either from the master or from Captain Dancodis or Mr. Pittas before they left.

With this knowledge, was welding to the pulley on Dec. 28 which caused the fire part of the hot work of which Mr. Kavallaris had actual knowledge? I think it was. Welding work to the wheels and pulleys forming part of the opening and closing mechanism of the hatch covers formed part of the work planned to be carried out in Varna. I doubt whether Mr. Kavallaris knew in detail what further work was to be done in Salonika but if, as I find, he knew that welding work was to be carried out, I think he must have known that this might include welding work to the pulleys even if the immediate reason for carrying out such work was because the hatch cover would not close properly. It would be entirely artificial to attempt to distinguish between Mr. Kavallaris' knowledge of hot work done in order to complete unfinished work started in Varna and knowledge of hot work done with the same object, that is to make the hatch covers function properly, the need for which may have arisen as a result of an operational problem. In the light of the fact that I have rejected Mr. Kavallaris' evidence that he knew nothing, owners can hardly complain about this conclusion.

I therefore conclude that AMJ have established that the fire was caused with the actual fault or privity of owners and therefore they cannon rely on the art. IV, r. 2 fire exemption.

3. CO_2 system; unseaworthiness; causation

AMJ's case, supported by Mr. Fyans, was that the vessel was unseaworthy for the carriage of the cotton cargo because it had no CO_2 system in the hold. There is considerable scope for argument as to whether the SOLAS Rules required such a system in a vessel of this age, particularly as she subsequently obtained a SOLAS exemption from the Maltese flag authority. However, Mr. Fyans's view was that irrespective of any SOLAS obligation the vessel was unsuitable for the carriage of this cargo without a CO_2 system. Owners' answer to this is that before loading the holds were surveyed on behalf of AMJ and the certificate stated that they were "suitable to be loaded with the present commodity". Even after the fire AMJ accepted the holds as they were. Accordingly, AMJ must be taken to have waived any breach of contract.

I am not satisfied on the evidence that the vessel was unseaworthy in this respect. Even if it was, I accept owners' arguments that the breach has been waived and it is too late now for AMJ to rely on it. If I am wrong about this, however, there is a considerable argument about causation. Dr. Rizos believes that as the fire only reached hold 4 at 23.00, nearly three hours after it was discovered in hold 5, a CO_2 system would have prevented it spreading via the bulkhead to hold 4. CO_2 released into a hold acts within minutes and although it does not extinguish a fire it greatly reduces the rate at which it spreads. Dr. Foster disagreed. He said that it was possible that the fire would have reached the bulkhead by the time CO_2 could have been released and that there would have been insufficient CO_2 remaining in the system after discharge into hold 5 to protect hold 4. Owners submit that on this basis of the evidence AMJ's case is speculative and that they have not therefore established the necessary causal link between the absence of the CO_2 system and any damage to the cargo in hold 4. I agree.

Conclusion

1. The fire was caused by welding.

2. Owners are therefore liable to AMJ for breach of art. III, r. 1 of the Hague Rules and/or

3. They are liable for breach of art. IV, r. 2 because the fire was caused by their actual fault or privity.

4. But AMJ's case based on unseaworthiness due to the state of the hatch covers and the absence of a fixed fire extinguishing equipment in the cargo holds fails.

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Dec. 14, 1995

ARAB BUSINESS CONSORTIUM INTERNATIONAL FINANCE AND INVESTMENT CO.

v.

BANQUE FRANCO-TUNISIENNE

Before Mr. Justice WALLER

Arbitration — Award — Registration — Application to set aside — Plaintiff obtained arbitration award — Award made enforceable as a judgment by French Court — Judgment registered in England — Whether judgment on an award excluded from provisions of Brussels Convention — Whether registration should be set aside — Civil Jurisdiction and Judgments Act, 1982.

Arbitration — Award — Enforcement — Application to set aside — Plaintiff obtained arbitration award — Plaintiff sought to enforce award under the Arbitration Act, 1975 — Allegations of non-disclosure — Whether leave to serve out of jurisdiction should be set aside — Whether France more appropriate forum.

Practice — Writ — Extension of validity — Application to set aside — Life of writ expired — Whether plaintiff could issue a concurrent writ without extending validity of original writ — Whether defendant could rely on limitation of time defence — Whether orders granting leave to serve out and extending validity of writ should be set aside.

The plaintiffs (ABCI) alleged they agreed by letter dated Apr. 2, 1982 to buy 50 per cent. of the shares in the defendants (BFT) for 2,500,000 Tunisian Dinars (£5,14,139,082).

ABCI allege that despite payment of the agreed price there was a failure by BFT to transfer the shares only rectified in March, 1994 by which time the shares had dropped in value to about U.S.$2,772,902.

ABCI commenced an arbitration in Paris claiming the difference and interest on that difference as from the date when the moneys had been paid over. In an award dated July 23, 1987 the ICC awarded ABCI U.S.$3,200,001.47. By a judgment of the French Court dated Sept. 3, 1987 the ICC award was made enforceable as a judgment of the Court.

In Action 192/94 ABCI sought to enforce in England the judgment made on the ICC award. On Apr. 26, 1994 Master Foster registered the judgment of the French Court on ABCI's ex parte application pursuant to the Civil Jurisdiction and Judgments Act, 1982 which enacted the Brussels Convention.

BFT applied to set aside the registration. They submitted that the judgment was not registrable under the 1982 Act because that judgment concerned the enforcement of an arbitration award and art. 1(4) of the Convention excluded arbitration.

On July 8, 1994 Master Children rejected those submissions and declined to set aside the registration. BFT appealed.

In Action 1993 Folio No. 933 ABCI sought to enforce the award itself. They obtained ex parte leave to serve those proceedings out of the jurisdiction.

BFT applied to set aside the leave contending that there were serious non-disclosures in the affidavit and that the appropriate course was to set aside the leave. BFT submitted that in the affidavit supporting the application for leave to serve out there was a reference to a decision of the Tunisian Court giving leave to enforce the award but not disclosure of the fact that the order had been reversed on appeal and that there were other proceedings taken which purported to invalidate the agreement to arbitrate. In the alternative BFT argued that the forum for trying out these matters was France where BFT had already commenced proceedings to annul the award.

In Action 1994 Folio 36 ABCI claimed against BFT in fraud. They alleged that prior to ABCI sending the letter dated Apr. 2, 1982 which ABCI asserted "contained or evidenced "the contract, BFT supplied to ABCI BFT's annual accounts for the year 1980. It was alleged that these accounts contained fraudulent misrepresentations and that ABCI were entitled to damages assessed by reference to the purchase price paid for the shares. It was further alleged that the fraud was only discovered in March, 1988 and that the earliest date for expiry of the limitation period under English law was Mar. 31, 1994.

The writ was issued on Jan. 12, 1994, was marked "not for service outside the jurisdiction" and thus expired on May 11, 1994. Leave to serve out was given on July 7, 1994 and on the same day application was made to extend the validity of the writ until Sept. 11, 1994.

BFT applied to set aside these orders the issues for decision being: (a) Where a plaintiff had issued a writ "not for service out" and had allowed the four month period to expire could he issue a concurrent writ without extending the validity of the original writ? (b) If not and if it was his intention thereafter also to apply for leave to serve out what was the relevance of the fact that the defendant had already an accrued limitation defence? (c) If a concurrent writ for service out could be issued without extending the validity of the writ, what was the relevance of the fact that the four month period had been allowed to expire and/or the limitation period had been allowed to expire? (d) Even if it could be said that the plaintiffs applied for an extension of validity within the life of the writ, had the plaintiff shown good reasons for such extension in the light of the expiry of the limitation period.

—Held, by Q.B. (Com. Ct.) (WALLER, J.), that (A) As to Action 192/94: there were cogent reasons why those agreeing terms of the Brussels Convention should exclude disputes between parties which were subject to arbitration and there were cogent reasons why enforcement of an award should have been agreed by parties to that Convention to have been left to be

dealt with by other international Conventions including the New York Convention; registration of a judgment in a Court of a country where the award had taken place was one method of enforcement and there were cogent reasons why the parties to the Brussels Convention would agree to exclude such judgments from being enforceable under the Convention; the appeal from the Master would be allowed and registrations of the judgment under the 1982 Act refused (see p. 488, col. 2; p. 489, col. 1);

——*The Atlantic Emperor*, [1992] 1 Lloyd's Rep. 342 applied.

(B) As to Action 1993 Folio 933: (1) on the evidence it was impossible not to conclude that reference to the adverse decisions of the Tunisian Court should have been referred to, even if explained and there was non-disclosure (see p. 491, col. 1);

(2) where there had been an award that had not been annulled in the country where it had been issued and where it was being contended by ABCI that there was every reason why it should be entitled to enforce that award the disclosure would not have affected the mind of any Judge in relation to granting leave (see p. 491, cols. 1 and 2);

(3) the duty of disclosure applied on any *ex parte* application and the Judge who had to deal with such application was dependent on points which should be drawn to his attention being so drawn clearly; the punishment that would in fact be inflicted on ABCI would be out of proportion to the offence; if there were a risk that proceedings could not be restarted because of limitation it would appear that that would be too severe a punishment having regard to the fact that if there had been disclosure it would not have made any difference to the Judge who had to deal with the ex parte application; in these circumstances although there was non-disclosure it would not be right to set aside leave on that ground (see p. 491, col. 2; p. 492, col. 1);

(4) as to forum conveniens what was at issue was whether a French award should be enforced in England and there could not be any forum in which that could be debated other than in the English Court (see p. 492, col. 1).

(C) As to Action 1994 Folio 36: (1) what R.S.C., O. 11, r. 1(1)(f) was concerned with was a wrongful act committed by a defendant within the jurisdiction or a wrongful act committed by a defendant outside the jurisdiction which inflicted damage within the jurisdiction; what was specifically not alleged was that the defendants as it were aimed some conduct at the plaintiff within the jurisdiction inflicting [illegible] him there; the position appeared to be that ABCI were in London acting on a representation [illegible] them outside the jurisdiction resulting in [illegible] from a source outside the jurisdiction for [illegible] in yet another jurisdiction; O. 11, r. 1(1)(f) was not designed to cover that situation (see p. 493, col. 2);

(2) the plaintiff needed to obtain an extension to the validity of the writ [illegible] be entitled to issue a concurrent writ (see p. [illegible], col. 1);

(3) if the plaintiffs had made the correct application they would not have been entitled to an extension of the validity of the writ to allow for the issue of a concurrent writ; there was no good reason for granting such extension (see p. 498, col. 1);

(4) in this case there was in fact an application to extend the validity of the writ beyond the period of six months and that was made after the validity of the writ had expired; none of the reasons put forward by the plaintiffs could ever have justified an extension of the validity of the writ beyond six months and the orders extending such validity and/or giving leave to issue and serve a concurrent writ out of the jurisdiction would be set aside (see p. 498, cols. 1 and 2).

——*Dong Wha Enterprise Co. Ltd. v. Crowson Shipping Ltd.*, [1995] 1 Lloyd's Rep. 113; *The Nova Scotia*, [1993] 1 Lloyd's Rep. 154 and *The Jay Bola*, [1992] 2 Lloyd's Rep. 62 considered.

The following cases were referred to in the judgment:

Atlantic Emperor, The (E.C.J.) [1992] 1 Lloyd's Rep. 342; [1991] 1 E.C.R. 3855;

Brink's Mat Ltd. v. Elcombe and Others, (C.A.) [1988] 1 W.L.R. 1350;

Dong Wha Enterprise Co. Ltd. v. Crowson Shipping Ltd., [1995] 1 Lloyd's Rep. 113;

Far Eastern Shipping Co. v. AKP Sovcomflot, [1995] 1 Lloyd's Rep. 520;

Jay Bola, The [1992] 2 Lloyd's Rep. 62;

Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. and Another, (C.A.) [1990] 1 Q.B. 391;

Myrto, The (No. 3) (H.L.) [1987] 2 Lloyd's Rep. 1; [1987] A.C. 597;

N.V. Cabasse v. Vanaise, (1978) Digest Case I-1.2B8;

Nova Scotia, The [1993] 1 Lloyd's Rep. 154;

Rosseel N.V. v. Oriental Commercial & Shipping Co. (U.K.) Ltd. and Others, [1991] 2 Lloyd's Rep. 625;

Sabi v. Westminster Transports S.A. and Kestrel Marine Ltd., [1995] 1 Lloyd's Rep. 115.

These were applications by the defendants Banque Franco-Tunisienne that (a) the registration of a judgment made by the French Court to enforce an arbitration award made between the defendants and the plaintiffs Arab Business Consortium International Finance and Investment Co. be set aside on the ground that such registration was excluded by the Brussels Convention; (b) that the orders granting leave to the plaintiffs to enforce the award itself be set aside on the ground that there were serious non-disclosures in the affidavit in support of such enforcement; and (c) the orders granting the plaintiffs leave to serve a concurrent writ out of the jurisdiction and extending the validity of the writ be set aside.

Mr. Michael Burton, Q.C. and Mr. Charles Haddon-Cave (instructed by Messrs. [illegible]) for the plaintiffs; Mr. V. V. Veeder, Q.C. and Mr. Joe Smouha (instructed by Messrs. Herbert Smith) for the defendants.

The further facts are stated in the judgment of Mr. Justice Waller.

JUDGMENT

Mr. Justice WALLER:

Introduction

The plaintiffs (ABCI) allege they agreed by letter dated Apr. 2, 1982 to buy 50 per cent. of the shares in the defendant (BFT) for 2,500,000 Tunisian dinars (then approximately U.S.$4,139,082).

ABCI allege that despite payment of the agreed price, there was a failure by BFT to transfer the shares only rectified in March, 1994 by which time, as they allege, the shares had dropped in value to some U.S.$2,772,982. ABCI commenced an arbitration in Paris claiming the difference and interest on that difference as from the date when the moneys had been paid over. In an award dated July 23, 1987 the ICC awarded ABCI the sum of U.S.$3,260,061.47. By a judgment of the French Court, the Tribunal de Grand Instance de Paris dated Sept. 3, 1987, the ICC award was made enforceable as a judgment of the Court.

The above is sufficient to describe the first two matters before me.

The first matter relates to Action 192/94. In that action ABCI seek to enforce in England its judgment made on the ICC award. On Apr. 26, 1994 Master Foster registered the judgment of the French Court entered on Sept. 3, 1987 on ABCI's ex parte application. He did so under the Civil Jurisdiction and Judgments Act, 1982 (which of course enacted the Brussels Convention). BFT submit that the judgment is not registrable under the 1982 Act because they submit that the judgment concerns the enforcement of an arbitration award, and they submit that by art. 1(4) of the Convention, "Arbitration" is excluded. They submit that the judgment would have been registrable under the Foreign Judgments (Reciprocal Enforcement) Act, 1933 if registered prior to Sept. 3, 1993, that Act still applying to matters excluded from the Brussels Convention.

On July 8, 1994 Master Chisholm rejected those submissions and declined to set aside the registration, from which order BFT appeal. That appeal is the first matter I must deal with.

The second matter relates to Action 1993 Folio No. 933. In that action ABCI seeked to enforce the award itself. They obtained from me (as it happens) ex parte leave to serve those proceedings out of the jurisdiction. What is asserted by BFT is that there were serious non-disclosures in the affidavit put before me, and that the appropriate course is to set aside leave. That would leave ABCI to re-apply for leave to issue and serve proceedings, which, BFT would suggest, should not be granted in the context of a possible time bar defence. In the alternative it is submitted that BFT have various bases on which they will be entitled to argue that the award should not be enforced under the New York Convention (brought into force in the United Kingdom by the Arbitration Act, 1975), and that the forum conveniens for trying out those matters is France where BFT have already commenced proceedings to annul the award.

The third matter arises out of Action 1994 Folio 36 which action makes a claim by ABCI against BFT in fraud. What is alleged is that, prior to ABCI sending the letter dated Apr. 2, 1982, which ABCI assert "contained or evidenced" the contract, BFT supplied to ABCI BFT's annual accounts for the year 1980; it is alleged that those accounts contained fraudulent misrepresentations and that ABCI are entitled to damages assessed by reference to the purchase price paid for the shares. It is further asserted that only in or about March, 1988 or subsequently, ABCI discovered the fraud. It is on that basis that ABCI assert that the earliest date for the expiry of the limitation period under English law would be Mar. 31, 1994.

The writ in this third action was issued on Jan. 12, 1994 and was originally issued "not for service out of the jurisdiction". On ABCI's case, limitation could have expired on Mar. 31, 1994. If the writ had only a four month life, the life expired on May 11, 1994; if the writ had a six month life it expired on July 11, 1994.

The application for leave to serve a concurrent writ out of the jurisdiction was not made until early July, 1994 i.e. in the two month period between May 11, 1994 and July 11, 1994. Furthermore at the same time a request was made to extend the validity of the writ beyond even July 11, 1994 to Sept. 11, 1994.

I have to address whether those orders should have been made and/or should now be set aside.

First matter: Action 192/94 jurisdiction under the 1982 Act (Brussels Convention)

The approach of Mr. Burton, Q.C. and Mr. Haddon-Cave is summarized in their separate note on this aspect. In short they submit that a judgment is a judgment and thus not "Arbitration", and the proceedings are to register a judgment and not to

enforce an arbitration award. They rely on an authority of the Brussels Court *N.V. Cebaco v. Vanzeur*, (1978) Digest Case I-1.288, where the Brussels Court enforced a Netherlands judgment ordering enforcement of a Netherlands arbitration award. They further suggest that an authority of the European Court much relied on by Mr. Veeder, Q.C. on behalf of BFT, *The Atlantic Emperor*, [1992] 1 Lloyd's Rep. 342; [1991] 1 E.C.R. 3855, is irrelevant. They submit that that case was concerned only as to whether judgments "ancillary" to arbitration were within the exception art. 1(4). Accordingly, they submit that the judgment is enforceable under the Brussels Convention.

In my view those submissions must be rejected. First, I am clear that *The Atlantic Emperor* is a highly material case.

Furthermore, it is one of which I am bound to take judicial notice under s. 3(2) of the 1982 Act which provides:

> . . . judicial notice should be taken of any decision of, or expression of opinion by, the European Court on any such question.

The question referred to is any question as to the meaning or effect of any provision of the Brussels Convention. It is true that that case was concerned with proceedings relating to (a) the appointment of an arbitrator and (b) an ancillary point whether the arbitration agreement was valid. It was thus not directly concerned with whether proceedings seeking to enforce an award fell within the exception. However, it was the Court's view that it was the intention to exclude—

> . . . Arbitration in its entirety, including proceedings brought before National Courts . . . [par. 18 of the judgment].

and that view was formed as that paragraph makes clear because arbitration *including the enforcement of arbitration awards* are already covered by international agreements including the New York Convention. By the word "Arbitration" was intended to be included the dispute between the parties which was the subject of the arbitration, appointments by the Court of Arbitrators as part of the process of setting up the arbitration, and, as the words I have emphasized above make clear, the enforcement of the awards themselves.

The opinion of the Advocate General also supports the above view. First, he recites, and impliedly approves, the various reports of Committees of Experts; the Jenard report (par. 56), the Schlosser report (par. 57), and the Evrigenis and Kerameus report (par. 59). Those reports all support the view that proceedings or judgments enforcing awards are excluded from the Convention, although the language of the Schlosser report is possibly clearest. The relevant paragraph of that original report is worth quoting in full. Paragraph 65(c) states as follows:

> . . . nor does the 1968 Convention cover proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards. This also applies to Court decisions incorporating arbitration awards — a common method of recognition under United Kingdom law. If an arbitration award is revoked and the revoking Court or another National Court itself decides the subject matter in dispute, the 1968 Convention is applicable.

Secondly, the Advocate General rejects the "updated" opinion of Professor Schlosser and did so in trenchant terms.

Thirdly, by clear implication in his rejection of one aspect of the new opinion expressed by Professor Schlosser, it was clearly the Advocate General's view that a judgment enforcing an award was itself excluded from the Convention (see par. 62-71 of his opinion).

Mr. Veeder, Q.C. in his submissions also relied (a) on the official commentaries above referred to (see par. 13 of his written submissions); (b) on the views of scholars and commentators in England and abroad (see par. 14 of his written submissions); and (c) on a decision of the Landgericht Hamburg dated Apr. 24, 1979 *No. 5 0112/79* where a judgment on an award was not enforced under the Brussels Convention because arbitration was excluded. I accept a point made by Mr. Burton, Q.C. that in many of the expressions of opinion of the scholars and commentators referred to in par. 14 of the written submissions, the passage, par. 65 of Professor Schlosser to which reference is made, and thus it may not be very fair to add the weight of all the opinions of the scholars and commentators to that expressed originally by Professor Schlosser. But what it is also right to say is that certainly no commentator, prior to Professor Schlosser changing his view shortly before and during the currency of *The Atlantic Emperor*, ever suggested that par. 65 of the original report of Professor Schlosser was wrong.

In my view there were cogent reasons why those agreeing the terms of the Brussels Convention should exclude disputes between parties which were subjected to arbitration, and there were cogent reasons why enforcement of an award should have been agreed by the parties to that Convention to have been left to be dealt with by other international Conventions, including, for example, the New York Convention. Registration of a judgment in a Court of a country where the award has taken place is one method of enforcement and there are cogent reasons why the parties to the Brussels Convention

would agree to exclude such judgments from being enforceable under the Convention.

The only factor which has affected my mind as weakening the cogency of the above arguments is the fact that an award, once turned into a judgment, is enforceable under the Foreign Judgments (Reciprocal Enforcement) Act, 1933. It is registrable by virtue of s. 10A inserted by the 1982 Act. Indeed, the section is making arbitration awards registrable only if they have been turned into judgments, but the section also provides (by excluding s. 6 of the 1933 Act from applying) that awards can also be enforced as judgments, even if so adapted. So s. 10A of the 1933 Act it can be said, is not consistent with leaving arbitration awards, once turned into judgments, to be dealt with by for example the New York Convention.

The answer to that point as I see it, is that in relation to the Brussels Convention, the Court is concerned with what the common intention was of those agreeing the terms of that Convention. What has happened vis à vis the 1933 Act cannot assist in that exercise. In deciding what the common intention was, the reasoning of the Advocate General in *The Atlantic Emperor* is extremely persuasive. Furthermore, the decision of the Court is in my view to the effect that a judgment on an award is excluded from that Convention.

In the result the appeal from the Master must be allowed and registration of the judgment under the 1982 Act should be refused.

The second matter: 1993 Folio No. 933

The Arbitration Act, 1975

The points that arise I have already identified as: (a) non-disclosure and (b) forum non conveniens.

What ABCI are seeking to do by this action is to enforce their arbitration award under the New York Convention to which the 1975 Act gives effect. There has been no suggestion that through a merger of the award in the judgment procured in France, the award itself is not enforceable. Reference was made to this point in passing during argument, but presumably, on the basis of the views expressed in Dicey & Morris Conflict of Laws (12th ed.) at p. 607 at the top and p. 625 at the bottom, BFT would not wish to contest ABCI's right to enforce the arbitration award under the New York Convention just because of the judgment enforcing that award being obtained in France.

It is right to bear in mind, in relation to both points that arise on this aspect, the words of Mr. Justice Steyn (as he then was) in *Rosseel N.V. v. Oriental Commercial & Shipping Co. (U.K.) Ltd. and Others*, [1991] 2 Lloyd's Rep. 625 at p. 629 where, in the context of an attempt to set aside proceedings seeking to enforce an award, he was faced with a submission that there was no sufficient jurisdictional connection where a company had no assets within the jurisdiction, he said as follows:

> I disagree. The English Court is bound by a statute, arising from treaty obligations, to enforce the award. The presence of assets in the jurisdiction is not a precondition under the statute to the enforcement of the award. It ought not to be regarded in the exercise of the Court's discretion as a prerequisite to the granting of leave to serve out of the jurisdiction. A contrary view would in effect introduce into the statute, which carefully reflects our treaty obligations, a precondition which is not to be found in the 1958 New York Convention. That Convention has now entered into force in the laws of some 80 countries. It is the great success story of international commercial arbitration. This Court ought to be astute to avoid making an order which will derogate from the efficacy of the New York Convention system and our treaty obligations as enshrined in the 1975 Act.

When a plaintiff is seeking to enforce an award in England and seeking leave to serve out, he does so in reliance on O. 11, r. 1(m) i.e. the claim is brought to enforce any judgment or arbitral award. It is a requirement in such a case, as in any other, that the plaintiff support the application by an affidavit complying with O. 11, r. 4. Furthermore, since the application is made ex parte, there is an obligation of disclosure. That obligation is to bring to the attention of the Court any matter, which, if the other party were represented, that party would wish the Court to be aware of in the context of exercising its discretion.

In the context of the obligation to disclose, I was referred to *Brink's Mat Ltd. v. Elcombe and Others*, [1988] 1 W.L.R. 1350 and in particular the passages in the judgments of Lord Justice Ralph Gibson at pp. 1356F-1357G, and Lord Justice Slade at p. 1359 which I believe to be worth quoting:

> Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing

tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *Rex v. Kensington Income Tax Commissioners* [1917] 1 K.B. 486 principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.

Though in the present case I agree that there was some material, albeit innocent, non-disclosure on the application to Roch J., I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such non-disclosure, to refuse to continue the injunction granted by Roch J. on 9 December 1986.

That was a case relating to the granting of an injunction, and it does of course make a difference what form of ex parte application the Court is dealing with. That is recognized in quite a number of cases and in *The Jay Bola*, [1992] 2 Lloyd's Rep. 62 at p. 67 Mr. Justice Hobhouse (as he then was) put it this way:

> There is a duty of disclosure on all ex parte applications but the extent of the duty and the gravity of any lack of frankness will depend in any given case on the character of the application. At one end of the scale there are *Anton Piller* orders and *Mareva* injunctions where the consequences of the order may be unpredictable and irremediable and very possibly most serious for the proposed defendant: there the very fullest disclosure must be made so as to ensure as far as possible that no injustice is done to the defendant. At the other end of the scale are minor procedural applications where there may be no risk at all of prejudice, or at least none that cannot be fully made good by an order in costs. Where the application is, as in the present instance, one of a character which would not prejudice the relevant party's position (i.e. that of Armstel) and would not cause them any loss or inconvenience that would not fully be made good by an order in costs, the duty of disclosure does not have such an extreme extent.

There is clearly a distinction to be drawn between deliberate non-disclosure designed to deceive the Court and persuade it to grant an ex parte order where it otherwise would not, and innocent non-disclosure where disclosure would in fact have made no difference to the order that the Court would have made. Obviously, if a non-disclosure has been of a serious kind and deliberate, the Court would wish to ensure that any advantage gained by the non-disclosure should not be retained.

Here I should mention a factor which, as it seems to me, could be said to be two edged. If non-disclosure were established, and if leave were set aside, and if ABCI were forced to commence further proceedings to enforce their award, there is a strong argument that they would be time barred and thus unable to start again. BFT rely on that factor as being in their favour urging that if ABCI have been guilty of non-disclosure, they should not be entitled to retain the advantage which they had gained by issuing the writ prior to the limitation period expiring. ABCI on the other hand argue that even if there has been some non-disclosure then to drive them from the judgment seat would be an undue punishment for such non-disclosure as there may have been.

Against the above background let me pose the questions which arise.

1. Was there non-disclosure?

Having regard to the duty of the English Court to enforce awards under the New York Convention, there can be relatively few matters which would lead the Court not to give leave to serve out of the jurisdiction. But obviously if the award has been paid, or if it has been set aside by a competent authority of the country in which or under the law of which it was made, or if it had been accepted by the plaintiff that one of the reasons for non-enforcement under s. 5 of the 1975 Act would be applicable, such matters clearly should be disclosed.

What if, as in the present case, what is alleged is that in the affidavit supporting the application for leave to serve out there was reference to a decision of the Tunisian Court (i.e. not the Court where the award was made) giving leave to enforce the award but non-disclosure of the fact that that order had been reversed on appeal, and that there were decisions of the Tunisian Court which purported to affect the validity of the arbitration agreement? The context in which reference was made to the Tunisian Court decision was relied on by Mr. Burton, Q.C. and it is right to set it out in some detail.

Mr. Hallonen in his affidavit sworn June 3, 1993 states in par. 13 that —

> . . . this is an ex parte application under Order 11. I should . . . refer to certain matters which the Defendants may seek to raise in answer to the enforcement of the award as being grounds of a defence or defences under Section 5(2) and/or (3) of the 1975 Act.

Then in par. 14 he sets out the first aspect which he is seeking to draw to the attention of the Court which relates to his contention that the Tunisian authorities have sought to control the BFT by submitting the dispute with the plaintiffs to arbitration in Paris, had infringed Tunisian exchange control regulations. It is asserted that prosecutions brought in relation to exchange control were an attempt by the Tunisian authorities to frustrate enforcement of the award and it is then said that no exchange control argument was raised before the French Court when ABCI applied for and obtained an order from the French Courts rendering the award enforceable in France. He then continues as follows:

> No attempt has been made by BFT (or any other Tunisian party) to challenge the order of the Paris court. The prosecution was only started after enforcement proceedings were subsequently instituted in Tunis and after ABCI obtained an order from the Tribunal de Premiere Instance de Tunis dated 24 September 1987 rendering the ICC award enforceable.

The second point to which he refers is the settlement agreement which he asserts was signed by him under duress on July 3, 1989. That settlement agreement, if it were valid, would have compromised the claim the subject of the award but, ABCI say that Dr. Bouden signed that settlement agreement under duress.

Nowhere is there mention that the Tunisian Court in fact reversed the order referred to. Nor is there any reference to the other proceedings taken which purported to invalidate the agreement to arbitrate.

There is no question that if those matters had been referred to it would have been asserted by Mr. Hallonen that the proceedings themselves were part of the campaign being waged against Dr. Bouden by the Tunisian authorities.

However, in the same way as the settlement agreement was referred to and then explained, it seems to me impossible not to conclude that reference to the adverse decisions of the Tunisian Court should have been referred to, even if explained. I would thus conclude that there was non-disclosure.

Was the non-disclosure deliberate and in bad faith?

The answer to this question is very much bound up with the answer to the next question. In one sense the non-disclosure was deliberate in that Dr. Bouden from whom Mr. Hallonen was receiving all his information, did know that an appellant Court had reversed the decision on enforcement, but I do not believe that there was dishonesty in the sense of a deliberate attempt to keep back a matter which it was appreciated might make a difference to the Court's exercise of its discretion. The reason for that will appear from what I say below.

Would disclosure have made any difference to the granting of leave ex parte?

Dr. Bouden and ABCI's case is that from about October, 1988 until the end of 1991 the authorities in Tunisia (including STB, a shareholder in BFT and a state owned organization), had been using all means, including grossly improper means, to get Dr. Bouden and ABCI to abandon the award. Those means included, according to Dr. Bouden, prosecuting him for exchange control offences and persuading the Court to act as an arm of the state. As a result of the pressure put upon him, Dr. Bouden alleges that he was forced to sign certain documents in June and July, 1989, to which I have already referred as the settlement agreement. As part of the improper pressure, Dr. Bouden alleges, as I have already indicated, that the Courts in Tunisia were prevailed upon to make orders in favour of BFT including the making of the decisions which it is alleged should have been disclosed in Mr. Hallonen's affidavit. I am not going to go into the detail of the allegations made. They are set out in extenso in the chronology put in by ABCI. The allegations are extremely serious and they are denied by BFT.

Suffice it to say that if disclosure had been made of the decisions adverse to ABCI and Dr. Bouden, they would have been made in the context of the above allegations, and as in the affidavits before the Court now, it would have been asserted that the decisions formed part and parcel of the 1988–1992 campaign of duress and intimidation.

As I see it in the context of there being an award that had not been annulled in the country where it had been issued, and where it was being contended by ABCI that there was every reason why it should be entitled still to enforce that award, I cannot see that the disclosure would have affected my mind or the mind of any Judge in relation to granting leave.

Should leave be set aside?

It is important to emphasize the duty of disclosure. That duty, as appears from the passage in the judgment of Mr. Justice Hobhouse as I have already quoted, applies on any ex parte application. The Judge who has to deal with an ex parte application is dependant on points which should be drawn to his attention being so drawn clearly. There should be no thought in the mind of those preparing affidavits that provided that somewhere in the exhibits or in the affidavit a point of materiality can be discerned, that is good enough. Some of the submissions of Mr. Burton, Q.C. for ABCI, seemed to me to be so suggesting. As part of the need to

emphasise the duty it may be necessary to set aside orders to penalise those guilty, but in my view in this case the punishment that would in fact be inflicted on ABCI would be out of proportion to the offence. If there were a risk that proceedings could not be re-started because of limitation, it would seem to me that that would be too severe a punishment having regard to the fact that if there had been disclosure, it would not have made any difference to the Judge who had to deal with the ex parte application.

In those circumstances, albeit there was non-disclosure, it seems to me that it would not be right to set aside leave on that ground.

Forum non conveniens

This point taken by BFT seems to me to be misconceived. What is at issue here is whether a French award should be enforced in England; there cannot be any forum in which that can be debated other than in the English Court.

The only question as it seems to me is whether the English Court might stay proceedings pending the resolution in some other jurisdiction of matters referred to in s. 5(2). In considering that question various points arise. The first is whether the Court of its own motion should consider a stay. BFT have made clear that they would not apply for a stay and obviously ABCI do not do so. The second question which was not much debated before me would be whether the Court would only have the power to stay if an application was being made as per s. 5(2)(f) which is expressly referred to in s. 5(5) or whether if proceedings were contemplated in some other jurisdiction which could affect the decision on any of the matters (a) to (e), in those circumstances also there would be a power to stay. This latter point does not I think really arise in this case because I do not understand BFT to be seeking a stay as opposed to the setting aside of service, but it adds emphasis to the point that I have already made on forum conveniens, that in my view, on a natural reading of s. 5(5) there is no power in the Court even to stay save where an application has been made as contemplated by s. 5(2)(f). This is not inconsistent with the judgment of Mr. Justice Potter in *Far Eastern Shipping Co. v. AKP Sovcomflot* [1995] 1 Lloyd's Rep. 520, indeed I think the language of his judgment at p. 524 shows he took a similar view.

It does however seem to me that the Court does have the power to consider of its own motion whether there should be a stay while an application is being made in France to set aside the award, and that follows again from the language of the section and is consistent with the Court being entitled to consider whether its time should be taken up with other matters while the s. 5(2) application is pending. Having not heard argument on this point from either side, it would not be right for me to rule one way or the other, and it may be that in any event, having regard to the fact that any decision in France might be appealed and that a stay here would unfairly prejudice the parties so far as time is concerned, that in any event no stay should be ordered. I would however like to have further assistance on this matter before finally concluding that a stay, while the application to the French Court is pending, would not be conducive to the saving of costs.

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Before dealing with what would appear to be the technical points over service and validity of the writ, I would propose to deal with the question whether this is a case where leave to serve the proceedings out of the jurisdiction could ever be given.

Is the claim within Order 11?

The application relied on O. 11, r. 1(1)(d)(i), (iii), (iv) and (f).

The claim made in this action is for damages for fraudulent misrepresentations made in the 1980 accounts inducing ABCI to enter into a contract to purchase shares in BFT, thereby, as they allege, being induced to pay 2,500,000 Tunisian Dinars which sum was transferred to BFT on July 24, 1982. It is further alleged that when the shares were transferred to ABCI they were worthless.

As it seems to me on the plain language of O. 11, r. 1(1)(d) the claim is not brought to—

> . . . enforce, rescind, dissolve, annul or otherwise affect a contract, or [be] is brought to] recover damages or obtain other relief in respect of the breach of a contract . . .

If ABCI are to bring the claim within O. 11 at all, it has to be in reliance on O. 11, r. 1(1)(f).

The question to be considered accordingly is whether the claim is founded on a tort either "where the damage was sustained within the jurisdiction" or which "resulted from an act committed within the jurisdiction". In the affidavit in support of the application for leave to serve out Mr. Hallonen relied on the following assertions:

He asserted that—

> . . . on 17th November 1981 BFT by its chairman Mohamed Belhassen Riahi provided to ABCI a copy of its annual accounts for last year closed prior to the negotiations, 1980 translated into English . . . In those accounts the following representations were made by BFT . . . In paragraph 25(iv) he said as follows:
>
> Rule 1(f); ABCI's claim for fraudulent misrepresentations is founded on a tort and the damage, namely ABCI's entry into the contract of 2nd April 1982 and its payment of the 2,500,000 Tunisian dinars thereunder, resulted from a "substantial and efficacious act (see Dicey & Morris . . .) in the commission of the tort which act took place in England. That act was the making of the misrepresentation to ABCI who acted on it in London by being induced in London by the misrepresentation made by BFT to act as it did and by accepting in London BFT's contractual offer.

In the affidavit of Miss Christiansen dated Oct. 4, 1994 par. 18 she asserted—

> I am informed by Mr. Riahi, former chairman of BFT, and verily believe that the initial negotiations in relation to a proposed participation . . . took place in Paris. Thereafter any discussions took place in Tunisia.

She having stated clearly that Mr. Hallonen had not suggested that the alleged misrepresentation was made by a person in England or to any person in England. Dr. Bouden in his affidavit in reply dated May 3, 1995 par. 7, having in other paragraphs where he intended to state that things happened in London expressly so stated, simply said:

> On the 17th November 1981 I spoke to Mr. Riahi and he sent to me a copy of the 1980 balance sheet translated into English.

There was no challenge to the assertion that any handing over of the accounts had occurred in Tunisia. It is to be noted that later in that same affidavit in relation to the 1981 accounts, Dr. Bouden stated that on *June* 27, 1982 he received a copy of those accounts *in London*. That distinction is important. Miss Christiansen's retort to that affidavit and on this aspect so far as material is contained in par. 12, again asserting a handing over of the 1980 accounts in Tunis and asserting that so far as the 1981 accounts were concerned, Mr. Riahi was certain that he did not send those accounts to London.

After the hearing my attention was drawn finally to Dr. Bouden's affidavit dated Oct. 9, 1995 where he comments on par. 12 of Miss Christiansen's affidavit and in particular says at (iii):

> . . . Mr. Riahi was the only person from whom I would have received the English translation of accounts. I was spending most of my time in London . . . . There was nowhere else to which the accounts *could have been sent*. . . .

Finally I should emphasize that in the skeleton argument put in on behalf of ABCI, there is no suggestion that the 1980 accounts were sent to or received in London.

My conclusion on the evidence is that in that last affidavit Dr. Bouden is in fact referring to the 1981 accounts and not to the 1980 accounts. In any event having regard to the number of times the matter had been dealt with prior to that last affidavit without an assertion that the accounts had been received in London, I cannot conclude that there is any strong, or any case, made out that a representation by reference to the 1980 accounts was made in London.

The above is important because there must be borne in mind the words of Lord Justice Slade in *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. & Another*, [1990] 1 Q.B. 391 at p. 437 where he said:

> . . . But the defendants are, we think, right to insist that the acts to be considered must be those of the putative defendant, because the question at issue is whether the links between him and the English forum are such as to justify his being brought here to answer the plaintiffs' claim.

What (f) is concerned with is a wrongful act committed by a defendant within the jurisdiction or a wrongful act committed by a defendant outside the jurisdiction which inflicts damage within the jurisdiction. What is specifically not alleged here is that the defendants as it were aimed some conduct at a plaintiff within the jurisdiction inflicting damage on him there. That might have been the case if the accounts had been sent to London for the purpose of making representations seeking to induce ABCI to enter into a contract. So far as damage is concerned, ABCI have one difficulty which is that they were not actually in being at the time that they assert that the contract was being made. But, in any event there is little, if any, evidence about where their commercial heart was. On any view they paid money from an account in Switzerland and received shares in a Tunisian company. Thus, the position appears to be that, so far as BFT were concerned, quite fortuitously, ABCI through Dr. Bouden was in London acting on a representation made to them outside the jurisdiction resulting in the payment from a source outside the jurisdiction for worthless shares in yet another jurisdiction.

In my view, O. 11, r. 1(1)(f) was not designed to cover that situation.

Extensions of the validity of the writ

There is little dispute about the relevant dates. The cause of action accrued on Apr. 2, 1982. Limitation would have expired on Apr. 2, 1988 but for s. 32 of the Limitation Act. The writ was issued on Jan. 12, 1994 and, on the basis of s. 32, the limitation period would have expired at the earliest on Mar. 31, 1994. The writ was issued "not for service outside the jurisdiction" and thus expired on May 11, 1994. Leave to serve out was given on

July 7, 1994. If six months was the appropriate expiry period, that would expire on July 11, 1994. Also on July 7, 1994, an application was made to extend the validity of the writ until Sept. 11, 1994. It is of some interest that albeit both applications for leave to serve out and to extend the validity of the writ were made at the same time, the way the applications were made was (a) to seek leave to serve out and (b) then to assume on the application to extend validity that the writ had a "life" of six months, and (c) thus to present to the Court the application to extend validity as being an application being made *during* the period of validity of the writ. Orders granting leave to serve out and extending the validity until Sept. 11, 1994 were made by Mr. Justice Cresswell on July 7, 1994. The concurrent writ was issued on July, 12, 1994 and served on July 22, 1994.

At the time of the applications for leave to serve out of the jurisdiction and to extend validity, both the validity of the writ and the limitation period (at least very arguably) had expired.

The questions that arise are:

(a) Where a plaintiff has issued a writ "not for service out" and has allowed the four month period to expire, can he issue a concurrent writ without extending the validity of the original writ?

(b) If not, and if it is his intention thereafter also to apply for leave to serve out, what is the relevance of the fact that the defendant has already, at least arguably, an accrued limitation defence?

(c) If a concurrent writ for service out could be issued without extending the validity of the writ, what is the relevance of the fact that the four month period has been allowed to expire and/or the limitation period has been allowed to expire?

(d) Even if it could be said that the plaintiffs applied for an extension of validity within the life of the writ, have the plaintiffs shown good reason why there should be an extension in the light of the expiry of the limitation period?

I believe that the convenient starting point is to refer to the speech of Lord Brandon in the House of Lords in *The Mytre (No. 3)*, [1987] 2 Lloyd's Rep. 1 at p. 9, col. 1; [1987] A.C. 597 and the passages which identify the proper approach of the Court to the various situations that can exist at the time when parties apply to extend the validity of a writ.

> My Lords, there are three main categories of cases in which, on an application for extension of the validity of a writ, questions of limitation of action may arise, the first being cases in which the writ has been issued within the relevant period of limitation, that is to say the period applicable to the cause of action on which the claim made by the writ is founded, has expired. Category (1) cases are where the application for extension is made at a time when the writ is still valid and before the relevant period of limitation has expired. Category (2) cases are where the application for extension is made at a time when the writ is still valid but the relevant period of limitation has expired. Category (3) cases are where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired. In both category (1) cases and category (2) cases, it is still possible for the plaintiff (subject to any difficulties of service which there may be) to serve the writ before its validity expires, and, if he does so, the defendant will not be able to rely on a defence of limitation. In category (1) cases, but not category (2) cases, it is also possible for the plaintiff, before the original writ ceases to be valid, to issue a fresh writ which will remain valid for a further 12 months. In neither category (1) cases nor category (2) cases, therefore, can it properly be said that, at the time when the application for extension is made, a defendant who has not been served has an accrued right of limitation. In category (3) cases, however, it is not possible for the plaintiff to serve the writ effectively unless its validity is first retrospectively extended. In category (3) cases, therefore, it can properly be said that, at the time when the application for extension is made, a defendant on whom the writ has not been served has an accrued right of limitation.
>
> It would not be right, however, to regard the question whether, at the time of the application for extension, a defendant on whom a writ has not been served has an accrued right of limitation as the only relevant factor in relation to such extension. In cases of category (1) cases and category (2) cases, where there is no such accrued right, the effect of an extension may still enable a plaintiff to serve a writ, which was issued before the relevant period of limitation expired, more than 12 months after the expiry of that period. This necessarily involves a departure, in favour of a plaintiff, from the general rule on which a defendant is entitled to rely that a writ against him, if it is to be effective, must be issued before the relevant period of limitation has expired and must be served on him within 12 months of its issue.

Lord Brandon then deals with the many cases concerned with the previous rules and the then rules, and continues at p. 13, col. 1; p. 622 as follows:

> I think on the whole that it has been unhelpful to put the condition for extension as high as "exceptional circumstances," an expression which conveys to my mind at any rate a large degree of stringency. The old rule in force until 1962 referred to "any other good reason," and I think that the new rule should be interpreted as requiring "good reason" and no more.

The question then arises as to what kind of matters can properly be regarded as amounting to "good reason." The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the judge who deals either with an ex parte application by a plaintiff for the grant of an extension, or with an inter partes application by a defendant to set aside an extension previously granted ex parte.

Good reason is necessary for an extension in both category (2) cases and category (3) cases. But in category (3) cases the applicant for an extension has an extra difficulty to overcome, in that he must also give a satisfactory explanation for his failure to apply for extension before the validity of the writ expired.

As I see it, if there has to be, or is an application to extend the validity of the writ, the above principles should apply. Thus:

(i) if *before* issuing the concurrent writ in this case the plaintiffs had needed to apply to extend the validity of the writ already issued, they would seem to be in a category (3) situation; they would seem to have to show good reason why the validity should be extended and would seem to have the added burden of showing why they had allowed the 4 month period to expire before they made any application.

(ii) if the application to extend the validity of the writ was, (as the plaintiffs' solicitors were suggesting) within the period of validity i.e. six months (on the basis leave to serve out had been given) the plaintiffs would still be in a category (2) situation i.e. insofar as they were seeking an extension beyond six months, having to show good reason but without the added burden.

Since the decision in *The Mytre*, the rules have changed to provide for a different period of validity as between a writ to be served within the jurisdiction and a writ to be served out. This has led to conflicting views being expressed in this Court as to the proper construction of the rules, and it is to that that I turn next.

The decisions are, as I analyse them, to the following effect. First, Mr. Justice Mance in *Dong Wha Enterprise Co. Ltd. v. Crosmon Shipping Ltd.*, [1995] 1 Lloyd's Rep. 113 has disagreed with Mr. Justice Colman in *Saris v. Westminster Transports S.A. and Kestrel Marine Ltd.*, [1995] 1 Lloyd's Rep. 115. On Mr. Justice Colman's interpretation of O. 6, r. 8(1)(A), if a writ was issued not for service out and leave was then sought to issue and serve a concurrent writ, (in *Saris* within the four month period), the concurrent writ would simply have a four month life. He reached that conclusion on the wording of O. 6, r. 8(1)(A) which provides as follows:

> A concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

Mr. Justice Mance was unhappy about the apparent injustice that the above interpretation brought about in relation to a plaintiff who only sought leave to serve out *after* issue of a writ initially issued only for service within the jurisdiction. He however refused, following Mr. Justice Hobhouse in *The Jay Bola* (sup.), to accede to the submission that a writ had a six month life from the outset simply if it were clear that leave to serve out would be needed, but he held that the effect of obtaining leave to serve a concurrent writ out of the jurisdiction was to extend the validity of the original writ to six months, thus giving the concurrent writ a six month life also. However, as I understand it, the validity of the original writ was only extended so far as the particular defendant, (in respect of whom leave to serve out had been obtained), was concerned. Thus, the effect of an order giving leave to serve out a concurrent writ in respect of one defendant did not produce a situation in which defendants within the jurisdiction could be served with the original writ outside the period of four months.

It seems to me to be implicit in the ruling of Mr. Justice Mance that albeit the effect of giving leave to serve out was to extend the validity of the writ and to give a chance of defeating a limitation defence if the writ were served within six months, he did not consider limitation a material factor on the question whether leave to serve out should be given provided objectively leave to serve out was clearly required, and was something to which the plaintiff was entitled. That seemed to be the factual situation in *Dong Wha*. So he did not, as I see it, on an application for leave to serve out, put the plaintiffs in a category (2) situation, taking the view that the rules intended to give six months for service where leave to serve out was objectively required. I fully understand the logic of that position but enter the caveat that I for my part would think the position might be different if there could be any argument about whether objectively leave to serve out was required e.g. in relation to a defendant who was moving in and out of the jurisdiction of the English Court. In such a situation, it might well be relevant that the effect of granting leave to serve out would in fact defeat a limitation defence

available to a defendant if four months was the appropriate period of validity.

In *Dong Wha* Mr. Justice Mance recognized the wording of O. 6, r. 8(1)(A) as posing some difficulty, but he felt that he was not driven by that wording to come to anything other than what was seen to be a just solution where leave to serve out was being sought after issue of a writ. But he was dealing with a situation where the application to issue and serve a concurrent writ was in fact made within the four month period of validity of the original writ issued.

If the application for leave to serve out is made outside the four month period, there is a further rule which comes into play. By O. 6, r. 6(1), a concurrent writ can only be issued —

> . . . at the time when the original writ is issued or at any time thereafter *before the original writ ceases to be valid.* (my emphasis)

I ought to deal with the suggestion made by Mr. Justice Potter in *The Nova Scotia*, [1993] 1 Lloyd's Rep. 154 at p. 156 where Mr. Justice Potter expressed the following view:

> At the time of service upon Messrs. Hughes Hooker (the defendant's solicitors) the period of four months available for service of the writ within the jurisdiction has expired but there was still a short time available to Mr. Melbourne before the expiry of six months from the date of issue to seek and obtain leave under R.S.C., O. 11 and to serve the defendants out of the jurisdiction with the writ with such endorsement removed . . . .

Mr. Justice Mance also quoted the above passage in *Dong Wha* and seemed to contemplate the suggestion as a possibility within the inherent jurisdiction of the Court albeit he recognized that it was a very odd process.

The suggestion of Mr. Justice Potter appears to be that instead of applying to issue and serve a concurrent writ, a party might apply to amend the notation and seek leave to serve the actual writ out of the jurisdiction. The comment of Mr. Justice Potter also related to the period between four and six months, and if accurate, would seem to contemplate an ability to revitalize a writ which had originally a four month period of validity by such an application.

It is clear that the point was not fully argued in *The Nova Scotia* and was a comment made by Mr. Justice Potter in passing. As Mr. Justice Mance himself recognized, it also does not follow the practice actually adopted in, I believe, every case and certainly adopted in the case before me, of seeking leave to issue a concurrent writ. I would thus for my part discount the thought in the mind of any party that it is a procedure open to them. As I see it, if a writ is to be served out of the jurisdiction then *before it is issued*, leave is required (see O. 6, r. 7(1)). The rules then provide for the ability to issue a concurrent writ with such leave. I do not myself see room for the alternative procedure suggested. The reason that I have dealt with the point is that it could be said to be of relevance in the present context. As I read O. 6, r. 6(1), the plaintiffs had no right to issue a concurrent writ unless the validity of the existing writ had been extended prior to any application for leave to issue a concurrent writ for service out of the jurisdiction. Nor in my view had they any right to apply for leave to serve out without issuing such a concurrent writ.

Dong Wha was not dealing with the situation where the four month period had expired, and it does not seem to me a permissible extension of the reasoning of Mr. Justice Mance in *Dong Wha* to read O. 6, r. 6(1) as allowing a successful application for leave to issue a concurrent writ and serve the same out of the jurisdiction, as itself having extended the validity of the existing writ, with the effect of then being able to say that the application itself has been made within the period of validity of the original writ.

Even if, contrary to my own view, the procedure suggested by Mr. Justice Potter was [illegible], I would not think that there should be any difference in principle. The fact would remain that the validity of the writ would have expired and an application would be being made to the Court, the effect of which would be to be extending the validity of that writ at a time when a limitation defence was available. That too would, in my judgment, bring the application within category (3) of Lord Brandon's categories.

The view I have formed is I believe supported by the judgment of Mr. Justice Hobhouse (as he then was) in *The Jay Bola*. In that case what in fact happened was that Mr. Justice Hobhouse decided that it was right to look at the writ at the date of issue and ask oneself whether it was for service out or not. If leave were required, it was the granting of leave that would give the writ a six month life. But, in that case, what in fact happened was that the writ was issued against Ocean View (thought to be the owners) not for service out of the jurisdiction. Leave was in fact obtained to serve the writ out of the jurisdiction but that leave was set aside. There then, after the four month period of validity had expired, was an application to join Arnstel as the defendant in the writ. No leave was required to serve them out of the jurisdiction, and indeed, no application was made to serve them out of the jurisdiction. Thus, Mr. Justice Hobhouse held that the life of the writ, so far as Arnstel was concerned, had expired prior to an application being made to

join them in the action, and furthermore, the time limit under the Hague Rules had also expired by that time. Accordingly he held —

> . . . it follows that any right which the plaintiffs might have had to join Arnstel as a defendant named in the writ and serve them without obtaining first the leave of the Court had been lost by June 28 and accordingly that on July 19 the plaintiffs had to obtain an order which either expressly or implicitly extended the validity of the writ since it could not at that date be served upon Arnstel as a writ which was issued on Feb. 28. It could only be served upon Arnstel as a writ which had been originally issued on Feb. 28 and at some subsequent date whether directly or indirectly been the subject of some order of the Court which authorised its service on Arnstel outside the original period.

In *Dong Wha* Mr. Justice Mance was construing the rules to prevent what he could see would be an injustice. That may be so where the application is made within the four month period. I do not however see that in a case where a plaintiff has allowed the four month period to expire without applying to issue and serve a concurrent writ, or at least to extend the validity of the writ so as to allow him so to do, that there is any injustice on insisting that he shows good reasons (a) why he has not made an application for leave to serve out during the four month period, and (b) why he should now have the validity extended so that he can issue and serve such a writ albeit limitation has in all probability expired.

It may be that in providing reasons, difficulty in serving and late appreciation of the fact that leave to serve out was required would be relevant, but failure to appreciate the position within the four month period should, as it seems to me, never be easy to justify. The whole purpose of the change in the rules for shortening the periods for service, was to compel people to get on with the process of service. The fact that six months are given for service of a writ abroad does not mean that the party is entitled to wait four months before he considers whether or not he should apply for leave to serve out.

Now as to the facts of the case. As by now is clear, in my view the plaintiffs needed to obtain an extension to the validity of the writ in order to be entitled to issue a concurrent writ. First, what the plaintiffs' advisers did was to apply for leave to serve out without pointing up the fact that the validity of the writ had expired, and the difficulties they faced on the language of O. 6, r. 6(1). Second, they assumed in their application for an extension of the validity, that the writ had a six month life which on any view it could not have (even on the most charitable view) unless leave to serve out were obtained. Third, the fact that the limitation defence was available and/or would become available on expiry of the life of the writ, was not addressed fully and frankly.

The plaintiffs rely on a note put on the affidavit by Mr. Justice Cresswell indicating that he appreciated that he was being asked to differ from the views of Mr. Justice Colman in *Saris*. I do not think that helps the plaintiffs because the real point is, that in my view, an extension of the validity of the writ was necessary before leave to issue a concurrent writ could be given, or at least, (if my view were wrong) very arguably that was the position; that put, or very arguably put, the plaintiffs in a category (3) situation, and none of that was on any view made clear on the application before Mr. Justice Cresswell.

But let me assume that the plaintiffs had got their tackle in order and had made the correct application drawing attention to the relevant points, would they then have been entitled to an extension of the validity of the writ to allow for the issue of a concurrent writ?

The history must be borne in mind. The claim being made was one in fraud in relation to matters that took place in 1982. It was being contended that the earliest date at which that fraud could have been discovered was March, 1988. Albeit there was a substantial period of time in which the plaintiffs would assert they were under considerable difficulty in obtaining documents and information, they had held a conference with Counsel in April, 1993 and a further conference in October, 1993. At that latter conference, many documents, as I understand it, were produced, and following that conference, at which Counsel explained that firm evidence of fraud was needed before the same could be pleaded, the assistance of chartered accountants Halpern & Woolf was obtained. Halpern & Woolf produced a preliminary report on Nov. 26, 1993. That report was updated on Dec. 2, 1993 and that enabled Counsel to settle the generally indorsed writ which was issued on Jan. 12, 1994. That writ was in fact served upon Herbert Smith but they declined to accept service. That point seems to me to be of importance.

Then a further conference was held with Leading and Junior Counsel but only in March, 1994. The delay is not explained. At that stage Counsel suggested that some further documentation was necessary. Further documents were produced and forwarded to the accountants, and a supplemental report was produced on May 6, 1994, that being forwarded to Counsel on May 9, 1994.

The four month period of the writ expired on May 14, 1994. I cannot see any good reason why

there should have been the delay between January and March. If the writ could be served in January, why could not leave be applied for immediately on being told that Herbert Smith refused to accept service? Even if that were wrong, why was there no application either to extend the validity of the writ or to issue and serve a concurrent writ between May 6 and 14, 1994?

It follows that I can see no good reason why, (if an application had been made) the validity of the writ should have been extended so as to enable an application to be made for leave to issue and serve a concurrent writ out of the jurisdiction.

In any event, in this case there was in fact an application to extend the validity of the writ beyond the period of six months. On the construction of the rules that I favour, that was made after the validity of the writ had expired. Even if it could be argued that the Court should look more favourably on an application to extend the validity of the writ up to six months where it was linked to an application to issue and serve a concurrent writ out of the jurisdiction, and if it could be argued that that should be so even where the application was made *after* four months and even when limitation at that stage provided a defence, the argument cannot extend to looking favourably on an extension beyond six months. It does not seem to me that any of the reasons put forward by the plaintiffs could ever have justified an extension of the validity of the writ beyond six months and that is a conclusion that I would reach whether I considered the matter as if the validity had been allowed to expire at the time of the application, or whether I put myself in the position in which the plaintiffs' advisers purport to put themselves i.e. that the validity of the writ had not expired as at the date of application.

Finally I should say that even if the reasons put forward might have prima facie been good for allowing an extension of the writ, there was in my view such a serious failure to put the accurate picture in front of Mr. Justice Cresswell that on that ground, in any event, I would have set aside his orders.

In these circumstances, I set aside the orders extending validity of the writ and/or giving leave to issue and serve a concurrent writ out of the jurisdiction. I also set aside service of that concurrent writ.

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Oct. 23, 1995

MITSUBISHI HEAVY INDUSTRIES LTD.
v.
GULF BANK K.S.C.

Before His Honour Judge COLMAN

Banking — Counter indemnity — Guarantee and counter indemnity issued for supply of plant to Kuwait — Iraq invaded Kuwait and contract terminated — Bank claimed under counter indemnity — Whether bank entitled to call for deposit — Whether bank entitled to raise rate of commission — Whether bank entitled to charge interest on unpaid deposit — Whether bank entitled to block credit balance funds.

In March, 1989 Mitsubishi contracted with the Kuwaiti Ministry of Electricity and Water to supply and erect equipment for a power station in Kuwait. It was a term of the construction contract that Mitsubishi would provide the Ministry with an advance performance guarantee. In order to procure the issue of the guarantee Mitsubishi entered into a counter indemnity in favour of the bank. The counter indemnity provided *inter alia*:

> 2. In consideration of the agreement by the Bank to issue a Guarantee we hereby irrevocably and unconditionally agree to pay to the Bank on its first written demand an amount equal to and in the same currency as such sum paid out by the Bank under or in connection with a guarantee . . .
>
> 3. Fees
>
> On that date of issue of a guarantee and every six months thereafter we will pay to the Bank a commission at the rate of 0.4% pa of the actual outstanding amount under the Guarantee . . .
>
> 6. Events of Default
>
> If
>
> (i) We fail to pay any sum due from us hereunder at the time in the currency and in the manner specified herein; or
>
> (ii) any representation or statement made by us in this indemnity, any notice or other document, certificate or statements delivered by us pursuant hereto or in connection herewith is or proves to have been incorrect or misleading when made; or
>
> (iii) any of our indebtedness is not paid when due, any of our indebtedness is declared to be or otherwise becomes due and payable prior to its specified maturity or any of our creditors become entitled to declare any of our indebtedness due and payable prior to its specified maturity;
>
> then in such event, the Bank shall be under no obligation to issue any Guarantee and may by notice in writing require us to deposit with the Bank . . . an amount . . . equal to the outstanding amount of such Guarantee(s).
>
> 9. Payments
>
> All payments to be made by us shall be made either by debit to our account . . . with the Bank (the Bank being hereby irrevocably authorised by us to make such debit) or remittance to the Bank by us at our option . . .
>
> We will pay interest to you on any sum which we fail to pay on the due date . . .

On Aug. 2, 1990 Iraq invaded Kuwait and all further work on the power station ceased. On Apr. 27, 1991 the Kuwait government issued a *cabinet decision* to the effect that all government contracts were terminated as of Aug. 2, 1990. On Mar. 15, 1992 the Ministry informed Mitsubishi that the construction contract was terminated on Aug. 2, 1990.

On Apr. 28, 1992 Mitsubishi wrote a letter to the bank in which it was stated inter alia that as the contract and advance payment guarantee were automatically terminated and released on Aug. 2, 1990 the counter indemnity also ceased to be in full force and effect and the bank had no claim against Mitsubishi. The bank disputed this.

Mitsubishi maintained credit balances in certain accounts with the bank. On Sept. 21 the bank demanded immediate cash collateral in the full amount of the guarantee and raised the rate of commission under the counter indemnity from 0.04 per cent. to 1.5 per cent. from Oct. 1, 1993. The bank stated that as continuing security it had blocked all Mitsubishi accounts with the bank and no interest would be payable on the credit balances since Apr. 28, 1992. Pursuant to cl. 9 the bank debited Mitsubishi's account with interest on the amount of the unpaid collateral.

The issues for decision were whether the bank was entitled to demand that the value of the guarantee should be deposited pursuant to cl. 6(iii) and whether the bank was entitled to debit Mitsubishi's account with interest on the amount of the unpaid collateral.

Held, by Q.B. (Com. Ct.) (COLMAN, J.), that (1) the function of cl. 6 was clearly to protect the bank upon the happening of any event of default by releasing it from its obligation to issue a guarantee or if it had already issued a guarantee by providing it with additional security of a deposit for the performance of Mitsubishi indemnity obligations (*see p. 502, col. 2*);

(2) the assertion by Mitsubishi in the Apr. 28, 1992 letter that in consequence of the unenforceability of the construction contract and the guarantee, the counter indemnity had ceased to have effect was a direct challenge to the bank's right to be indemnified; in so challenging the enforceability of the counter indemnity Mitsubishi came clearly within the area of conduct against which it was the commercial purpose of cl. 6 to protect the bank (*see p. 503, col. 1*);

(3) the words "any representations or statement" in cl. 6(ii) were capable in their ordinary meaning of covering matters of law as well as matters of fact or mixed matters of fact and law; statements on such matters were as capable of being or proving to be "incorrect or misleading" as statements of fact; there was nothing in cl. 6(ii) intrinsically inconsistent with its

(1) ARAB BUSINESS CONSORTIUM INTERNATIONAL FINANCE AND INVESTMENT CO v BANQUE FRANCO-TUNISIENNE

ARAB BUSINESS CONSORTIUM INTERNATIONAL FINANCE AND INVESTMENT CO v BANQUE FRANCO-TUNISIENNE

COURT OF APPEAL (CIVIL DIVISION)

[1997] 1 Lloyd's Rep 531

HEARING-DATES: 8, 11 July 1996

11 July 1996

CATCHWORDS:

Arbitration -- Award -- Registration -- Application to set aside -- Plaintiff obtained arbitration award -- Award made enforceable as a judgment by French Court -- Judgment registered in England -- Whether judgment on an award excluded from provisions of Brussels Convention -- Whether registration should be set aside -- Civil Jurisdiction and Judgments Act, 1982.

Arbitration -- Award -- Enforcement -- Application to set aside -- Plaintiff obtained arbitration award -- Plaintiff sought to enforce award under the Arbitration Act, 1975 -- Allegations of non-disclosure -- Whether leave to serve out of jurisdiction should be set aside -- Whether France more appropriate forum.

Practice -- Writ -- Extension of validity -- Application to set aside -- Life of writ expired -- Whether plaintiff could issue a concurrent writ without extending validity of original writ -- Whether defendant could rely on limitation of time defence -- Whether orders granting leave to serve out and extending validity of writ should be set aside.

HEADNOTE:

The plaintiffs (ABCI) alleged they agreed by letter dated Apr 2, 1982 to buy 50 per cent of the shares in the defendants (BFT) for 2,500,000 Tunisian Dinars (US$4,139,082).

ABCI allege that despite payment of the agreed price there was a failure by BFT to transfer the shares only rectified in March, 1994 by which time the shares had dropped in value to about US$2,772,962.

ABCI commenced an arbitration in Paris claiming the difference and interest on that difference as from the date when the moneys had been paid over. In an award dated July 23, 1987 the ICC awarded ABCI US$3,260,061.47. By a judgment of the French Court dated Sept 3, 1987 the ICC award was made enforceable as a judgment of the Court.

In Action 192/94 ABCI sought to enforce in England its judgment made on the ICC award. On Apr 26, 1994 Master Foster registered the judgment of the French Court on ABCI's ex parte application pursuant to the Civil Jurisdiction and Judgments Act, 1982 which enacted the Brussels Convention.

BFT applied to set aside the registration. They submitted that the judgment was not registrable under the 1982 Act because that judgment concerned the enforcement of an arbitration award and art 1.4 of the Convention excluded arbitration.

On July 8, 1994 Master Chisholm rejected those submissions and declined to set aside the registration. BFT appealed.

In Action 1993 Folio No 933 ABCI sought to enforce the award itself. They obtained ex parte leave to serve those proceedings out of the jurisdiction.

BFT applied to set aside the leave contending that there were serious non-disclosures in the affidavit and that the appropriate course was to set aside the leave. BFT submitted that in the affidavit supporting the application for leave to serve out there was a reference to a decision of the Tunisian Court giving leave to enforce the award but not disclosure of the fact that the order had been reversed on appeal and that there were other proceedings taken which purported to invalidate the agreement to arbitrate. In the alternative BFT argued that the forum for trying out these matters was France where BFT had already commenced proceedings to annul the award.

In Action 1994 Folio 36 ABCI claimed against BFT in fraud. They alleged that prior to ABCI sending the letter dated Apr 2, 1982 which ABCI asserted "contained or evidenced" the contract, BFT supplied to ABCI BFT's annual accounts for the year 1980. It was alleged that these accounts contained fraudulent misrepresentations and that ABCI were entitled to damages assessed by reference to the purchase price paid for the shares. It was further alleged that the fraud was only discovered in March, 1988 and that the earliest date for expiry of the limitation period under English law was Mar 31, 1994.

The writ was issued on Jan 12, 1994, was marked "not for service outside the jurisdiction" and thus expired on May 11, 1994. Leave to serve out was given on July 7, 1994 and on the same day application was made to extend the validity of the writ until Sept 11, 1984.

BFT applied to set aside these orders the issues for decision being: (a) Where a plaintiff had issued a writ "not for service out" and had allowed the four month period to expire could he issue a concurrent writ without extending the validity of the original writ? (b) If not and if it was his intention thereafter also to apply for leave to serve out what was the relevance of the fact that the defendant had already an accrued limitation defence? (c) If a concurrent writ for service out could be issued without extending the validity of the writ, what was the relevance of the fact that the four month period had been allowed to expire and/or the limitation period had been allowed to expire? (d) Even if it could be said that the plaintiffs applied for an extension of validity within the life of the writ, had the plaintiff shown good reasons for such extension in the light of the expiry of the limitation period.

-- Held, QB (Com Ct) (WALLER, J), that (A) As to Action 192/94: there were cogent reasons why those agreeing terms of the Brussels Convention should exclude disputes between parties which were subject to arbitration and there were cogent reasons why enforcement of an award should have been agreed by parties to that Convention to have been left to be dealt with by other international Conventions including the New York Convention; registration of a judgment in a Court of a country where the award had taken place was one method of enforcement and there were cogent reasons why the parties to the Brussels Convention would agree to exclude such judgments from being enforceable under the Convention; the appeal from the Master would be allowed and registrations of the judgment under the 1982 Act refused.

(B) As to Action 1993 Folio 933; (1) on the evidence it was impossible not to conclude that reference to the adverse decisions of the Tunisian Court should have been referred to, even if explained and there was non-disclosure;

(2) where there had been an award that had not been annulled in the country where it had been issued and where it was being contended by ABCI that there was every reason why it should be entitled to enforce that award the disclosure

would not have affected the mind of any Judge in relation to granting leave;

(3) the duty of disclosure applied on any ex parte application and the Judge who had to deal with such application was dependent on points which should be drawn to his attention being so drawn clearly; the punishment that would in fact

be inflicted on ABCI would be out of proportion to the offence; if there were a risk that proceedings could not be restarted because of limitation it would appear that that would be too severe a punishment having regard to the fact that if there had been disclosure it would not have made any difference to the Judge who had to deal with the ex parte application; in these circumstances although there was non-disclosure it would not be right to set aside leave on that ground;

(4) as to forum conveniens what was at issue was whether a French award should be enforced in England and there could not be any forum in which that could be debated other than in the English Court.

(C) As to Action 1994 Folio 36: (1) what RSC, O 11, r 1(1)(f) was concerned with was a wrongful act committed by a defendant within the jurisdiction or a wrongful act committed by a defendant outside the jurisdiction which inflicted damage within the jurisdiction; what was specifically not alleged was that the defendants as it were aimed some conduct at the plaintiff within the jurisdiction inflicting damage on him there; the position appeared to be that ABCI was in London acting on a representation made to them outside the jurisdiction resulting in the payment from a source outside the jurisdiction for worthless shares in yet another jurisdiction; O 11, r 1(1)(f) was not designed to cover that situation;

(2) the plaintiff needed to obtain an extension to the validity of the writ in order to be entitled to issue a concurrent writ;

(3) if the plaintiffs had made the correct application they would not have been entitled to an extension of the validity of the writ to allow for the issue of a concurrent writ; there was no good reason for granting such extension;

(4) in this case there was in fact an application to extend the validity of the writ beyond the period of six months and that was made after the validity of the writ had expired; none of the reasons put forward by the plaintiffs could ever have justified an extension of the validity of the writ beyond six months and the orders extending such validity and/or giving leave to issue and serve a concurrent writ out of the jurisdiction would be set aside.

ABCI sought leave to appeal the issues for consideration being: (1) Did the claim by ABCI for damages for fraudulent misrepresentation fall within the scope of O 11, r 1(1)(d) or (1)(f)? (2) Did the validity of the writ issued on Jan 12, 1994 expire after four months on May 11, 1994 or was it capable of continuing to be valid for six months provided an application for leave to serve a concurrent writ out of the jurisdiction was made before July 11, 1994? (3) Could this Court interfere with the Judge's decision to set aside the extension of the validity of the writ? (4) Could this Court interfere with the Judge's decision that the order of July 7, 1994 should be set aside in any event on the ground of non-disclosure?

– Held, by CA (NEILL and POTTER, LJJ), that (1) it was for the Judge to evaluate the evidence; and it would be wrong for this Court to interfere with the Judge's decision (see p 536, col 1);

(2) it was not asserted that damage had been suffered within the jurisdiction; under O 11, r 1(1)(f) it was necessary to bear in mind that the central question was whether there was a link between the putative defendant and the English forum; there was no evidence before the Judge of any actual loss within the jurisdiction and the Judge was right in his conclusion (see p 536, col 2);

(3) this was not a claim to rescind or discharge a contract; the contract was made in 1982 and the claim could not have any material effect on it; the Judge's decision should be upheld on the basis that this was not a claim which could at any time have been brought into this country by means of an application to invoke the exceptional jurisdiction of the Court under O 11 (see p 537, col 1);

(4) it would not be appropriate on an application for leave to appeal to

express a concluded view as to the various interpretations which had been placed on O 6, r 8 (validity of the writ); the provisional view was that the Judge was correct in his conclusions as to the proper practice (see p 537, col 2);

(5) it was clear that the Judge had in mind in his judgment not only what he described as "difficulties on the language of O 6, r 6(1)" but also the failure to draw specific attention to the fact that a limitation defence was available and/or would become available on the expiry of the life of the writ; even if it had been concluded that the case had been brought within the provisions of O 11, there was an unwillingness to disturb the Judge's order; the application for leave to appeal would be refused (see p 539, cols 1 and 2).

CASES-REF-TO:

BP Exploration Ltd v Hunt, (CA) [1976] 1 Lloyd's Rep 471;
IP Metal Ltd v Ruote Oz SpA, (CA) [1994] 2 Lloyd's Rep 560;
Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc and Another, (CA) [1990] 1 QB 391;
Moore (DW) & Co Ltd v Ferrier, (CA) [1988] 1 WLR 267;
Myrto, The (No 3), (HL) [1987] 2 Lloyd's Rep 1; [1987] AC 597;
Nova Scotia, The [1993] 1 Lloyd's Rep 154;
Spiliada Maritime Corporation Ltd v Cansulex Ltd, (HL) [1987] 1 Lloyd's Rep 1; [1987] AC 460.

INTRODUCTION:

This was an application by the plaintiffs Arab Business Consortium International Finance and Investment Co (ABCI) for leave to appeal from the decision of Mr Justice Waller, ([1996] 1 Lloyd's Rep 485) granting the application of the defendants Banque Franco-Tunisienne to set aside the order made by Mr Justice Cresswell to extend the validity of the writ issued by the plaintiffs against the defendants.

COUNSEL:

Mr M Burton, QC and Mr Charles Haddon-Cave for the plaintiffs; Mr Joe Smouha for the defendants.

PANEL: NEILL, POTTER LJJ

JUDGMENTBY-1: NEILL LJ

JUDGMENT-1:

NEILL LJ: The plaintiff, Arab Business Consortium International Finance and Investment Co (ABCI) is a Cayman Islands company. The certificate of incorporation of ABCI was issued on May 18, 1982. At the time of its incorporation and until November, 1992 the chairman of ABCI was Dr Majid Bouden.

The defendant is Banque Franco-Tunisienne (BFT) a body incorporated in Tunisia and with its main office in Tunis.

On Jan 12, 1994 ABCI issued a writ in the Commercial Court against BFT claiming damages for fraudulent misrepresentation. At that stage no leave was sought to issue the writ for service out of the jurisdiction.

The writ was subsequently amended. It is sufficient to refer to the writ in its amended form.

It was alleged in the writ that fraudulent misrepresentations were made by BFT in its 1980 annual accounts, and that these misrepresentations consisted of --

. . . the deliberate understatement and/or misstatement of the state of indebtedness and nature and extent of the bad debts of BFT and of the deliberate under provision for bad debts in the 80 annual accounts.

It was said that these statements were made in order to conceal from ABCI and other potential investors the nature and extent of BFT's bad debts.

It was further alleged in the writ that these fraudulent misrepresentations were made in order to induce ABCI to enter into a contract with BFT for the purpose of shares in BFT. It was contended that ABCI was so induced and that a contract was made on or about Apr 2, 1982 contained in or evidenced by a letter from ABCI to BFT of Apr 2, 1982 and/or a subscription certificate dated Apr 2, 1982.

In part 1(d) of the writ it was alleged that these fraudulent misrepresentations were concealed from ABCI and were not known to ABCI and could not with reasonable diligence have been known until in or about March, 1988 at the "very earliest".

In June, 1994 ABCI applied to extend the validity of the writ until Sept 11, 1994 and also for leave to issue a concurrent writ against BFT and to serve the concurrent writ on BFT in Tunisia. On July 7, 1994 Mr Justice Cresswell made an order extending the validity of the writ until Sept 11 and giving leave for service of the concurrent writ in Tunisia.

On Oct 4, 1994 BFT issued a summons pursuant to O 12, r 8 to set aside the order made by Mr Justice Cresswell on July 7. By order dated Feb 15, 1996 (which was perfected on Feb 26, 1996) Mr Justice Waller granted BFT's application and set aside the order of July 7, 1994. In addition he set aside the service of the concurrent writ. The Judge's reasons for his order were set out in his judgment handed down on Dec 14, 1995. The Judge refused leave to appeal from his order. ABCI now seek leave to appeal. The Judge's decision is now reported: [1996] 1 Lloyd's Rep 485.

The issues which arise for consideration on this application can be listed as follows:

(1) Does the claim by ABCI for damages for fraudulent misrepresentation fall within the scope of O 11, r 1(1)(d) or (1)(f)?

(2) Did the validity of the writ issued on Jan 12, 1994 expire after four months on May 11, 1994 or was it capable of continuing to be valid for six months provided an application for leave to serve a concurrent writ out of the jurisdiction was made before July 11, 1994?

(3) Can this Court interfere with the Judge's decision to set aside the extension of the validity of the writ?

(4) Can this Court interfere with the Judge's decision that the order of July 4, 1994 should be set aside in any event on the ground of non-disclosure?

I propose to deal with these issues in turn. Before I do so, however, I should draw attention to a short passage in the speech of Lord Templeman in Spiliada Maritime Corporation Ltd v Cansulex Ltd, [1987] 1 Lloyd's Rep 1 at p 3, col 2; [1987] AC 460 at p 465 F:

> it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial Judge. Commercial Court Judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity . . . An appeal should be rare and the Appellate Court should be slow to interfere.

We were also referred to a passage in the judgment of Lord Justice Saville in IP Metal Ltd v Ruote Oz SpA, [1994] 2 Lloyd's Rep 560, where the Court of Appeal was concerned with the decision of a Judge in the Commercial Court that the contract was subject to a jurisdiction clause which fell within art 17 of the Brussels Convention (as amended) so that the English Court had exclusive jurisdiction. At p 566 Lord Justice Saville said:

> . . . It seems to me that in matters of this kind the Court of Appeal should be slow to grant leave to appeal, save where it is clearly arguable that the

Judge erred in failing to apply the appropriate principle. To do otherwise would be to encourage the tendency . . . for interlocutory matters of the present kind to be turned into lengthy and expensive trials on affidavit, in order to determine whether or not there should be a proper trial on proper materials in this country. To my mind such a tendency defeats the very object of the exercise, which is not to have a trial but to decide whether or not, in law and justice, a foreign party should be put to the expense and inconvenience of a trial in this country.

It is to be noted that in the IP Metal case part of the criticism of the Judge was that he had erred in his analysis of the facts: see p 565.

I come to the first issue.

Order 11

Order 11, r 1(1), so far as is material, provides:

. . . Service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun by the writ --

. . . (d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of a breach of a contract, being (in either case) a contract which -- (i) was made within the jurisdiction, or . . . (iii) is by its terms, or by implication governed by English law, or (iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of the contract . . .

(f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction.

The affidavit in support of the application for leave to serve BFT out of the jurisdiction at its registered office in Tunis was sworn by Mr J Hallonen on June 27, 1995. By then he had become chairman and managing director of ABCI.

In par 25 of his affidavit Mr Hallonen set out the reasons why it was contended that ABCI's claim fell within O 11. It is not necessary for me to refer to the first part of this paragraph because, at any rate at this stage, the issue as to jurisdiction under r 1(1)(d) is confined to a consideration of whether the claim by ABCI is one which "affects" the contract made on Apr 2, 1982. I should, however, read par (iv) of par 25. It is in these terms:

Rule 1F: ABCI's claim for fraudulent misrepresentations is founded on a tort and the damage, namely ABCI's entry into the contract of 2nd April 1982 and its payment of the 2,500,000 Tunisian Dinars thereunder, resulted from a "substantial and efficacious" act (see Dicey and Morris (12th Edn), vol I, page 342) in the commission of the tort which act took place in England. That act was the making of the misrepresentation to ABCI who acted on it in London by being induced in London by the misrepresentation made by BFT to act as it did and by accepting in London BFT's contractual offer.

The principal arguments advanced on behalf of ABCI were directed to r 1(1)(f). It will be convenient to repeat the words of r 1(1)(f).

The claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction.

Mr Burton, QC argued in the first place that the claim fell within the second limb of r 1(1)(f). The basis of Mr Burton's argument was his contention that the 1980 accounts had been sent to Dr Bouden and received by him in London. We were referred to the relevant evidence. I come to Dr Bouden's fourth affidavit and to pars 5, 6 and 7 of that affidavit at pp 58 and 59 of the core bundle.

5. During 1981 and 1982 I was based mainly in London operating essentially from an office and flat at 60 Park Lane, London W1. On 20th October I was

telephoned by Mr Mohammed Belhassen Riahi (who was then Chairman and Chief Executive Officer of BFT). He confirmed his offer to the group consisting of myself [and he identifies the other people]. I wrote to him that day from London confirming that we were interested but I still required certain financial information from him.

6. On the invitation of Mr Riahi I visited Tunisia during the 10th and 16th November 1981 and met a number of people including Mr Hassan Belkhodja . . . During the course of my meeting with Mr Belkhodja I learned that negotiations were taking place with a number of foreign banks but the Tunisians would prefer that a Company headed by a Tunisian native subscribed for shares in BFT rather than a foreign bank.

7. On the 17th November 19811 spoke to Mr Riahi and he sent me a copy of the 1980 balance sheet of BFT translated into English. [That wasexhibited]. During the course of the 18th/24th November 1 received a number of telephone calls from Mr Riahi in relation to the accounts. He told me the capital position of BFT was very good, that it was far better than the other banks in Tunisia, that it had very few bad debts, and that all loans were of good quality and were suitably secured.

I should also refer to par 12 of that affidavit which was in these terms:

On 27 June 1982 I received in London a copy of the 1981 accounts for BFT that had been translated into English.

The second affidavit to which we were referred was that of Miss Christiansen, the solicitor acting on behalf of the defendants. I read part of par 12 of her affidavit which is at p 69 of the core bundle. In par 12 she referred to information which she had received from Mr Riahi and she said she believed him. In sub-par (i) of the affidavit she said:

He [Mr Riahi] did not, at any time, telephone Mr Bouden in London. [Later she went on:]

(vi) Mr Riahi did speak with Mr Bouden on the telephone on 17th November 1981 and Mr Riahi did give Mr Bouden a copy of BFT's 1980 accounts translated into English under cover of a letter dated 17th November 1981. The letter was given to Mr Bouden by hand at BFT's offices in Tunis.

(vii) Mr Riahi did not telephone Mr Bouden in London during the week of 18th-24th November 1981.

(viii) Mr Riahi cannot recall if he sent an English translation of BFT's 1981 accounts to Mr Bouden. However, he is certain that if he did send the accounts, he did not send them to London. In any event, the 1980 and 1981 accounts were not translated into English specifically for ABCI and Mr Bouden.

The next document to which we were referred was a letter from Mr Riahi to Dr Bouden dated Nov 17, 1981. That is in bundle 1 at p 75. There is no address under the name of the addressee, so one cannot tell to where it was sent. It is headed "MB Hassen Riahi Chairman and Chief Executive", and the date is "Tunis, 17 November 1981". Under that is the addressee Mr Majid Bouden, and it reads:

Dear Sir,

Further to our telephone conversation today, we are sending you enclosed: -- The annual report of our Bank pursuant to the financial year 1980.

Then there is certain other information to which I need not refer. The letter is signed, and underneath is written "Banque Franco-Tunisienne" and the address in Tunis.

The next affidavit we were referred to was the fifth affidavit of Dr Bouden which was sworn on Oct 9, 1995 in which he commented on Miss Christiansen's fourth affidavit. I refer to a passage in that affidavit at p 124 in the core

bundle where Dr Bouden said this:

3.(iii) Mr Riahi was the only person from whom I would have received the English translation of accounts. I was spending most of my time in London.

Then he referred to an affidavit which he said supported that statement.

There was nowhere else to which the accounts could have been sent.

On the basis of that evidence it was submitted that the Judge should have concluded that Dr Bouden received the 1980 accounts in London. On his evidence, he was in Tunisia in 1981 only between Nov 10 and 16, so that it was to be inferred that he was back in London by the time the letter of Nov 17 reached him. It was to be noted that in the letter of Nov 17, it was said: "We are sending you . . . the annual report . . ." He stressed the word "sending".

The Judge dealt with this evidence at p 493 of the report of the judgment. He referred to par 25(iv) of Mr Hallonen's affidavit, to the passages to which I referred in Miss Christiansen's affidavit and to the two affidavits sworn by Dr Bouden. The Judge commented that there had been no challenge in Dr Bouden's fourth affidavit to the assertion that any handing over of the accounts had occurred in Tunisia. He also drew attention to the skeleton argument which had been put in on behalf of ABCI and took note of the fact that there was no suggestion in that document that the 1980 accounts were sent to or received in London.

The Judge then continued:

My conclusion on the evidence is that in that last affidavit [ie the affidavit of Oct 9, 1995 which I have described as the fifth affidavit] Dr Bouden is in fact referring to the 1981 accounts and not to the 1980 accounts. In any event having regard to the number of times the matter had been dealt with prior to that last affidavit without an assertion that the accounts had been received in London, I cannot conclude that there is any strong, or any case, made out that the representation by reference to the 1980 accounts was made in London.

The above is important because there must be borne in mind the words of Lord Justice Slade in Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc and Another, [1990] 1 QB 391 at p 437 where he said:

. . . But the defendants are, we think, right to insist that the acts to be considered must be those of the putative defendant, because the question at issue is whether the links between him and the English forum are such as to justify his being brought here to answer the plaintiff's claim.

What (f) is concerned with is a wrongful act committed by a defendant within the jurisdiction or a wrongful act committed by a defendant outside the jurisdiction which inflicts damage within the jurisdiction. What is specifically not alleged here is that the defendants as it were aimed some conduct at a plaintiff within the jurisdiction inflicting damage on him there. That might have been the case if the accounts had been sent to London for the purpose of making representations seeking to induce ABCI to enter into a contract.

I have considered Mr Burton's submissions on this part of the case but I have not been convinced by them. It was for the Judge to evaluate the evidence. In my view he was quite correct to take into account the words of Lord Justice Slade in Metall und Rohstoff, that --

. . . the question at issue is whether the links between the defendant and the English forum are such as to justify his being brought here to answer the plaintiff's claim.

I am satisfied that it would be wrong for this Court to interfere with the Judge's decision.

Mr Burton's alternative argument under r 1(1)(f) was to the effect that ABCI "sustained damage within the jurisdiction". It was argued that ABCI suffered loss either when the offer to sell the shares was accepted by the letter dated Apr 2, 1987 sent from London and ABCI became liable under the contract, or alternatively, when ABCI decided to confirm or adopt the share contract and thus to confirm and adopt the liability under the contract. This decision was reached at the ABCI board meeting on July 19, 1982 when it was also decided to send the purchase price.

Our attention was drawn to the judgment of the Court of Appeal in DW Moore & Co Ltd v Ferrier, [1988] 1 WLR 267 in support of the proposition that the loss was suffered at the time and at the place when the worthless contract was entered into or confirmed and adopted.

The Judge dealt with this matter in his judgment as follows:

So far as damage is concerned, ABCI have one difficulty which is that they were not actually in being at the time that they assert that the contract was being made. But, in any event there is little, if any, evidence about where their commercial heart was. On any view they paid money from an account in Switzerland and received shares in a Tunisian company. Thus, the position appears to be that, so far as BFT were concerned, quite fortuitously, ABCI through Dr Bouden was in London acting on a representation made to them outside the jurisdiction resulting in the payment from a source outside the jurisdiction for worthless shares in yet another jurisdiction. In my view, O 11, r (1)(1)(f) was not designed to cover that situation.

It may be noted that this alternative claim is based on the amendment to r 1(1)(f) which was introduced in 1987 to bring O 11 into conformity with the Brussels Convention: see art 5(3) of the Convention.

I agree with the Judge's conclusion on this point. It was not asserted in par 25(iv) of Mr Hallonen's affidavit that damage had been suffered within the jurisdiction. Furthermore, under this limb of O 11, r 1(1)(f) also it is necessary to bear in mind that the central question is whether there is a link between the putative defendant and the English forum. There was no evidence before the Judge of any actual loss within the jurisdiction. The money was paid from an account in Switzerland. Furthermore, I do not find any assistance in the decision in Moore v Ferrier which was concerned with the date of loss and not with any issue arising under O 11.

I would reject this alternative argument.

I come finally on this part of the case to the submission based on r 11(1)(d). It was argued that the claim "affected" the contract dated Apr 2, 1982.

We were referred by Counsel to a passage in the judgment of Mr Justice Kerr in BP Exploration Ltd v Hunt, [1976] 1 Lloyd's Rep 471 at p 476 where he said:

The words "or otherwise affect" are very wide; indeed almost as wide as they can be.

Mr Justice Kerr said this in the context of a claim for a declaration that a contract had been discharged by frustration. But it is to be noted that a little later in his judgment Mr Justice Kerr referred to the dictionary meaning of the verb "to affect" which he set out as being "to produce a material effect on something".

Mr Burton submitted that, if the claim for damages for fraudulent misrepresentation succeeded, the damages would be awarded on the basis that the contract had not been entered into and, accordingly, that the claim "affected" the contract. I cannot accept this argument. This is not a claim to rescind or discharge a contract. The contract was made in 1982. This claim cannot have any material effect on it.

In these circumstances I am satisfied that the Judge's decision should be upheld on the basis that, quite apart from any procedural difficulties, this was not a claim which could at any time have been brought in this country by means of an application to invoke the exceptional jurisdiction of the Court under O 11.

Nevertheless, I should make some reference to the other arguments which were addressed to us.

The validity of the writ

Our attention was drawn to a number of cases decided in the Commercial Court in which differing views have been expressed as to the meaning and effect of O 6, r 8. So far as is material O 6, r 8 provides:

(1) For the purposes of service, a writ (other than a concurrent writ) is valid in the first instance -- . . . (b) where leave to serve the writ out of the jurisdiction is required under Order 11 for 6 months (c) in any other case for 4 months beginning with the date of its issue.

(1A) A concurrent writ is valid in the first instance for the period of the validity of the original writ which is unexpired at the date of the issue of the concurrent writ.

In his judgment at p 495 the Judge referred to the conflicting decisions as to the proper construction of this rule. I do not propose to refer to these decisions in detail. I can, however, summarize the conclusions of the Judge which were to this effect:

(1) That where a writ has been issued marked not for service outside the jurisdiction it is not permissible to seek to amend the notation on the writ and then obtain leave to serve that writ out of the jurisdiction. In particular such a procedure could not be used to revitalize a writ which had originally had a four-month period of validity so as to convert it into a writ with a life of six months.

(2) That where the original writ has been issued marked not for service outside the jurisdiction, an application can be made for leave to issue and serve a concurrent writ outside the jurisdiction. But any application has to be made during the period of validity of the original writ because under the rules a concurrent writ is valid

. . . in the first instance for the period of validity of the original writ which is unexpired at the date of the issue of the concurrent writ.

(3) That where a plaintiff has allowed a four-month period to expire without applying to issue and serve a concurrent writ or at least to extend the validity of the writ so as to allow him so to do, he is required to show a good reason why he has not made an application for leave to serve out during the four-month period and why he should now have the validity extended.

I do not consider that it would be appropriate on an application for leave to appeal to express a concluded view as to the various interpretations which have been placed on O 6, r 8. Moreover, I understand that in the near future the wording of the rule is likely to be changed. It is, however, my provisional view that the Judge was correct in his conclusions as to the proper practice.

I turn therefore to the way in which the Judge dealt with the extension of time and the issue on non-disclosure. I can deal with them together but, before doing so, I should refer again to the fact that in par 1(d) of the writ it was asserted that it was only in or about March, 1988 at the earliest that ABCI discovered the fraud. If this date is right, it follows that there is at least a possibility that the expiry of the limitation period under English law would have been Mar 31, 1994, that is, in the period between the issue of the writ and the application which came before Mr Justice Cresswell on July 7, 1994.

Extension of time and non-disclosure

I can come next to the judgment at p 497 of the report where the Judge said this:

. . . in my view the plaintiffs needed to obtain extension to the validity of the writ in order to be entitled to issue a concurrent writ. First, what the plaintiffs' advisers did was to apply for leave to serve out without pointing up the fact that the validity of the writ had expired, and the difficulties they faced on the language of O 6, r 6(1).

Second, they assumed in their application for an extension of the validity, that the writ had a six-month life which on any view it could not have (even on the most charitable view) unless leave to serve out were obtained. Third, the fact that the limitation defence was available and/or would become available on expiry of the life of the writ, was not addressed fully and frankly.

The plaintiffs rely on a note put on the affidavit by Mr Justice Cresswell indicating that he appreciated that he was being asked to differ from the view of Mr Justice Colman in Saris. I do not think that helps the plaintiffs because the real point is, that in my view, an extension of the validity of the writ was necessary before leave to issue a concurrent writ could be given, or at least, (if my view were wrong) very arguably that was the position; that put, or very arguably put, the plaintiffs in a category (3) situation, and none of that was on any view made clear on the application before Mr Justice Cresswell.

I interpose to explain what the Judge meant by a category (3) situation. The words "a category (3) situation" were a reference to cases where the writ has expired and its validity has to be extended retrospectively: see the speech of Lord Brandon in the House of Lords in The Myrto (No 3), [1987] 2 Lloyd's Rep 1 at p 9, col 1; [1987] AC 597 at p 616C. The Judge continued:

But let me assume that the plaintiffs had got their tackle in order and had made the correct application drawing attention to the relevant points, would they then have been entitled to an extension of the validity of the writ to allow the issue of a concurrent writ?

The Judge then set out the history of the matter which I need not read. Then, having referred to the issue of the writ, he continued:

. . . a further conference was held with Leading Counsel and Junior Counsel but only in March, 1994. The delay is not explained. At that stage Counsel suggested that some further documentation was necessary. Further documents were produced and forwarded to the accountants, and a supplemental report was produced on May 6, 1994, that being forwarded to Counsel on May 9, 1994.

The four-month period of the writ expired on May 14, 1994. I cannot see any good reason why there should have been a delay between January and March. If the writ could be served in January, why could not leave be applied for immediately on being told that Herbert Smith refused to accept service? Even if that were wrong, why was there no application either to extend the validity of the writ or to issue and serve a concurrent writ between May 6 and 14, 1994?

It follows that I can see no good reason why (if an application had been made) the validity of the writ should have been extended so as to enable an application to be made for leave to issue and serve a concurrent writ out of the jurisdiction.

In any event, in this case there was in fact an application to extend the validity of the writ beyond the period of six months. On the construction of the rules that I favour, that was made after the validity of the writ had expired. Even if it could be argued that the Court should look more favourably on an application to extend the validity of the writ up to six months where it was linked to an application to issue and serve a concurrent writ out of the jurisdiction, and if it could be argued that that should be so even when the

application was made after four months and even when limitation at that stage provided a defence, the argument cannot extend to looking favourably on extension beyond six months. It does not seem to me that any of the reasons put forward by the plaintiffs could ever have justified an extension of the validity of the writ beyond six months and that is a conclusion that I would reach whether I considered the matter as if the validity had been allowed to expire at the time of the application, or whether I put myself in the position in which the plaintiffs' advisers purport to put themselves ie that the validity of the writ had not expired as at the date of application.

Finally I should say that even if the reasons put forward might have prima facie been good for allowing an extension of the writ, there was in my view such a serious failure to put the accurate picture in front of Mr Justice Cresswell that on that ground, in any event, I would have set aside his orders.

Counsel for ABCI drew our attention to three matters. First, he said that the Judge had been wrong about the report from the accountants. He said that the final report from the accountants was not produced until June 24, 1994; therefore the Judge was in error in this regard in stating that the last relevant report was received on May 9. Secondly, he said that the reason for the delay between January and March, 1994 was the fact that there had been a change of solicitors. Thirdly, he pointed to the fact that, as a matter of proper practice, it would not have been appropriate to serve the writ until Counsel were satisfied that the allegations brought were adequately supported by evidence. Until the final report came in, Counsel was not in a position to authorize the service of the writ. It seems to me, however, that, even if the decision by the Judge as to the extension depended in part at least on his belief that the last relevant report from the accountants was received by Counsel on May 9, whereas in fact the final report was not produced until June 24, there remains his conclusion on the failure to put an accurate picture in front of Mr Justice Cresswell. I have read the judgment again and I have cited passages from it. It seems to me quite clear that the Judge had in mind in that final paragraph not only what he described as "the difficulties on the language of O 6, r 6(1)" but also the failure to draw specific attention to the fact that a limitation defence was available and/or would become available on the expiry of the life of the writ.

In these circumstances, even if I had come to the conclusion that the case had been brought within the provisions of O 11, I would not have been willing to disturb the Judge's order.

Accordingly, for these reasons I would refuse the application.

JUDGMENTBY-2: POTTER LJ

JUDGMENT-2:

POTTER LJ: I agree. I would add only this: in relation to the issue raised but not decided as to the meaning and effect of O 6, r 8 reliance was placed by the appellants upon a passage in my own judgment in The Nova Scotia, [1993] 1 Lloyd's Rep 154. In that case, which did not involve the considerations of limitation with which Mr Justice Waller was faced in this case, in the course of narrating the facts at p 156, col 2, I made the remark adverted to by Mr Justice Waller at [1996] 1 Lloyd's Rep p 496 to the following effect:

At the time of service upon Messrs Hughes Hooker (the defendant's solicitors) the period of four months available for service of the writ within the jurisdiction had expired but there was still a short time available to Mr Melbourne before the expiry of six months from the date of the issue to seek and obtain leave under RSC O 11 and to serve the defendants out of the jurisdiction with the writ with such endorsements removed . . .

That was a suggestion made by one side in argument which was not the subject of further address or consideration; nor did the decision in The Nova Scotia focus or depend upon it. Further, I am satisfied that such a suggestion was contrary to the practice of the Writ Office, and the procedure mentioned was neither feasible nor appropriate at that time. In my view, Mr Justice Waller

was right to treat it as a procedure which was not open to the plaintiffs, and I share the provisional view expressed by Lord Justice Neill.

DISPOSITION:
Appeal dismissed with costs.

SOLICITORS:
Finers; Herbert Smith.