emphasis) adopt the principles applied in English cases in relation to the automatic striking out of Count Court actions, I expressed the view, which I repeat, that the less the “Guernsey factors” were present in any particular case, then the more our courts should adopt the

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A stricter attitude indicated by the English authorities, such as Rastin (29). In Rastin (29), Bingham MR (at p. 739 F) stated:-

B *"We would not readily extend the application of the rules laid down in Allen and Birkett into this new field, and it would in any event be strange to concentrate on the position of the defendant when the object of the rule is to ensure diligent prosecution of the case by the plaintiff.*

C *This last point, in our view, gives a crucial pointer towards the way in which the discretion should be exercised. A retrospective application to extend time should not succeed unless the plaintiff (in which expression we include his advisors) is able to show that he has... prosecuted his case with at least a reasonable diligence. That does not mean that there is no room to criticise any aspect of his conduct of the case but that overall he is innocent of any significant failure to conduct the case with expedition*
D *having regard to the particular features of the case."*

I conclude, as I did in Stoneman (28), that, in the absence of the "Guernsey factors", the task of plaintiffs in discharging the burden of persuading the Royal Court to show indulgence to them when Causes have been allowed to become périmée, and thereby prescribed, will necessarily and proportionately be that much greater. In reaching that conclusion I find support, I believe, from, inter alia, what Carey DB had to say in Saromaje (25) (at p. 4) when he stated:-

F *"I am reluctant to see the Rules as to péremption being eroded to the stage that restoration will be allowed in all cases other than those which would have reached the stage of being struck out for want of prosecution. It is in the public interest that litigation should proceed expeditiously. It will be for the Courts to decide where the*
G *lines should be properly drawn in future cases."*

And in Haines (27) Carey DB stated (at p. 8):-

H *"This Cause, therefore, will be restored to the pleading list. Before leaving the case I would just record that I hope that this will turn out to be the high water mark in applications for indulgence when cases have been allowed by advocates to become périmées. If it is not, it may be that the Court will have to introduce some further rule of court on the lines that where a case has been adjourned sine die (that having been the belief of Counsel though incorrect in that case) it will be struck out if nothing is done for*
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A *a certain period of time. I hope now that with Le Moigne and this case advocates will review their files and keep systems to make sure that cases are kept alive so that the Court does not have to be asked to make orders of the kind being sought here."*

B Both Counsel, as on other matters in this case, provided helpful and comprehensive written submissions. At the hearing on the 6th December, 2000, Counsel did not seek to expand at any length on those submissions. I have read them all carefully. They are sensibly based on the Southwell "guidelines", to reach, naturally enough, contrasting conclusions as to how I should decide this application. Many of the submissions re-visit the course of this action, including mutual allegations as to culpability for failing to bring the proceedings forward with greater urgency. I do not intend to review those submissions. I would, however, wish to take particular note of one submission, much emphasised by Mr. Greenfield in oral argument. That submission, which reflected those to which I have referred on earlier occasions, was that the Dorey B's judgment in April, 1998, on the subject of peremption, was based upon the mutual obligations which had been imposed by the Court of Appeal in their directions in October, 1994; with the result that the effect of that ruling continued after the Bailiff's judgment in April, 1998. Accordingly the proceedings had not at any time since October, 1994, become preempt. Mr. Greenfield accepted that whilst I was entitled to form my own view as to whether they had done so in October, 1999, the Plaintiffs were entitled to believe that, because of the Bailiff's ruling on peremption in April, 1998, "*peremption was not running*" (to use Mr. Greenfield's words); accordingly, in those circumstances, the Plaintiffs' failure not to take appropriate action until March, 2000, was excusable.

F I, like Counsel, approach my determination of this application on the basis of the Southwell guidelines.

G *(1) The position of the Plaintiffs, and the effect on the Plaintiffs and the Plaintiffs' case if the action is not restored;*

H It is self-evident, I believe, that if this action is not restored then the Plaintiffs will not be able to pursue their claims against these Defendants. It is, of course, a claim for at least US \$495 million – a huge sum of money by any standards. It is not for me precisely, indeed it would be an impossibility, to determine how strong the Plaintiffs' case may be against these Defendants. Nevertheless, my instinctive view is that, particularly in the light of the evidential difficulties and problems which I have tried to identify, the Plaintiffs' case appears to be a weak one. Depending upon the strength of their case, the Plaintiffs will be, to a

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A greater or lesser extent, prejudiced. That prejudice, in my view, is very largely of their own making.

If this action is not restored, the Plaintiffs would then have to consider whether or not they had a claim against their advocates. It is without doubt impossible for me to say whether they have, and if so, the strength of such claim. But it seems to me that any claim by the Plaintiffs against their advocates would inevitably involve some determination as to whether the Plaintiffs had a valid claim against these Defendants in the first place, with all the attendant evidential difficulties in such claim. It does, however, seem to me perfectly proper to express the view that the Plaintiffs themselves, as opposed to their advocates, are the authors of the culpable delays which have taken place, certainly since the autumn of 1994, and this notwithstanding the learned Bailiff's view that those delays were excused by Mr. Saffouri's ill-health between April, 1995, and April, 1997.

D Nor do I consider that, with regard to the inevitable necessity of obtaining the services of new advocates, any of the factors such as those which were present in Le Moigne (26) and Haines (27) arise in this case, such as to persuade me that, for that reason, the best interests of justice can only be served by the Plaintiffs' action being restored.

E (2) *The history of the action, and the activity or inactivity of the Plaintiff, and of the Plaintiffs' legal representatives, which have led to the action becoming périmée;*

I do not need to repeat my review of the history of this action, and my conclusions as to the culpable inactivity of the Plaintiffs. Save to say that from April, 1998, Saffouri, having been restored to better health by April, 1997, should have been straining at the leash to take proceedings forward; and that once the learned Bailiff had delivered his further judgment in October, 1998, the Plaintiffs should have done so with alacrity – i.e. should have taken the matter back to the Court of Appeal at the latest in January, 1999. Hence my earlier conclusion that the whole of the period from January, 1999, to March, 2000, was one of culpable delay on the part of the Plaintiffs.

H (3) *The position of the Defendants, and the effect on the Defendants and the Defendants' case if the action is restored;*

I have already stated, in relation to the strike out application, my conclusions as to the serious prejudice which would be caused to the Defendants should this action continue.

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A (4) *Any other circumstances etc;*

None of the matters referred to by Southwell JA under this heading have any application in this case.

B (5) *The general circumstances in Guernsey etc;*

Again none of these circumstances have any application in this case, the absence of which must weigh against the Plaintiffs.

C There are, however, two further factors which I consider to be relevant.

Firstly, the impossibility, now, of having a fair or satisfactory trial.

D Secondly, it is the responsibility of this Court to weigh in the balance, as an overriding objective of doing justice, on the one hand the wish of these Plaintiffs to pursue their proceedings against the Cochrane Defendants, and on the other, the need to allot the Court's limited resources fairly between all litigants. As already noted that is a factor which one is not entitled to take into account under the Birkett principles in relation to a strike out application, though it is a relevant consideration in determining whether the manner in which a plaintiff has pursued his proceedings before the Court may amount to an abuse of process (for which see, inter alia, Arbuthnot Latham (23) and Securum Finance (24)). It is, in my view, a relevant factor to bear in mind on a Rule 50(b) application, if I am satisfied, which I am, that the history of the proceedings to date, and the Plaintiffs' culpable part in allowing them to drag on for so long, do not augur well for any expeditious resolution of the Plaintiffs' claim against these Defendants. (I recall Saffouri's affidavit in the summer of 1997 that he wished to pursue his claim actively). I further bear in mind the fact that defences have not yet been filed, additional interlocutory proceedings will no doubt ensue after the closing of the pleadings, and that other matters may also cause delays, for example the possible taking of evidence on commission, at least in South Africa.

G In all of these circumstances and for all of these reasons, I dismiss this application to restore the Cause to the Rôle.

H The final comments which I would make in respect of this application to restore are to repeat the doubts I expressed in Stoneman (28), as to whether the views expressed by both the Court of Appeal and Carey DB in Haines (27) are necessarily correct, namely that the effect of the enactment of Rule 50(b) enables this Court to restore a Cause to the Rôle at a time

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A when the cause of action is prescribed. I do not intend to repeat my tentative reasons for
expressing that doubt. It is sufficient to say that, having considered again most carefully the
judgment of the Court of Appeal in Haines (27), I am satisfied that the proposition that Rule
50(b) had that effect was an integral part of the Court's decision, by which I am accordingly
bound.

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D. Summary of Conclusions

- (i) I strike out the Plaintiffs' Cause for want of prosecution, under Rule 36(2) of the
1989 Rules, and by virtue of my inherent jurisdiction to do so.
- (ii) I find that the Plaintiffs' Cause became preempt on the 7th October, 1999.
- (iii) I refuse to restore the Plaintiffs' Cause under Rule 50(b) of the 1989 Rules.
- (iv) Insofar as is necessary, I discharge the Arrêt of the 7th February, 1989, stayed for
24 hours.

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I will hear submissions as to costs and other matters.

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