In the Royal Court of the Island of Guernsey

The 24th day of July, 2001 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E., Lieutenant Bailiff; sitting alone.

RUSLAN BORISOVICH SHAMURIN Plaintiff

and

(1) BASE METAL TRADING LIMITED
(2) YURII YURIEVICH ZHIVILO Defendants
(3) MIKHAIL ZHIVILO

WHEREAS on the 21st day of June and 6th day of July, 2001 the Lieutenant Bailiff considered an application by the Plaintiff to determine the Defendants' Exceptions de Fonds and Exceptions Declinatoire and having heard Advocate P.T.R. Ferbrache, Counsel for the Plaintiff, and Advocates C.A. Tee and J.M. Wessels Counsel for the First and Second Defendants, and Third Defendant respectively, the Lieutenant Bailiff this day handed down judgment in the terms attached hereto and:-

1. DISMISSED the Exception de Fonds of the First Defendant
2. DISMISSED the Exception de Fonds of the Second Defendant
3. DISMISSED the Exception de Fonds and Exceptions Declinatoire of the Third Defendant
4. AWARDED recoverable costs in respect of the hearing of the Exceptions referred to in the said Judgment in favour of the Plaintiffs.

S. M. Simmonds

Her Majesty's Deputy Greffier.

Amended version — Copied to HMG/JER/JMW/CAT 25/1

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between:

RUSLAN BORISOVICH SHAMURIN.....Plaintiff

and

(1)BASE METAL TRADING LIMITED
(2)YURII YURIEVICH ZHIVILO .....Defendants
(3)MIKHAIL ZHIVILO

Judgment

The background to this action, which was commenced early in 1999, is that the Plaintiff and the Second Defendant (Yuri) are Russian citizens and were directors and shareholders of the First Defendant Company (Base Metal) from shortly after the date of its incorporation in Guernsey on 4th December, 1992, until 31st December, 1996. This company traded on the London Metal Exchange and is said to have incurred substantial losses in or about the year 1994. They were also directors and shareholders of another company, called Rosby Trading Ltd, (Rosby) which was formed in Guernsey in August, 1993. For a brief period after its inception two nominee companies under the umbrella of the B.D.O.Reads Group were the registered shareholders and directors of Base Metal, and for a slightly longer period the same nominee companies legally owned the issued shares in Rosbys. As I understand the position, the Plaintiff, prior to the events complained of, beneficially owned fifty per cent of the shares in Base Metal.

Amongst its other assets, which, according to Paragraph 11 of the Cause, were considerable, Base Metal owned Flat 80, 79, Leninsky Prospect Moscow, the Metallurgical Investment Company and a Bank known as the Moscow Clearing House, both being registered in Russia. At all material times the Third Defendant (Mikhal) who is the brother of Yuri, was the President of Metallurgical, and the Plaintiff was Managing Director of Base Metal and Chairman of the Bank. Again, according to the Cause, Base Metal provided Mikhail with the Flat and an income of U.S.$ 3,300 per month. In 1994 the Plaintiff and Mikhal shared the Moscow Flat.

As a result of alleged threats of violence and death by Mikhal during 1994 the Plaintiff is said to have resigned his directorship of Base Metal and to have transferred his sharehold interests in Base Metal and Rosby (which was compulsorily dissolved in 1998) to Yuri and Mikhal. Similar pressure was also applied by Mikhal to the Plaintiff to obtain an unsecured loan facility of U.S.$ six million in favour of the two individual Defendants by 31st December (1994, as stated in the Plaintiff's Affidavit of 22nd December, 2000, and 1996, as stated in paragraph 13 of the Cause); to transfer his flat and personal money to them;

as Chairman of the Bank to obtain deposits and finance; to prepare false proposals for finance and capital investment and finally to set up companies elsewhere to siphon off the funds so deposited with or acquired by the Bank, for the benefit of the individual Defendants. According to the Plaintiff's translated Affidavit of 22nd December, confirmation of Mikhal's propensity to violence was demonstrated by the fact that he was wanted by Interpol as a suspect involved in the attempted murder of Mr.Aman Tuleyev, Governor of the Kemerovo Region of Russia, the alleged motive being that Mr.Tuleyev had organised State interventionist activities resulting in the deterioration in the dominance of Metallurgical in the mining industry in the Region.

This was supported at the resumed hearing on 20th June of the Exceptions pleaded by all three Defendants, by a Press report adduced by Advocate Ferbrache, on behalf of the Plaintiff, stating that Mikhal had in fact been arrested in Paris on 22nd February, 2001, on an international warrant on suspicion of procuring the assassination of Mr.Tuleyev, and detained in La Sante prison. At that stage there existed some doubt as to whether Mikhal was still in custody or not, which, in turn, might have had a bearing on whether the Plaintiff was justified in his continuing anxiety for his personal safety if he returned to Moscow, or if this action had to be tried there. However on 6th July, Advocate Wessels, representing Mikhal, produced the minutes of the Court of Appeal proceedings in Paris which show that the extradition request by the Russian Federation had been denied and, so far as the attempted assassination charge was concerned, his client had been discharged from custody.

The gravamen of the Plaintiff's action is therefore of not only a tortious, but a criminal, conspiracy to compel him to carry out the acts I have summarised, and of continuing threats and violence, emanating principally from Mikhal, to enforce these demands. In Paragraph 20 of the Cause he seeks, *inter alia*, (against all the Defendants) a declaration that he is beneficially entitled to fifty per cent of the share capital of Base Metal; damages to the equivalent of the Plaintiff's loss of salary from his directorship of Base Metal since he resigned; full particulars and documents relating to all dealings with, by and on behalf of Base Metal from January, 1994, and an injunction preventing any further dealings with its assets. As against Base Metal the Plaintiff seeks full accounts from the said date, and as against Yuri and Mikhal the Plaintiff claims damages and the refund of £1,306 representing his personal possessions which he alleges he had transferred to them under duress. Finally he seeks, though it is not clear from whom, the re-transfer of the Moscow Flat to Base Metal. At this stage I should state that I have entertained some doubts regarding the quantum of prayer (b) because although the claim dates from October, 1994, it appears from the History of Directors at page 4 of the Plaintiff's Supplemental Bundle filed on 15th January, 2001, that the Plaintiff remained a director of Base Metal until the end of 1996, when he was relaced by Mikhal.

Exceptions de fonds and declinatoire have been filed on behalf of each Defendant; on behalf of Base Metal that Guernsey is not the *forum conveniens*, and on behalf of Yuri and Mikhal that the Royal Court lacks jurisdiction to hear this case. Additionally, the point is taken on behalf of Mikhal that the Court had no jurisdiction to grant leave to the Plaintiff to serve process against him out of the jurisdiction under Rule 7 of the Royal Court Civil Rules 1989. Although Advocate Tee, who represents Base Matal and Yuri, covered the jurisdictional aspect in her argument, I understood that this was only in relation to Yuri and not in relation to the corporate Defendant, for the manner in which the *Exception de Fonds* of 28th May, 1999, is framed invites the Court to decline to hear the Plaintiff's case against Base Metal under the principles of *forum non conveniens*, and the allegation therein relating to jurisdiction forms only one of the three sub-paragraphs of the particulars of the *exception*.

As I understood her case Miss Tee accepted that these proceedings were issued as of right against Base Metal (provided a valid cause of action was shown). This aspect formed an important aspect of Mr.Wessels' submissions, inasmuch as he contended that the process against Base Metal had been the vehicle which the Plaintiff had used to mount the action against Yuri and Mikhal. The joinder was a device employed in an effort to establish that the Court had jurisdiction over them. While, therefore, Miss Tee correctly submitted that the Court could only consider the *forum non conveniens* point once it was satisfied on jurisdiction, as the jurisdictional point does not arise in the case of Base Metal, I propose to address the issue of whether Guernsey is the *forum conveniens* first.

The point arose comparatively recently in Singleton v. Zetshock [1997] GLJ 28th April, where, during a skiing holiday in Austria the Defendant, a resident of England, collided violently with the Plaintiff who sustained serious injuries and was brought to Guernsey for treatment. *Exceptions de fonds* were lodged on behalf of the Defendant maintaining (a) that the Guernsey Court had no jurisdiction and (b) that Guernsey was not the *forum conveniens*, inasmuch as the events and the injuries giving rise to the alleged tortious liability had occurred in Austria, and several of the witnesses were resident in the United Kingdom. The Deputy Bailiff (as he then was) held that although one of the material witnesses was Austrian, the vast majority of the witnesses as to fact, and some of the doctors, came from Guernsey. There were some specialist medical and forensic witnesses who were in the United Kingdom, but who regularly featured in Guernsey accident cases and could the more easily travel to Guernsey from England than their counterparts in Guernsey could travel to England. Consequently it was held that the balance of convenience clearly lay in the trial taking place in Guernsey, which was, accordingly, the *forum conveniens*.

A similar result occurred in Edmunds v. Simmonds [2001] 1 WLR 1003, (although the decision there turned to some extent on the wording of Sections 11, 12 and 14(3)(b) of the Private

International Law (Miscellaneous Provisions) Act 1995), where the plaintiff was a passenger in a car driven by the defendant which was involved in a collision with a lorry in Spain in circumstances which suggested that the defendant, and not the Spanish lorry driver, was wholly to blame for the accident. Garland J. held that the factors connecting the tort to England were overwhelming and it was substantially more appropriate for the action to be heard in England. It is manifest, however, that it will usually be easier to decide where the balance of convenience (or, as it was put in Butler v.Butler [1998] 1 WLR 1208 which admittedly depended on the wording in paragraph 9(1) of Schedule 1 of the Domicile and Matrimonial Proceedings Act 1973 the balance of fairness) lies in an accident case, where the issues are more clear cut and the location of the witnesses can be speedily determined, than in a commercial case involving relatively complex issues.

In Singleton v.Zetshock the Deputy Bailiff referred to a passage in Lord Goff's speech in Spiliada Maritime Corporation v. Cansulex Ltd [1987] 1 AC 460 which appears in both the bundles of authorities produced on behalf of Yuri and Mikhal. That case involved the charter of a Liberian vessel to carry sulphur in bulk from Canada to India. It was alleged that the sulphur was wet when loaded and caused severe damage to the vessel, for which the shipowners claimed damages from the cargo owners. The decision involved both the issues that arise in the instant case, namely that of service out of the jurisdiction and that of *forum conveniens*. At page 480 Lord Goff said that in both groups of cases the fundamental issue for the Court to address must be:

> *".....to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice."*

It is important at this stage to be clear as to where the burden of proof lies. It is accepted by the Advocates for Yuri, in paragraph 17 of their skeleton argument filed on 20th October, 2000, that as regards the issue of *forum non conveniens* the burden rests on the Defendant. It is of equal importance to be clear as to the nature of the burden. As Lord Goff said at page 477, it is:

> *".....not just to show that England'* (and I interpolate here 'Guernsey') *'is not the natural or appropriate forum for the trial, but '*(and, I again interpolate, 'also') *'that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way proper regard is paid to the fact that jurisdiction has been founded in England'* (Guernsey) *'as of right."* My emphasis.

Although they are very much to similar effect I propose to refer also to the opening words of Lord Templeman in the same case:

> *"Where the plaintiff is entitled to commence his action (as in this case he is vis a vis Base Metal) 'the Court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the Court that some other forum is more appropriate."*

The whole tenor of the submissions made on behalf of Base Metal is that the Russian Federation is clearly and obviously the most appropriate forum in which this action should be tried, and I instance paragraph 23 of its Skeleton Argument which follows extensive references to Dicey and Morris on Conflict of Laws, in which there are equally extensive references to the Spiliada case which is now regarded as the *locus classicus* both on *forum non conveniens* and on the issue as to jurisdiction in Order 11 cases. The submissions in the Skeleton Argument were amplified by Miss Tee in her address on 20th June, and, indeed became the basis for the application on behalf of her clients on 16th January for an adjournment in order to adduce evidence of Russian Law, namely Articles 117 and 119 of the Civil Procedure Code of the Russian Federation, since Mr.Ferbrache had objected to the references to those provisions in paragraph 24 of the Skeleton Argument unless evidence was produced in support thereof.

Evidence was, accordingly, forthcoming in the shape of the Affidavit of 1st February, 2001, of Mr.Ilya Nikiforov, a Russian Lawyer and Assistant Professor of Law at St.Petersburg University. He deponed that not only were the Russian Courts an appropriate venue for the proposed action, but that the effect of Aricles 117 and 119 was that the trial was most appropriate where movable property was situated, and that the Russian Courts had exclusive jurisdiction over disputes as to rights over immovable property. In this connexion it will be recalled that the Cause alleged that, prior to the events complained of, Base Metal beneficially owned at least three flats in Moscow.

Mr.Ferbrache challenged the effect of these submissions, and pointed out that there would appear to be a conflict between the Defendants' Russian law expert and the opinion of Mr.Dudko, a legally qualified member of the Moscow office of the well-known solicitors, Linklaters which dates back to the 19th century. But if I assume in favour of Base Metal that it has discharged the burden of proof in its two aspects as propounded by Lords Templeman and Goff, so that it is entitled to a stay in favour of a trial in Russia, I yet have to consider a further aspect of Spiliada. As Lord Goff states at page 478:

> *"If however the Court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence that the plaintiff will not obtain justice in the foreign jurisdiction.....on this enquiry the burden shifts to the plaintiff."* My emphasis.

Even clearer, if that were possible, is the earlier passage from Lord Templeman at page 465:

> *"But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English* (Guernsey) *Court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere."* Again my emphasis.

The factor that the Court may permit a plaintiff to pursue the action where it is begun if it is shown that he cannot obtain justice in the other proposed, and possibly more suitable, forum, as indicated in the phrases I have emphasised, is readily accepted in paragraph 25 of the First and Second Defendants' Skeleton Argument.

Unfortunately for the First Defendant, the consummate industry of the Plaintiff's Advocates has produced a situation to which the underlined words in the above passages are peculiarly apposite, for exhibited to Mr.Shepherd's second Affidavit of 16th March, 2001, there is that which in Guernsey would be a Cause dated 19th December, 2000, in which Base Metal would appear to be the second plaintiff, in an action filed in the Southern New York District Court alleging conspiracy to defraud by a number of Russian Companies and even referring to the Russian-American Mafia Group. Under the heading BACKGROUND, as a preface to paragraphs 58 to 67 of that Cause, there appears this arresting phrase:

"THE NOTORIOUSLY CORRUPT RUSSIAN LEGAL AND ECONOMIC SYSTEM."

There follow several paragraphs referring to the domination of this corrupt system by groups of 'oligarchs' who are directly connected to criminal gangs, with the result that

> *".....Russia's court system is ineffective, does not consistently enforce established contract and commercial rights, has limited enforcement powers, and has become a de facto adjudicator for companies operated by economic criminals."*

Also exhibited to the Plaintiff's skeleton argument are Witness Statements of Mr.Dekany, an English solicitor relating to proceedings in England in which the role of the Plaintiff and Base Metal are reversed and in which the issue of *forum conveniens* is raised. But I do not think they affect the position as regards the New York action. True that that Claim is not a sworn document. True also that different lawyers represented Base Metal in New York and filed the Claim. But they must have done so on instructions from their client, Base Metal. How then, can the same client, albeit in different proceedings claim that this Plaintiff can obtain justice in the Russian Federation if its statements in the American claim are true?

In these circumstances it does not, in my judgment, lie in the mouth of the Advocates for Base Metal in Guernsey now to submit that the parties can receive a fair trial in the Russian

Federation. Consequently and for these reasons I have no hesitation in holding that the Plaintiff in this case has discharged the transferred burden of proof as set out by both Lord Templeman and Lord Goff, and has shown that he will not be able to obtain justice in the foreign jurisdiction for which this defendant contends, namely the courts of the Russian Federation. I therefore dismiss the *Exception de Fonds* filed on behalf of Base Metal in this case on the 28th May, 1999.

I now turn to the *exceptions* filed by the Second and Third Defendants. Here it is clear, if I may be permitted the expression, that the boot is on the other foot for at page 464 of the Spiliada case Lord Templeman said:

> *"Where the plaintiff can only commence his action with leave, the Court applying the doctrine of forum conveniens will only grant leave if the plaintiff satisfies the Court that England is the most appropriate forum to try the action."*

So far as the Second Defendant, Yuri, is concerned, paragraph 8 of the Skeleton Argument alleges that the leave granted by the Bailiff on 12th February, 1999, was *per incuriam* and on the most perfunctory of Affidavits in support, which did not begin to address the requirements set out in Rule 7 (2) of the 1989 Rules, namely that before making an order the Court has to be satisfied:

> *"that the matter to which the document relates--*
>
> *(a) is properly justiciable before the Court; and*
>
> *(b) is a proper one for service out of the jurisdiction*

In amplification of this argument Miss Tee submitted that the bare statement in paragraph 8 of Advocate Prentice's Affidavit of 11th February, 1999, that the proposed action was properly justiciable by the Royal Court did no more than repeat the text of the sub-Rule, and was insufficient on an application which was *ex parte*, and in which, accordingly, the Court did not have the benefit of contrary argument. In such case the Court should have been provided with adequate material on which to make an informed decision on whether to grant the application for leave to serve the intended proceedings outside the jurisdiction.

Mr.Wessels emphasised that there were two separate questions to be addressed in the instant case, namely whether there was jurisdiction to entertain the claim at all, followed by the issue of *forum non conveniens*. Although these were distinct issues he accepted that there would be a degree of overlapping between them. By his *exceptions* he had disputed, in the first place, that the Court possessed jurisdiction to hear the action at all, and secondly that it had jurisdiction to grant the leave it had given to the Plaintiff on 12th February, 1999. It will be apparent that in this respect also there is a degree of overlap,

for when the Bailiff granted the leave that he did it was implicit in his order that the Cause was 'properly justiciable' before the Court, meaning, according to the dictionary definition, subject to the jurisdiction of the Court in Guernsey, as well as holding that it was a proper case for service out of the jurisdiction.

Mr.Wessels referred to that portion of the speech of Lord Goff in the Spiliada case where he cited a passage from Lord Diplock in Amin Rasheed Shipping Corporation v.The Kuwait Insurance Co (The Al Wahab) [1984] AC 50 at page 68 where, having emphasised the need for caution in exercising the discretion to grant leave under the then paragraph (f) of Order 11 Rule 1 (1) (which related to claims on a contract as therein stated) Lord Diplock had said:

> *"..the onus under R.S.C Order 11, r.4(2) of making it 'sufficient to appear to the court that the case is a proper one for service out of the jurisdiction under this Order' lies upon the would-be plaintiff."*

Paragraph (b) of our Rule 7 is a shortened form of Rule 4(2) but the Court still has to be satisfied even, *ex parte*, that the proposed proceedings are proper to be served out of the jurisdiction.

Mr.Wessels submitted that the question of the burden of proof resting on the Plaintiff to show under both aspects of the Rule that the Royal Court had jurisdiction to entertain the claim was simply never addressed in February, 1999. I appreciate that, unlike the case to which Lord Diplock was referring, the claim is here founded on tort, namely conspiracy between the individual Defendants and duress, but there were similarities, in that the then proposed first defendant, Base Metal, carried on business, through its subsidiaries, in the foreign country, as well as in London. The brothers Zhivilo were directors of the Guernsey registered company throughout 1997 and 1998. Moreover, the remedies sought against Base Metal are in part enforceable within the jurisdiction, whereas according to paragraph 4.6.1 of Mr.Dudka's opinion on Russian Law of February, 2001, the Russian Federation has non-exclusive jurisdiction as regards prayers (b), (g), (h), (c) (e), and (f) of the prayer in paragraph 20 of the Cause. Both he and Mr.Nikiforov are associated with law firms, Mr.Dudka with Linklaters and Mr.Nikiforov with Egorov, Puginsky, Afanasiev & Marks Ltd. Mr.Dudka is a distinguished jurisprudential lawyer while Mr.Nikiforov is an Associate Professor of Law, possibly of even greater distinction in private international law. As regards movable property he says that a claim for title of movable property 'will be entertained', subject to the exception, by the Russian National Courts, regardless of where it is situated. On this aspect, therefore, I do not detect much difference in opinion between them.

Mr Ferbrache strongly submitted that the Order of February, 1999, was regularly made after due consideration of the material then placed before the Court. It was clear from the Act of Court that the Affidavit of Mr.Prentice was considered. It had exhibited

the proposed Cause which gave more than adequate information to the Court to enable it to reach an informed decision. Of course it was *ex parte*, but this will almost inevitably be so when leave is sought to serve intiating process outside the jurisdiction. Although the local Rule was in a very much shortened form, the Court in practice would nevertheless always pay regard to all the alternative situations which were set out disjunctively in paragraphs (a) to (u) of Order 11 Rule 1 (1). In particular Mr.Ferbrache relied on the Guernsey case of Johnson v. Manitoba Marine Ltd & Malta Dry Docks Corporation [1988] 16th November in which a similar *exception* to the present one taken on behalf of Mikhal was filed. There, as here, the first defendant was a Guernsey Company, and there, as here, the plaintiff was a non resident of Guernsey. The *exception* was taken by the second defendant, a Malta registered company, which was allegedly responsible for the wrongdoing alleged. After consideration of the circumstances and the relevant Law, the then Bailiff held that the Guernsey Royal Court had wide powers under the Rules and under common law to join parties in proceedings in Guernsey, and he dismissed the *exception*.

It seems to me that the circumstances disclosed by the Cause which was exhibited to Mr.Prentice's Affidavit are similar to those alleged in the Manitoba Marine case. The wrongdoing alleged is by the Zhivilos, both of whom were directors in 1997 and 1998 and Yuri was additionally a director from 1993 to 1996. Furthermore, according to the witness statements of Mr.Dekany, included as Exhibits 7 and 8 to the Plaintiff's Skeleton Argument, Base Metal has itself either filed proceedings or is contemplating proceedings against the Plaintiff in the High Court in London, with extensive claims relating to trading losses allegedly caused by the Plaintiff (the proposed Defendant in the Draft Particulars of the Claim in the English Commercial Court) during a period when he and Yuri were co-directors thereof. In paragraph 40 of his statement of 17th October, 2000, Mr.Dekany, a member of the firm acting for Base Metal in London, gives a wholly different reason for the transfer of the Plaintiff's shares in Base Metal to Yuri Zhivilo from that alleged in paragraph 13 of the Cause. Mr.Dekany's account is in line with that given in the Affidavit of Pavel Igorovitch Khefits, sworn at the offices of another well-known firm, Norton Rose, in Moscow. These Affidavits and statements show that there are serious issues of fact to be tried. The all-important issue here is where they are to be tried.

Finally, on the issue of service outside the jurisdiction, I agree with Mr.Ferbrache, in that, assuming the Court on an application under Rule 7 considers the various alternatives in Order 11 Rule 1(1) of the Rules of the Supreme Court, as they were prior to the recent reforms, then paragraph (c) of the English sub-rule would be appropriate, inasmuch as the the First Defendant has been duly served outside the jurisdiction and the Second and Third Defendants are in my judgment proper parties thereto.I therefore find that in the cases of both Yuri and Mikhal that the Royal Court has jurisdiction to entertain the Plaintiffs action against them.

However, in my judgment, a further fundamental point to be addressed as part of, but subsidiary to, the jurisdictional issue, raised as it is on behalf of the Second and Third Defendants, is whether the Court has power to review the grant of leave to serve process out of the jurisdiction in an appropriate case. In Singleton v.Zetshock the Deputy Bailiff held that he had power to revisit the issue of whether or not he should have granted the leave sought by Mr.Wessels and he placed the burden on the plaintiff to show that he had been right in the exercise of his antecedent discretion to do so. In that case he was, of course, reviewing his own decision, and not that of another Judge. In the light of further material which had by then become available to the Court and of the arguments then raised by Advocate Mrs.Hall, by then representing the Defendant, the Deputy Bailiff considered the matter *de novo* and remained satisfied that it was an appropriate case for service out of the jurisdiction.

Similarly in the Spiliada case the cargo owners applied to Staughton J. to set aside the leave previously granted under Order 11 rule 1(1)(f)(iii) to serve the writ upon them in Canada. The Judge, after lengthy argument and consideration of similar proceedings which were pending involving similar issues in respect of another ship, the Cambridgeshire, rejected the application. His decision was reversed by the Court of Appeal, with the result that the leave to serve out of the jurisdiction previously granted by Neill J, and the proceedings served in consequence, were set aside. The Spiliada case was an action to recover damages in respect of a breach of contract which was by its terms governed by English law. It therefore related to Order 11, Rule 1(1), paragraph (d)(iii) (as shown in the 1999 White Book), as opposed to paragraph (f) (again I refer to R.S.C 1999) which would have applied in this case if the action had been commenced in England. Even so I accept that the principles of the House of Lords decision in Spiliada (which restored the decision of Staughton J and thus the leave earlier granted by Neill J.) should be followed here.

The difficulty, however, as I see it, is that the application to Staughton J. was made under a specific provision, namely Order 12, Rule 8 (1)(c) which provides:

> *"A defendant who wishes to dispute the jurisdiction of the Court in the proceedings.by reason of any such irregularity or on any other ground shall give notice of his intention to defend the proceedings, and shall, within the time limited for service of a defence, apply to the Court for:*
>
> .....
>
> .....
>
> *(c) the discharge of any order giving leave to serve the writ on him out of the jurisdiction.*

I have been unable to find any similar provision in our Rules. It could of course be argued that in every case where an order is made *ex parte*, there must be a power to review that decision if and when the matter becomes *inter partes*. But if the Royal Court had intended to give itself power to discharge the order of another Judge of equal jurisdiction, nothing would have been easier than to have so provided, as the legislature did, for example, in the case of interim injunctions issued under the Law Reform (Miscellaneous Provisions) Law, 1987, by Section 2. It may be that a proposed defendant, or the Defendants here, had I decided the other issues differently, would have been driven to an appeal by this conclusion, but that is not a matter which enables me to give myself a power which is not there. As Lord Simon said in King-Emperor v. Benoari Lal Sarma [1945] 1 AER at p.216:

> *"Again and again this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used."*

For the reasons I have endeavoured to give I also dismiss the *exceptions* filed by the Second and Third Defendants.

A.R.W.Hancox
Lieutenant Bailiff
24th July 2001.