NO. S1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,*
R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT,*
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT
OF NEW WALTER ENERGY CANADA HOLDINGS, INC.,
NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP.,
NEW WILLOW CREEK COAL CORP., NEW WOLVERINE COAL CORP.
AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS

BOOK OF AUTHORITIES OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST (VOLUME 2)

CRAIG P. DENNIS, Q.C. &
JOHN SANDRELLI
DENTONS CANADA LLP
Barristers and Solicitors
20th Floor, 250 Howe Street
Vancouver, BC V6C 3R8
Tel: 604-687-4460
Fax: 604-683-5214

COUNSEL FOR THE UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

MARY I.A. BUTTERY &
H. LANCE WILLIAMS
DLA PIPER (CANADA) LLP
Suite 2800, Park Place
666 Burrard St
Vancouver, BC V6C 2Z7
Tel: 604-687-9444
Fax: 604-687-1612

COUNSEL FOR WALTER CANADA GROUP

MARC WASSERMAN, MARY PATERSON &
PATRICK RIESTERER
OSLER, HOSKIN & HARCOURT LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, ON M5X 1B8
Tel: 416-362-2111
Fax: 416-862-6666

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59	*Weldon v. Teck Metals Ltd.*, 2011 BCSC 489 at para. 32, aff'd 2012 BCCA 53
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102	A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws*, vol. 1, 15th ed. (London: Sweet & Maxwell, 2012) at 48-51 and 1528-1531
103	*Black's Law Dictionary*, 10th ed. (Toronto: Thomson Reuters, 2014) at 324, *sub verbo* "*comity*".
104	Canadian Bar Association Bankruptcy, Insolvency and Restructuring Law Section and Canadian Corporate Counsel Association, *Statutory Review of the Bankruptcy and Insolvency,* July 2014.
105	Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Toronto: LexisNexis, 2015) at 311
106	George Panagopoulos, *Restitution in Private International Law* (Oxford: Hard Publishing, 2000) at 31
107	*Halsbury's Laws of Canada,* 1st ed. (2016 Reissue) (Toronto, ON: LexisNexis, 2016) at 970-971, para. 269
108	*Halsbury's Laws of England, Conflict of Laws*, vol. 8(1), 4th ed. (Reissue) (London, UK: Butterworths, 1996) at 710, para. 980
109	Houlden and Morawetz, Bankruptcy and Insolvency Analysis, I§12, p. 958, N§1, p. 1243 (2016-2017 edition)
110	Industry Canada, *Corporate, Insolvency and Competition Law Policy: Statutory Review of the Bankruptcy and Insolvency Act and the Companies Creditors Arrangement Act*, Discussion Paper, 2014 at 28
111	Janet Walker, *Castel & Walker Canadian Conflict of Laws*, 6 ed., loose-leaf (consulted on 10 December 2016), (Toronto, ON: LexisNexis, 2005), vol 1, ch 3 at 3-1, vol 2, ch 30 at 30-1, vol. 2, ch 31 at 31-11 to 31-13 and vol. 2, ch 2 at 32-1 to 32-3
112	Joint legislative review task force of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals, *Report on the statutory review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, July 15, 2014 at 31
113	Lyle G. Harris, Q.C., *Discovery Practice in British Columbia*, 2nd ed. (2016 Update) (Vancouver: The Continuing Legal Education Society of British Columbia, 2004), ss. 2.1 and 3.1

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114	Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada* (Toronto: LexisNexis, 2014) at 376, 391-92, 400, and 1313
115	Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, (Toronto: Irwin Law, 2010) at 211, 216, 217, 233 and 275
116	TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford: Oxford University Press, 2004) at 71-72 at para 3.09, 3.10., and 76
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TAB 32

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Joshi v. Vien,
2003 BCSC 1772

Date: 20031125
Docket: S070548
Registry: New Westminster

Between:

Raman Joshi and Parveen Sudhir

Plaintiffs

And

Thi T. Vien and Ha Nhat Diem Nguyen

Defendants

Before: Master Nitikman

Reasons for Judgment

Counsel for Plaintiffs:	N.A. Mulholland
Counsel for Defendants:	J.M. Noble
Date and Place of Trial/Hearing:	November 6, 2003 New Westminster, BC

Nature of the Application

[1] The defendants seek an order extending the time to file and deliver the notice requiring trial by jury in the within proceeding.

[2] The underlying action is for personal injury following a motor vehicle accident on July 21, 2001. Liability has been admitted. A trial is scheduled for five days beginning December 6, 2004.

[3] The defendants say that the jury notice was inadvertently filed late. They say that the plaintiffs have not been prejudiced in any way by the late filing. Their counsel says that it was their intention from the outset to have a jury trial. Therefore, counsel submits, the defendants have met all of the legal requirements for obtaining the order they seek.

[4] Counsel cites a number of legal authorities in support of that submission.

Background

[5] The plaintiffs filed a notice of trial on June 5, 2003. The notice was delivered to the defendants enclosed in a letter dated June 7, 2003. June 7th was a Saturday.

[6] The relevant Rules of Court are sub rule 39(26) and Rule 3. Sub rule 39(26) states that the party desiring trial by jury may file the appropriate form of notice within 21 days after delivery of the notice of trial. The defendants do not deny that the jury notice was delivered outside the 21 day time limit proscribed by the Rules.

[7] Sub rule 3(2) gives the court discretion to extend or shorten time limits provided for in the Rules even if the application for the extension is made after the period of time has expired.

[8] Just how far outside the 21 days the notice of trial by jury was filed and served, is a question. Ms. Amanda Doyle, paralegal, in an affidavit in support of the application, deposes that the jury notice should have been filed on or before July 3, 2003.

[9] My own calculation of time as defined in the ***Interpretation Act***, suggests that, to comply with the Rules, the defendants would have needed to file and deliver the jury notice to the plaintiffs on or before June 30, 2003. Instead, the notice was filed on July 30, 2003 and delivered on July 31, 2003.

Discussion

[10] Defendants' counsel submits there are two significant pieces of evidence in support of the application: first, an I.C.B.C. Suit Report dated December 4, 2001, contains two indications that a jury trial was being contemplated from the outset. In the section of the report entitled "Instructions to Counsel", under the heading "Trial by Jury", the adjuster has checked the "yes" box (Exhibit A to Ms. Doyle's affidavit sworn November 5, 2003, filed November 6′ 2003); second, Exhibit B to the same affidavit is a photocopy of what Ms. Doyle refers to as "our three ring binder". The photo shows a black binder with what appears to be a white label on it. The label contains the hand written words "Jury Trial".

[11] I note two things: (1) there is nothing in the photo to identify the black background as a binder and (2) there is nothing that identifies the black background as a binder belonging to the within litigation.

The Authorities

[12] In ***Penner v. Great West Life Assurance Co.*** [2002] B.C.J. No. 1764, 2002 BCSC 1131, Justice Koenigsberg referred with approval to a decision of Master Brine in which he said there was no question that filing and serving a jury notice out of

time is a nullity and cannot be cured by the application of Rule 2 [sic].

[13] The party seeking to file a jury notice and deliver it outside the time limit imposed by Rule 39(26), must obtain leave of the court. The questions for the court to consider when hearing the application, are: (1) did the applicant have a clear intention or desire to have the action tried by a jury during the time allowed for filing a Jury Notice? (emphasis added); (2) was the failure to file and deliver the notice in time due to inadvertence or neglect on the part of the applicant or the solicitor?; (3) has the character of the action changed so materially that a jury trial is now clearly appropriate when it was not appropriate during the time allowed for filing a jury notice?; (4) have the parties consented to late filing?; (5) has the application been brought in a timely manner?

[14] In the case at bar, the defendants do not allege that the character of the action has undergone a material change as is contemplated by paragraph (3) above. There has been no consent, so paragraph (4) is not relevant. There is no dispute that the failure to file the jury notice on time was inadvertent: (2) above in not relevant. I will consider (1) and (5).

[15] In ***Lanci v. Marpole Transport Ltd.***, 2000 BCSC 1227; [2000] B.C.J. No. 1701 (Q.L.) (S.C.) the jury notice was filed and delivered about three years after the notice of trial. The court considered case authorities that stood for the principle that the party seeking to elect a jury trial after expiry of the period limited by the Rules, must satisfy the court either that the wish or intention to do so existed during the period so limited, or that it was prompted by a fundamental change in circumstances.

[16] As already noted, in the case at bar there is no allegation that there has been a fundamental change in circumstances to justify a late filing and delivery of a jury notice. Accordingly, this court must determine whether there is sufficient evidence that wish or intention to elect a trial by jury existed during the 21 day time period following delivery of the notice of trial. (See ***Ngai (Guardian ad litem of) v. Cho*** [2001] B.C.J. No.383, 2001 BCSC 333.)

[17] In ***Ngai***, Justice Neilsen considered the adequacy of the evidence presented in support of the defendant's position that the intention to have a jury trial was present during the period of time in which the jury notice would need to be filed. She concluded that the evidence was insufficient because it came from the plaintiff's legal secretary and

therefore did not establish the requisite intent to justify an extension of time. (See also ***Ehmig v. Lee*** [1994] B.C.J. No.364 (S.C.)(Master.)

Conclusion

[18] I find that the evidence on behalf of the defendants in the case at bar is insufficient to support an extension of time to file the jury notice.

[19] The evidence relied on is from a paralegal who deposes to personal knowledge of facts and matters, or fact and matters stated to be on information and belief. However, the body of the affidavit (#3) does not identify which statements are based on personal knowledge and which on information and belief. For example, paragraph 7 states: “The intention to proceed by way of jury trial never changed.”

[20] Did the paralegal have personal knowledge of that intention? If so, how did she come by that knowledge? If she was relying on information and belief, she should have said so. The source of the information is not identified. The statement is hearsay about a critical piece of evidence. It is evidence that goes to one of the tests that the applicants must meet, namely, was it their intention to proceed with a jury trial during the requisite period of time to file and deliver the jury notice? Where such a key piece of evidence

is involved, the court should not rely on information from an unidentified source. (See ***Ngai*** (supra).)

[21] Defendants' counsel submits that the evidence in support of the application overcomes the deficiencies in evidence noted in the case authorities. Counsel refers to the I.C.B.C. Suit Report where the adjuster has indicated "yes" to the jury trial question, and to the photo of something black with a label saying "Jury Trial".

[22] The Suit Report was prepared in December 2001. In my opinion, it says nothing about the defendants' intention between June 7, 2003 and June 29 or 30 or even July 3, 2003. It is between those dates that the intent must be established. Given my conclusions about Ms. Doyle's evidence on that point, I find that the requisite intention has not been established.

[23] Defendants' counsel refers as well to the labelled binder as evidence of intention in the requisite period. As I indicated above, that evidence also falls far short of establishing anything beyond what is shown: a black background and a label that says "Jury Trial".

[24] In view of my decision, it is not necessary to consider the issue of prejudice.

Decision

[25] The application is dismissed.

[26] Costs in the cause to the plaintiffs.

"Master S. Nitikman"

TAB 33

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *King v. Malakpour,*
2015 BCSC 2272

Date: 20151204
Docket: S157548
Registry: New Westminster

Between:

Oliver King

Plaintiff

And

Davar Malakpour and Maryam Nateghi

Defendants

Before: The Honourable Mr. Justice Crawford

Reasons for Judgment

The Plaintiff, Oliver King:	In Person
Counsel for Defendants:	D.K. Georgetti
Place and Date of Hearing:	New Westminster, B.C. August 26, 2015
Place and Date of Judgment:	New Westminster, B.C. December 4, 2015

Introduction

[1] Mr. King, by application dated August 11, 2015, seeks a judgment against the defendants for $122,000 being monies alleged to have been stolen from the plaintiff's account; for money obtained from the theft and sale of the Mr. King's belongings; and various other relief.

[2] The defendants seek to have the plaintiff's action dismissed with various alternative relief.

The Claim of Oliver King

[3] Mr. King's Notice of Civil Claim is dated December 30, 2013. That is significant because on December 12, 2013 Madam Justice Gropper handed down a judgment in an action by Mr. King against the Toronto Dominion Bank: *King v. TD Canada Trust*, 2013 BCSC 2283.

[4] That trial was heard on November 5 and 6, 2013.

[5] Her Ladyship said King alleged the Toronto Dominion Bank had honoured a cheque for $97,000 from his account which he alleged was contrary to his explicit written instructions to the TD bank, and the cheque was a forgery.

[6] Her ladyship found against Mr. King finding he failed to prove his allegations as to providing explicit written instructions.

[7] Soon after, Mr. King issued the Writ in this matter against Davar Malakpour (his brother) and Maryam Nateghi (his brother's wife).

[8] The claim (Tab 15 of Binder) alleges in the Statement of Facts as follows:

> Davar Malakpour and Maryam Nateghi broke in to my storage and stole what could be sold, stole my small safe whit my emergency money and stole my ID and ordered an used it to pick up cheques from my bank. Then Davar Malakpour forged my signature and took out 1000$, 1000$, 2000$, 97,000$, 2000$ and 1000$ out of my bank account. When i came back to Canada, I found out what had happened, then I confronted him. He said he sold my belongings for 46000$. I told him to get me back my belongings, where he said he will give me the money. The money was fronted to me from his car

> window in a envelop. Then I drove to a parking spot, opened it there was only 28000$. Later on I found out that he has illegally accessed my account, I found out where he lived, I confronted him, then he said, he will do anything to avoid paying me my money back. Then he abandoned his house for several month. However I have found out last week that he has rented it out but keeps his address there. Davar Malakpour has paid 28000$ back out of 46000, still owes 104000+ interests of cash money he took out of my account. I have found out from My oldest brother that they used the money to pay down payment for a Hino tow truck, Paid to upgrade there house, paid off Maryam Nateghis 30000$ credit debt, invited her parent to Canada and paid for whole trip and there living, purchased a house in Iran and started a marijuana grow up, which was busted by RCMP. Davar Malakpour is my older brother and Maryam Nateghi is his wife. Davar Malakpour has previously been convicted of cheque fraud in City of North Vancouver. He had left behind rest of the cheques in my belonging thinking I was going to be gone for long time, so he could access it for further use in future.

The Default Judgment

[9] In February 2014 Mr. King took default judgment against the defendants. That judgment did not come to the attention of the defendants until late 2014 at which time they applied to set aside the default judgment on the basis that no personal service of the claim had been affected on the defendants.

[10] In an oral judgment in April 2015 Madam Justice Devlin held after a trial on the issue that personal service of the claim had not had been affected on the defendants, she set aside the default judgment, and allowed Mr. King to keep the claim alive by serving the notice of claim. Mr. King did.

The Defendants' Response

[11] The defendants filed a Response (Tab 16). The principal defence to the allegation of theft of $97,000 is found in paras. 3 - 5:

> 3. The cheques that the plaintiff alleges were forged were written by the plaintiff. The major cheque, for $97,000.00, was given to Davar Malakpour for the purposes of paying back money that the plaintiff had borrowed, and also to buy land in Iran that Davar Malakpour was supposed to inherit from his father, Mr. King and Mr. Malakpour have the same father. In anticipation of old age, their father divided his land and allocated it to his children. Mr. King expressed an interest in buying Mr. Malakpour's portion, and Mr. Malakpour agreed. Their now-deceased father arranged the transfer of title, or the equivalent thereof.

> 4. The defendants deny any knowledge of any storage unit belonging to or leased by the defendant, and any knowledge of any goods or chattels therein contained.
>
> 5. The defendants deny any debt, contractual or otherwise, owing to the plaintiff. Although the defendants deny any debt or liability to the plaintiff, the plaintiff also did not seek repayment from the defendants before proceedings with this action.

The Application for Summary Judgment

[12] On July 31, 2015 the defendants brought an application seeking to have the action dismissed either on the face of the pleadings (*Supreme Court Civil Rules,* R. 9-5), by way of summary judgment and on consideration of the pleadings and affidavits (*Supreme Court Civil Rules,* R. 9-6); or summary trial (*Supreme Court Civil Rules,* R. 9-7), where the rule provides that on the hearing of a summary trial, judgment may be given in favour of any party on issue or generally unless the court is unable to find the facts necessary to decide the issues of fact or law or the Court is of the opinion that it would be unjust to decide the issues on the application. The matter proceeded under R. 9-7.

Mr. King's Affidavit

[13] Mr. King purported to file an affidavit in support of his application for judgment (Tab 13).

[14] I say purported because the first four pages recite portions of the *Canadian Charter of Rights and Freedoms* which have no application. There are no statements of facts relevant to the pleaded issues.

[15] Affidavits, as described in R. 22-2 (2) of the *Supreme Court Civil Rules*, require the name, address and occupation of the person swearing the affidavit, and must be divided into consecutively numbered paragraphs.

[16] Exhibits must be identified in the affidavit and marked as an exhibit to the affidavit: R. 22-2(8). The exhibit pages are to be numbered sequentially: R. 22-2(10). The content of an affidavit can only contain what a person would be allowed to state in evidence at trial: R. 22-2(12). If an affidavit contains statements on information or

belief then the source of information and belief must be given, and such information cannot be used if a party is seeking a final order: R. 22-2(13).

[17] Mr. King's affidavit has only one statement even close to being relevant and showed that he did receive compensation from a motor vehicle action in early 2010 the amount of $121,535.95 which he put it in his account in the TD Bank.

[18] He also provided a binder with a number of documents separated by eight tabs, none of which were identified as exhibits in any affidavit nor otherwise satisfy the *Rules'* evidentiary requirements.

The Evidence of the Defendants

[19] The defendants deny any claim as alleged by Mr. King.

[20] Particularly they deny that they had forged cheques or dealt with the contents of any storage locker. Pursuant to the *Rules* they have sought particulars of where the storage locker was and what the contents were. No response was made by Mr. King.

[21] Mr. Malakpour acknowledges cashing cheques signed by the plaintiff on July 17, 2010 of $1,000; on August 24, 2010 of $2,000; and on September 1, 2010 of $97,000.

[22] Mr. Malakpour says he came as a refugee from Iran in 1992. In 1993 his father told him and his seven siblings that he was going to divide his land and give the portions to his children in his lifetime. That intent is evidenced by a translated letter of instruction: Exhibit E.

[23] Mr. Malakpour says while he could not return to Iran, Mr. King intends to return to Iran and therefore they made an agreement whereby the father would transfer Mr. Malakpour's portion of the land to Mr. King.

[24] He says his father consented to the transfer and the plaintiff agreed to pay him $100,000.

[25] This report was corroborated by his brother Safa Malakpour, who swore an affidavit to the same (Tab 6).

[26] Safa Malakpour says that in 2009 he was party to a three-way teleconference with his brothers Davar and Hamid (Oliver King), that Hamid was having trouble with his immigration status in Canada while Davar was a refugee from Iran. He said they agreed Davar would sell his interest in the land to Hamid (now Mr. King) for approximately $100,000 and Hamid would obtain a double share of the land from father.

[27] He says he later spoke with his father and confirmed that Davar's interest in the land would be Hamid's. His father died not long after in 2010 or 2011.

[28] He adds that he witnessed Hamid (Mr. King) borrow approximately $20,000 from Davar by way of cheque in 2006.

[29] Mr. Davar Malakpour says that the transfer of the lands was made on January 29, 2009. A translated Farsi document evidences the transfer of land (Tab 4(f)).

[30] The transfer shows 449 square meters going to Hamid, which is consistent with him receiving Davar Malakpour's "share" of the father's land.

[31] Mr. Malakpour says his father passed away in 2011 or 2012.

[32] Mr. Malakpour further denies any knowledge about a locker or any contents being stolen by him.

[33] He says that he has loaned his brother tens of thousands of dollars and supported him in times of financial need, including when he was incarcerated in the United States, and has not been paid back.

[34] That was the evidence before me on the hearing on August 25, 2015.

[35] Mr. King had provided absolutely no affidavit material, i.e. sworn factual material, to support his claims. On the face of the documentation filed, I advised him I was obliged to dismiss his application for judgment.

[36] However, I raised to Mr. Malakpour his failure to say in his affidavit that he had Mr. King's consent to take the monies from Mr. King's bank account when Mr. King was in jail in the United States in September 2010.

[37] That flows from facts stated by Gropper J. said in *King* at paras. 6 and 7:

> [6] Shortly after April 6, 2010 he left for Iran and returned to Vancouver 17 days later.
>
> [7] On May 19, 2010 Mr. King entered the United States. He was immediately detained by Homeland Security and placed in a federal penitentiary. He was convicted of three charges and acquitted of the fourth. He was sentenced to 30 months imprisonment.

[38] And at para. 34:

> The reasons for sentencing in the United States District Court, Western District of Washington at Seattle were given on May 31, 2011 and clearly outline what Mr. King was charged with and convicted of.

[39] I adjourned the hearing generally so Mr. Malakpour might file an affidavit within 15 days. I allowed Mr. King a further 15 days to respond. I informed them that depending on the affidavits filed I might then render judgment.

Affidavit of Mr. Malakpour sworn September 1, 2015

[40] Mr. Malakpour says he was not paid by his brother for the transfer of his interest in his father's land in 2009. He said that Mr. King told him he had a pending insurance settlement and would pay him once he received his settlement.

[41] He says he could not recall the exact circumstance of how he obtained the cheques of July 17, 2010 of $1,000 and August 24, 2010 for $2,000.

[42] With respect to the cheque of September 1, 2010 of $97,000, he says that in the spring of 2010 Mr. King told him over the telephone he would be receiving a

cheque from him but not to deposit it until he knew the insurance settlement had cleared. He expected it would occur soon.

[43] Subsequently he received a cheque dated September 1, 2010 for $97,000 by regular mail, the cheque being post-dated.

[44] Then in late August 2010, Mr. King called him by telephone and said he was in jail in the United States and asked if he still had the cheque. He said he did, and Mr. King said to cash the cheque as soon as possible, which he did.

Affidavit of Mr. King sworn September 25, 2015

[45] Mr. King filed an affidavit on September 25, 2015. It does not deal with the specific issues in any particularity, let alone his brothers' evidence that he owed Davar Malakpour $100,000 for the land in Iran. It is simply a series of run on sentences putting forward unsubstantiated allegations of fact and argument.

[46] It does not deal in any way with the transfer of land for which Mr. Malakpour says the monies were paid.

[47] Mr. King argues s. 14 of the *Charter* was applicable in the proceeding of *King v. TD Canada Trust* (arguing his right to an interpreter and asserting that he is deaf and unable to understand English) and that accordingly the judgment of Gropper J. cannot be relied on. I do recall Mr. King at one stage saying he was hard of hearing but he partook in two half day hearings in front of me with no evident difficulties regarding his hearing.

[48] Otherwise he has typed some seven pages in essence alleging that he had the cheques for his bank account in his own care when he was incarcerated in the United States.

[49] He says Mr. Malakpour has committed a fraud. He puts forward a scenario that the defendants were heavily in debt, stole Mr. King's ID, and used it to obtain a book of cheques from the TD Canada Trust, then forged Mr. King's signature (the

initials “OK”) and successfully withdrew the monies from Mr. King’s account, knowing that he was incarcerated in the United States.

[50] He says his early release was a surprise to the defendants and, knowing he would seek to recover the monies they had defrauded him of, they went into hiding and avoided service of a Notice of Claim on them.

[51] He further alleges they broke into his storage. He provides a list of items which appear to be a number of very expensive suits totalling $72,000, two bicycles totalling $7,399, and eight rifle scopes of military quality over $30,000, or in round terms some $111,000. He says they admitted to him the break in and theft occurred and agreed to refund proceeds of $46,000, only paying $28,000 (this seems inconsistent with him not being in touch with them after his release from prison in August 2012 as earlier asserted).

[52] He further says that the defendants told him the money had been sent to Iran and that he went to Iran and then was told by Ms. Nateghi’s father that the money had been sent back to Canada.

[53] He says that on his arrival back in Canada, the defendants then told him they could rely on Gropper J.’s decision and would not pay him. He says all of their actions are fraudulent.

[54] He mentions evidence in the trial before Gropper J. but not found in the Reasons for Judgment. As well (with respect to the hearing before Devlin J. as to whether the Notice of Claim was served) he says that owner of Mirage Plumbing Ltd., Mr. Malakpour’s employer, told him that Mr. Malakpour’s pay stubs were fake, and thus the affidavit provided to the Court in the hearing regarding service of the claim (regarding the whereabouts of Mr. Malakpour when he was allegedly served) was false. There is no affidavit from the employer.

[55] None of this is helpful with respect to the central issue before me, which in effect is Mr. Malakpour’s assertion that the payment to him was for the transfer of his interest in his father’s lands in Iran to Mr. King.

Mr. King's Conduct during the Proceedings

[56] Beyond the unresponsiveness of Mr. King's affidavits, I note also Mr. King failed to respond to the defendant's demand for particulars regarding the alleged theft of the contents of his storage locker. He is not represented by counsel. He suggested he is entitled to call himself "Doctor", but professes no understanding of the *Rules of Court*. On the other hand he has been in the civil justice process for well over two years and has had several judges remonstrate with him about his failure to abide by the *Rules* which he now ignores at his own risk.

Discussion

[57] Mr. Malakpour admits he received the monies from Mr. King's bank account in 2010.

[58] He says that was for payment of the land transfer in Iran in 2009.

[59] If that was a fraud committed on Mr. King, he suggests he logically should have sued Mr. Malakpour when he returned to Canada in or about August 2012.

[60] In the action Mr. King brought against the TD, Gropper J. found that nine cheques were paid out of Mr. King's bank account, all with the name Dr. Oliver King printed on them. They were paid to his brother, his sister and his lawyer at the time. Then on his return to Canada in August 2012, two further cheques were written by Mr. King, on October 9th, and October 31st. In September 2012 he was paid $28,000 by a certified cheque from Mr. Malakpour.

[61] In mid-2013 he sued the TD Bank alleging negligence by the bank in the administration of his account.

[62] When he lost that action, he sued his brother.

[63] It is difficult to understand why Mr. King would have sued the TD Bank alleging the forgeries. Alleging as he does that his brother stole money from his bank account, i.e. theft, then Mr. King should have sued Mr. Malakpour directly.

[64] As well one would think he would have gone to the police to complain of the criminal activity, both with regard to the stolen chattels worth some $110,000 according to his list, and the $100,000 taken from his bank account.

[65] Nor do I understand why he would have gone to Iran in search of the "stolen money" if he says his brother is the culprit but has no interest in going to Iran.

[66] I take from a recent judgment of Dardi J. in *Lougheed v. Wilson*, 2014 BCSC 2073:

> [81] The seminal decision of the British Columbia Court of Appeal in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd*. (1989), 36 B.C.L.R. (2d) 202 (C.A.) identified a number of factors a court ought to consider in determining whether it would be unjust to proceed summarily in a particular case. These factors include: the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, and the course of the proceedings. These factors remain relevant in the current jurisprudence.
>
> [82] Since *Inspiration Management*, the issue of the appropriateness of the summary trial procedure has garnered considerable judicial attention. The modern judicial approach in this province endorses the consideration of additional factors when evaluating suitability. These factors were helpfully summarized by Gerow J. in *Dahl et al. v. Royal Bank of Canada et al*., 2005 BCSC 1263, (upheld on appeal 2006 BCCA 369) at para. 12:
>
> a) is the litigation extensive and will the summary trial take considerable time;
>
> b) is credibility a crucial factor – and have the deponents of the conflicting affidavits been cross examined;
>
> c) will the summary trial involve a substantial risk of wasting time and effort, and producing unnecessary complexity; and
>
> d) does the application result in litigating in slices. (see also: *Novin v. Novin*, [2004] B.C.J. No. 2082 (C.A.); *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138).

[67] Further guidance in the circumstances of this case is provided by the Court of Appeal in *0997900 B.C. Ltd. v. Askounis*, 2015 BCCA 458, where the Court reaffirmed *Inspiration Management* and stated the following with respect to summary trial applications involving allegations of fraud:

> [23] … Included in the appellants submission on the mode of trial is the contention that a full trial was required because their counterclaim included an allegation of fraudulent misrepresentation. This, in my view, is not a sufficient reason to require a full trial. The mere use of the electric word

> 'fraud' does not disqualify an action from summary trial - in determining a challenge to the mode of trial the question is always whether issues involved in the presentation of the case make the summary trial process unsuitable. The appellants, in my view, have not identified any area of evidence that would have advanced a viable claim in fraudulent misrepresentation requiring a full trial

[68] Gropper J. appears to have found Mr. King's credibility lacking which resulted in a special costs order against him. In this action I am unable to find any evidential basis for any judgment he seeks against the defendants. He does not dispute the central thesis put in evidence by two of his brothers that he purchased Mr. Davar Malakpour's interest in the family lands for $100,000, and authorised payment from his account in 2012. Rather he says that withdrawal was done without his knowledge. Yet he returned to Canada, used his account, was paid $28,000 by Mr. Malakpour, and almost a year later sued the TD bank for monies he now says his brother wrongfully took.

[69] As to the issue of the stolen belongings I note para. 12 from Gropper J.'s Reasons:

> Mr. King says he returned to Canada in August 2012. He located his belongings, which included the cheques on his account with "Dr. Oliver King" printed on them. He also received a certified cheque dated September 20, 2012 from Davar Malakpour in the amount of $28,000 which he deposited into his account at TD.

[70] This is at odds with his allegation that in his absence his brother broke in to his locker and stole and sold the contents. It might also be thought incongruous that if his brother had stolen his belongings, he would be paid back by certified cheque.

[71] As well he alleges his brother had been convicted but Mr. Malakpour produced a criminal record check stating he had no registered criminal conviction

[72] Also he avers his "oldest brother" told him how the defendants spent his money in rescuing their desperate financial situation, but no affidavit was filed that might support such allegation.

[73] A summary trial decision can be made when the court is satisfied it has sufficient facts to decide the matter, the process is adequate in the circumstances of

the case, and given the savings to the parties in terms of costs, and to the adjudicative process, the intent of speedy and inexpensive dispute resolution is achieved.

[74] This matter is not complex. Here, I am satisfied that the defendants have, on balance, proven the monies were paid from the plaintiff's bank account in satisfaction of a debt. As to the plaintiff's allegation the defendants broke in to his locker and stole and sold his belongings, I have no evidence of the allegation which is denied by the defendants.

[75] In sum, I dismiss the claims of the plaintiff. If ancillary relief is sought by the defendants and is specified in the application, it should be noted in the requisition filed with any proposed order. The defendants sought special costs, but given the summary disposition the defendants are entitled to their ordinary costs.

"The Honourable Mr. Justice Crawford"

TAB 34

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***L.M.U. v. R.L.U.,***
2004 BCSC 95

Date: 20040123
Docket: 02/1737
Registry: Victoria

Between:

L.M.U.

Plaintiff

And:

R.L.U.

Defendant

Before: The Honourable Mr. Justice Bouck

Reasons for Judgment

Counsel for the Plaintiff:	Dalmar F. Tracy
Counsel for the Defendant:	Robert C. Doell
Date and Place of Hearing:	20031217 Victoria, B.C.

INTRODUCTION

[1] This is a matrimonial dispute. The defendant alleges the parties settled their differences on 14 November 2003. He seeks an order staying these proceedings relying on sections 8 and 10 of the ***Law and Equity Act***, R.S.B.C. 1996, c. 253. He also asks that an order be made "in the terms of the settlement agreement reached between the parties on 14 November 2003." He abandoned his claim for relief under Rule 18A. The plaintiff says she never agreed to any settlement.

FACTS

[2] L.M.U. commenced these proceedings on 10 April 2002. The trial is set to take place on 12 January 2004. During the course of the litigation the parties exchanged many Offers and Withdrawals of Offers to Settle under Rule 37 of the Supreme Court Rules. According to plaintiff counsel's Outline there were a total of 13 such Offers and Withdrawals of Offers.

[3] On 7 November 2003, counsel for the plaintiff forwarded to counsel for the defendant a Rule 37 Offer titled "Plaintiff's Offer to Settle No.4." One of the terms of the offer was for the defendant to pay the plaintiff $350,000.00 at 4:00 p.m. on 19 November 2003. It read in part:

> 4. ... the defendant will cause to be paid to the Plaintiff's solicitor in trust, on or before 4:00 p.m. on November 19, 2003, $350,000.00 in cash, in full satisfaction of all the plaintiff's claims for an interest in and reapportionment of all family assets or other property not already divided between the parties.

[4] In a letter dated 14 November 2003, counsel for the defendant replied to that offer requesting an extension of time for payment of the $350,000.00 until 28 November 2003. It read in part:

> ... our client advises that he wishes to accept your client's Offer to Settle No.4 on the condition that payment of the $350,000.00 is made on or before November 28, 2003. R.L.U. advises that the bank requires ten working days in which to process the necessary documentation and provide him with the funds. Kindly advise if we have reached a settlement at your very earliest convenience so that we may advise the Trial Coordinator's office and prepare necessary documentation.

[5] By way of a reply letter dated 14 November 2003, counsel for the plaintiff agreed to the extension of time until 28 November 2003. It read in part:

> Further to your letter to me of today's date, L.M.U. will extend the deadline for payment of $350,000.00 to on or before 4:00 p.m. on 28 November 2003 on the condition that we will not speak to an Order finalizing this matter until the settlement funds are in your trust account and you have irrevocable instructions to deliver them to me forthwith, once the order is spoken to, and that no steps are taken to adjourn the trial until the Order is spoken to.

[6] On 17 November 2003, counsel for the plaintiff served on counsel for the defendant a Rule 37 Notice of Withdrawal of the Offer dated 7 November 2003.

ISSUES

[7] 1. Is the defendant entitled to an order staying the proceedings?

2. Did the parties reach a settlement agreement by the exchange of the above documents between 7 November 2003 and 14 November 2003?

ANALYSIS

1. The Order Staying Proceedings

[8] Section 8(2) of the ***Law and Equity Act*** reads:

> 8. (2) Nothing in this Act disables the court from directing a stay of proceedings in a cause or matter pending before it, if it thinks fit.

[9] The section allows a court to stay a proceeding either temporarily or permanently. Temporary stays often are granted by way of an adjournment order. In those instances courts usually adjourn a proceeding to a fixed date. Alternatively, they may adjourn it *sine die* which means to a date suitable to

one or both counsel. There does not appear to be any case law where a court permanently stayed a proceeding.

[10] In a memorandum to counsel dated 7 January 2004, I temporarily stayed the trial proceedings until delivery of these reasons.

[11] Counsel for the defendant wants a temporary stay order pending determination of whether the parties settled their differences by the exchange of documents. Therefore, this part of the motion must be treated as an interlocutory application rather than an application for a final order.

[12] On these applications and others of a similar nature, the parties seem to have considerable difficulty presenting affidavit evidence that complies with the Supreme Court Rules (the "Rules"). Counsel seldom raise these issues on any application. This judgment presents an opportunity to offer the parties and their counsel some guidance on procedural and evidentiary problems and suggest better alternatives. Case law dealing with procedure and evidence are notorious for the many distinctions they raise with respect to general principles. Therefore, I do not pretend that the following comments include all the case law concerning these matters.

a. Oral Hearsay Evidence

[13] At a trial, where a final order will dispose of the issues between the parties, a witness may give admissible evidence only. Subject to certain exceptions, hearsay evidence is not admissible. Few, if any, cases try to define the exact nature of hearsay because it may take many forms: ***R. v. Hawkins*** (1996), 111 C.C.C. (3d) 129 at 153. Sopinka, Lederman and Bryant, Second Edition, *The Law of Evidence in Canada*, at 173 helpfully offer this definition:

> Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceedings in which it is offered, are inadmissible if such statements are tendered either as proof of the truth or as proof of assertions implicit therein.

[14] There are three main reasons for excluding hearsay evidence. First, because the speaker was not under oath at the time he or she made the out-of-court statement. Second, because the party opposite in interest to the speaker was not present at the time to cross-examine the speaker. Third, because the trier of fact was not present to observe the demeanour of the speaker when the words were uttered: ***R. v. Hawkins*** (1996), 111 C.C.C. (3d) 129 at 153; ***R. v. Abbey*** 138 D.L.R. (3d) 202 at 216 (S.C.C.).

[15] On the other hand, a witness at trial may repeat an out-of-court statement for a relevant purpose other than for proof of the truth of the contents: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, Second Edition, page 177, paragraph 6.16. There are other exceptions to the admissibility of out-of-court statements at trial when the speaker does not testify. These include admissions by a party, dying declarations, declarations against interest and spontaneous declarations: Sopinka, *supra* at 189, paragraph 6.51. Exceptions also exist with respect to the admissibility of children's evidence in criminal sexual cases: ***R. v. Khan*** (1990), 59 C.C.C. (3d) 92 (S.C.C.).

[16] At a trial, witnesses testify under oath or affirmation. The trial judge rules on admissibility issues before the jury can hear any questioned evidence.

[17] The Rules govern interlocutory applications, including rules for presenting evidence and its admissibility. Rule 52(3) states that an "application" includes all proceedings that may be heard in chambers. Rule 44(3) requires a party to bring an interlocutory application by way of a motion. Rule 52(1) says that all interlocutory applications shall be heard and disposed of in chambers. The Rules do not define the word "chambers." Generally, it means a hearing without witnesses

conducted in an open courtroom where counsel and the judge do not gown.

[18] Subject to certain exceptions, evidence on an interlocutory application must be given by way of affidavit: Rule 52(8):

> 52 (8) On an application, evidence shall be given by affidavit, but the court may ...
>
> (e) permit other forms of evidence to be adduced.

[19] Rule 51(10) describes the nature of the affidavit evidence a deponent may repeat on an application. It reads:

> 51 (10) An affidavit may state only what a deponent would be permitted to state in evidence at trial, except that, if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made
>
> (a) in respect of an application for an interlocutory order, or
>
> (b) by leave of the court under Rule 40(52)(a) or 52(8)(e).

[20] Rule 40(52)(a) gives a judge the right to allow a party to prove a fact or document at a trial by a statement on oath of information and belief.

[21] Rule 52(8)(e) apparently means that on an application a court may admit different forms of evidence, apart from affidavit evidence. What other forms that evidence might take is not clear.

[22] Thus, Rule 51(10) allows a deponent to repeat any evidence the deponent would be permitted to give at a trial, if the deponent were called as a witness. A deponent would not be permitted to give hearsay evidence at trial because of its inherent unreliability. The Rules create an exception. They allow a deponent to swear or affirm in an affidavit the contents of an out-of-court statement made by a speaker to the deponent (the information) provided the deponent gives the speaker's name (the source). Failure of a deponent to name the source of the out-of-court statement may make the affidavit "worthless": ***Re: Young Manufacturing Co. Ltd.***, [1900] 2 Ch. 753 at 754–755 (C.A.); ***Scarr v. Gower*** (1956), 18 W.W.R. 184 at 188 (B.C.C.A.). When the purpose of introducing the statement is for the proof of its truth, deponents must swear or affirm that they believe the facts contained in the statement are true (the belief).

[23] From this analysis, it seems that any affidavit supporting an interlocutory application should be framed along the following lines where the purpose of the affidavit is to

prove the truth of the facts contained in an out-of-court statement made by another person to the deponent:

> On or about the ____ day of _____ 20___ at _____, B.C., Mr./Ms. _____ [e.g., source of out-of court statement] stated to me that: _____ [repeat contents of statement made by other person to deponent] and I believe the facts contained in the statement are true.

[24] Out-of court oral statements can be admitted where they are tendered for a relevant purpose other than the proof of the truth of the facts contained in the statement: Sopinka, at page 177, paragraph 6.16. For example, where the relevant purpose of introducing into evidence the out-of-court oral statement is only to prove the statement was made, the affidavit should be framed in these words:

> On or about the ___ day of _____ 20__ at _____, B.C., Mr./Ms. _____ [e.g., source of out-of court statement] stated to me that: _____ [recite contents of statement] and this statement is offered into evidence for the relevant purpose of _____ [e.g., explaining the subsequent conduct of the deponent, etc.].

b. Written Hearsay Evidence

[25] Rule 51(10) applies to both oral out-of-court statements and written out-of-court documents. Therefore, it is necessary to investigate the admissibility of written documents at a trial and their admissibility on an

application. Where the Rules mention the word “document”, it is defined under Rule 1(8).

[26] Written documents presented by a party at a trial do not become evidence unless the party offering them first proves them through a live person. That is because the document may be a forgery, or it may be incomplete, or it may not be an exact replica of the original document if it is a photocopy of the original, etc. Only a witness personally familiar with the document can testify to its authenticity. Therefore, the law does not allow a judge to order that documents be marked as exhibits at trial just because a party produces them for marking. Typically, a court will require evidence that the document was duly executed. This is proved by calling the person who prepared or authored the instrument. Proof of execution generally is required before proof of contents is allowed: Sopinka, *supra* at page 1023, paragraph 18.43.

[27] Some documents must be proved by showing that they were signed or written by the person who purports to have signed or written them. Other documents must be proved by tendering a correct copy of the original. Finally, there are documents that must be proved if they are tendered to establish the truth of the matters contained therein: Sopinka*, supra*, at page 1004, paragraph 18.3.

[28] After proof of authorship or execution, the extent to which the document is admissible to prove the truth of the facts stated therein depends on the nature of the statements contained in the document. Some statements may be admissible for this purpose and others may not: Sopinka, *supra*, at page 1026, paragraph 1851.

[29] There are exceptions to these rules under the ***Evidence Act***, R.S.B.C. 1996, c. 124, where documents may be admitted without calling a person to prove them. They include such things as "state documents," s. 25, "business records" if the proper foundation is laid: s. 42, etc.

[30] These are just a few of the requirements that parties must consider when presenting a document for admission at a trial. Of course, opposing parties may formally or informally admit the documents dispensing with their proof: Sopinka, *supra*, at page 1051, paragraphs 19.1 to 19.6.

[31] On interlocutory applications, deponents often swear or affirm to the authenticity of documents using these words:

> Attached hereto and marked Exhibit ____ ["A", "B", "C", etc.] to this my affidavit is _____ [e.g. a copy of a document dated ____ day of _____ 200_]."

[32] Just because documents are marked as exhibits to an affidavit does not convert them into admissible evidence, particularly where they are tendered for proof of their truth: ***Re: Koscot Interplanetary (U.K.) Ltd.***, [1972] 3 All ER 829 at 835, d to g Megarry J.

> For the purpose of inspection and copying, I readily accept that there is no distinction between including a statement in the affidavit and exhibiting to the affidavit a document containing the statement; but I greatly doubt whether there is any deemed inclusion of the exhibit in the affidavit for all purposes. ...
>
> It may also be that the documents might be admissible for some purpose other than establishing the truth of the statements contained in them. But for the purposes for which they were tendered, namely of establishing such truth, I hold them inadmissible.

[33] Nor will a statement in an affidavit deposing that the affiant has personal knowledge of written hearsay contained in the document have any weight, if on reading the material it seems improbable that the affiant had such first-hand information: ***Re: Koscot Interplanetary (U.K.) Ltd.***, *supra,* at 833-834.

[34] Rule 51(10) does not restrict itself to oral hearsay evidence. It deals with all types of evidence that a "deponent would be permitted to state at trial," if the deponent were a witness. From this discussion, it seems to

follow that written documents introduced by way of affidavit on an application are subject to rules similar to those that apply to oral out-of-court statements. Deponents may be able to swear or affirm to their belief of the truth of some statements in one part of a written document but not with respect to statements in another part.

[35] A deponent who is the author or signatory of a document or who has personal knowledge of its contents can depose to its authenticity. But a deponent who lacks this position or knowledge of an out-of-court document must necessarily depose to it on information and belief. On interlocutory applications, when these latter deponents mention a written document as an exhibit to their affidavits for the purpose of proving the truth of the words contained therein, they must assert that allegation. The preamble probably should contain words framed along the following lines:

> On the ___ day of _____ 20__ at _____, B.C., Mr./Ms. _____ [source] informed me that he/she is _____ [e.g., the author; signatory, etc.] of Exhibit __ (e.g., “A”, “B”, etc.) and I believe the facts contained in the document are true.

[36] This suggested preamble tries to follow the intention of Rule 51(10) that restricts the admissibility of evidence in an affidavit unless the “deponent would be permitted to state

that evidence at trial". For the reasons set out above documents generally cannot become evidence at trial unless a witness with personal knowledge of the document is called to prove it. Without the above preamble, a Chambers judge may find the document "worthless": ***Re: Young***, *supra*; ***Scarr v. Gower***, *supra*.

[37] Like an out-of-court oral statement an out-of-court written statement may be included in a deponent's affidavit if it has some other relevant purpose than the proof of the truth of its contents. In those circumstances, the preamble probably should contain words framed along the following lines:

> On the ___ day of _____ 20__ at _____, B.C., Mr./Ms. _____ [source] informed me that he/she is _____ [e.g., the author; signatory; etc.] of Exhibit __ (e.g., "A", "B", etc.) and I offer the document into evidence for the relevant purpose of proving _____ [e.g., the subsequent conduct of _____,etc.].

c. The Omnibus Preamble

[38] Frequently, deponents swear or affirm to the admissibility of hearsay evidence using these words:

> I have personal knowledge of the facts and matters hereinafter deposed to, save where stated to be on information and belief, in which case I verily believe the same to be true.

[39] This type of preamble does not make out-of-court oral or written statements admissible on an interlocutory application for proving the truth of the facts contained in the statements because it is inadequate for that purpose. Nor does it make out-of-court statements admissible for proving such things as the fact that the statement was made since it does not mention another relevant purpose for admitting the statement.

d. Personal Opinions and Scandalous Remarks

[40] Despite judicial warnings about these matters, deponents often include inadmissible personal opinions and scandalous comments about the character or actions of another person and derogatory statements about their behaviour. Sopinka*, supra*, pages 604-616, paragraphs 12.1 to 12.24 set out the limits the law places on the admissibility of opinion evidence coming from lay persons. In ***Creber v. Franklin*** (August 26, 1993), Vancouver Registry DO83222 at pp. 8-9, [1993] B.C.D. Civ. 1549-03 (S.C.), Spencer J. commented that affidavit deponents should state facts only. They should not add their descriptive opinions of the facts. Affidavits should not be "larded with adjectives" expressing opinions about the conduct of others. "Self-serving protestations of surprise, shock, disgust or other emotions claimed" by deponents are not helpful, even if they rarely might be admissible.

[41] These kinds of inadmissible gratuitous comments affect the weight given to the rest of the admissible affidavit material. They may also result in a cost penalty order to the offending party.

e. Affidavit Wars

[42] Experience and legal principle confirms that the best way to produce a just result on contested issues at trial is to follow a three-stage process. Stage one is the presentation of the plaintiff's evidence in chief and the cross-examination by the defendant. Stage two is the presentation of the defendant's evidence in chief and the cross-examination by the plaintiff. Stage three is the plaintiff's reply or rebuttal evidence and the cross-examination by the defendant. However, there are limits on the plaintiff's right to call reply evidence. Generally, "matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded"; Sopinka*, supra*, at 958, paragraph 16.154. In other words plaintiffs cannot hold back or "split their case" by leading evidence at trial that they should have anticipated would be necessary to counter any defence. If new evidence is allowed in reply the defendant cannot usually counter it except by leave of the court to offer what is called surrebuttal evidence.

[43] When presenting affidavit evidence on interlocutory applications, parties should follow this three-stage procedure because Rule 51(10) confines the admissibility of evidence to evidence that "a deponent would be permitted to state in evidence at trial." A deponent would not be permitted to testify a number of different times during the course of a trial.

[44] Unlike a trial, the application process does not give a Chambers judge the ability to regulate what affidavits are admissible as evidence in chief and what affidavits are admissible as evidence in reply. That may be one reason why parties often file a number of affidavits in no particular order. It may also occur because parties do not have the opportunity to cross-examine deponents as they could if the deponents gave evidence at a trial. Without that chance, the system more or less compels the parties to try to "even out the playing field" by filing counter-affidavit after counter-affidavit.

[45] On many interlocutory applications, the applicant and the respondent keep presenting affidavit evidence right up to the date of the hearing. Instead of the logical three-stage trial process, the application system becomes a confusing multi-stage process with both sides trying to get in the last word.

When that happens, the Chambers judge or master may dismiss the application or order a trial of the issue because there is insufficient time for the judge to sort out the competing facts and reach a just conclusion. Or, they may order a trial of an issue under Rule 52(11)(d). It reads:

> 52 (11) On an application the court may ...
>
> (d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.

[46] Alternatively, the court may refer the matter to the master, registrar or a special referee requesting that one of them conduct an oral hearing under Rule 32(1) and report back to the court with a report and recommendation: Rule 32(3).

[47] If a trial of an issue takes place before a judge under Rule 52(11), he or she can confine the oral evidence to the logical three-stage process. Hearsay would not be admissible. If the hearing occurs before a master, registrar or special referee it seems that they too can control the nature of the process in a similar manner: Rule 32.

f. Cross-Examination on Affidavits

[48] Under Rule 52(8)(a) a court may order a deponent to attend for cross-examination before a judge or another person. Rarely does the examination take place before a judge. If it happens at all, it may occur before a court reporter who produces a transcript. For the cross-examination to have any useful meaning, it should be done before the Chambers judge who hears the application. However, there is no administrative machinery in place to ensure this will happen.

[49] If an out-of-court cross-examination is held before a court reporter, a party may present the transcript of the examination to the Chambers judge at the application's hearing. In most instances, it will have little persuasive value. This is because the Chambers judge was not present to observe the deponent's demeanour when the cross-examination took place. A Chambers judge can seldom assess a deponent's credibility just by reading an affidavit or a copy of the cross-examination transcript.

[50] For these reasons few litigants request an order under Rule 52(8)(a).

g. Written Briefs

[51] Our Rules require an applicant and the respondent to file an “outline” following form 125: Rule 51A(12)(a). A copy of each outline must be included in the “chambers record”: Rule 51A(12)(c)(iii)(iv). That record is presented to the judge at the start of the hearing. Frequently, the outlines are around two pages in length. They tend to confine themselves to sketching in the nature of the applicant’s allegations and the respondent’s answer.

[52] Rule 51A(d)(ii) gives applicants a discretion as to whether they will include in the chambers record a “written argument”. The Rules do not require either party to include written argument in the chambers record or produce it at the hearing. Nor do they suggest a format such an argument might follow.

[53] One way that parties might avoid the cost and expense of a trial of an issue under Rule 52(11) or a hearing under Rule 32, would be for their counsel to present written argument in a form that summarizes the essence of the dispute into a brief. It should include the facts arising from the evidence, the issues, an analysis of the law and the applicable remedies. For a suggested form, see: *British Columbia Annual Practice* 2004, SC–667-668.

h. Conclusion

[54] The Lieutenant Governor in Council has the authority to enact and amend the Rules, not the judges: ***Court Rules Act***, R.S.B.C. 1996, c. 30, s. 1(1). That includes the power to legislate on the "means by which particular facts may be proved and the mode by which evidence may be given": s. 1(2)(b). Our Rules are based in large part on the English rules of 1883. Many parties and their counsel seem to have considerable difficulty complying with our evidentiary and procedural rules on interlocutory applications. When a system creates problems for the many, the fault usually lies with the system and not with the individuals who try to make it work.

[55] After more than 140 years, perhaps now may be the time for the Lieutenant Governor in Council to consider enacting modern rules of procedure that other progressive jurisdictions use in deciding interlocutory issues.

[56] On this interlocutory application, neither party complained about the admissibility of the oral or written attachments mentioned in the various affidavits of the other party. Counsel for the defendant agreed with the truth of the facts contained in the affidavit material that I relied upon. Those facts are the ones set out in the first part of this judgment. They are sufficient to grant interlocutory relief

in the form of a temporary stay of the action pending completion of the settlement agreement.

2. The Alleged Settlement Agreement

[57] The defendant submits that the 7 November 2003 Offer to Settle and the two letters of 14 November 2003 constitute a binding settlement of the dispute between the parties.

[58] As I understand him, counsel for the plaintiff contends that because the Offer to Settle of 7 November 2003 was put forward under Rule 37, all acceptances should have been made in compliance with that Rule. Hence, they have no legal effect. He argues that since the defendant did not pay the $350,000.00 on or before 17 November 2003, when the Notice of Withdrawal was delivered, the 7 November 2003 Offer to Settle lapsed.

[59] Alternatively, counsel for the plaintiff alleges that defence counsel’s letter of 14 November 2003 is not a contractual offer to accept because it only expresses the defendant’s “wish” to settle. Plaintiff’s counsel also submits that his letter of 14 November 2003 was not an acceptance of the offer because it did not expressly agree to the precise terms of defence counsel’s letter of the same date

and was only a “refinement” of the original Offer to Settle of 7 November 2003.

[60] The defendant asks that I find in his favour on three issues. First, that the parties entered into a binding settlement agreement on 14 November 2003. Second, that the plaintiff breached the agreement by failing to complete it according to its terms. Third, as a result of that breach he is entitled to an order compelling the plaintiff to specifically perform the agreement according to its terms. If I make those findings and grant the order, it will amount to a final order because it will dispose of all the issues in the action. In these circumstances, the law normally requires me to ignore any hearsay evidence and act only on evidence that would be admissible at a trial of this dispute.

[61] ***McKenzie v. McKenzie***, [1975] 4 W.W.R. 214 (Macfarlane J., B.C.S.C.); appeal dismissed; [1976] 5 W.W.R. 214 (B.C.C.A.) is authority for the proposition that where there is a dispute between the parties as to the settlement of an action, a party to the action may bring proceedings in the action by way of a motion and supporting affidavit material for the purpose of enforcing the settlement agreement. In other words, the party alleging the settlement agreement does not necessarily have to commence a separate action in order to enforce the agreement.

Macfarlane J. relied upon the case law interpreting the ***Laws Declaratory Act***, 1948 R.S.B.C., c. 179, s. 2(7), now s. 10 of the ***Law and Equity Act***.

[62] Section 10 of the ***Law and Equity Act*** gives a court the power to grant all reasonable remedies to which any of the parties may be entitled provided the order is within the court's jurisdiction. It reads:

> 10. *In the exercise of its jurisdiction* in a cause or matter before it, *the court must grant*, either absolutely or on reasonable conditions that to it seem just, all *remedies* that any of the parties may appear to be entitled to *in respect of any legal or equitable claim properly brought forward by them* in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.
>
> (italics mine)

[63] Like England, the British Columbia Legislature enacted s. 10 of the ***Law and Equity Act*** for the purposes of clarifying the law concerning "matters formerly within the Court of Chancery and its effect in relation to common law actions": ***McKenzie v. McKenzie***, *supra*, at 359. In the courts of equity a party could bring a summons to enforce a compromise of the original action, "provided no substantial question was raised

as to the terms, validity or enforcement of the settlement agreement": ***McKenzie v. McKenzie*** at 359.

[64] It seems to follow that a British Columbia court can enforce the alleged settlement agreement in these proceedings provided there are no substantial differences between the parties on the facts arising from the affidavits as to the terms, validity or enforcement of the agreement. Put another way, there must be no seriously contested issues of fact. Where there is that dispute then, the party who wishes to enforce the agreement should first seek a stay of the original action under s. 8(2). The stay order may be conditional on the applicant taking appropriate steps to enforce the agreement in a timely way.

[65] Upon receiving such a stay, the party attempting to uphold the agreement may either commence a separate action to enforce the agreement or bring a motion in the original action as was done here. Either way, it seems that a party must still get an order staying the original action.

[66] Where a party seeks to enforce the agreement by bringing an application in the original action, the party may rely on affidavit evidence: Rule 52(8). If it turns out there are seriously contested issues of fact contained in the affidavits, either party may then apply to the court for a

trial of the issue as to the agreement's enforceability: Rule 52(11)(d). It reads:

> 52 (11) On an application the court may ...
>
> (d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.

[67] For the purpose of a trial under Rule 52(11)(d) it may be necessary to amend the original pleadings in order to raise the issue of the settlement agreement. Discovery can then take place on that issue prior to the trial. This might help narrow the scope of the dispute.

[68] In ***McKenzie v, McKenzie***, *supra*, at page 360, "there (was) no question to be determined ... concerning the terms of settlement or regarding the validity or enforceability of the agreement." Thus, Macfarlane J. did not have to stay the original action, or order the trial of the issue regarding settlement, or compel the aggrieved party to commence an entirely new action.

[69] ***McKenzie v. McKenzie***, *supra,* cites ***Eden v. Nash*** (1878), 7 Ch. D. 781 (C.A.) in support of the proposition that courts of equity could enforce a settlement by way of a summons in

the action without compelling the parties to commence a separate action. In ***Eden v. Nash***, *supra,* the parties had conducted cross-examination on the affidavits. At page 786, the court said:

> If the Plaintiff had wished for a trial with a jury, I think that he should at an earlier stage have taken steps to obtain it if he could; but I say further that in this particular case had an application for a trial by jury been made even in an action brought for the purpose of enforcing the agreement, I should not have granted it. I think it is a case in which I should have refused it, considering the language of Order XXXVI, Rule 26.

[70] English rule Order XXXVI, Rule 26, gave a judge the right to deprive a party of a jury trial if it appeared "desirable." The court never mentioned whether it would have refused to hear the case if tried without a jury. It then went on to say that based on reading the affidavits and the cross-examination transcripts it preferred the evidence of the defendant over that of the plaintiff. However, suppose the affidavit and the cross-examination transcript are not that clear. Given those circumstances a court might now decline to make a finding and compel the dissatisfied party to commence an entirely new action. In that event, all the time and expense spent pursuing a remedy by way of an application would be wasted.

[71] The great era of legal reform in England occurred between 1833 and 1875: Holdsworth, *A History of English Law*, Vol. XV. By the ***Judicature Act*** 1873 (in force in 1875), Parliament gave equity courts and common law courts the right to grant either equitable or common law relief. British Columbia did the same thing in its ***Laws Declaratory Act***, *supra*, now the ***Law and Equity Act***, s. 10. More importantly, the rules of the equity courts and those of the common law courts were merged into a single code of civil procedure: Holdsworth, *supra*, Vol. XV pages 128-134. British Columbia adopted the 1875 English Rules as modified in 1883: Darrell W. Roberts; *The British Columbia Annual Practice* 1988, History of the Rules of Court, p. x.

[72] Arguably, the Rules only allow a court to make a final order where there are no seriously contested issues of fact. Two rules give a court jurisdiction to make a final order on affidavit evidence alone. They are: Rule 10 - Originating Applications and Rule 18A – Summary Trials. On a Rule 10 application, where there are seriously contested issues of fact, a court may order the petitioner to serve a statement of claim on the respondent and thereafter the dispute would proceed as an action: Rule 52(11)(d); ***Nordstrom v. Baumann*** (1962), S.C.R. 147 at 156. On a Rule 18A application where

there are also seriously contested issues of fact, a court may find the application unsuitable and order the matter proceed to trial in the ordinary way: ***Cannaday v. Todd Mountain Development Ltd*** (1998), 44 B.C.L.R. (3d) 236, paragraph [53], (C.A.).

[73] In other words, an application seeking a final order is self-contradictory because an application is designed to provide relief by way of an interim order, not a final order. As mentioned above, hearsay evidence is admissible by way of affidavit on an application but is not admissible at a hearing where a party seeks a final order. For these reasons, the defendant's motion for a final order may be outside the court's "jurisdiction" and "not properly brought" as required by s. 10 of the ***Law and Equity Act***, *supra*.

[74] Counsel did not argue these points. Additionally, higher authority allows a litigant to pursue a final order based on an alleged settlement by way of an application. Therefore, I do not intend to pursue the matter further.

[75] During the course of the hearing, I asked plaintiff's counsel to let me know what exhibits in the defendant's affidavit material he could not admit to as being true. He mentioned several documents and I removed them from my record.

Therefore, I assume the remaining material contains the truth. On this material, I found the facts set out above.

[76] A dispute remains between the parties as to whether there was an agreement and what its terms were. But the disagreement does not depend upon the credibility of witnesses. It just depends upon a reading of the Offer to Settle dated 7 November, the two letters dated 14 November 2003 and the application of those documents to the law.

[77] Courts try to uphold bargains wherever possible. After examining the evidence and the law, I am satisfied the parties agreed to settle their differences through exchanging the Offer to Settle and the two subsequent letters. Just because the plaintiff used a Rule 37 Offer to Settle in the first instance, does not mean the parties had to comply with Rule 37 before they could finally resolve the dispute. Besides, the acceptance of an offer under Rule 37 must be unconditional: Rule 37(15).

[78] The defendant accepted the Rule 37 offer conditionally in his counter-offer by requesting a new closing date of 28 November 2003. The plaintiff agreed to that request without insisting that the defendant use the Rule 37 process. In accepting the defendant’s counter-offer, the plaintiff waived her right to complain that her letter of 14 November 2003 was

not binding on her because it was not presented in the form required under Rule 37.

[79] Parties can arrive at a contract of settlement by using Rule 37 alone, by reaching an agreement outside the provisions of Rule 37 or, by a combination of the two processes: ***McKenzie v. Brooks***, 1999 BCCA 623, [1999] B.C.J. No. 2411 (C.A.):

> [24] ... Rule 37 can operate in tandem, or on a parallel track, with the usual informal procedures by which counsel daily seek to settle their cases ... the informal process operates on a "without prejudice" basis. ...
>
> [27] If both formal and informal offers are outstanding at any one time, it is open to the opposing party to accept either of them. Acceptance of either brings the action to an end.

[80] Plaintiff's counsel did not treat defence counsel's letter of 14 November 2003 as some sort of exploratory inquiry by the defendant as to the terms of the offer. In plaintiff's counsel reply to that letter, he agreed to "extend the deadline for payment of $350,000.00 to ... 28 November 2003." Plaintiff's counsel then suggested a way of tidying up the details of the transaction by means of a final court order.

[81] Getting a court order was not a necessary ingredient that had to be met in order to make the contract effective. That order would necessarily follow as a matter of course. The

plaintiff could not escape from the contract by filing the Notice of Withdrawal of the 7 November 2003 offer on 17 November 2003 because on 14 November 2003 she agreed to complete the settlement on 28 November 2003.

[82] For these reasons, I find the parties reached a contract of settlement on 14 November 2003. The plaintiff breached the terms of that contract when she failed to complete on the closing date of 28 November 2003. By way of a remedy, the defendant is entitled to an order for specific performance of the contract.

SUMMARY

[83] 1. Affidavits filed in support of an interlocutory application may contain oral and written hearsay evidence.

2. An affidavit sworn on information and belief for the purpose of proving the truth of the facts mentioned in an out-of-court oral statement must reveal the source of the information and the deponent’s belief that the facts contained in the statement are true.

3. An affidavit sworn on information and belief only for the purpose of proving an oral out-of-court statement was made must reveal the source of the

facts contained in the statement, and the relevant purpose for admitting the statement.

4. An affidavit sworn on information and belief for the purpose of proving the truth of the facts contained in a written document authored by a person other than the deponent must reveal the source of the document and the deponent's belief that the facts contained in the document are true.

5. An affidavit sworn on information and belief for the purpose of proving the contents of all or part of a written document authored by a person other than the deponent must reveal the source of the document and the relevant purpose for admitting the document.

6. A document is not admissible on an application unless a deponent proves it in one of the two ways just mentioned.

7. If there are seriously contested issues of fact between the parties about the terms of a settlement agreement that depend upon credibility issues, it appears that the party alleging the agreement should bring an application in the action and then apply for a trial of the issues, or commence a new action.

8. If the facts as to the terms of a settlement agreement are not in serious dispute and the only issue is the agreement's legal validity, a court apparently has the authority to decide the issue by way of a motion in the action based upon affidavit evidence.

9. On this application there were no contested issues of fact concerning the terms of the settlement agreement and its alleged breach.

10. The parties arrived at a settlement agreement and the plaintiff broke the agreement by refusing to complete according to its terms.

11. The defendant is entitled to a decree that the plaintiff specifically perform the settlement agreement.

JUDGMENT

[84] 1. There will be an order staying the action pending completion of the contract reached between the parties.

2. There will be a decree for specific performance of the settlement contract.

3. There will be liberty to apply.

4. Costs of this application to the defendant.

“J.C. Bouck, J.”
The Honourable Mr. Justice J.C. Bouck

TAB 35

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lozinski v. Maple Ridge (District),* 2015 BCSC 2565

Date: 20150528
Docket: M120873
Registry: Vancouver

Between:

Angela Roxanne Lozinski

Plaintiff

And

Corporation of the District of Maple Ridge and Raymond Ward

Defendants

Before: The Honourable Madam Justice Warren

Oral Ruling re Admissibility of Dr. Powers' Report

Counsel for the Plaintiff:	Thomas N. Teed
Counsel for the Defendants:	Charles D. Jago
Place and Date of Hearing:	Vancouver, B.C. May 26, 2015
Place and Date of Judgment:	Vancouver, B.C. May 28, 2015

[1] **THE COURT:** These are my reasons on the admissibility of Dr. Powers' report.

[2] This is a personal injury action arising out of a car accident that occurred on August 15, 2011. Both liability and damages are in issue. Objections have been raised over the admissibility of certain expert opinion evidence. The evidence in question is relevant to damages only.

[3] The defendants objected to the admissibility of a report authored by a vocational rehabilitation consultant named Dr. Dean Powers, and tendered by the plaintiff. The plaintiff objected to the defendants' attempt to elicit an opinion from the plaintiff's family doctor, Dr. Fox, as to the cause of the plaintiff's lower back pain. The defendants have not obtained a report from Dr. Fox, but they interviewed and subpoenaed him. They also included, in a will-say statement, the opinion they expect him to give at trial.

[4] On May 26, 2015, I ruled Dr. Powers' report inadmissible and I sustained the plaintiff's objection to Dr. Fox being asked by defence counsel, in direct examination, to provide opinion evidence concerning the cause of the plaintiff's low back pain. I gave reasons pertaining to Dr. Fox's evidence on May 26, 2015, and said I would give reasons concerning Dr. Powers' report at a later date. These are my reasons concerning Dr. Powers' report.

[5] As already noted, Dr. Powers is a vocational rehabilitation consultant. He met with the plaintiff. His assistant administered a battery of vocational tests to the plaintiff. The testing was apparently supervised by Dr. Powers, but it is not clear from the report what specific role he played in the administration of the tests and the review of the results.

[6] Dr. Powers' report is dated July 10, 2013. It was served on counsel for the defendants in February 2015. Defence counsel served a notice of objection shortly thereafter. Its admissibility was argued on the second day of what was to be a five-day trial. The report is 66 pages long. It consists of a title page, a table of

contents, a one-page summary of Dr. Powers' qualifications, and one page containing four substantive paragraphs under the heading "Vocational assessment comments and recommendations". Those four pages are followed by seven appendices, which are labelled "A" through "G". Thus, the body of the report itself is a single page and it is followed by approximately 62 pages of appendices.

[7] The body of the report appears to contain Dr. Powers' principal opinions. However, the word "opinion" is not actually used and the facts and assumptions on which the opinions are based are not clearly expressed in the body of the report. The body of the report does not refer specifically to any of the appendices. The relationship between the contents of the body of the report and the contents of the appendices is not obvious, although the "testing" is briefly referred to in the body of the report.

[8] Appendix A is titled "Background". It opens with the words, "The following are the facts and assumptions as I understand them". It does not say that these are the facts and assumptions on which Dr. Powers' opinions are based. Indeed, this appendix does not contain the test results which apparently do underlie the opinions. There follows five single-spaced pages consisting of 22 paragraphs containing background information concerning the plaintiff. The source of the information in Appendix A is not disclosed. It may be that this is a summary of the information gleaned by Dr. Powers from his interview of the plaintiff and from his review of documents, but that is not made clear.

[9] Appendix B is titled "Medical Condition". It consists of seven and a half single-spaced pages consisting of 33 paragraphs. It appears to be Dr. Powers' summary of various medical reports and records pertaining to the plaintiff. It may also include Dr. Powers' summary of some of the plaintiff's work records. Again, the source of the information in Appendix B is not stated expressly, although throughout Appendix B there are references to various documents, including physicians' notes and reports of diagnostic testing. The inference is that the source of the information

in Appendix B is the set of documents reviewed by Dr. Powers and listed in Appendix E, but that is not stated expressly.

[10] Appendix C is titled "Vocational testing results". It is 27 pages long. From its opening paragraph, it appears to have been prepared not by Dr. Powers, but rather by his assistant, Kim Eyrl, who writes that he or she administered vocational testing under the supervision of Dr. Powers. It does not explain the role assumed by Kim Eyrl, or the role assumed by Dr. Powers, in the administration of the tests, the tabulation of the results, or the interpretation of the results. Each of the tests is described and the plaintiff's results are reported. It is not clear whether any of the content of Appendix C reflects opinions.

[11] Appendix D is titled "Occupational profiles", it is just over nine pages long. It includes information regarding a variety of occupations, including typical duties, relative salaries, working conditions, job stability, job availability, and employment outlook. The source of the information in Appendix D is not disclosed. It is not clear whether Appendix D is entirely factual or whether it also contains opinions.

[12] Appendix E is titled "Index of reports". It is a five-page list of medical, educational, and vocational documents. Apparently these are documents that were reviewed by Dr. Powers, but the report does not actually say he reviewed them or that he relied on them in forming his opinions.

[13] Appendix F is Dr. Powers' *curriculum vitae*.

[14] Appendix G is titled "Disability management information and definitions". It appears to contain information that expands on the body of the report.

[15] The format of Dr. Powers' report is very similar to the description of a report of Dr. Dennis Magrega that was ruled inadmissible by Justice Abrioux in *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1109, and it suffers from virtually all the same defects. My reasons for ruling Dr. Powers' report inadmissible mirror Justice Abrioux's reasons for ruling Dr. Magrega's report inadmissible.

[16] Mr. Justice Abrioux's decision in *Maras* post-dated the creation of Dr. Powers' report. I was advised by counsel for the plaintiff that since the release of the *Maras* decision, Dr. Powers has modified the format in which he writes expert reports for use in this court. However, this particular report was not modified, even though it was not delivered to the defendants until February 2015, approximately eight months after the *Maras* decision was released.

[17] The legal principles governing the admissibility of expert opinion evidence are set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. These are relevance, necessity, the absence of any exclusionary rule, and a properly qualified expert.

[18] Rule 11-7 of the *Supreme Court Rules* provides that, unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed by the court, must not be tendered at trial unless the evidence is included in a report prepared and served in accordance with Rule 11-6. Rule 11-6(1) prescribes certain content for expert reports. It requires that all expert reports include, in addition to a certification that the expert is aware of his or her duty to assist the court and not be an advocate, the following information:

> (a) the expert's name, address and area of expertise;
>
> (b) the expert's qualifications and employment and educational experience in his or her area of expertise;
>
> (c) the instructions provided to the expert in relation to the proceeding;
>
> (d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
>
> (e) the expert's opinion respecting those issues;
>
> (f) the expert's reasons for his . . . opinion, including
>
> > (i) a description of the factual assumptions on which the opinion is based,
> >
> > (ii) a description of any research conducted by the expert that led him or her to form the opinion, and
> >
> > (iii) a list of every document, if any, relied on by the expert in forming the opinion.

[19] The information required by this Rule is necessary in order for the trial judge to determine the admissibility of the expert opinion tendered and, if the opinion is found admissible, the weight to be accorded to it.

[20] According to *Mohan*, an expert opinion is only admissible where it is relevant to an issue in the case, where it is necessary because the subject matter is such that ordinary people are unlikely to form a correct judgment about it if unassisted by persons with special expertise, and where it is reliable, because the witness offering the opinion is not biased and has the expertise required to give it. Thus, the report must be clear about the nature and scope of the opinions sought, the issues to which those opinions relate, and the nature of the opinions given, so that the relevance and necessity of the opinion evidence can be assessed. The expert's area of expertise and qualifications must be included, so that it can be determined whether the expert is properly qualified to give the opinions expressed.

[21] As stated by Justice Abrioux in *Maras* at paragraphs 17 and 18, the function of an expert report is to provide the trier of fact with a ready-made inference from facts to be proven at trial, and the weight to be given to an expert report depends significantly on the extent to which those facts are actually proved. Accordingly, the reasons for the opinions, and in particular the facts and assumptions underlying the opinions must be stated clearly and succinctly. If the trial judge is unable to clearly identify the facts and assumptions that underlie the opinion, he or she cannot determine whether all the facts and assumptions underlying the opinion have been proved and, as a result, he or she cannot assess the weight to give the report.

[22] For these reasons, it is essential that the trial judge is able to clearly discern the nature and scope of the opinion and to distinguish the opinion from the facts and assumptions on which it is based. In other words, it is vital that the court can clearly decipher what is opinion, what is fact, and what facts form the foundation for the opinion.

[23] Where an expert report contains lengthy appendices and schedules, including detailed summaries of interviews or document reviews, it may be impossible to

differentiate between assumed facts and the expert's opinion. The problem is amplified where the expert, in addition to providing opinion evidence, is also going to provide factual evidence, such as the nature of tests administered by the expert and the results of those tests. In such a case, it is essential that the trial judge is able to discern the extent to which the report is setting out, as fact, the test results, and the extent to which the report is setting out, as opinion, the inferences the expert draws from those results.

[24] Where an expert report does not clearly articulate the facts and assumptions upon which it is based, and instead attaches lengthy summaries and lists of other evidence such as clinical records and medical reports, the court is left unsure as to whether the expert opinion depends upon the accuracy of all the information in the summaries and lists. In other words, if all the information in the summaries and all the documents on the lists are not independently proved at trial, it will be difficult and perhaps impossible for the judge to assess the weight to be given to the opinion.

[25] An appendix containing summaries, to the extent it does not contain any opinion or underlying facts and assumptions, is, as noted by Justice Abrioux, no more than a working paper and should not be included in the report itself. If such an appendix is included, without the report making very clear the extent to which the opinions depend on the accuracy of the information in the appendix, then including the appendix gives rise to a significant risk that the weight to be given to the report will be diminished if all the information in the appendix is not independently proved.

[26] Similarly, while all the documents reviewed by the expert must be kept in the expert's working file, Rule 11-6(1)(f)(iii) requires the report to list only the documents the expert relied on in forming the opinion.

[27] I have already described Dr. Powers' report. It clearly fails to comply with the requirements of Rule 11-6(1). It does not include the certification required pursuant to Rule 11-2(2). However, more importantly for the purposes of this application, it does not set out the instructions provided to Dr. Powers in relation to the proceeding, it does not set out the nature of the opinion being sought and the issues in the

proceeding to which the opinion relates, it does not clearly set out his opinions respecting those issues, and it does not clearly identify the reasons for his opinions, including the facts and assumptions upon which the opinions are based.

[28] Plaintiff's counsel submitted that most of Dr. Powers' opinions, perhaps as much as 90 per cent, are found on the one page in the body of the report headed "Vocational assessment comments and recommendations". However, even that page is ambiguous with respect to the nature of the opinion Dr. Powers is giving and the facts and assumptions upon which it is based. As already noted, the words "in my opinion" do not appear anywhere on the page. By way of example, the first sentence on that page reads:

> Ms. Lozinski has a significant unresolved medical condition that narrows substantially the number of occupational choices available to her due to a combination of cognitive, psychological and physical limitations.

[29] It is not clear whether Dr. Powers is purporting to opine that Ms. Lozinski has a significant unresolved medical condition, or whether that is an assumption upon which he has formed the opinion that the number of occupational choices available to her is limited. If the former, reliability concerns may arise, as it does not appear that Dr. Powers is qualified to give the opinion that Ms. Lozinski has a significant unresolved medical condition. If the latter, the opinion may not be necessary, because the court may well be able to form its own judgment, unassisted by special expertise, that the occupational choices available to someone with a significant medical condition are limited: *Sengbusch v. Priest*, [1987] B.C.J. No. 973 (S.C.).

[30] I will not review the report line by line, but I will give one additional example. On the same page, Dr. Powers states:

> The cognitive diminishment, based on cohort norms equivalents will interfere with her ability to be competitively employable.

[31] It is not clear whether Dr. Powers is purporting to opine that Ms. Lozinski suffers from "cognitive diminishment" and, if so, what that term even means, or whether he is expressing the opinion that she is not competitively employable

because her vocational test results were below average. It is not clear whether he is equating low test results with the term "cognitive diminishment" and, if so, on what basis.

[32] In addition to the concerns with how the opinions are articulated in the body of the report, the purpose or purposes of the appendices is not made clear. Appendix C may contain opinions, as well as the test results, but if so the two are interwoven. There is the further problem that Appendix C appears to have been written by Kim Eyrl, and if Appendix C contains opinions, it may be that they are Kim Eyrl's opinions and not Dr. Powers' opinions. To the extent that the appendices do not contain opinions, it is not clear whether they contain facts that are integral to Dr. Powers' opinions. That is, the extent to which his opinions are based on the facts contained in the appendices is unclear.

[33] Counsel for the plaintiff submits I should admit Dr. Powers' report, even though it fails to comply with the requirements of the Rules, and notwithstanding its deficiencies, because the opinions are important to the case. However, I cannot assess the importance of the opinions, because I cannot clearly identify them. For reasons already expressed, even if I make assumptions about what the opinions are, I cannot assess the weight to accord to them, because I cannot clearly ascertain the facts and assumptions upon which they are based.

[34] Rule 11-7(6) provides that the court may allow an expert to provide evidence, even if one or more of the requirements of the Rules have not been complied with, if facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in the report, where non-compliance is unlikely to cause prejudice, or where the interests of justice require it.

[35] The first circumstance concerning new facts has no application here. The second two circumstances clearly would not provide a basis to admit this report. To the contrary, the deficiencies in the report, particularly the lack of clarity as to the nature of the opinions and the facts on which they are based, are very likely to cause

prejudice to the defendants. Those deficiencies make it difficult, if not impossible, to prepare for cross-examination, to decide whether the report ought to be challenged as unnecessary for the reasons expressed in *Sengbusch*, or unreliable due to the relationship between the opinions and Dr. Powers' particular expertise, and to seek to undermine the report by showing that the facts and assumptions on which it is based were not established.

[36] Finally, in this case, there is no compelling argument as to why the interests of justice would require the admission of the report. As I noted when giving my reasons pertaining to Dr. Fox's opinion, it was inevitable that the trial would not complete this week because the five days scheduled were inadequate. Plaintiff's counsel has expressed the view, now, that a further 10 days is required to complete the case. Defence counsel's estimate was slightly less than that. It appears the two of them agree that perhaps eight days might be enough.

[37] In the circumstances, it was agreed that the issue of liability would be tried and determined before the issue of damages and the damages portion of the trial would be adjourned to a later date. As a result of the adjournment, there is time for Dr. Powers to prepare a replacement report in accordance with this ruling. Permitting him to do so will not prejudice the defendants, provided they have an opportunity to respond to it.

[38] In all the circumstances, and having considered the report as a whole, including the appendices, I conclude that it does not satisfy the principles of admissibility to which I have referred. It fails to comply with the Rules pertaining to expert reports. The circumstances set out in the Rules in which such a report could nevertheless be admitted do not exist in this case. The deficiencies cannot be remedied by redaction.

[39] For these reasons, Dr. Powers' report will not be admitted into evidence. In the interests of justice, Dr. Powers may prepare a replacement report in accordance with this ruling. Initially, I was going to order that it not contain any new opinion evidence. I will reserve on that point for now, as counsel are going to discuss the

extent to which new expert evidence can be prepared, given the length of the adjournment that appears to be the result of the parties' inability to schedule new dates for the damages portion of the trial. Nevertheless, whether or not it contains new evidence, it must accord with the following directions:

(a) The report must contain all of the information required by Rule 11-6(1).

(b) The report must clearly delineate between facts and assumptions on the one hand and opinions on the other. There should be a section that commences with the phrase "I have been asked to provide an opinion concerning the following matters", and a section that commences with the phrase "The facts and assumptions upon which my opinions are based are as follows". Opinions should be prefaced with the phrase "in my opinion".

(c) The facts and assumptions upon which the opinions are based must be set out specifically in the body of the report and separate from the opinions themselves. Assumed facts – that is, facts not within Dr. Powers' personal knowledge – should be set out generically without reference to why they are assumed. For example, rather than reciting what the plaintiff reported to her doctor at various times, if the plaintiff's medical condition provides a foundation for the opinions, the report should simply state assumptions about the plaintiff's medical condition at particular times. Facts within Dr. Powers' personal knowledge, for example, the test results if indeed those results are within his personal knowledge, should be identified as such.

(d) The section of the report discussing the test results must delineate between the nature of the test results which appear to be facts and any inferences Dr. Powers draws from them.

(e) Appendices A, B, C, D, and G should be reviewed by Dr. Powers for the purpose of ascertaining what he considers necessary for the

formulation of his opinions and what needs to be included in his list of assumed facts. To the extent there is information in an appendix that is a fact or assumption upon which Dr. Powers relies, that must be contained in the facts and assumptions section of the report itself. To the extent an appendix contains an opinion, that opinion must be set out in the opinion section of the report. The remainder of these appendices should be removed from the report and form part of his working file.

(f) Appendix E should be reviewed by Dr. Powers for the purpose of ascertaining which documents he actually relied on in forming his opinion. Only the documents actually relied on should be referred to in the report itself.

[40] The defendants will have the opportunity, once they are provided with Dr. Powers' replacement report, to obtain a responding report as contemplated by Rule 11-6(4).

[41] The timing of the delivery of these reports will be settled between counsel with my assistance, if necessary.

"WARREN J."

TAB 36

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Mayer v. Mayer,
2012 BCCA 77

Date: 20120217

Dockets: CA038462; CA038597; CA038598; CA038599;
CA038600; CA038680; CA038681; CA038805;
CA038806; CA038807; CA038809

Dockets: CA038462; CA038809

Between:

Mhinder Singh Mayer

Appellant
(Plaintiff)

And

Richard Ravinder Mayer, Anuradha Mayer, Rita Webb, Gina Mayer, Custom Pumping Ltd., R & G Equipment Ltd., formerly known as R. & G. Equipment Rentals Ltd. and R. and G. Equipment Rentals Ltd., Aqua Pod Ltd., Island Aggregates Ltd., Mack Sales & Service of Nanaimo Ltd., Bastion Project Management Ltd., New Concrete Concepts Ltd., and Front Street Projects Ltd.

Respondents
(Defendants)

And

Osborne Contracting Ltd., Osborne Industries Ltd., Holman Transport Ltd., Mayer Truck & Equipment Ltd., Gulf Coast Materials Ltd., Timberland Investment Ltd., Archer Holdings Ltd. (Incorporation No. BC0812178), and Custom Pumping Ltd.

(Defendants)

- and -

Dockets: CA038600; CA038680;
CA038681

Between:

Mhinder Singh Mayer

Appellant
(Plaintiff)

And

Osborne Contracting Ltd., Osborne Industries Ltd., Holman Transport Ltd., Mayer Truck & Equipment Ltd., Gulf Coast Materials Ltd., Timberland Investment Ltd., Gina Mayer, Rita Webb, Richard Ravinder Mayer, Anuradha Mayer, Archer Holdings Ltd. (Incorporation No. BC0812178), Custom Pumping Ltd., R & G Equipment Ltd., formerly known as R. & G. Equipment Rentals Ltd. and R. and G. Equipment Rentals Ltd., Aqua Pod Ltd., Island Aggregates Ltd., Mack Sales & Service of Nanaimo Ltd., Bastion Project Management Ltd., New Concrete Concepts Ltd., and Front Street Projects Ltd.

Respondents
(Defendants)

And

Bhora Singh Mayer

Respondent

- and -

Dockets: CA038597; CA038807

Between:

Bhora Singh Mayer

Respondent
(Plaintiff)

And

Mhinder Singh Mayer

Appellant
(Defendant)

And

Marc Furnemont

Respondent
(Defendant by counterclaim)

- and -

Dockets: CA038598; CA038805

Between:

Mhinder Mayer

Appellant
(Plaintiff)

And

Gina Mayer

Respondent
(Defendant)

- and -

Dockets: CA038599; CA038806

Between:

Mhinder Mayer

Appellant
(Petitioner)

And

Osborne Contracting Ltd., Osborne Industries Ltd., Holman Transport Ltd., Mayer Truck & Equipment Ltd., Gulf Coast Materials Ltd., Timberland Investments Ltd., and Bhora Singh Mayer

Respondents
(Respondents)

And

Rita Webb, Gina Mayer, New Concrete Concepts, Custom Pumping Ltd., Island Aggregates Ltd., R & G Equipment Ltd., Mack Sales & Service of Nanaimo Ltd., and Bastion Project Management Ltd.

Respondents

Before: The Honourable Mr. Justice K. Smith
The Honourable Madam Justice D. Smith
The Honourable Madam Justice K. Neilson

On appeal from the Supreme Court of British Columbia:

September 2, 2010 (*Mayer v. Osborne Contracting Ltd.*, 2010 BCSC 1249, Vancouver Docket S097716);
October 20, 2010 (*Mayer v. Mayer*, 2010 BCSC 1729, Vancouver Dockets S073324, S085604, S093607 and S097716));
December 1, 2010 (*Mayer v. Osborne Contracting Ltd.*, 2010 BCSC 1881, Vancouver Docket S097716);
December 20, 2010 (*Mayer v. Osborne Contracting Ltd.*, 2010 BCSC 1883, Vancouver Docket S097716);
February 11, 2011 (*Mayer v. Mayer*, 2011 BCSC 386, Nanaimo Docket S52127 and Vancouver Dockets S073324, S085604, S093607 and S097716).

Counsel for the Appellant:	I.G. Nathanson, Q.C. G.B. Gomery, Q.C. P.R. Senkpiel
Counsel for the Respondents, Marc Furnemont, New Concrete Concepts Ltd., Island Aggregates Ltd., Mack Sales & Service of Nanaimo Ltd., Bastion Project Management Ltd., Richard Ravinder Mayer and Anuradha Mayer:	S.A. Griffin J. Cytrynbaum
Counsel for the Respondents, Rita Webb, Gina Mayer, Custom Pumping Ltd., R & G Equipment Ltd., Archer Holdings Ltd., Aqua Pod Ltd. and Front Street Projects Ltd.:	G. Orris, Q.C.
Counsel for the Respondent, Bhora Singh Mayer:	R.B. Fraser S. Batkin
Place and Date of Hearing:	Vancouver, British Columbia May 17, 18, 19, 20, 2011
Place and Date of Judgment:	Vancouver, British Columbia February 17, 2012

Written Reasons by:
The Honourable Mr. Justice K. Smith

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Madam Justice K. Neilson

Written Reasons by:
The Honourable Madam Justice K. Neilson (page 48, para. 137)

Concurred in by:
The Honourable Mr. Justice K. Smith
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice K. Smith:

Introduction

[1] Before this Court are eleven appeals brought by Mhinder Mayer from twenty-eight orders set out in eight formal orders made by the Honourable Mr. Justice Walker of the Supreme Court of British Columbia during his case management of sixteen related proceedings in that Court.

[2] The sixteen proceedings arise out of divers disputes between Mhinder Mayer; his brother Bhora Mayer; Bhora Mayer's wife, Gina Mayer; their two children, Richard Mayer and Rita Webb (née Mayer); and Richard Mayer's wife, Anuradha Mayer. The disputes stem from a trust (the "Brothers' Trust") created on March 20, 1966 by the Mayer brothers: Bhim, Bhagwan, Bhora, Mhinder, and Welbier. To avoid confusion, I will refer to the brothers and other members of their families by their first names in these reasons.

[3] These reasons concern appeal no. CA38462, Mhinder's appeal from the first of two summary trial judgments, which was pronounced in Supreme Court action no. S097716 ("Action 716"). The other appeals will be dealt with by my colleague Madam Justice Neilson in reasons following these that I have read and with which I agree.

[4] Following our reasons is an appendix that contains a glossary of terms used in both Mr. Justice Walker's reasons and ours.

[5] The judge's reasons for judgment underlying this appeal are indexed as 2010 BCSC 1249. The orders he made, all challenged in this appeal, are these:

1. All of the Plaintiff's express trust claims are dismissed;

2. All of the Plaintiff's resulting trust claims in respect of transactions that pre-date June 8, 2006 are barred and dismissed;

3. All of the Plaintiff's claims for a constructive trust remedy in respect of transactions that pre-date June 8, 2006 of which the Plaintiff was aware, or could have reasonably become aware, by June 8, 2006 are barred and dismissed;

4. All of the Plaintiff's claims, made in his own name, for diversion of assets from the Identified Trust Companies and the Disputed Trust Companies, as defined in the Statement of Claim herein, are dismissed;

5. All of the Plaintiff's claims that duplicate his claims in any other actions or proceedings are stayed pending a reconciliation of pleadings and further order of this Court.

[6] For the reasons that follow, I have concluded that the appeal should be allowed and the orders set aside.

[7] Before describing Action 716, I will set out the relevant background, which will disclose the significance of the date "June 8, 2006" to the impugned judgment.

Background

[8] By their trust agreement, the brothers agreed they would be equal beneficial owners of all business ventures undertaken and assets acquired by any of them, excluding personal residences. They acquired several parcels of real property and incorporated a number of companies to carry on various businesses, which they operated as the "Osborne Group" of companies (also described herein as the "Identified Trust Companies"). The properties and shares were held nominally by individual brothers.

[9] Welbier died in 1985. In 1987, Bhim withdrew from the trust. He subsequently commenced action against the remaining three brothers for an interest in the trust assets. His action was settled without trial. The details of his claim do not appear in the record before us.

The Bhagwan Mayer Action

[10] Bhagwan withdrew from the operations of the Osborne Group in 1991. Ten years later, he commenced action in the Supreme Court of British Columbia (the "Bhagwan Mayer Action") against Mhinder, Bhora, Richard, Rita, Gina, Kelly Mayer (Mhinder's wife), Marc Furnemont (a certified general accountant who was employed as comptroller for the Osborne Group of companies), and several companies that are also parties in the current litigation.

[11] Curiously, Bhagwan's claim was in many ways a mirror image of Mhinder's claim in the extant proceedings. He alleged, among other things, that in 1988 the three remaining brothers (Bhagwan, Bhora, and Mhinder) had received advice that the Osborne Group of companies was paying higher corporate taxes by operating as a single integrated business subject to a trust agreement than it would have had to pay "if it operated as several smaller independent companies". He alleged,

> Acting on this advice, the Remaining Brothers agreed in late 1988 to establish new companies with trusted family members as the sole shareholders. These new companies would be owned and operated for the benefit of the Remaining Brothers, but would be in a position to take advantage of a lower corporate tax rate.

[12] Bhagwan pleaded the brothers agreed these "new companies" would be set up with Richard and Gina, and later Rita, as shareholders. He alleged the companies (described separately in these reasons as "Richard Mayer's Companies", "Gina Mayer's Companies", and "Rita Webb's Companies" and, when taken together with Richard, Gina, Rita, and Marc Furnemont, described jointly as the "Secondary Defendants") were then incorporated and operated so as to minimize the corporate taxes payable by the Brothers' Trust. Bhagwan also alleged the acquisition in trust for the brothers of certain properties that are now claimed by Mhinder to be held in trust for the Brothers' Trust. He referred to this arrangement as the "Related Trust".

[13] Bhagwan alleged further that, in the spring of 1990, he asked Bhora to obtain written trust agreements from Richard, Rita, and Gina confirming the Related Trust. He pleaded that he was later shown a one-page document "confirming that Richard,

Rita, and Gina were holding the Related Companies in trust for the benefit of the Remaining Brothers." He pleaded that this document bore the signatures of Richard and Gina but not that of Rita, and that Bhora advised him Rita would execute the document "when she was available." He alleged further that he understood the document was being held in a "company safe".

[14] Bhagwan also alleged that Bhora and Mhinder had sold and encumbered trust assets without authority, had deprived him of his equal share of drawings, and had breached their fiduciary duties to him. He claimed an accounting, tracing of the trust assets, and damages for breaches of trust by Bhora, Mhinder, and the Secondary Defendants, alleging the latter participated in the breaches of trust and were in knowing receipt and use of trust assets for their own benefit and for the benefit of Bhora and Mhinder. He also claimed unjust enrichment and sought remedial constructive trusts.

[15] Two weeks to the day after Bhagwan commenced his action, on December 24, 2001, Richard, Rita, Gina, and Marc Furnemont each signed documents entitled "Acknowledgment of Trust". They were in virtually identical terms. They purported to "confirm" that, except for personal residences, the signatories each held the shares in companies specified in each Acknowledgment and "the numerous real estate properties", which included those subject to Bhagwan's claims, in trust for Bhora and Mhinder. Mhinder was given possession of the signed acknowledgments.

[16] Two months later, in February 2002, Bhora and Mhinder, through their solicitor, delivered a joint statement of defence in the Bhagwan Mayer Action in which they pleaded that none of the specified assets held in the names of Richard, Rita, and Gina were the property of the Brothers' Trust and that these assets had been transferred to Richard, Rita, and Gina in the ordinary course of business for good and valuable consideration. They pleaded, as well, that Bhagwan had resigned as a trustee of the Brothers' Trust in or about 1991 and had ceased to be a trustee or beneficiary at that time. Accordingly, they said, pursuant to the terms of the

Brothers' Trust, Bhagwan was entitled on his withdrawal to only his share of the initial acquisition cost of the assets currently held in the trust.

[17] In their statement of defence, delivered in March 2002, Richard, Rita, and Gina denied they had improperly received, used, or held any assets of the Brothers' Trust in trust.

[18] Mhinder disclosed neither the execution of the Acknowledgments of Trust nor the documents themselves during discoveries in the Bhagwan Mayer Action (nor, apparently, did Bhora, Richard, Rita, Gina, or Marc Furnemont). As well, Mhinder testified in his examination for discovery by Bhagwan's solicitor in 2005 that the assets identified in the Acknowledgments of Trust were "owned" by their nominal owners. There is nothing in the record before us to indicate whether Bhora, Richard, Rita, Gina, or Marc Furnemont gave *viva voce* testimony in the Bhagwan Mayer Action or, if they did, whether they testified about the Acknowledgments of Trust.

[19] Following two weeks of trial in November 2005, the trial of the Bhagwan Mayer Action adjourned. It did not resume. Rather, on June 8, 2006, the parties entered into a settlement agreement (the "Bhagwan Mayer Settlement Agreement") pursuant to which Bhora and Mhinder paid Bhagwan $1.175 million and Bhagwan released his claim to "all alleged legal and beneficial interest in the trust assets/properties claimed" in his action. The agreement distinguished between Bhora, Mhinder, and the Osborne Group of companies (the "Osborne Defendants"), on the one hand, and Richard, Rita, Gina and the other defendants alleged to have received assets in trust for Bhagwan, Bhora, and Mhinder (the "Secondary Defendants"), on the other. Mutual releases were entered into between Bhagwan and all defendants. As well, although there was no *lis* as between the Osborne Defendants and the Secondary Defendants, the agreement contained these clauses, to which the judge in these proceedings attached considerable importance:

> 4. The Osborne Defendants and Bhagwan Mayer agree that none of Bhagwan Mayer, Bhora Mayer, Mhinder Mayer and the Osborne Defendants, or any of them, have any beneficial interest in any of the property or businesses legally owned or carried on by any of the Secondary Defendants.

> 5. Bhagwan Mayer and the Secondary Defendants agree that none of Bhagwan Mayer and the Secondary Defendants, or any of them, have any beneficial interest in any of the property or businesses owned or carried on by the Osborne Defendants.

[20] By a subsequent consent order, the Bhagwan Mayer Action was dismissed "for all purposes and effects as if pronounced by this Court after a full trial of this proceeding on the merits."

The Bhora Mayer Action, the Gina Mayer Rents Action, and the Oppression Proceeding

[21] Shortly after the Bhagwan Mayer Action settled, a dispute arose between Bhora and Mhinder concerning the operations of the trust businesses. As a result, in May 2007, Bhora commenced action no. S073324 in the Supreme Court of British Columbia (the "Bhora Mayer Action") against Mhinder for declarations that certain real properties and the shares of certain companies were held by Mhinder in trust for the Brothers' Trust and for consequential relief. Mhinder delivered a statement of defence and a counterclaim against Bhora and Marc Furnemont. He admitted some of the companies were trust companies (the "Identified Trust Companies", a.k.a. the "Osborne Group") and denied others were trust companies (the "Disputed Trust Companies") and he alleged breaches of trust and breaches of fiduciary duties by Bhora and Marc Furnemont, including failing to account for and to pay Mhinder his share of rentals earned on trust properties, causing the trust companies to transfer trust assets improperly and to loan trust monies to members of Bhora's family, and generally carrying on the trust businesses in a manner detrimental to Mhinder's interests.

[22] In December 2007, Mhinder issued a petition in which he sought leave pursuant to s. 232 of the *Business Corporations Act*, S.B.C. 2002, c. 57, to bring a derivative action on behalf of Osborne Contracting Ltd. against Bhora and Island Aggregates Ltd., one of the Richard Mayer Companies. (Mhinder did not pursue this proceeding and his claims therein were subsequently subsumed in claims made in other proceedings.)

[23] Then, in August 2008, Mhinder commenced Supreme Court action no. S085604 against Gina (the "Gina Mayer Rents Action") claiming she had converted rental income from trust properties to her own and Bhora's personal use.

[24] In March 2009, Mhinder delivered a notice of motion in the Bhora Mayer Action seeking to join the Identified Trust Companies as defendants to his counterclaim in order to advance a claim that Bhora was administering the affairs of the Identified Trust Companies in a manner oppressive to him and to seek remedial orders pursuant to s. 227 and s. 234 of the *Business Corporations Act*, including an order authorizing him to commence derivative actions.

[25] Bhora objected that a statutory oppression proceeding must be commenced by petition. Dissuaded by this objection, Mhinder issued a petition, no. S093607, on May 15, 2009 (the "Oppression Proceeding"), naming Bhora and the Identified Trust Companies as respondents. In his petition he stated he would discontinue the petition "if Bhora Mayer would consent to the addition of the Identified Trust Companies as defendants in Mhinder Mayer's Counterclaim" in the Bhora Mayer Action.

[26] In July 2009, Mr. Justice Walker was appointed case management judge in the Bhora Mayer Action. In September 2009, he was appointed case management judge in all related proceedings, of which there are several I have not mentioned, some of them brought by and involving family members other than Bhora and Mhinder.

[27] In October 2009, Mhinder delivered a revised notice of motion and a draft amended statement of defence and counterclaim in the Bhora Mayer Action seeking again to join the Identified Trust Companies, Richard, Rita, Gina, and their respective companies as defendants by counterclaim. However, at a case management conference on October 13, 2009, the judge dismissed the motion. He directed

1. that Mhinder advance these claims against Richard, Rita, Gina, and their respective companies in yet another action to be commenced by October 19, 2009;

2. that Mhinder not pursue relief against the Identified Trust Companies in the Bhora Mayer Action and that he deliver an amended statement of defence and counterclaim in that action by October 19, 2009; and

3. that Mhinder pursue his oppression claim against Bhora and the Identified Trust Companies in the Oppression Proceeding and that he deliver an amended petition by October 19, 2009.

Action 716

[28] Pursuant to the first case management direction just mentioned, Mhinder commenced Action 716, the source of the appeal with which these reasons are concerned, on October 20, 2009 against the Richard Mayer Defendants, the Webb/Mayer Defendants, and the Identified Trust Companies, in which he made claims reminiscent of Bhagwan's claims in the Bhagwan Mayer Action. He alleged, among other things, that Bhora held certain assets in trust for him and the Brothers' Trust; that Bhora had managed the affairs of the trust companies in a manner detrimental to his interests; that Bhora had improperly caused trust properties and companies to be transferred to Richard, Gina, and Rita without his knowledge or consent; that Gina had appropriated rentals from trust property for the benefit of herself and Bhora; that Gina had been improperly paid fees from trust monies; and, although he was not a named defendant, that Marc Furnemont had participated in the alleged breaches of trust or that he was in breach of fiduciary and professional duties. Mhinder sought, among other things, leave to bring derivative actions in the names of the Identified Trust Companies; damages; a finding of unjust enrichment and disgorgement of profits obtained through breaches of trust; an accounting; and declarations that Bhora, Richard, Gina, and Rita held one-half of their respective companies and properties in trust for him.

[29] Although Bhora was not named as a defendant in Action 716 (Mhinder's claims against Bhora in this regard had been advanced in his counterclaim in the Bhora Mayer Action), the judge granted him leave to enter an appearance and to participate in the proceedings, which he did.

[30] The Acknowledgments of Trust executed on December 24, 2001 made their first formal appearance in early November 2009 when, in response to a demand for particulars of his trust claims, Mhinder pleaded them and alleged they "confirmed" that Richard, Gina, Rita, and Marc Furnemont held the companies and properties in question in trust for Bhora and him. As well, his response particularized a number of alleged breaches of trust.

[31] In their statement of defence filed two weeks later, the Richard Mayer Defendants pleaded that Mhinder agreed at the time the Acknowledgments of Trust were executed that "those documents were of no legal force or effect", that he had returned the Acknowledgment Gina had executed to her, and that he had represented to the others that he had destroyed their Acknowledgments. As well, they pleaded the provisions of the Bhagwan Mayer Settlement Agreement and asserted that by reason of that agreement Mhinder was estopped from claiming that the properties and assets in question were held in trust for him. Further, they pleaded the action was barred in law by the *Limitation Act,* R.S.B.C. 1996, c. 266, and in equity by Mhinder's laches.

[32] The Webb/Mayer Defendants pleaded to like effect in their statements of defence, both filed on December 1, 2009.

[33] At a case management conference on December 16, 2009, the judge, despite his earlier directions refusing to allow Mhinder to amend his counterclaim in the Bhora Mayer Action to claim oppression and directing him to bring this claim separately in the Oppression Proceeding, directed that the Oppression Proceeding go forward as an action, that it be heard concurrently with the Bhora Mayer Action, and that the petition in the Oppression Proceeding stand as a statement of claim.

The First Summary Trial – Action 716

[34] In early March 2010, Mhinder filed a notice of motion in Action 716 for an order for further and better discovery of documents by Bhora and the defendants. Then, by notices of motion dated March 9 and March 10, 2010 respectively, the defendants sought, pursuant to the summary trial rule, Rule 18A [now Civil Rule 9-7],

> 1. a declaration that pursuant to the [Bhagwan Mayer] Settlement Agreement among the Plaintiff, the Richard Mayer Defendants and others dated June 8, 2006, the Plaintiff has acknowledged and agreed that he has no beneficial interest in the property or business of the Richard Mayer Defendants, Rita Mayer and her companies and Gina Mayer and her companies.
>
> 2. an order dismissing this action ...

[35] At a hearing held on March 16 and 17, 2010, the judge adjourned generally Mhinder's application for further discovery and directed that he would hear the defendants' summary trial applications commencing on May 3, 2010. As well, he directed Mhinder to file his reply by March 24, gave directions for the delivery of demands for particulars and responses, and directed that Bhora and the defendants deliver their evidential materials by April 6 and that Mhinder deliver his by April 19. He also directed that Mhinder's examinations for discovery of Richard, Rita, Gina, and representatives of their respective companies were not to take place before the latter part of June 2010 because, as I understand it, it was his view that the summary trial to determine whether the Bhagwan Mayer Settlement Agreement barred Mhinder's claims could result in the dismissal of Mhinder's action without the necessity of oral and documentary discovery. Thus, the judge described this summary trial as a "surgical strike".

[36] To that point in time, the only examinations for discovery held had been a three-day examination of Mhinder by counsel for Bhora on March 24-26, 2010 and a three-day examination of Bhora by counsel for Mhinder on April 7-9, 2010, both conducted in the Bhora Mayer Action. Neither examination was completed. No examinations had been held in Action 716.

[37] Mhinder delivered his reply on March 23 in which he pleaded, among other things,

1. to the effect that he had left it to Bhora to instruct counsel on their joint behalves in the Bhagwan Mayer Action and that he had little knowledge of what was happening in that lawsuit;

2. that the Bhagwan Mayer Settlement Agreement did not settle his claims against the Secondary Defendants;

3. that the Secondary Defendants were trustees for him of the assets identified in the Acknowledgments of Trust and that as trustees they could not rely on his alleged contractual waiver in the Bhagwan Mayer Settlement Agreement because, in breach of their fiduciary duties to him, they failed to make full disclosure to him of material facts, unknown to him, bearing on his beneficial entitlement; and

4. that he signed the Bhagwan Mayer Settlement Agreement relying on the representations of Richard and Rita that, if he did so, he was "not excluded from anything", that he was "not out", and that he "did it all", and that they were thereby estopped from raising the Agreement as a bar to his claims.

[38] In response to demands for particulars of his allegations "that Bhora Mayer and Marc Furnemont directed large amounts of money and assets to be transferred to Richard Mayer, Gina Mayer, Rita Webb and the Other Family Companies for no consideration or at gross undervalues", Mhinder delivered particulars on April 8 and 16 in which he pleaded that, beyond what was set out in his statement of claim, the particulars demanded were "peculiarly within the knowledge of others" and that he would deliver further particulars to the extent he was able to do so "after discoveries are completed."

[39] Thus, Mhinder's trust claims were based on allegations of express trusts (founded in large part on the Acknowledgments of Trust) and resulting trusts

(founded on the alleged transfer of trust assets for no or inadequate consideration to Richard, Rita, Gina, and their companies). As well, he sought declarations of constructive trusts in aid of his claims of unjust enrichment.

[40] Mhinder's affidavit evidence, which was supported in some respects by the evidence of Kelly, conflicted with the affidavit evidence of Bhora, Gina, Richard, Rita, and Marc Furnemont concerning the circumstances of both the execution of the Bhagwan Mayer Settlement Agreement and the execution of the Acknowledgments of Trust. As well, although the evidence of Bhora, Gina, Richard, Rita, and Marc Furnemont conflicted with Mhinder's evidence, they were not consistent as between themselves as to the circumstances of the execution of the Acknowledgments of Trust and Bhora gave differing evidence on that matter on separate occasions.

[41] Following the exchange of materials ordered by the judge, Bhora delivered a further affidavit sworn on April 23, 2010 to which he exhibited extracts from a transcript of evidence given by Mhinder in 2005 on his examination for discovery by Bhagwan's solicitor in the Bhagwan Mayer Action, in which Mhinder asserted that some of the assets he is now claiming were "owned" by their nominal owners and denied he "owned" them. Neither the questions nor the answers distinguished between legal and beneficial ownership.

[42] Thus, the summary trial had "morphed" (to use the judge's expression) from the discrete issue of interpretation and effect of the Bhagwan Mayer Settlement Agreement into a factual dispute with conflicting evidence and credibility issues.

The Hearing

[43] Counsel for the defendants delivered lengthy written submissions: 15 pages for the Webb/Mayer Defendants, 79 pages for the Richard Mayer Defendants, and 53 pages for Bhora. They argued for findings of fact concerning the circumstances of the settlement of the Bhagwan Mayer Action, the execution of the Bhagwan Mayer Settlement Agreement, and the execution of the Acknowledgments of Trust and contended that, on those facts, Mhinder was estopped from bringing his claims by

clause 4 of the Bhagwan Mayer Settlement Agreement, which I have set out at paragraph 19 above.

[44] In his responding submissions delivered April 30, 2010, which were 68 pages in length, Mhinder's counsel argued that the issue was not suitable for summary trial. He submitted that because of the conflicts in the evidence concerning the circumstances of the execution of the Bhagwan Mayer Settlement Agreement and the execution of the Acknowledgments of Trust the judge would be unable to find the necessary facts to grant judgment and that, even if he could find the facts, it would be unjust to grant judgment because the discovery process was not complete, the defendants' evidence had not been tested by cross-examination, and it was likely therefore that further facts bearing on the issue had not yet come to light. As well, he submitted, findings of fact made on a summary trial of the issue would have to be addressed again at the subsequent trial, creating the potential for conflicting findings, and consequently that the case should not be "litigated in slices". After addressing the merits at length, he concluded by reiterating that the issue was not suitable for summary trial and, in the alternative, submitted "there should be, at the very least, an order for cross-examination on the affidavits that have been put forward", adding, "Cross-examination without full prior discovery is probably not going to put the court in a position to resolve the conflicts in the evidence and find the facts necessary for the just resolution of the legal issues."

[45] When the summary trial application came on for hearing on May 3, 2010, the judge granted Mhinder leave to amend his statement of claim to add, as an alternative to his claim that Richard and Rita held the Richard Mayer Companies and the Rita Webb Companies in trust for Bhora and Mhinder, a claim that they held those companies in trust for Bhora, Mhinder, Richard, and Rita. This alleged arrangement was subsequently referred to as the "New Family Trust". Counsel for the Richard Mayer Defendants then began his oral submissions.

[46] In his remarks, counsel for the Richard Mayer Defendants broadened his submissions to include, in addition to estoppel arising from the Bhagwan Mayer

Settlement Agreement, arguments that Mhinder's action should be dismissed as an abuse of process and that Mhinder's lack of "clean hands" should bar the equitable relief he claimed. Counsel relied in this regard on the pleadings in the Bhagwan Mayer Action and on the evidence Mhinder had given on examination for discovery in that action, which the judge received in evidence without comment and apparently without objection.

[47] At the commencement of the afternoon of the second day of submissions Mhinder's counsel objected that the abuse-of-process and clean-hands arguments had no foundation in the pleadings. As well, he submitted it would be unjust to permit these submissions to be raised "in the middle" of the summary trial, which had gone ahead on the basis it would be a "surgical strike" to consider the estoppel issue. He said allegations of fraud must be pleaded and, among other things, that these submissions raised the question whether he should consider tendering further evidence to meet them. Further, as I understand his position, he said he did not want to adjourn the summary trial of the estoppel issue because of the "enormous amounts of time and energy" already spent on it and because he wanted to get on with discovery of Richard, Rita, and Gina, which, as I have noted, the judge had directed be postponed pending the summary trial.

[48] The judge asked Mhinder's counsel what new evidence there could be. Counsel responded that he could not say: that he needed time to consider the question. The judge then observed, alluding to the light that had been cast on Mhinder's conduct in remarks made earlier by defendants' counsel, that Mhinder's counsel had not been taken by surprise by the abuse-of-process and clean-hands submissions and that the only question was whether he needed time to consider whether to file further evidence and to review the volume of authorities counsel for the Richard Mayer Defendants had given him over the luncheon adjournment. The judge said he would be prepared to adjourn until 10:00 o'clock or 2:00 o'clock the following day, but no longer, and stood down for a few minutes to allow Mhinder's counsel to consider his position. When court reconvened, Mhinder's counsel advised

that he would not attempt to tender further evidence given the short time the judge had specified.

[49] The judge granted leave to the Richard Mayer Defendants to file an amended statement of defence to plead these issues and submissions by counsel for the respondents resumed and continued to their conclusion at mid-morning on May 7, the fifth day of the summary trial. The gist of these submissions was that there was no need for the judge to consider any evidence other than Mhinder's evidence and no need to resolve any conflicts in the evidence. Rather, counsel argued, Mhinder's pleadings in the Bhagwan Mayer Action, his failure to disclose the Acknowledgments of Trust in that action, and his evidence given on his examination for discovery in that action showed him to be "a liar, a cheat, and a fraud." Accordingly, they submitted, his evidence should be rejected and, in that event, that he had failed to prove his case.

[50] Mhinder's counsel commenced his submissions at mid-morning on May 7, a Friday, by again submitting that the matter was not suitable for summary trial on the bases he had put forward in his written submissions as outlined above. He also noted that Mhinder was at a disadvantage – since it was the defendants' application they had argued first and had set out the reasons his action should be dismissed before he had an opportunity to put forward his claim in its best light, as a plaintiff is normally entitled to do.

[51] Shortly after counsel's submissions had begun, the judge interrupted and said he wanted to hear an explanation of the position Mhinder had taken in the Bhagwan Mayer Action. He inquired about this point several times thereafter during submissions by Mhinder's counsel. He observed that counsel for the defendants were urging him to dismiss the action on the basis of Mhinder's evidence alone and that he had heard nothing from Mhinder to answer them. Each time he raised the matter Mhinder's counsel said he would come to it. When counsel subsequently addressed this point he referred to Mhinder's evidence that he relied on Bhora to manage the Brothers' Trust, that Bhora instructed their counsel in the Bhagwan

Mayer Action, and that he did not disclose the Acknowledgments of Trust because Bhora told him not to do so. As for Mhinder's examination for discovery evidence, counsel submitted, as I understand his remarks, that the questions and answers relied on by the defendants as contradictory to Mhinder's trust claims in Action 716 were all phrased in terms of "ownership" of the Richard Mayer Companies and the Rita Webb Companies, which he submitted should be seen as a colloquial use of the word and not necessarily inconsistent with Mhinder's current claim of beneficial ownership.

[52] The judge was not content to accept submissions on the point. He remarked that Mhinder had not provided an explanation for his conduct through affidavit evidence, although he had been given an opportunity to do so. He asked rhetorically what he should do about this and told Mhinder's counsel to "think about it" over the afternoon recess. Following the recess, Mhinder's counsel advised the judge he would seek leave to tender a short affidavit sworn by Mhinder to address the point. Then, court adjourned for the weekend.

[53] Court reconvened on Monday morning, May 10. Counsel for Mhinder tendered an affidavit in which Mhinder deposed that Bhora told him the "new trust" created by the Acknowledgments of Trust had been established after Bhagwan left the Brothers' Trust and that it should not be disclosed because it was a "completely separate matter" from Bhagwan's claim. He said he accepted and acted on Bhora's advice. As for his evidence given on discovery, he said he could "no longer recall my thinking on that day but I believe I gave the answers I did concerning the ownership of various companies thinking that the owner of any company meant the person who owned the shares."

[54] Counsel for the defendants opposed the admission of the affidavit on the ground, among others, that they would have to file responding affidavits and the summary trial would thereby be prolonged. To that, the judge suggested that, rather than file responding affidavits they should apply to cross-examine Mhinder on his affidavit before him. Mhinder's counsel said he would not object to a cross-

examination limited to what Mhinder did in the Bhagwan Mayer Action but said it would be unfair to expand the cross-examination into a "general attack on his credibility" unless the other parties were also subjected to cross-examination as to credibility. The judge admitted the affidavit and ordered cross-examination of Mhinder on the affidavit to begin the next morning. In his ruling (see 2010 BCSC 1945), he said,

> [14] ... The cross examination will be limited to the clean hands issue. The cross examination will not, however, be limited to Mhinder Mayer's discovery evidence given in the Bhagwan Mayer action. Nor will it be limited solely to the points made by Mhinder Mayer in the affidavit that he now seeks to file.

He did not order cross-examination of the other parties.

[55] There followed three days of cross-examination of Mhinder by the three opposing counsel. Following that, the judge heard four further days of submissions with counsel for the defendants going first, counsel for Mhinder following, and then counsel for the defendants in reply.

[56] In his closing remarks, Mhinder's counsel again submitted the case was not suitable for summary trial. In the alternative, he sought leave to cross-examine the defendants on their affidavits, which the judge denied.

The Reasons for Judgment

[57] The judge reserved judgment and, on September 2, 2010, gave written reasons for judgment, 101 pages and 301 paragraphs in length. As I have mentioned, his reasons are indexed as 2010 BCSC 1249.

[58] The judge concluded the issues were suitable for disposition on a summary trial. He first set out the applicable approach, which is not in dispute:

> [21] The Court may grant judgment on a summary trial application brought pursuant to Rule 18(5), now *Supreme Court Civil Rules*, Rule 9-7, in favour of any party, either upon an issue or generally, unless the Court is unable "on the whole of the evidence" before it on the application, to find the facts necessary to decide the issues of fact or law, or, the court is of the opinion that it would be "unjust to decide the issues on the application": *Orangeville Raceway Ltd. v. Wood Gundy* (1995), 6 B.C.L.R. (3d) 391, 59 B.C.A.C. 241,

> at paras. 30 to 34 and 43; and *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 36 C.P.C. (2d) 199 (C.A.).
>
> [22] Judgment may be granted on a summary trial application where there are conflicting affidavits, when the Court is able to make the necessary findings of fact on conflicting evidence: *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.), cited in *Inspiration Management*, at para 42.

[59] Then, he said, there was no need to weigh the conflicting evidence since, on his own evidence, Mhinder's trust claims failed. I will quote his words:

> [23] In this case, my decision does not follow upon a weighing of conflicting affidavit evidence between the parties.
>
> [24] Examination of Mhinder Mayer's own evidence and prior conduct without weighing conflicting evidence from various affiants (including the personal applicants), leads me to conclude that Mhinder Mayer's claims based on express and resulting trust as well as most of his constructive trust claims prior to June 8, 2006, are suitable for summary determination. I am satisfied that determination of the relief sought on this application, insofar as it concerns the trust claims, does not involve litigation in slices.
>
> [25] Mhinder Mayer has failed, on his own evidence, to prove his express trust claims. I have also determined that he should be barred from asserting any resulting trust claims and nearly all of his constructive trust claims for transactions that occurred prior to June 8, 2006.
>
> [26] Given my findings, which I go on to set out in these reasons for judgment, there is no further evidence that Mhinder Mayer could seek to obtain from the applicants that could assist him in proving his express or resulting trust claims, and most of his constructive trust claims prior to June 8, 2006.

Later, he added,

> [143] The applicants depose that those documents [the Acknowledgments of Trust] were drawn and signed at Mhinder Mayer's request. They point to several reasons being given to them to sign, and say that none of them had anything to do with evidencing a trust arrangement or agreement. I have not, in determining the application, weighed the evidence of the parties regarding the purpose(s) of the Acknowledgments. I have, instead, considered only Mhinder Mayer's evidence, his pleadings, and his conduct.

[60] The judge went on to denounce Mhinder's evidence as unreliable and lacking in credibility. He concluded that Mhinder's claim on the theory of an express trust based in part on the written Acknowledgements of Trust could not be sustained on his own evidence. He continued,

> [228] Given the glaring inconsistencies in Mhinder Mayer's evidence, my findings concerning his credibility and the unreliability of his evidence, I am unable to accept his evidence concerning the effect to be given the Acknowledgments.
>
> [229] Moreover, I do not need to resolve the purpose or circumstances in which the Acknowledgements were signed in order to determine whether an express trust was created. Even if it were the case that the Acknowledgments were created for an inappropriate purpose so that it could be said the applicants lack clean hands, the applicants are not advancing a claim against Mhinder Mayer founded on those documents.
>
> [230] I find that Mhinder Mayer has not proven his claim of express trust on a balance of probabilities. My determination is based upon my view of all of his evidence and my adverse assessment of his credibility and the unreliability of his evidence. He has failed to discharge his onus to prove an intention to create a trust, let alone the certainty of objects or subject matter.
>
> [231] Where an intention to create an express trust may not be gleaned from documents, it may be found from specific words and conduct or from surrounding circumstances: *Horizon FX Investments Incorporated (Re),* 2010 BCSC 416. In this case, Mhinder Mayer has not discharged his onus to prove when the new family trust was created, what property was settled on that trust, and the identity of the trustees and beneficiaries.

[61] The judge concluded further that the Bhagwan Mayer Settlement Agreement barred Mhinder's resulting-trust and constructive-trust claims in respect of transactions of which he could reasonably have been aware at the date of the Agreement. He concluded as well that clauses 4 and 5 of the Bhagwan Mayer Settlement Agreement had contractual effect and that Mhinder could not avoid their effect for two reasons: Mhinder had not proven the elements giving rise to a promissory estoppel (paras. 238-41) and, if his evidence as to the existence of an express trust were accepted, he would lack clean hands (paras. 248-250).

[62] The judge also held that Mhinder lacked standing to pursue claims in his own name as a beneficiary based on wrongs done to or by the various companies involved, while noting that the same relief was claimed against Bhora in the Bhora Mayer Action and that Bhora was not a party to Action 716.

[63] Finally, the judge rejected the defendants' submission that Mhinder's entire action should be dismissed as an abuse of process. He said,

> [280] As well, my findings concerning Mhinder Mayer's lack of credibility and the lack of reliability of his evidence are confined to his trust claims

> advanced against the applicants. I have not made any findings about nor expressed any comment in relation to the merits of his other claims. My determination and findings in relation to one aspect of his action does not prohibit Mhinder Mayer from pursuing the remainder of his claims.

Positions on Appeal

[64] On this appeal, Mhinder contends the judge erred in concluding his claims were suitable for disposition on a summary trial. He elaborates these contentions under four headings: (a) the judge erred in examining only his evidence, most of it given under cross-examination; (b) the judge overlooked the failure to afford him full discovery and cross-examination of the opposing parties, thus denying him the opportunity to prove his case out of the mouths and from the documents of his opponents; (c) the summary trial of certain issues, leaving others left to be tried, was "litigating in slices", which ought to have been avoided; and (d) the complexity of the litigation and the length of the summary trial hearing militated against a summary disposition.

[65] In the alternative, Mhinder submits the judge erred in dismissing all of his claims for a remedial constructive trust in respect of transactions that pre-dated June 8, 2006 (the date of the Bhagwan Mayer Settlement Agreement) of which he was aware or could have reasonably become aware by that date, and in holding that Mhinder lacked standing in his capacity as a beneficiary of the Brothers' Trust to sue for wrongs done by and to companies incorporated to carry out the trust's purposes.

[66] Mhinder seeks an order allowing the appeal, dismissing the summary trial applications, and remitting his trust claims to the Supreme Court of British Columbia.

[67] The respondents submit the judge "dealt with the matter fairly and in a principled way that protected the court's interest in arriving at not only a just result but one which upheld the integrity of its process." They say even if Mhinder's assertions were true the court "would never permit itself to be used and to lend its assistance to Mhinder to perfect what would be a connivance and fraud". In their submission, further discovery would not have assisted Mhinder and there was no need for the judge to resolve conflicting evidence because, even if Mhinder was

telling the truth, he did not come to court with clean hands and was therefore not entitled to the equitable relief he claimed. Further, they say, he submitted voluntarily to cross-examination and cannot now claim the process was unfair. They add that what Mhinder complains was unfair was the inevitable result of tactical decisions he made deliberately during the evolution of his position in the broader litigation, all calculated to oppress the defendants and to urge upon the court a case with no merit.

Discussion

The Mode of Trial

[68] I agree with Mhinder's submission that the judge erred in permitting the issue on the summary trial to "morph" from a question of interpretation and effect of a document, the Bhagwan Mayer Settlement Agreement, to a summary determination of Mhinder's claims of express, resulting, and constructive trusts in the face of conflicting evidence on the central facts without a proper judicial consideration of this evidence, which would have included discovery and cross-examination of Mhinder's opponents.

[69] The judge's view that Mhinder was required to establish his case on his own evidence and that the respondents' evidence need not be considered does not accord with Rule 18A(11) [now Rule 9-7(15)], which requires the court to consider "the whole of the evidence before the court on the application":

> 18A (11) On the hearing of an application under subrule (1), the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application ....
>
> [Emphasis added.]

And, as McEachern C.J.B.C. said, in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 215, 36 C.P.C. (2d) 199 (C.A.),

> In deciding whether the case is an appropriate one for judgment under R. 18A, the chambers judge will always give full consideration to all of the evidence which counsel place before him ...
>
> [Emphasis added.]

[70] In my view, the judge erred fundamentally in his approach in concluding he could find the facts necessary to decide the issues without considering all of the evidence before him and without resolving the conflicts in that evidence.

[71] Further, the judge refused to allow Mhinder to develop his case fully through discovery and cross-examination of his opponents and thereby possibly to present further evidence supportive of his trust claims in addition to his own.

[72] In particular, the judge found Mhinder's conduct in the Bhagwan Mayer Action to be misconduct without permitting Mhinder to attempt to buttress his evidence that he was acting on Bhora's instructions through discovery and cross-examination of Bhora and through evidence from others who may have had knowledge of the relevant circumstances. As the judge noted (at para. 161), Mhinder deposed,

> 32 Bhora Mayer told me that after 1991 (when, according to our belief, Bhagwan had left the Trust) a "new trust" had been created. I understood him to be referring to the Family Trust I have described. Bhora Mayer specifically told me that we should not disclose documents relating to the new trust. I did not discuss this with our lawyers.

In his affidavit evidence, Bhora denied discussing this "new trust" with Mhinder. He did not specifically deny he told Mhinder not to disclose the documents, although his denial could probably be inferred. This factual dispute was not fully investigated.

[73] As well, as the judge noted (at para. 166), Mhinder deposed he signed the Bhagwan Mayer Settlement Agreement on the basis of representations made to him by Richard and Rita. Specifically, he deposed,

> 39 My recollection is that Rita Webb called me to advise that the Bhagwan litigation had settled and to tell me that there was a settlement agreement being faxed to me. I looked at it and spoke with her again. The agreement contained two paragraphs that correspond to paragraphs 4 and 5

> of the final signed agreement and I told her that I did not want to sign because paragraph 4 (or its equivalent) was not right. She told me that these paragraphs came from the lawyers who said they had to put them in. I said that I did not want to sign.
>
> 40 Then I got a telephone call from my nephew, Ricky Mayer, who apparently had spoken with Rita and wanted me to sign the agreement. At first I said that I would not sign. We discussed the same paragraphs I had discussed with Rita. At some point in this or a later conversation that day, he said, 'you are not excluded from anything', which was a reference to the businesses and properties referenced in paragraph 4.
>
> 41 I received a further telephone call from Rita in which we discussed again these same paragraphs. She said that if I signed the Agreement, 'you are not out', which was a reference to the businesses and properties referenced in paragraph 4, adding "you did it all".

Richard and Rita denied these alleged conversations. The judge refused to allow Mhinder to examine Richard and Rita for discovery before the summary trial and refused to allow him to cross-examine them on their affidavits. Thus, this factual dispute was not investigated.

[74] Similarly, the judge's conclusion that clauses 4 and 5 of the Bhagwan Mayer Settlement Agreement had contractual effect (at para. 237) because Mhinder intended them to induce the settlement and intended to benefit from the settlement was made without the full investigation of the relevant facts that was essential in order to determine the proper effect to be given to those provisions.

[75] These factual disputes were pivotal at the summary trial on the view the judge took of the matter. Yet, the judge said he was able to decide Mhinder's trust claims without considering any evidence aside from that given by Mhinder himself. He said,

> [218] I find Mhinder Mayer's evidence concerning his trust claims, including the alleged new family trust, the Acknowledgements, the alleged representations made by Richard Mayer and Rita Webb (relied on in his evidence to invoke the doctrine of promissory estoppel), and his discovery evidence in the Bhagwan Mayer Action, lacking in credibility. In a number of instances (e.g., the promissory estoppel representations), I found his evidence so vague as to be unreliable. ...
>
> ...
>
> [228] Given the glaring inconsistencies in Mhinder Mayer's evidence, my findings concerning his credibility and the unreliability of his evidence, I am unable to accept his evidence concerning the effect to be given the Acknowledgments.

...

[230] I find that Mhinder Mayer has not proven his claim of express trust on a balance of probabilities. My determination is based upon my view of all of his evidence and my adverse assessment of his credibility and the unreliability of his evidence. ...

...

[241] I do not accept Mhinder Mayer's evidence concerning the representations allegedly made by his nephew and niece. His evidence is neither credible nor sufficient to found an inducement claim. Mhinder Mayer has not proven representations were made. ...

[76] Then the judge concluded,

[276] It was submitted on behalf of Mhinder Mayer that adverse findings concerning his credibility will prejudice him and "wreak havoc" on the related actions. No particulars were provided to me other than it would be unfair to Mhinder Mayer to make adverse remarks about his credibility. I respectfully disagree. To decline, as a general rule, to decide Rule 18A applications out of concern for adverse findings of credibility in multi-party or complex litigation would permit the Court's process to be used by an untruthful party to prolong a case without merit against another party.

...

[281] I am not persuaded that my decision in respect of Mhinder Mayer's trust claims will cause unfairness in the determination of the claims advanced in the related actions. There is no reason to refrain from determining the Rule 18A application when it can be done based upon Mhinder Mayer's own evidence. In addition, my determination of Mhinder Mayer's trust claims on this application will shorten the length of trial by at least three to four weeks and the interlocutory proceedings considerably.

[282] There is no further evidence that Mhinder Mayer can seek to adduce of which I have been advised in order to prove his express trust claim, or to overcome his misconduct. Since my determination of this application is based upon Mhinder Mayer's own evidence and conduct, cross examination of the personal applicants on their affidavits will not advance his case in view of the evidence contained in their affidavits.

[283] In reaching my conclusion that I should decide the application insofar as the trust claims are concerned, I am mindful that there may be times when deciding some but not all of the claims made in a case can lead to unforeseen adverse consequences if findings are carried over to the subsequent determination of other issues. That risk is minimized because I am the case management and trial judge of this and the related actions. Although I have determined claims on this application, and not merely issues, I draw comfort from the remarks of Donald J.A. in *Graham v. Moore Estate*, 2003 BCCA 497, where he said at para. 35:

> Sometimes splitting the issues in a case can lead to the unavoidable result that findings carry over to the later

> determination of unresolved issues. That is a consideration to be factored into the decision whether to grant a Rule 18A trial on part of the case, but it is not necessarily a determinative factor. Where, as here, the case is under the management of a single judge who hears all aspects of the case, the danger of injustice is minimized.

[77] With respect, the judge erred in approaching the issues in the way he did. As Justice Sopinka stated in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 358-59,

> ... a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.
>
> [Emphasis added.]

To the same effect, this Court stated, in *R. v. Barton*, 2001 BCCA 477, 51 W.C.B. (2d) 4,

> [7] One of the fundamental principles upon which our legal system operates is the right of each side in a legal dispute to be heard. … The Court is impressed with the duty to fully hear and consider both sides and to render a considered judgment as to the proper disposition of the case.
>
> [Emphasis added.]

[78] The system is founded on the conception that the parties to a lawsuit will bring forward all relevant evidence available to support their case and will present their case in its best light. In that way, "it guarantees to each of the parties who are affected the right to prepare for themselves the representations on the basis of which their dispute is to be resolved": Professor Paul Weiler, "Two Models of Judicial Decision-Making" (1968), 46 Can. Bar Rev. 406 at 412, quoted with approval in *R. v. Swain*, [1991] 1 S.C.R. 933 at 972.

[79] Litigants do not always have access to all of the relevant evidence bearing on the issues raised. Often, relevant documents are in the sole possession or control of their opponents. Documentary discovery requires the opponents to disclose such documents and enables the litigants to use them in support of their case. Also, oral discovery offers the opportunity to learn of relevant evidence otherwise not known to

the examining party, to obtain helpful admissions, and to explore the strengths and weaknesses of the opponent's case: see *Anglo-American Timber Products Ltd. v. British Columbia Electric Company Limited* (1960), 23 D.L.R. (2d) 656 at 657-58, 31 W.W.R. 604 (B.C.C.A.). Moreover, when a party is unable to tender necessary evidence in any other way, the party may adduce such evidence from his opponent: Rule 40(20) [now Civil Rule 12-5(26)]. Clearly, parties are not confined to reliance on their own evidence.

[80] Further, cross-examination is essential to protect trial fairness since, without it, the court cannot assess the probative value of the evidence: see *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443 at para. 63. In *R. v. Osolin*, [1993] 4 S.C.R. 595 at 663, Cory J. made the following remarks which, although made in a criminal context, are apposite to this discussion:

> There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. ... Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. ...

I would add that, in cases of conflicting evidence, cross-examination of the parties offering the conflicting evidence is essential – the credibility of one or the other cannot be considered in a vacuum.

[81] In addition to exposing credibility to scrutiny, cross-examination may also cast a different light on the evidence given by witnesses and may bring out relevant information that might not otherwise be disclosed, thus enabling the court to be informed of all the evidence bearing on the issues.

[82] In *J.M. Stafford & Associates Ltd. v. Integrated Resources Photography Ltd. and Bank of B.C.* (1985), 62 B.C.L.R. 60 (Co. Ct.), Leggatt Co. Ct. J. (as he then was), having heard the witness on one side of an issue cross-examined on a Rule 18A summary trial, refused to grant judgment without cross-examination on other conflicting affidavits. He saw it as a question of procedural fairness requiring "substantial procedural safeguards", as that phrase was used in *Martineau v.*

Matsqui Institution Disciplinary Bd., [1980] 1 S.C.R. 602 at 628-29. In a passage at 67 of his reasons for judgment, which was quoted with approval in *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 at 382 (C.A.), Leggatt Co. Ct. J. said,

> In my view "substantial procedural safeguards" will usually involve more than the treatment of evidentiary matters through affidavit evidence. The nature of the decision-making process and, more specifically, the need to make findings of fact and weigh evidence most often necessitates the right to present viva voce evidence and to cross-examine witnesses without leave of the court. Without the procedural regularities of viva voce evidence and cross-examination, a party's opportunity to effectively present his case and to correct or contradict any relevant statement prejudicial to his view is significantly diminished. Consider how simple questions of fact may involve a very complex process of advocacy which may not be readily apparent. Relevant exculpatory evidence, essential to complete an accurate fact finding, may not be heard at all simply by virtue of the fact that witnesses are not cross-examined. Scenarios where one form of evidence (e.g., affidavit evidence) is challenged by another (e.g., live testimony) would clearly lead to an unbalanced procedural process where the weight given to evidence is more a function of the form of presentation rather than the substantive value of the evidence itself.

I would adopt these remarks as apt in the present circumstances.

[83] In my view, once issues of credibility arose, it was unjust to proceed under Rule 18A without permitting Mhinder to develop his case fully through discovery and through cross-examination of the defendants on their affidavits or through a conventional trial if that was necessary.

[84] Adding to the injustice, the application was brought by the defendants and, as a result, the manner in which the summary trial proceeded raised difficulties for Mhinder. The traditional order of trial is described in Rule 40(53) [now Civil Rule 12-5(72)]: plaintiffs lead their evidence first and then defendants lead their responding evidence, if any. In this way, plaintiffs are able to present the evidence in support of their claims fully, in an orderly way and in its best light, before it is challenged by the defendants. Here, Mhinder was thrown on the defensive at the outset. The summary trial was initially focussed on the estoppel defence arising out of the Bhagwan Mayer Settlement Agreement and on the alleged weaknesses in Mhinder's claims and, as a result, he was deprived of the advantages accruing to

plaintiffs in a normal trial. This disadvantage was compounded when the issues to be tried changed mid-trial and Mhinder was virtually forced to give evidence to respond to the defendants' arguments. To proceed in this manner was unfair to Mhinder and unjust.

Mhinder's "Misconduct"

[85] Nevertheless, the respondents defend the judge's dismissal of Mhinder's claims without resolving the evidentiary conflicts on the basis that, even if Mhinder had been truthful his trust claims would have been barred by the "clean hands" maxim, *viz*., "He who comes to equity must come with clean hands." They rely on the judge's hypothetical reasoning on this issue, although he made no express finding that the maxim was applicable.

[86] The judge correctly stated the relevant rule (at para. 243) citing, among other authorities, I.C.F. Spry in *The Principles of Equitable Remedies*, 6th ed. (London: Sweet & Maxwell Ltd., 2001) at 169,

> ... it must be shown, in order to justify a refusal of relief, that there is such an "immediate and necessary relation" between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief.

Thus, the relationship between the relief sought and the misconduct must be direct and necessary in the sense that the person seeking equitable relief must be required to rely on the misconduct in order to vindicate his claim: see *DeJesus v. Sharif*, 2010 BCCA 121 at paras. 84-86, 71 B.L.R. (4th) 159; *Attwood v. Small* (1838), 6 Cl. & F. 232 at 447-48, 7 E.R. 684 (H.L.); John A. McGhee, ed., *Snell's Equity*, 31st ed. (London: Sweet & Maxwell Ltd., 2005) at 98-99.

[87] Here, the judge identified Mhinder's misconduct (at para. 249) as failing to disclose the Acknowledgments of Trust in the Bhagwan Mayer Action when he knew it was wrong to fail to do so, giving misleading evidence and untruthful answers on his examination for discovery in that action, signing the Bhagwan Mayer Settlement Agreement when he knew it was false and in the expectation that Bhagwan would rely on it, and using the process of the court to obtain a dismissal of all Bhagwan's

claims “including those that bear on the trust claims Mhinder Mayer advances in this action.”

[88] He expressed his hypothetical conclusion in this way:

> [248] As I have pointed out, if I had accepted Mhinder Mayer’s evidence concerning the existence of a new family trust in this action, then it would mean he gave misleading and inaccurate discovery evidence in the Bhagwan Mayer Action in order to benefit himself. His misconduct in that case relates to the very same subject matter comprising his trust claims in this case.
>
> [Emphasis added.]

[89] While it is true that Mhinder’s misconduct as found by the judge relates to the same subject matter as the trust claims he brings in Action 716, the misconduct is not the foundation of his current claims. Mhinder relies on the Acknowledgements of Trust signed in December 2001, five years prior to the misconduct, as evidence of an express trust whereby Richard and Rita held the shares of their companies and certain properties in trust for Bhora and Mhinder (or alternatively, for Bhora, Mhinder, Richard, and Rita). Further, his claim for a resulting trust arises simply by virtue of the allegedly gratuitous transfer of certain assets to Richard and Rita commencing in or about 1988 which, if gratuitous, would raise a rebuttable presumption of resulting trust: see *Pecore v. Pecore*, 2007 SCC 17 at paras. 24-25, [2007] 1 S.C.R. 795.

[90] It follows that, although Mhinder’s behaviour in the Bhagwan Mayer Action could constitute misconduct, depending on how the evidentiary conflicts in regard to this conduct might be resolved, the misconduct did not have an “immediate and necessary relation” to his trust claims and it would be possible for Mhinder to prove these claims without relying on the impugned conduct: *Tinsley v. Milligan*, [1994] 1 A.C. 340 at 367, 371, 375, [1993] 3 All E.R. 65 (H.L.). Further, the fact that, in the judge’s view, Mhinder did not have a clean record in the matter was not a bar to the equitable relief he claimed. As Lord Brougham said in *Attwood*, *supra*, at 447-448, quoted in I.C.F. Spry, *The Principles of Equitable Remedies*, 8th ed. (London: Sweet & Maxwell Ltd., 2010 at 170),

> ... [T]hat general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract.
>
> [Emphasis added.]

[91] The judge also referred (at paras. 245-47) to a number of cases that stand for the proposition that the court will not enforce a trust where to do so would require the plaintiff to give evidence that the trust was established in furtherance of an illegal or immoral purpose. Thus, if the trusts Mhinder seeks to enforce were made for such a purpose his claims might be barred under this rule. However, none of the parties who gave evidence said that the transfers of assets to Richard, Rita, Gina, and Marc Furnemont were made in furtherance of any illegal or immoral purpose. Further, although there was conflicting evidence of the purpose of the Acknowledgments of Trust, none of the deponents said they were made for such a purpose.

[92] As well, the judge referred to *Taylor v. Wallbridge* (1879), 2 S.C.R. 616 at 639, where the Court commented that it would be contrary to public policy to permit a litigant to assert a resulting trust when the litigant had transferred the subject property out of his hands in order to perpetrate a “fraud on the court” by testifying as a disinterested witness in an earlier proceeding in which title to the property was in issue. In my view, this *dictum* would not apply here since, although Mhinder testified on his examination for discovery in the Bhagwan Mayer Action in a manner the judge found to be false and misleading, there was no evidence that this testimony was placed before the court in the truncated trial of that action and, in any event, although the consent order dismissed the action “as if pronounced by this Court after a full trial of this proceeding on the merits”, the court did not adjudicate Bhagwan’s claims and it therefore cannot be said Mhinder’s evidence led to a “fraud on the court.”

[93] Moreover, allegations of bad faith, abuse of process, lack of clean hands and the like cannot be resolved without a consideration of their full factual circumstances,

especially when there are credibility issues. As Lord Bingham said, dealing with an application to strike out an action as an abuse of process in *Johnson v. Gore Wood & Co. (a firm)*, [2000] UKHL 65, [2001] 1 All E.R. 481 at 490 (H.L.),

> The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court [citations omitted].
>
> [Emphasis added.]

Here, there were no examinations for discovery of any of the parties on the clean hands issue, since it was not introduced into the pleadings until the second day of the summary trial hearing. Only Mhinder was cross-examined on the issue. Thus, no "scrupulous examination of all the circumstances" took place.

[94] It follows that the submission that Mhinder's position is the result of tactical decisions he made in order to oppress the defendants must be rejected since the premise of the argument cannot be supported in the absence of full evidence on the point.

[95] Accordingly, I would not accede to the respondents' submission that the judge's error in disregarding their evidence and in failing to resolve the conflicts in the evidence can be ignored because the "clean hands" doctrine would have defeated Mhinder's trust claims in any event.

"Litigating in Slices"

[96] The appellants contend, as well, that the judge erred in his approach by "litigating in slices", that is, by adjudicating certain issues on a summary basis and leaving the issues remaining in the action to be tried at a later time.

[97] Rule 18A(11)(a) contemplates the judge granting judgment "on an issue or generally". However, it is a salutary principle that the application judge must carefully consider whether trying some issues and not all will contribute, in the end, to the "just, speedy and inexpensive determination of the dispute on its merits": *Bacchus*

Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd., 2002 BCCA 138 at para. 7. Generally, issues should not be tried separately under Rule 18A when they are interconnected with the remaining issues, when substantial time will be required for hearing a summary trial, and when there is a substantial risk of wasting time and effort and of producing unnecessary complexity: *Sinnott v. Westbridge Computer Corp.* (1993), 78 B.C.L.R. (2d) 28 at para. 16 (S.C.).

[98] The judge considered this axiom when he said, in a passage I have quoted above but which I will reproduce here for convenience,

> [283] In reaching my conclusion that I should decide the application insofar as the trust claims are concerned, I am mindful that there may be times when deciding some but not all of the claims made in a case can lead to unforeseen adverse consequences if findings are carried over to the subsequent determination of other issues. That risk is minimized because I am the case management and trial judge of this and the related actions. ... I draw comfort from the remarks of Donald J.A. in *Graham v. Moore Estate*, 2003 BCCA 497, where he said at para. 35:
>
> > Sometimes splitting the issues in a case can lead to the unavoidable result that findings carry over to the later determination of unresolved issues. That is a consideration to be factored into the decision whether to grant a Rule 18A trial on part of the case, but it is not necessarily a determinative factor. Where, as here, the case is under the management of a single judge who hears all aspects of the case, the danger of injustice is minimized.

[99] I cannot agree that the “risk [was] minimized” in this case. For one thing, as will be seen in my colleague’s reasons, the judge’s adverse findings of credibility against Mhinder unjustly permeated his reasoning in his subsequent decisions. Moreover, the judge erred in principle in that he gave too little weight to the factors I have just mentioned.

[100] Finally, although there are exceptions (see *Placer Development Ltd.* at 386), complex cases are generally not suitable for Rule 18A summary trials. As Esson J.A. said for the Court in *Cannaday v. Sun Peaks Resort Corp.* (1998), 44 B.C.L.R. (3d) 195 at para. 53, 102 B.C.A.C. 241 (C.A.),

> [53] One point which may properly be taken from this case is that the summary trial procedure is not well suited to factually complex cases. The

> difficulty, of course, is all the greater where not all parties are competently represented, and perhaps greater again where the application is brought by the defendant. All too often, proceedings such as these place an inordinate burden on the judge and in the end prove to be a waste of time and effort. In its place, Rule 18A is a useful procedure for permitting speedy and inexpensive resolution of cases, but it is doubtful that its place extends beyond cases which are relatively straightforward on their facts.

[101] The parties in the case at bar were competently represented. However, the relevant events took place over a period of approximately 45 years and involved numerous corporate businesses and real properties and myriad transactions. Many if not most of the factual issues were the subject of conflicting evidence. The parties submitted in total 142 pages of written argument on the estoppel issue alone, the summary trial took 13 days to complete, and the judge's reserved reasons for judgment were 101 pages in length. Further, the issues were intermingled factually and legally with the issues in the related proceedings, all of which arise out of the Brothers' Trust. In total, the documentary evidence on the appeals now before the Court runs to 3,924 pages and fills 18 volumes of appeal books. This case is not "relatively straightforward" on its facts. I do not say that there are no discrete issues that might be determined summarily but the case as it was tried here is not the type of case for which Rule 18A was intended.

[102] For those reasons, I have concluded that the trial judge erred in proceeding with a summary trial of Mhinder's trust claims and that Orders 1 and 2 set out in para. 5 of these reasons above should be set aside.

Pre-June 8, 2006 Constructive Trust Claims

[103] Mhinder's alternative ground of appeal – that the trial judge erred in making Order 3 – need not be discussed. Since this order was founded on the judge's conclusion that clauses 4 and 5 were contractually binding on Mhinder, a conclusion that I have already observed should not have been reached without a full investigation of all relevant evidence, the order must be set aside.

Mhinder's Standing

[104] However, Mhinder's counsel has requested that, if we should conclude the judgment should be set aside and the trust claims should be remitted to the Supreme Court, we resolve the question arising out of Order 4, that is, whether the judge erred in applying the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (Ch.) to conclude Mhinder did not have standing to advance in his own name claims arising out of the alleged diversion of assets from the Identified Trust Companies and the Disputed Trust Companies.

[105] In my view, discussion of this issue, although not strictly necessary to the disposition I would make of this appeal, will likely be beneficial to the parties, as it appears this dispute may be destined to be tried again in the Supreme Court.

Mhinder's Standing as a Beneficiary – The Rule in *Foss v. Harbottle*

[106] The Rule in *Foss v. Harbottle* is the subject of a comprehensive discussion in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 276 at paras. 7-30, 82 B.C.L.R. (4th) 230, *per* Newbury J.A., writing for the Court. From *Everest*, I take the following propositions. The Rule holds that the proper plaintiff in respect of a wrong done to a company or association of persons is *prima facie* the company or the association of persons itself, and no individual member can maintain such an action if the matter relied upon as constituting the cause of action can be approved by a majority of the members. Implicitly, the Rule applies if the cause of action properly belongs to the company or the association of persons and not to an individual member in his own right (para. 7). The Rule does not apply to a cause of action that belongs to an individual member of the company or the association personally, an exception that is "particularly difficult to delineate in particular fact situations" (para. 9). Thus, a member who suffers personal and direct damage may bring a claim in that respect, but an individual member cannot claim for losses that are "reflective" or "derivative" of losses suffered by the company, such as a diminution in share value as a result of damage done to the company (para. 28). The reasons for

the Rule include the avoidance of a multiplicity of actions and the avoidance of double recovery for the same loss (paras. 22, 28).

[107] Mhinder pleaded that he and Bhora, along with the other three brothers previously mentioned, documented the Brothers' Trust in three instruments dated March 20, 1966, January 12, 1978, and February 8, 1984 respectively. The trust was established by the first document in time and was amended by the second two. Although not set out in the pleading, each of the two amending documents contained, among others, this preambulatory clause:

> B. In pursuance of the [trust] Agreement the Brothers have acquired many properties and carry on business through various companies and in many cases the formal registrations of title or ownership of the properties and shares have been placed in the names of one or some of the Brothers as a matter of convenience rather than in the names of all.

[108] Mhinder further pleaded breach of fiduciary duty by Bhora, the resulting unjust enrichment of the defendants, and, as well, their knowing participation in Bhora's breaches of trust. More specifically, he said,

> 58 At the direction of Mr. Furnemont [who was acting in his capacities as accountant, *etc.* to the Identified Trust Companies, the Disputed Trust Companies, and the Other Family Companies and the Brothers' Trust] and Bhora Mayer, since Bhagwan Mayer left the Brothers' Trust, large amounts of money and assets have been transferred to Ricky Mayer, Gina Mayer, and Rita Webb, and the Other Family Companies, for no consideration or at gross undervalues, some particulars of which are set out in this Statement of Claim. This was done without Mhinder Mayer's knowledge, or in the alternative, without his informed consent. Further particulars are peculiarly within the knowledge of those parties and will be given in accordance with Rule 19(11.1) of the Rules of Court. In the circumstances, Ricky Mayer, Gina Mayer, Rita Webb, and the Other Family Companies hold that money and those assets in trust for Bhora Mayer and Mhinder Mayer. Mhinder Mayer pleads the doctrine of resulting and constructive trust.
>
> 59 Further, in the circumstances, it is unjust and there is no juristic reason for the transfer of money and assets referred to in the immediately preceding paragraph, and Ricky Mayer, Gina Mayer, Rita Webb, and the Other Family Companies have been unjustly enriched.
>
> 60 In breach of his fiduciary obligations and duties of care to Mhinder Mayer, Bhora Mayer has appropriated and diverted, or caused the Identified Trust Companies and/or the Disputed Trust Companies, or some of them, to appropriate and divert certain of their assets for improper purposes and for the personal benefit of Bhora Mayer and members of his family...

[109] Mhinder's pleading then listed some particulars of numerous specific transactions, including a series of allegedly improvident contracts, loans, and transactions involving the Identified Trust Companies and the Disputed Trust Companies. He followed that with a pleading that full particulars of these claims were "peculiarly within the knowledge of the Defendants". As well, he pleaded that "the Defendants were aware that Bhora Mayer was acting in breach of trust at the time those breaches occurred and knowingly participated in those breaches of trust."

[110] In his prayer for relief, Mhinder claimed, amongst many other things, an order that the defendants disgorge all profits made as a result of the alleged breaches of trust; an accounting of all money due him as a result of the alleged breaches of trust; a declaration that the defendants hold corporate shares, assets, and properties in trust for him; and an order permitting him to trace the proceeds of the alleged breaches of trust.

[111] Curiously, Mhinder's parallel claims against Bhora in respect of these same transactions, which are legally and factually enmeshed with the claims under discussion, are found in Mhinder's counterclaim in the Bhora Mayer Action and Bhora is not a defendant in the action now under consideration. This is a regrettable result of the judge's refusal, at the case management conference on October 13, 2009, to allow Mhinder to amend his counterclaim in the Bhora Mayer Action to advance these claims together with his claims against Bhora and of the judge's direction that these claims must be brought in a separate action.

[112] In any event, the judge held that these claims belonged to the corporations and that Mhinder had no standing to bring them personally. He said,

> [262] Regardless of whether [these transactions] pre- or post-date the Bhagwan Mayer Settlement Agreement, they are not, in my opinion, claims for which Mhinder Mayer has personal standing to advance. Those claims belong to an aggrieved corporation and not a shareholder. Characterizing them as claims for a constructive trust remedy does not alter the analysis since the pleading is that corporate funds have been diverted. ...
>
> ...
>
> [265] Claims in respect of diversion of corporate assets should be brought by the companies aggrieved. ...

[113] Relying on *Robak Industries Ltd. v. Gardner*, 2007 BCCA 61, 65 B.C.L.R. (4th) 62, Mhinder submits the judge erred in failing to recognize that the Rule in *Foss v. Harbottle* does not apply where the plaintiff shareholder has both an independent relationship with the wrongdoer and a loss independent of that suffered by the company to which the wrong was done.

[114] In *Robak*, the plaintiffs claimed damages for alleged wrongful conduct relating to the control and management of a corporation in which the plaintiffs were shareholders and the defendants included a director, other shareholders, and the company's solicitors. The plaintiffs' causes of action included conspiracy to cause them economic injury, defamation, and breaches of fiduciary duties. The defendants applied successfully to strike portions of the statement of claim on the basis they disclosed no reasonable cause of action since the plaintiffs were precluded from bringing the claims by the Rule in *Foss v. Harbottle*. As this Court noted on appeal (at paras. 12-14), the chambers judge observed that the Rule does not apply when the shareholder has a personal right of action arising out of a relationship between the shareholder and the wrongdoer that is different from the relationship the shareholder derives through his shareholdings in the company, but concluded that, although the plaintiffs had established an independent relationship with the alleged wrongdoers and independent causes of action against them for conspiracy and defamation, the loss claimed, a reduction in the value of their shares, was derivative of the loss suffered by the company. This Court affirmed the judgment, stating,

> [38] ... [The chambers judge] did not apply the wrong test for striking pleadings; she considered whether the appellants had a reasonable cause of action, including a valid claim for damages. She applied binding Canadian law, which has been considered and affirmed in a persuasive judgment of the Ontario Court of Appeal in [*Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 220 D.L.R. (4th) 611]. In both [*Rogers v. Bank of Montreal* (1986), 9 B.C.L.R. (2d) 190 (C.A.), affirming (1985), 64 B.C.L.R. 63 (S.C.)] and *Meditrust*, shareholders claimed losses in the value of their shares as the result of an alleged conspiracy against them involving wrongs done to the company, and in both cases the claims were dismissed. The chambers judge did not decide, contrary to the appellants' arguments, that a shareholder may never bring a claim for the diminution in the value of the shareholder's shares, but confirmed, by reference to [*Hercules Management Ltd. v. Ernst and Young et al*, [1997] 2 S.C.R. 165] and [*Haig v. Bamford*, [1977] 1 S.C.R. 466], that a shareholder may have a cause of action for loss in the value of

> shares where the shareholder has both an "independent relationship" with the wrongdoer and an "independent loss" from that of the company to whom the wrong has been done. She decided that in this case, the appellants had not shown that they have a cause of action for an "independent loss" in respect of wrongs done to Getty. I agree with her conclusion.
>
> [Emphasis in original.]

[115] As I understand Mhinder's position, he contends he has an independent relationship with the defendants because he is a trust beneficiary of the shares in the Disputed Trust Companies and the Identified Trust Companies and the defendants were knowing participants in and recipients of the benefits of Bhora's breach of his duty as a trustee in causing these companies to transfer their property to the detriment of the trust. Accordingly, his causes of action are based on a relationship with the defendants different from their relationship with the companies and his causes of action are not available to the companies. Further, he submits that the requirement for an independent loss must be understood in these circumstances as a requirement for an independent remedy and that the restitutionary remedies he claims would not be available to the companies in any action they might take against the defendants.

[116] In my view, Mhinder has satisfied the first condition, a relationship with the defendants different from their relationship with the companies, and the issue turns on whether the loss he claims is merely reflective of losses sustained by the companies.

[117] I find the reasoning in *Shaker v. Al-Bedrawi*, [2002] EWCA Civ 1452, [2002] 4 All E.R. 835 persuasive on this point. In *Shaker*, the plaintiff alleged he was induced by the defendant to invest in a business project to be managed and controlled by the defendant through an "operating company" incorporated for that purpose. He alleged that, although the defendant was the sole director and nominal shareholder of the operating company, the shares were held in trust for him. He alleged further that the defendant subsequently sold the business of the operating company to a third party without advising him and without accounting to him for his share of the profits on his investment. He claimed the defendant had misappropriated the purchase price in

whole or in part and, as his trustee, was liable to account to him for his breach of trust. He also claimed against the defendant's solicitors in the sale transaction, alleging against them that they had knowingly participated in the breach of trust and had benefited to the extent of the fee they were paid out of the purchase price.

[118] Relying on the Rule in *Foss v. Harbottle* or, as it has become known in the United Kingdom in its more recent iteration as the *Prudential* principle (from *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)*, [1982] 1 All E.R. 354 at 357, [1982] Ch. 204 (C.A.), approved in *Johnson*, *supra*, at 502, the defendant applied to dismiss the plaintiff's action on a preliminary issue, that is, that the plaintiff was attempting as a shareholder to recover damages that were merely reflective of the operating company's loss and for which the operating company itself had a cause of action. This submission succeeded at first instance and the plaintiff appealed.

[119] On appeal, the plaintiff argued that the Rule does not apply to a proprietary claim by a beneficiary under a trust to a profit obtained by a trustee through the use of trust property consisting of shares in a company even if the company may have a claim against the trustee for breach of fiduciary duty owed to it as director in respect of monies constituting the claimed profit, since the claim of a beneficiary against his trustee to account for a profit is different in nature from any claim the company could properly bring against the trustee. The Court accepted the plaintiff's contention and held the Rule did not apply unless the defendant could establish that the whole of the claimed profit reflected the company's loss and that the company had a cause of action to recover it. The Court held further that this could not be shown without a trial. I will quote the Court's remarks, at paras. 83-84:

> [83] In our judgment the *Prudential* principle does not preclude an action brought by a claimant not as a shareholder but as a beneficiary under a trust against his trustee for a profit unless it can be shown by the defendants that the whole of the claimed profit reflects what the company has lost and which it has a cause of action to recover. As the *Prudential* principle is an exclusionary rule denying a claimant what otherwise would be his right to sue, the onus must be on the defendants to establish its applicability. Further, it would not be right to bar the claimant's action unless the defendants can establish not merely that the company has a claim to recover a loss reflected

> by the profit, but that such claim is available on the facts. If in the present case it could be shown that the $6m was misappropriated from ANA Inc or unlawfully distributed so that ANA Inc was entitled to the whole of the $6m, we would accept that the *Prudential* principle applied to bar Mr Shaker's action.
>
> [84] However, for the reasons already given, that has not been, and cannot without a trial be, shown. It is possible that at least part of the $6m was lawfully taken by Mr Bedrawi. Accordingly we respectfully disagree with the conclusion of the judge that the *Prudential* principle applies to prevent Mr Shaker proceeding against Mr Bedrawi in relation to the proceeds of sale.

[120] The Court held further, at para. 85, that the same analysis was applicable to the plaintiff's claim against the defendant's solicitors for knowing receipt of trust proceeds.

[121] Thus, the plaintiff beneficiary had a restitutionary claim against the defendant trustee and the defendant's solicitors to the extent the monies they extracted from the purchase price of the company's assets were taken in breach of trust and the defendant and his solicitors bore the burden of showing, if they could, that the plaintiff's loss was wholly reflective of a loss suffered by the company for which it had a cause of action and that the Rule therefore precluded recovery by the plaintiff.

[122] In my view, as a beneficiary of the Brothers' Trust, Mhinder would be entitled under this reasoning to recover from the defendants the benefits they received from the breaches of trust, if any, unless and to the extent that the defendants might show the losses suffered by the Brothers' Trust were reflective of losses suffered by the companies for which the companies have causes of action, such as, for example, for damages against Bhora for breach of his duties as a director in making improvident sales of corporate assets and in misappropriating corporate profits. Further, a finding in favour of Mhinder might entitle him to an order for disgorgement and a remedial constructive trust, which is a proprietary remedy imposed by the court on unjustly obtained gains, to assist him in the recovery of his personal loss: see *Atlas Cabinets and Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R. (4th) 161, 45 B.C.L.R. (2d) 99 at 112-13 (C.A.).

[123] The questions raised by this analysis cannot be answered without weighing the relevant evidence and finding the necessary facts. As Lord Bingham said, in *Johnson*, *supra*, at 503-04, after outlining the *Prudential* principle,

> These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, whether on the facts proved the shareholder's claim should be upheld. On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage...

[124] Here, there was affidavit evidence, rife with disputes, about many of the impugned transactions. However, it does not appear that the judge based his decision on any findings of fact made on the evidentiary record: he did not discuss the evidence at all but referred only to the pleadings and the submissions. Thus, it seems, although he dismissed the claims, he treated this part of the case as if it were merely an application to strike Mhinder's pleadings rather than as a summary trial of Mhinder's claims.

[125] The judge did not find the facts necessary to decide this issue. Moreover, he could not have found the necessary facts on the affidavits filed without affording Mhinder an opportunity to develop his case fully through discoveries and cross-examination of the defendants. Accordingly, his decision that Mhinder's claim was barred by the Rule in *Foss v. Harbottle* was made prematurely.

Mhinder's Standing as a Trustee

[126] However, this conclusion does not necessarily mean that Mhinder has standing to bring these claims as a beneficiary of the Brothers' Trust. Mhinder was not only a beneficiary of the Trust: he was, unlike the plaintiff in *Shaker*, also a trustee. This fact raises questions I think must be mentioned that were not addressed by the trial judge or argued by counsel on this aspect of the appeal.

[127] The nature of the remedies available to beneficiaries of a trust are discussed in *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thompson Canada Limited, 2005) at 1202-06. At 1203, Professor Waters states that the "classic view" is that "the remedies of the beneficiary are personal; they lie against the trustee to compel him properly to discharge his duties as a trustee" and, at 1204,

> The beneficiary's principal right is to require that the trustees, who have caused loss to the trust through their breach of trust shall out of their own pockets indemnify the trust for its loss ... And it is up to the trustees to recover, if they can, from any third party who was involved with them in the breach.

[128] On the other hand, if the breaching trustee cannot make good the loss, the beneficiary may have a remedy against third parties on behalf of the trust (at 1204). As Professor Waters notes at 1204, it is not always clear in this situation whether the remedy is the beneficiary's remedy or the trustee's remedy which the beneficiary is permitted to exercise and a case can be made for each analysis depending on the particular facts. Further, he observes at 1205 that where the breaching trustee has no rights against the third party because, for example, he has improperly made a gift of the trust property, "the beneficiary's claim cannot be understood as the derivative enforcement by the beneficiary of a right held by the trustee. It is a direct right."

[129] Mhinder's primary duty is to pursue these claims against the defendants as a trustee on behalf of the beneficiaries of the Brothers' Trust. As stated in *Nelson House Indian Band v. Young* (1999), 169 D.L.R. (4th) 606, 6 W.W.R. 405 (Man. C.A.),

> [13] Beneficiaries of a trust have no status to commence an action for the protection or recovery of trust property if the trustee is willing and able to commence such an action: see *Sharpe v. San Paulo Rlwy. Co.* (1873), 8 Ch. App. 597 (C.A.) and *Norfolk v. Roberts* (1912), 28 O.L.R. 593 (App. Div.), affirmed (1914), 50 S.C.R. 283.

[130] As Madam Justice Neilson notes at para. 233 below in response to submissions that were not made in respect of this appeal, co-trustees must act in concert and in these circumstances, where it is virtually certain that the consent of Mhinder's co-trustee, Bhora, to pursue these claims will not be forthcoming, Mhinder

should seek directions pursuant to s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464. The questions whether Mhinder should be given leave to sue as a single trustee and whether, if leave should be refused, he may sue in his own right cannot be answered in the absence of factual findings that must be made in the trial court.

[131] For those reasons, I would set aside Order 4 and remit this issue to the trial court.

The Stay of "Duplicate" Claims

[132] Order 5 stays all duplicate claims pending a reconciliation of the pleadings in the various proceedings and pending further order. As my colleague has noted at para. 246 below, the duplication was largely the result of the judge's directions on October 13, 2009, which left Mhinder no option but to pursue his claims in separate proceedings. Given our disposition of these appeals, Order 5 has no remaining utility and it should be set aside.

Conclusion

[133] For those reasons, I would allow the appeal from the first summary trial judgment, set the judgment aside in its entirety, and remit Mhinder's trust claims, including his claim for a remedial constructive trust, to the Supreme Court.

[134] Mhinder requests a direction that the remittal be to a different judge. He relies on the remarks of Hall J. (as he then was) in *British Columbia Nurses' Union v. British Columbia (Labour Relations Board)* (1995), 14 B.C.L.R. (3d) 363 at para. 20, [1996] 3 W.W.R. 113 (S.C.), aff'd 33 B.C.L.R. (3d), [1997] 6 W.W.R. 81 (C.A.). In this case, Mr. Justice Hall concluded the Labour Relations Board had erred in ordering that a grievance be remitted to the original arbitrator where the award involved findings on credibility. In his reasons, he said,

> [20] ... In my judgment, when a decision turns, as the case at bar does, on a disputed issue of credibility, it is approaching the impossible to ask the tribunal of first instance to revisit the matter with a view to possibly reversing those findings and making new findings. To my mind, it is making a demand upon the original hearing tribunal that verges on the superhuman. Where

> decisions on credibility have been reached after due consideration and reflection, I should think it could scarcely ever be appropriate that the matter be remitted.

[135] In affirming Hall J.'s judgment, Lambert J.A. said, for the Court,

> [14] ... It is, in my opinion, completely unrealistic to expect a decision maker to free his or her mind from a previous conclusion that someone is in essence, lying, and to reach a new and entirely balanced conclusion completely free from that previous settled decision on the basis of new evidence which may do nothing more than add another piece to the total puzzle of credibility and fact finding.

[136] The wisdom of these remarks is undeniable. Nevertheless, I would not presume to direct the Chief Justice of the Supreme Court in the exercise of his responsibilities for the administration of the judges of his Court. Accordingly, I would decline to give the direction sought.

Reasons for Judgment of the Honourable Madam Justice Neilson:

Introduction to the Remaining Appeals

[137] I concur with the reasons of my colleague, Mr. Justice Smith, regarding the disposition of Appeal No. CA38462. The question now arises as to the impact of that decision on the remaining ten appeals.

[138] These appeals arise from proceedings that followed the first summary trial. Briefly, these included several applications by Mhinder to amend his pleadings in Action 716, the Bhora Mayer Action, the Gina Mayer Rents Action, and the Oppression Proceeding, in accordance with directions given by the judge in his summary trial decision, as well as an application to add Gina, Rita, and some of their companies as defendants to the Oppression Proceeding. The respondents opposed these applications and they were ultimately dealt with during a 15-day hearing in which the judge also considered applications brought by the respondents to dismiss Mhinder's remaining claims in each action as an abuse of process, as well as applications by the respondents under Rule 9-7 for summary dismissal of Mhinder's claims. In the balance of this decision I refer to that hearing as the "second hearing".

On February 11, 2011, the judge delivered reasons denying Mhinder's applications to amend and add parties and dismissing all of his claims against the respondents except those in his counterclaim in the Bhora Mayer Action: 2011 BCSC 386.

[139] These proceedings took place in a context that arose from the summary trial judgment. With the reversal of that decision, the foundation for the parties' controversy reverts to its status at the commencement of that trial and many of the orders under appeal have been rendered academic. It therefore becomes necessary to consider whether issues in the remaining appeals should be determined.

[140] The doctrine of mootness was discussed by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353-362, 57 D.L.R. (4th) 231 at 353-361. I take the following principles from that decision. An issue is moot if it raises a merely hypothetical or abstract question, and a decision by the court will have no practical effect on the parties' rights. The court will generally decline to hear such an issue, although it retains a discretion to depart from that rule in certain circumstances governed by a two-step analysis. First, it is necessary to decide whether a live controversy remains between the parties. If not, the second step addresses three factors to determine whether the court should nevertheless exercise its discretion to hear the matter. These are, first, whether there is a continuing adversarial context; second, concerns of judicial economy; and, third, whether the court's intervention in the absence of an active dispute might be viewed as an intrusion on the role of the legislature.

[141] I am satisfied that the application of those principles in this case leads to a conclusion that the reversal of the summary trial has rendered moot most of the issues in the remaining appeals. For example, Mhinder has appealed the orders dismissing his applications to amend his pleadings and dismissing his claims, made in the second hearing. My colleague's decision, however, returns the pleadings and claims of the parties to their status at the outset of the summary trial. Thus, these subsequent orders have no remaining significance.

[142] I would, however, exercise my discretion to consider five issues that arise from the remaining appeals. There is clearly an ongoing adversarial dispute between the parties. As to judicial economy, these five issues may arise again in the controversy between the parties and it is my hope that our decision may provide useful future guidance. As we had full argument on these matters at the hearing of the appeal, there is little concern about using additional judicial resources to determine them. Finally, nothing suggests that court intervention on these issues might intrude on the role of the legislative branch.

[143] Before turning to those five matters, I will set out the remaining orders under appeal, and identify those that I would set aside as academic and those remaining for consideration.

[144] In **Appeal Nos. CA38597, CA38598, CA38599, and CA38600,** the following order was pronounced on October 20 and October 22, 2010 in Action Nos. S073324, S093607, S097716, S52127, and S085604, following an application brought by Mhinder Mayer to amend his pleadings:

> 1. Should Mhinder Mayer wish to further amend his pleadings in any proceeding to add claims or to add parties, Mhinder Mayer is required to file appropriate affidavit evidence in support of that application.

The judge's reasons for judgment are indexed as 2010 BCSC 1729.

[145] I am satisfied I should exercise my discretion to decide the appeals from these orders as they raise an issue that may recur in future proceedings between the parties.

[146] In **Appeal No. CA38681**, the following orders were pronounced December 1, 2010 in Action No. S097716, following an application by the respondents for a declaration that Mhinder has waived solicitor-client privilege:

> 1. Mhinder Mayer has waived privilege over otherwise privileged communications evidencing his motive, purpose and good faith in

bringing his applications dated October 13, 2010 to amend the claims in Actions S093607, S073324, S078623, S085604, S52157 and S097716 (the ‘Mhinder Mayer Actions’) and to join parties in action S093607;

2. Subject to paragraph 3 of this Order and for clarity, the waiver of privilege extends to otherwise privileged communications created after the date on which the Mhinder Mayer Actions were brought to the extent that they concern the substance or language of the proposed amendments;

3. In respect of the application to join parties in action S093607 and for clarity, the waiver extends to otherwise privileged communications evidencing Mhinder Mayer’s motive, purpose and good faith in seeking to join those parties pursuant to the proposed amendments and, on any previous occasion, to a consideration of joining them to a proceeding in which relief from oppression is being sought;

4. Mhinder Mayer shall produce to the Richard Mayer Defendants those documents, or portions thereof, from the files of Mhinder Mayer, Nathanson, Schachter & Thompson LLP and Gregory & Gregory in respect of which privilege has been waived;

5. Mhinder Mayer shall prepare a list, in a format to be agreed by the parties or settled by further order of the Court, of those categories of documents which he considers to remain privileged and deliver it to the Richard Mayer Defendants.

The judge’s reasons for judgment are indexed as 2010 BCSC 1881.

[147] In my view it is appropriate to determine whether the waiver remains extant and operative and, if so, to examine whether the judge properly defined its scope. I accordingly intend to address the issues raised by this appeal.

[148] In **Appeal No. CA38680**, the following order was pronounced December 20, 2010, in Action No. S097716, following an application to clarify the scope of the waiver of solicitor client privilege:

> 1. By virtue of the waiver of privilege declared under the order pronounced December 1, 2010, the documents to be produced by Mhinder Mayer pursuant to the order must include drafts of Mhinder Mayer's affidavit #2 sworn April 19, 2010 so far as the drafts concern factual matters made the subject of the amendments proposed in Mhinder Mayer's applications dated October 13, 2010 to amend the claims in actions S093607, S073324, S078623, S085604, S52157 and S097716 (the 'Mhinder Mayer actions') and to joint parties in action S096307.

The judge's reasons for judgment are indexed as 2010 BCSC 1883.

[149] Since this order also addresses the scope of the waiver of privilege, I will determine this appeal in conjunction with Appeal No. CA38681.

[150] In **Appeal No. CA38807**, the following orders were pronounced February 11, 2011, in Action S073324, following the second hearing:

> 1. Mhinder Mayer's application for leave to file a further amended statement of defence and counterclaim is dismissed and all new claims contained therein are barred, provided that the court will receive further submissions in respect of paragraphs 128 to 130 of the draft further amended statement of defence and counterclaim;
>
> 2. Mhinder Mayer's claims against Bhora Mayer for equalization of draws and income for the period prior to June 2006 are barred;
>
> 3. Mhinder Mayer is barred from advancing in this action claims against Bhora Mayer based on transactions that took place prior to June 8, 2006 or [*sic*] which he was aware, or could reasonably have been

aware involving either the Identified and Disputed Companies or the assets of the Brothers' Trust;

4. Mhinder Mayer's action against Marc Furnemont is dismissed.

The judge's reasons are indexed as 2011 BCSC 386.

[151] These orders were made at the conclusion of the second hearing and flowed from circumstances created by the judgment rendered on the summary trial. With the reversal of that judgment, these matters have become academic and I would therefore allow the appeal to the extent of setting the orders aside.

[152] In **Appeal No. CA38805**, the following orders were pronounced February 11, 2011, in Action S085604, following the second hearing:

1. Mhinder Mayer's amended application for leave to file an amended statement of claim is dismissed and his proposed new claims are barred.

2. The action is dismissed.

The judge's reasons are indexed as 2011 BCSC 386.

[153] For the reasons just set out with respect to Appeal No. CA38807, the appeal from this order is allowed and the orders set aside.

[154] In **Appeal No. CA38806**, the following orders were pronounced February 11, 2011, in Action S093607, the Oppression Proceeding, following the second hearing:

1. Mhinder Mayer's application for leave to join Rita Webb, Gina Mayer, New Concrete Concepts Ltd, Custom Pumping Ltd, Island Aggregates Ltd, R & G Equipment Ltd, Mack Sales & Service of Nanaimo Ltd, and Bastion Project Management Ltd as defendants and for leave to file a further amended petition is dismissed;

2. Mhinder Mayer is barred from advancing in this proceeding claims against Bhora Mayer and the corporate Defendants based on transactions that took place prior to June 8, 2006 of which he was aware, or could reasonably have been aware prior to June 8, 2006;

3. Mhinder Mayer is barred from pursuing derivative relief and relief from oppression as against Richard Mayer, Anuradha Mayer, Island Aggregates Ltd., Mack Sales & Service of Nanaimo Ltd., Bastion Project Management Ltd, and New Concrete Concepts (the "Richard Mayer Group") and Gina Mayer, Rita Webb, Archer Holdings Ltd., Custom Pumping Ltd., R & G Equipment Ltd., R and G Equipment Rentals Ltd., Aqua Pod Ltd. and Front Street Projects Ltd. (the "Webb/Mayer Group") in this proceeding for any other action or proceeding, in respect of the alleged transactions that he pleaded in paragraph 58 and paragraph 60 (c)-(j) of his statement of claim filed May 12, 2010 in Action S097716 (the "Disavowed Claims"), provided that:

   (a) Mhinder Mayer is not barred from otherwise pursuing derivative relief against the Richard Mayer Group or the Webb/Mayer Group based upon transactions that took place prior to June 8, 2006, which are not included in the Disavowed Claims, of which Mhinder Mayer was not aware, or could not reasonably have been aware prior to June 8, 2006; and

   (b) Mhinder Mayer is not barred from seeking oppression remedies, including derivative relief, in respect of transactions that occurred after June 8, 2006, which are not included in the Disavowed Claims, so long as he meets the statutory prerequisites.

4. Mhinder Mayer is barred from pursuing claims for relief from oppression, including derivative relief, as against the Defendants

herein based upon transactions that took place prior to June 8, 2006 of which Mhinder Mayer was aware, or could reasonably have been aware prior to June 8, 2006, provided that Mhinder Mayer is not barred from seeking oppression remedies against the Defendants, including derivative relief, in this action for transactions that occurred after June 8, 2006, so long as he meets the statutory prerequisites.

5. Notwithstanding the definition of the "Disavowal Claims" in this order, the Court reserves for further argument whether Mhinder Mayer is barred from pursuing derivative relief and relief from oppression in respect of the transaction that is the subject of his petition filed in proceeding S078623.

The judge's reasons are indexed as 2011 BCSC 386.

[155] For the same reasons as those pertaining to Appeal Nos. CA38805 and CA38807, the orders in paragraphs 1, 2, 4, and 5 are moot. The appeals from them will be allowed, and these orders set aside.

[156] Paragraph 3 of this order, however, raises the interpretation of the "Disavowal Pleading", a pleading by Mhinder that was extant at the commencement of the summary trial, and so remains in place. I therefore find it appropriate to address the appeal from this paragraph of the order.

[157] In **Appeal No. CA38809**, the following orders were pronounced February 11, 2011, in Action S097716, following the second hearing:

1. Mhinder Mayer's application for leave to file a further amended statement of claim is dismissed and his proposed new claims are barred;

2. Mhinder Mayer's claims against Bastion Project Management Ltd., Richard Mayer, Gina Mayer and Rita Webb are dismissed;

3. Mhinder Mayer is barred from pursuing derivative relief and relief from oppression as against the Defendants herein in respect of the alleged transactions that he pleaded in paragraph 58 and paragraph 60 (c)-(j) of his statement of claim filed May 12, 2010 (the "Disavowed Claims"), provided that:

    (a) Mhinder Mayer is not barred from otherwise pursuing derivative relief against the Defendants herein based upon transactions that took place prior to June 8, 2006, which are not included in the Disavowed Claims, of which Mhinder Mayer was not aware, or could not reasonably have been aware prior to June 8, 2006; and

    (b) Mhinder Mayer is not barred from seeking oppression remedies, including derivative relief, in respect of transactions that occurred after June 8, 2006, which are not included in the Disavowed Claims, so long as he meets the statutory prerequisites.

4. Notwithstanding the definition of the "Disavowed Claims" in this order, the Court reserves for further argument whether Mhinder Mayer is barred from pursuing derivative relief and relief from oppression in respect of the transaction that is the subject of his petition filed in proceeding S078623.

5. Mhinder Mayer may apply to the Court for directions under the *Trustee Act*, R.S.B.C. 1996, c. 464 to seek leave to bring an action against Bhora Mayer in respect of rent collected from Brothers' Trust Properties.

The judge's reasons are indexed as 2011 BCSC 386.

[158] The issues raised by paragraphs 1, 2, and 4 of that order are moot for the reasons previously expressed. The appeals from them are therefore allowed, and these orders set aside.

[159] Paragraph 3 of this order again raises the interpretation of the Disavowal Pleading and, as set out previously, I propose to determine that issue.

[160] Paragraph 5 of this order raises an issue with respect to Mhinder's standing to pursue the Gina Mayer Rents Action. I am satisfied there must be a determination of this issue before Mhinder can pursue this action, and it is appropriate for this Court to deal with it.

[161] In summary, the five issues that remain to be addressed are these:

1. Paragraph 1 of Appeal No. CA38681 – Did the judge err in finding Mhinder implicitly waived privilege by filing an affidavit of his counsel?

2. Paragraphs 2 through 5 of Appeal No. CA38681 and paragraph 1 of Appeal No. CA38680 – If privilege was waived, did the judge properly define the scope of the waiver?

3. Appeals Nos. CA38597, CA38598, CA38599, CA38600 – Did the trial judge err in ordering that Mhinder must adduce evidence in support of each of his applications to amend his pleadings and add parties to the Oppression Proceeding?

4. Paragraph 5 of Appeal No. CA38809 – Did the judge err in requiring Mhinder to apply to the Court for directions under the *Trustee Act,* R.S.B.C. 1996, c. 464 with respect to his standing to bring the Gina Mayer Rents Action?

5. Paragraph 3 of Appeal No. CA38806 and paragraph 3 of Appeal No. CA38809 – Did the judge err in finding the Disavowal Pleading precluded Mhinder from pursuing claims under the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*BCA*")?

[162] The appeals of each of the other orders are allowed and the orders set aside.

[163] The first three remaining appeals arise from Mhinder's attempts to amend his pleadings, and share the same factual chronology. I will set that out, and then deal with each of them.

Factual Chronology

[164] In his decision on the summary trial, the judge found that Mhinder's remaining claims in Action 716, including those for derivative relief under the *BCA* and for recovery of rental income from Gina, were an abuse of process because they duplicated claims brought by Mhinder against the respondents in other related proceedings. He therefore ordered that all duplicate claims advanced by Mhinder in Action 716 be stayed until Mhinder reconciled his pleadings. There followed a series of applications by Mhinder in an effort to comply with that order.

[165] Mhinder initially brought an application to consolidate all of his claims in the Bhora Mayer Action and to join some of the secondary defendants to that action with respect to his claim for derivative relief on behalf of the Identified Trust Companies. That application was heard on October 4, 2010. In their submissions, the respondents questioned Mhinder's motives in joining the new parties and argued his claim against them had no merit and was harassment and an abuse of process. As well, they maintained Mhinder's claim for derivative relief must fail because he could not establish the good faith required to obtain leave to bring a derivative action.

[166] The judge dismissed Mhinder's application. He expressed concern that some of the proposed amendments introduced substantively different claims and decided that, given Mhinder's history of inconsistent pleadings, amendment of the existing pleadings would provide greater clarity and certainty. He also intimated that allowing the consolidation to stand without requiring Mhinder to lead substantive evidence to support it would be problematic: 2010 BCSC 1728.

[167] On October 13, 2010, Mhinder delivered applications to amend his pleadings in five proceedings, including the Bhora Mayer Action, the Oppression Proceeding, Action 716, and the Gina Mayer Rents Action. The proposed amendments moved all claims under the *BCA* from Action 716 and the Bhora Mayer Action to the Oppression Proceeding, and sought to add Rita, Gina, New Concrete Concepts Ltd., Custom Pumping Ltd., Island Aggregates Ltd., R & G Equipment Ltd., Mack Sales and Service of Nanaimo Ltd., and Bastion Project Management Ltd., to whom I will refer as the "new parties", to that proceeding. Each of the applications stated that no evidence was required on an application to amend or add parties but, "[i]n any event, the affidavit of Mr. Gomery sets out the basis for the amendments". The relevant parts of that affidavit stated:

> 2. I swear this affidavit in support of the plaintiff's application to amend its pleadings in this action and in certain of the related actions and proceedings, including proceeding S093607, in which it is also sought to join certain parties as described below.
>
> 3. Many of the amendments proposed in these applications arise in consequence of the Order of Justice Walker pronounced September 2, 2010. In particular:
>
> (a) The claims against which have been dismissed in this action (no. S097716) have been removed from the proposed amended notice of civil claim; and
>
> (b) The court having ruled that certain claims can only be advanced as derivative claims, and Mr. Fraser having taken the position that derivative claims can only be brought by petition, those derivative claims which were formerly advanced in this action have been moved to proceeding no. S093607, a petition proceeding in which related claims for relief under s. 227 of the *Business Corporations Act* were already being advanced.
>
> 4. In order to properly plead the derivative claims in proceeding no. S093607, it is necessary that the following parties be added as petition respondents: Rita Webb, Gina Mayer, New Concrete Concepts Ltd., Custom Pumping Ltd., Island Aggregates Ltd., R & G Equipment Ltd., Mack Sales & Service of Nanaimo Ltd., and Bastion Project Management Ltd.
>
> 5. Mhinder Mayer seeks the addition of parties to proceeding no. S093607 only for the limited purpose I have described and not for any collateral or improper purpose. He seeks the amendment of the pleadings in the various actions in order that his claims may be fully and properly put before the court.
>
> [Emphasis added.]

[168] These applications were heard on October 20, 2010. The respondents took the position they were brought in bad faith and that Mhinder should be required to file evidence in support of his proposed amendments. They also suggested Mr. Gomery had waived solicitor-client privilege in providing the affidavit. The judge made no ruling on the issue of waiver. He described Mr. Gomery's affidavit as "woefully insufficient", dismissed Mhinder's applications, and ordered Mhinder to provide "appropriate affidavit evidence" in support of any future applications to amend his pleadings or add parties: 2010 BCSC 1729. He stated:

> [6] My decision on the summary trial application was founded, in part, on the history of inconsistent pleadings and positions filed and taken by Mhinder Mayer. My decision was also founded on the evidence he gave in this and in other related cases. Mhinder Mayer was cross examined on those inconsistent positions contained in the pleadings and in his evidence. I rejected his evidence given during the summary trial application insofar as those inconsistencies were concerned.
>
> [7] In my opinion, Mhinder Mayer should come forward with evidence to support his proposed amendments at this stage of the litigation, following a summary trial application, and approximately two and a half months before trial is to start, in a case involving a lengthy and complex fact pattern.

[169] Subsequently, Mhinder's counsel advised the respondents' counsel that Mhinder would not rely further on Mr. Gomery's affidavit and would renew his applications relying on his own affidavit evidence. New applications were accordingly filed on November 1, 2010, supported by two affidavits sworn by Mhinder. One of these, filed in the Oppression Proceeding, included these statements:

> 6. The existing petition seeks a declaration that the affairs of the Indentified Trust Companies are being administered in a manner that is oppressive to me and remedial orders under ss[.] 227 and 324 of the *Business Corporations Act,* including an order authorizing me to commence legal proceedings in the name of the Identified Trust Companies as this Court thinks fit. The proposed amendments state the relief sought more precisely and identify the proposed derivative claims as those listed in paragraph 39 of the statement of facts. (All paragraph numbers in this affidavit refer to the draft petition with interlineations at Exhibit A.)
>
> 7. The Proposed New Respondents are the persons against whom the proposed derivative claims would be brought, if the proposed derivative claims are permitted.
>
> 8. I firmly believe that the dealings between Bhora Mayer and his wife and children have been unfair to the Indentified Trust Companies. I seek

> leave to bring these derivative claims because I believe it is in the best interests of the Identified Trust Companies to do so.
>
> ...
>
> 12. I am swearing this affidavit for the purpose of my application for leave to amend the petition and join the Proposed New Respondents. I do not suggest that the evidence I am putting forward in this affidavit proves my claims. I propose to prove my claims at trial.

[170] Mhinder's second affidavit, filed in the Bhora Mayer Action, dealt with his amendments in the remaining proceedings.

[171] The respondents filed an application for a declaration that paragraphs 4 and 5 of Mr. Gomery's affidavit effected a waiver of privilege, and for an order compelling production of solicitor and client communications regarding Mhinder's motives and purposes in seeking the amendments and the addition of the new parties. That application was heard with Mhinder's renewed applications to amend his pleadings and add parties over several days, commencing November 17, 2010.

[172] The judge rendered his decision on December 1, 2010: 2010 BCSC 1881. As to Mhinder's applications to amend and add parties, he observed that the respondents had notified Mhinder and his counsel well before the summary trial that they viewed some of his claims as an abuse of process. He noted the respondents now argued, in addition, that Mhinder's applications were abusive because they sought to circumvent the effect of the judgment on the summary trial, and represented an attempt to gain an advantage in his litigation against Bhora by causing economic hardship to members of Bhora's family. The judge reviewed the proposed amendments, and concluded it was in the best interests of all parties to hear the respondents' forthcoming applications to strike Mhinder's claims as an abuse of process before deciding what, if any, amendments should be permitted. Over Mhinder's objections, he also decided that the question of abuse of process could be dealt with on a summary application instead of at trial.

[173] As to the issue of waiver of privilege, the judge found Mhinder had waived solicitor-client privilege when Mr. Gomery "entered the fray" by filing an affidavit that went to two matters of substance. The first was Mhinder's statutory obligation to

demonstrate good faith as a prerequisite to seeking derivative relief under ss. 232 and 233 of the *BCA*. The second was Mhinder's motives and alleged *mala fides* in proposing further proceedings against the new parties. He stated:

> [81] Mr. Gomery's affidavit spoke of his personal knowledge concerning Mhinder Mayer's state of mind and good faith. Mr. Gomery's evidence dealt squarely with his client's intention to add parties to the lawsuits where derivative relief is being sought. In those lawsuits, given the requirements of the BCA, the question of Mr. Mayer's good faith is engaged.
>
> [82] Further, Mr. Gomery and Mhinder Mayer have been well aware of the respondents' position that Mhinder Mayer's claims and his proposed claims against the secondary defendants are *mala fides* and constitute an abuse of this Court's process.
>
> ...
>
> [85] By those remarks [in paras. 4 and 5 of his affidavit], Mr. Gomery vouchsafed for his client's good faith, his client's purpose, and his client's state of mind, all in the midst of serious allegations that Mhinder Mayer has been and continues to take steps in various actions and proceedings that are an abuse of process.
>
> ...
>
> [95] Here, Mhinder Mayer's solicitor provided evidence of his client's good faith, the effect of which was to deny allegations of his client's alleged *mala fides* in seeking the amendments and to add parties. This all occurred in the midst of allegations of *mala fides* and abuse of process.
>
> [96] Mr. Gomery's evidence was also given in respect of statutory prerequisites. It does not lie in the mouth of the solicitor and his client to now say, "you cannot see the information I had from which I, as a solicitor, advised the Court of my client's good faith."

[174] As to the scope of the waiver the judge found:

> [97] In conclusion, I find that Mr. Gomery's affidavit has waived privilege over matters that are central to the dispute between Mhinder Mayer and the secondary defendants. Solicitor-client privilege has been waived concerning Mhinder Mayer's good faith in respect of the amendments that he now seeks.
>
> [98] In my opinion, there has been no waiver of solicitor-client privilege in respect of Mr. Gomery's entire file. In that regard, I accept Mr. Schachter's alternate submission that waiver has been effected in respect of the matters addressed in Mr. Gomery's affidavit.

[175] The parties appeared before the judge again on December 15, 2010 to settle the ambit of the order waiving privilege: 2010 BCSC 1882. Insofar as the waiver related to Mhinder's motives and purpose in seeking the amendments, the judge

rejected the respondents' submission that it extended to solicitor-client communications before the litigation began. As to the waiver related to the requirement of good faith in derivative proceedings, the judge found it concerned a matter arising at the beginning of oppression proceedings where derivative relief is sought and concluded the waiver extended to communications prior to the commencement of those proceedings in which Mhinder sought relief from oppression under the *BCA.*

[176] The second hearing proceeded. In its midst, a draft of an affidavit sworn by Mhinder was inadvertently produced. The chambers judge extended the scope of the waiver of privilege to include all drafts of this affidavit and ordered they be produced: 2010 BCSC 1883.

Analysis

1. Did Mhinder implicitly waive privilege by filing an affidavit of his counsel?

[177] Although the orders dismissing Mhinder's applications to amend his pleadings have been set aside, Mr. Gomery's affidavit remains part of the record. I am satisfied we should deal with this issue in the event the import of that affidavit arises in future proceedings between the parties. The central question is whether the judge erred in finding that, by filing his affidavit of October 13, 2010, Mr. Gomery entered the fray and implicitly waived privilege by testifying to two matters of substance: first, Mhinder's good faith in bringing new claims against the new parties and, second, Mhinder's ability to meet the statutory requirement of good faith in seeking derivative relief under the *BCA*.

[178] The legal principles governing privilege and its implied waiver are not contentious. The Supreme Court of Canada has consistently recognized the fundamental role that solicitor-client privilege plays in the proper functioning of our legal system and has guarded its breadth and primacy as a substantive rule of law, recognizing that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance": *Blank v. Canada (Minister of*

Justice), 2006 SCC 39 at para. 24, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* 2008 SCC 44 at para. 9, [2008] 2 S.C.R. 574.

[179] Solicitor-client privilege, however, may be waived expressly or by implication. It will be implicitly waived when a solicitor "enters the fray" by providing affidavit evidence that goes to a matter of substance in the client's litigation: *Casino Tropical Plants Ltd. v. Rentokil Tropical Plant Services Ltd.* (1998), 161 D.L.R. (4th) 750, 55 B.C.L.R. (3d) 233 (S.C.); *Sholinder and MacKay Sand and Gravel Ltd. v. Lake Windermere Resort Ltd.,* [1998] B.C.J. No. 779 (S.C.).

[180] What is a matter of substance is defined by the material facts set out in the pleadings and by the law that governs a party's claim.

[181] In *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.) at 220-21, 35 C.P.C. 146 (S.C.), Madam Justice McLachlin described implied waiver of privilege, and the role that considerations of fairness and consistency play in finding waiver:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Rogers v. Hunter*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).
>
> ...
>
> As pointed out in Wigmore on Evidence (McNaughton revision (1961)) vol. 8, pp. 635-36, relied on by Meredith J. in *Rogers v. Hunter*, *supra*, double elements are predicated in every waiver – implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Rogers v. Hunter,* the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 27 O.R. (2d) 395, 11 C.C.L.T. 49, 14 C.P.C. 247, 59 C.C.C. (2d) 87, 106 D.L.R. (3d) 340 (C.A.) [leave to appeal to S.C.C. refused [1980] 1 S.C.R. xii], it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to

> explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.

[182] As well, in deciding whether privilege has been implicitly waived, the court will consider whether a party has made its state of mind material to its claim or defence in such a way that enforcement of solicitor-client privilege would confer an unfair litigation advantage on that party: *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.,* 2004 BCCA 512 at para. 12, 245 D.L.R. (4th) 443.

[183] Mhinder argues, first, that Mr. Gomery's affidavit was of no substance. He says it was unnecessary and points out the judge found it inadequate and declined to rely on it. As well, he maintains it was spent and supplanted by his own affidavits before his applications to amend and add parties were heard. He argues these circumstances preclude a finding that Mr. Gomery's affidavit went to matters of substance, or gave Mhinder a litigation advantage over the respondents.

[184] I agree Mr. Gomery's affidavit was unnecessary. Evidence is not required on applications to amend pleadings or add parties: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 at 25, 28 C.P.C. (2d) 49 (C.A.); *MacMillan Bloedel v. Binstead* (1981), 58 B.C.L.R. 173 (C.A.); *Strata Plan VIS3578 v. Canan Investment Group Ltd.*, 2010 BCCA 329 at para. 45, 323 D.L.R. (4th) 482.

[185] I do not agree, however, that the affidavit was spent. It was filed and relied on at the October 20, 2010 hearing. The accompanying applications stated that the affidavit "set out the basis for the amendments". The decisions in *Cheung et al. v. 518402 B.C. Ltd.*, [1999] B.C.J. No. 2415 (S.C.) at paras. 13 and 22, and *Casino Tropical Plants Ltd.* at para. 16, suggest that once a waiver of privilege has been made it cannot be retracted. This is a logical consequence of the waiver, as being able to retract it would result in untenable litigation advantages and general unfairness.

[186] There is nothing that explains why Mr. Gomery filed this affidavit. Mhinder's submission that counsel commonly file such affidavits as innocuous "boilerplate" on

applications of this nature is not helpful in the absence of evidence indentifying this as the purpose of Mr. Gomery's affidavit.

[187] The affidavit thus remains extant and unexplained. The central issue is whether the judge erred in finding it went to matters of substance in Mhinder's litigation.

[188] The question of whether privilege has been implicitly waived requires identification of matters of substance by reference to the material facts and the law that governs the client's claim or defence, as well as an examination of considerations of fairness and consistency, and any litigation advantage that may arise from the enforcement of the privilege. That assessment takes place in the context of the legal standards that govern the rule of solicitor-client privilege. Thus, whether there has been an implied waiver of privilege is a question of mixed fact and law, reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen,* 2002 SCC 33 at para. 36, [2002] 2 S.C.R. 235.

[189] I turn to the judge's finding that Mhinder's purpose and good faith in seeking the amendments and the addition of the new parties were matters of substance. Mhinder reiterates a party's motive is immaterial on such applications, relying again on *McNaughton*. As well, he points out that when Mr. Gomery filed the affidavit there were no formal allegations of bad faith or abuse of process. He says the judge therefore erred in finding that Mr. Gomery's reference to his state of mind was a matter of substance.

[190] The respondents reply that throughout Action 716 they alleged Mhinder's proceedings against Richard, Rita, Gina and their companies were an abuse of process. They say the manner in which the summary trial developed, Mhinder's evasion and inconsistent evidence during that proceeding, and the judge's detrimental findings as to his credibility all confirmed this abuse. They maintain that Mhinder's attempts to amend his pleadings and add the new parties after the summary trial went far beyond the judge's directions, making it evident the concern of abuse of process remained, and they raised it expressly in submissions before the

judge on October 4, 2010. The respondents say that in these unique circumstances it was not necessary to formalize their allegations of abuse of process or bad faith in pleadings or affidavits. Both Mhinder and the judge were well aware that his motives and purpose in pursuing his proceedings against the new parties were matters of substance.

[191] I acknowledge that following the summary trial the respondents continued to argue that Mhinder's proceedings and applications were brought in bad faith and were an abuse of process. These arguments, however, were different in substance from those they had advanced during that trial. In Action 716, the only formal allegation of abuse of process was set out in Richard's amended statement of defence, filed May 5, 2010, and was based on Mhinder's conduct in the Bhagwan Mayer Action, an issue dealt with by the judge at the summary trial. The respondents' allegations of bad faith and abuse of process following that trial centred on the view that Mhinder's applications were designed to harass the new parties, in order to gain leverage against Bhora in the Bhora Mayer Action. None of those allegations had been formalized in a pleading, application, or affidavit when Mr. Gomery filed his affidavit on October 13, 2010.

[192] Given the fundamental importance of solicitor-client privilege, it is my view that where it is alleged a solicitor has entered the fray and implicitly waived privilege by testifying to a matter of substance in his client's litigation, that matter must be something on which issue has been formally joined. Arguments and allegations alone, regardless of how firmly held or advanced they may be, cannot be sufficient to create a matter of substance. To hold otherwise would result in significant and unanticipated intrusions into solicitor-client privilege, create uncertainty, and work against the objectives of fairness and consistency that underpin the concept of implied waiver.

[193] As well, both the respondents' arguments and the judge's findings on this point relied to a substantial extent on the negative findings made with respect to Mhinder's motives and credibility at the summary trial. This was despite the judge's

assurances in his reasons (2010 BCSC 1249) that his findings would not prejudice Mhinder in subsequent proceedings overseen by him as the case management judge:

> [280] As well, my findings concerning Mhinder Mayer's lack of credibility and the lack of reliability of his evidence are confined to his trust claims advanced against the applicants. I have not made any findings about nor expressed any comment in relation to the merits of his other claims. My determination and findings in relation to one aspect of his action does not prohibit Mhinder Mayer from pursuing the remainder of his claims.
>
> [281] I am not persuaded that my decision in respect of Mhinder Mayer's trust claims will cause unfairness in the determination of the claims advanced in the related actions. There is no reason to refrain from determining the Rule 18A application when it can be done based upon Mhinder Mayer's own evidence. In addition, my determination of Mhinder Mayer's trust claims on this application will shorten the length of trial by at least three to four weeks and the interlocutory proceedings considerably.
>
> ...
>
> [283] In reaching my conclusion that I should decide the application insofar as the trust claims are concerned, I am mindful that there may be times when deciding some but not all of the claims made in a case can lead to unforeseen adverse consequences if findings are carried over to the subsequent determination of other issues. That risk is minimized because I am the case management and trial judge of this and the related actions. Although I have determined claims on this application, and not merely issues, I draw comfort from the remarks of Donald J.A. in *Graham v. Moore Estate*, 2003 BCCA 497, where he said at para. 35:
>
> > Sometimes splitting the issues in a case can lead to the unavoidable result that findings carry over to the later determination of unresolved issues. That is a consideration to be factored into the decision whether to grant a Rule 18A trial on part of the case, but it is not necessarily a determinative factor. Where, as here, the case is under the management of a single judge who hears all aspects of the case, the danger of injustice is minimized.

[194] In my view, the judge erred in relying on his prior findings to elevate Mhinder's state of mind to a matter of substance when that issue had not been formally joined.

[195] As to the judge's finding that Mhinder's claims under the *BCA* made his good faith a matter of substance, Mhinder says both the respondents and the judge mistakenly assumed he was seeking leave to advance a claim for derivative relief

under ss. 232 and 233 of the *BCA*. Mhinder accepts that s. 232(2) provides that a complainant seeking derivative relief under those provisions must seek leave of the court, and must meet these requirements in s. 233(1) before he may advance such a claim:

> The court may grant leave under section 232(2) or (4), on terms it considers appropriate, if
>
> (a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,
>
> (b) notice of the application for leave has been given to the company and to any other person the court may order,
>
> (c) the complainant is acting in good faith, and
>
> (d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.
>
> [Emphasis added.]

[196] Mhinder says, however, that his claim under the *BCA* was not advanced under those provisions, but was pleaded as a claim for oppression and unfair prejudice pursuant to ss. 227 and 324 of the *BCA.* He says good faith is not a precondition to this claim, nor must he obtain leave to commence it. Mhinder concedes that if he establishes oppression and seeks to pursue derivative proceedings as a remedy he may have to establish good faith at that point, but says this is not clear and, in any event, neither the *BCA* nor the authorities make good faith a matter of substance in a pleading of oppression and unfair prejudice.

[197] Sections 227 and 324 of the *BCA* bear this out. The requirements for an oppression action are set out in s. 227(1) and (2):

> 227 (1) For the purposes of this section, “shareholder” has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.
>
> (2) A shareholder may apply to the court for an order under this section on the ground
>
> (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or

> (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

[198] Section 227(3) provides a comprehensive list of remedies available on a finding of oppression or unfair prejudice, including derivative proceedings:

> (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order
>
> …
>
> (r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

[199] Those parts of s. 324 relevant to Mhinder's claim provide for liquidation and dissolution of a company on an application by a shareholder or a director, among others, where such an order is just and equitable. Section 324 also provides the court may make any order it considers appropriate under s. 227(3).

[200] Thus, nothing in the provisions of ss. 227 and 324 make a complainant's good faith a precondition for a pleading of oppression or unfair prejudice, even if a remedial order involving derivative proceedings under those sections is pleaded in the prayer for relief.

[201] A review of Mhinder's pleadings in the relevant proceedings as they stood on October 13, 2010, and in the proposed amendments supported by Mr. Gomery's affidavit, reveals no claim under ss. 232 and 233 of the *BCA*. His amended statement of claim in Action 716 made no express reference to the *BCA,* although the prayer for relief included a claim for an order granting Mhinder leave to commence litigation in the names of the Identified Trust Companies to address any of the delicts alleged in his statement of claim.

[202] Mhinder's counterclaim in the Bhora Mayer Action set out lengthy allegations of mismanagement of the Identified Trust Companies by Bhora and alleged

diversion and misappropriation of their assets, as well as those of the Disputed Trust Companies, by him to his family members and their companies. He alleged each of these events constituted oppression under s. 227 of the *BCA*. The prayer for relief listed 29 potential remedies, one of which was identical to that for derivative relief in Action 716.

[203] Mhinder's allegations in the Oppression Proceeding against Bhora and the Identified Trust Companies listed many of the same transactions as those in the Bhora Mayer Action and claimed these constituted oppression under s. 227. The prayer for relief sought a declaration of oppression and a variety of remedies under s. 227(3), including liquidation, access to corporate records, share transfers, and an order permitting derivative actions in the name of the Identified Trust Companies.

[204] The amendments Mhinder put forward on October 13, 2010, supported by Mr. Gomery's affidavit, proposed consolidating all of his claims under the *BCA* in the Oppression Proceeding and adding the new parties. The proposed amended petition reiterated his allegations that Bhora had conducted the affairs of the Identified Trust Companies in a manner that was oppressive and unfairly prejudicial to Mhinder and listed particulars of these allegations. As well, it alleged Bhora had caused the Identified Trust Companies to enter many of the same transactions with the new parties as those described in Action 716 and the Bhora Mayer Action, resulting in loss to the Identified Trust Companies. Those aspects of the proposed petition that referred to the *BCA* were in these terms:

> 1 Mhinder Mayer claims against Osborne Contracting Ltd ("OCL"), Osborne Industries Ltd, Holman Transport Ltd, Mayer Truck & Equipment Ltd, Gulf Coast Materials Ltd and Timberland Investment Ltd (collectively, the "Identified Trust Companies") and Bhora Mayer:
>
> A A declaration that the affairs of the Identified Trust Companies have been conducted in a manner oppressive to Mhinder Mayer and that acts have been done by Bhora Mayer in the Identified Trust Companies that are unfairly prejudicial to Mhinder Mayer;
>
> B Orders pursuant to s 227 and s 324 of the *Business Corporations Act* to remedy the matters complained of including:
>
> a) A declaration that it is just and equitable that the Identified Trust Companies be dissolved and appropriate consequential relief;

b) An accounting of all amounts due to Mhinder Mayer by the Identified Trust Companies or Bhora Mayer or both;

c) Judgment in favour of Mhinder Mayer for all amounts found owing on the accounting;

d) The appointment of a monitor, receiver or receiver-manager of the Identified Trust Companies;

2 Mhinder Mayer further claims against the Identified Trust Companies, Bhora Mayer, Rita Webb, New Concrete Concepts Ltd, Custom Pumping Ltd., Island Aggregates Ltd., New Concrete [*sic*] R & G Equipment Ltd., Mack Sales & Service of Nanaimo Ltd., and Bastion Project Management Ltd.:

C An order authorizing or directing that such legal proceedings may be commenced by the Identified Trust Companies to redress the actions of those Petition Respondents as set out in paragraph 37 below, as Mhinder Mayer may direct, on the following terms:

a) Mhinder Mayer shall have conduct of the proceedings;

b) Mhinder Mayer will be given unfettered access to the documents and employees of the Identified Trust Companies for the purpose of the litigation;

c) The proceedings shall be conducted at Mhinder Mayer's expense, provided that he will have liberty to apply to the trial judge, at the conclusion of the proceedings, for an order that one or more of the Identified Trust Companies indemnify Mhinder Mayer for all or a part of his legal expenses incurred in advancing claims on their behalf;

d) Subject to further order of the court, Mhinder Mayer will indemnify the Identified Trust Companies against any costs they may be required to pay to a defendant sued on Mhinder Mayer's instructions.

...

PART 3: LEGAL BASIS

37 Mhinder Mayer's claims against Bhora Mayer and the Identified Trust Companies in Part I, paragraph 1, are founded in ss 227 and 324 of the *Business Corporations Act*;

38 Mhinder Mayer's claims against Bhora Mayer, the Identified Trust Companies, Richard Mayer, Rita Webb, Gina Mayer, New Concrete Concepts Ltd, Holman Transport Ltd, Custom Pumping Ltd., Island Aggregates Ltd., New Concrete [*sic*] R & G Equipment Ltd., Mack Sales & Service of Nanaimo Ltd., and Bastion Project Management Ltd. in Part I, paragraph 2, are founded in s 227(3)(r) of the *Business Corporations Act*.

[205] It appears clear the judge misapprehended the nature of Mhinder's claim under the *BCA*. In his reasons of December 1, 2010, the only provisions he referred to were ss. 232 and 233 and the authorities he considered dealt with those provisions. I am persuaded this misapprehension led him to err in finding Mhinder's good faith was a matter of substance and operated to waive privilege.

[206] The respondents argue that because Mhinder's oppression pleadings ultimately sought derivative proceedings as a remedy under s. 227(3)(r), good faith remained a matter of substance. They point out that Mr. Gomery's affidavit was clearly directed toward derivative proceedings against the new parties and reiterate their view that such a claim has no merit and represents harassment by Mhinder.

[207] I do not find these submissions persuasive. This issue arose while matters were still at the pleading stage. There is nothing in s. 227 or in the authorities provided by the parties that supports the view that good faith is a matter of substance at the outset of a proceeding under ss. 227 or 324. While it may become an issue if Mhinder ultimately seeks remedial derivative proceedings, that is not an express requirement in s. 227. Moreover, Mhinder also seeks other remedies that may obviate any wish to seek derivative relief. Thus, it is by no means clear that good faith will become a matter of substance even at a later point in the proceedings.

[208] I find support for these views in the comments of Kevin P. McGuinness in *Canadian Business Corporations Law*, 2d ed (Markham: LexisNexis, 2007) at 13.42:

> There is no strict requirement that an applicant for relief have clean hands in order to obtain relief under the oppression remedy; nor is it necessary to show that the parties have behaved reasonably. In *Journet v. Superchef Food Industries Ltd.* Gomery J. rejected the argument that the right to institute an oppression proceeding was limited to complainants who could establish their own "perfect probity". He stated:
>
> > Furthermore, the court is not convinced that the clean hands doctrine applies to the recourse provided in s. 234. The statute does not say so or even require that the applicant be in good faith, a requirement when a complainant wishes to commence a derivative action under the C.B.C.A. ... To require perfect probity from an applicant would imply that dishonest or improper management is sanctioned if no spotless

> complainant may be found to request the Court's intervention. That cannot have been the intention of the drafters of this legislation. Fault on the part of the complainant cannot excuse oppression and unfairness on the part of the corporation or its directors.
>
> Nevertheless, the complainant's conduct is not an irrelevant consideration. The behaviour of the complainant may well be relevant to a determination of whether the steps taken by the management of the corporation were in the best interests of the corporation, or that the control group within the corporation was not acting unfairly in the circumstances. Even where this cannot be shown, it may affect the relief that the court is prepared to grant, or cause the court to exercise its discretion to refuse a remedy.
>
> [Footnotes and citations omitted.]

[209] I am satisfied that while good faith may become an issue at the stage of remedy it is not a matter of substance at the pleading stage of an oppression claim.

[210] The new parties also argue that they are not directors or officers of the Identified Trust Companies and so could not have oppressed Mhinder as a shareholder. Their only role lies as potential defendants if Mhinder eventually obtains the right to commence actions against them on behalf of the Identified Trust Companies. They therefore say that joining them as parties is premature, and a demonstration of bad faith and harassment.

[211] In my view, these arguments do not assist the respondents on the issue of waiver of privilege. They are more productively advanced under Rule 6-2(7)(c), which deals with considerations on an application to add parties.

[212] I conclude the judge erred in finding that Mr. Gomery entered the fray on matters of substance, resulting in an implied waiver of privilege. I would therefore allow the appeal from paragraph 1 of the order of December 1, 2010, which forms part of Appeal No. CA38681, and set aside that aspect of the order.

2. Did the judge properly define the scope of the waiver of privilege?

[213] Since the order waiving privilege has been set aside, it is unnecessary to consider this issue. The appeals from paragraphs 2 through 5 of the order of December 1, 2010, which comprise the balance of Appeal No. CA38681, and the

appeal from the order of December 20, 2010, which comprises Appeal No. CA38680, are allowed.

3. Did the judge err in requiring Mhinder to provide evidence to support his applications to amend his pleadings and add the new parties?

[214] It appears the disposition of these appeals may lead to further applications by Mhinder to amend his pleadings or add parties. I am therefore satisfied this Court should determine this issue to prevent any confusion over whether such applications must have an evidentiary foundation.

[215] The fundamental purpose of pleadings is to define the issues to be tried with clarity and precision, give the opposing parties fair notice of the case to be met, and enable all parties to take effective steps for pre-trial preparation: *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 at para. 43, 338 D.L.R. (4th) 193.

[216] As previously stated, the general rule in this province is that a party is not required to lead evidence to support an amendment to its pleadings or the addition of parties. In *McNaughton* at 25, McLachlin J.A. gave this rationale for that principle:

> To require a party seeking to bring a third party claim to adduce evidence supporting that claim in advance of trial, is to deprive him of his right to plead a cause of action first and defer proof of it until trial. It is to require him to produce evidence at the outset, without the aid of discovery or the other means afforded by the rules for obtaining evidence, under peril that if he does not do so his claim will be struck out. It confuses the function of pleading – to outline the claim or defence – and the purpose of the trial – to determine whether, on the evidence, the claim or defence is made out.

[217] On October 20, 2010, the judge nevertheless ordered Mhinder to file affidavit evidence to support any further attempt to add claims or parties to any of his proceedings. In doing so, he acknowledged the general rule but relied primarily on this excerpt from *McNaughton* at 23 in deciding to depart from it, in particular, the reference to bad faith that I have emphasized:

> The Supreme Court Practice (the White Book), dealing with O. 28, r. 1, the predecessor of our rule on amendment, summarizes the principles governing the granting of amendments as follows:

> In *Tidesley [sic] v. Harper*, 10 Ch. D. pp. 396, 397 [*Tildesley v. Harper* (1878), 10 Ch. D. 393] Bramwell, L.J., said: "*My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise". "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs*".
>
> ...
>
> As a general proposition, a third party should not be required to adduce evidence in support of a pleading before trial. ... It is sufficient that his pleading discloses reasonable cause of action or defence. The courts take a liberal approach to pleadings. Before the courts will strike out a pleading or refuse an amendment on the ground that it discloses no reasonable cause of action or defence the case must be perfectly clear.

[218] In my view, the judge's departure from the general rule was not justified. In *McNaughton*, Madam Justice McLachlin was not dealing with allegations of bad faith. She relied on the excerpt from the White Book only to support the generally accepted view that the courts should take a liberal approach in granting leave to amend pleadings or add parties. Moreover, Lord Justice Bramwell's comment suggests that, if an application to amend is brought in bad faith, the appropriate remedy is to deny the amendments, not require an evidentiary basis for them. I appreciate that at another point in his judgment he suggested an affidavit or statement by a solicitor might be required to establish that an error addressed by the proposed amendment was made *bona fide*, but that was not the basis for his decision. Moreover, this aspect of his decision was not adopted in the White Book, nor by McLachlin J.A. Nor have the respondents produced any case in this jurisdiction that has endorsed an evidentiary requirement for an application to amend pleadings or add parties.

[219] In short, I find little support in the passage cited by the judge for the evidentiary requirement he imposed on Mhinder. To my mind, the most telling aspect of Bramwell L.J.'s comments is the requirement that the court must be satisfied that

a party is acting *mala fide* before denying leave to amend or, perhaps, before requiring that such an application be supported by evidence.

[220] This raises the question of what material the judge relied on to satisfy himself that Mhinder was acting in bad faith when he made these orders. As described previously, there were no formal allegations of *mala fides* at this juncture. Mr. Gomery's affidavit was the only evidence filed on the applications. It is clear from the judge's reasons that his order requiring evidentiary support for Mhinder's applications was anchored in his observations and findings regarding Mhinder's conduct and credibility at the summary trial. As mentioned before, this was despite his assurance that those matters would not find their way into the continuing proceedings between the parties.

[221] I am satisfied that despite his stated intent to the contrary, the judge's adverse findings with respect to Mhinder in the summary trial wrongly coloured his views of the applications that followed, and led to an inappropriate and unwarranted departure from the widely accepted rule that evidence is not required to support amendments to pleadings or the addition of parties.

[222] I would therefore allow each of Appeal Nos. CA38597, CA38598, CA38599, and CA38600, and set aside the orders that required Mhinder to file affidavit evidence to support his applications to add claims or parties.

4. Did the judge err in requiring Mhinder to apply to the Court for directions under the Trustee Act, R.S.B.C. 1996, c. 464 with respect to his action for rental income?

[223] This appeal involves Mhinder's standing to bring the Gina Mayer Rents Action, and arises from his attempt to amend his pleadings to reflect that the rental properties that are the subject of his claim are beneficially owned by the Brothers' Trust, and not by him personally as originally pleaded. While those amendments have not yet been made, I believe it is appropriate to consider this appeal as they appear inevitable and give rise to a dispute over whether Mhinder, as a trustee and beneficiary of the Brothers' Trust, has standing to pursue the claim.

[224] On August 6, 2008 Mhinder commenced the Gina Mayer Rents Action against his sister-in-law, alleging she had failed to account for rents she collected on seven properties registered in his name. The statement of claim stated that he owned six of the properties “in his own right” and held a beneficial half-interest in the seventh. It did not mention the Brothers’ Trust. Mhinder alleged that Gina stood in a fiduciary capacity to him and held all funds received from the properties in trust either for him, or for him and Bhora. He also alleged Gina converted the rental income to her own use, or to the use of herself and Bhora. He sought an accounting and judgment for the amount owed to him.

[225] In her statement of defence, Gina pleaded the seven properties were subject to the Brothers’ Trust Agreement. She agreed she collected rent and managed the properties since 1989, and said this was pursuant to an agreement with Mhinder and Bhora. She stated that, on their instructions, she paid the proceeds initially to Osborne Contracting Ltd. and, since 2000, to Bhora. She claimed Mhinder received regular accountings of this income until the family disputes arose.

[226] The same properties are also the subject of claims advanced by Bhora in the Bhora Mayer Action and by Mhinder in Action 716. In his pleadings in those actions, however, Mhinder either expressly or implicitly pleaded these properties were held by him pursuant to the terms of the Brothers’ Trust rather than by him personally.

[227] Mhinder’s claim against Gina for rental income in Action 716 was one of the few claims to survive the summary trial. The judge ruled Mhinder had standing to pursue the claim because it was personal to him, and because Mhinder submitted he had been unaware of Gina’s misappropriation of rent prior to the Bhagwan Mayer Settlement Agreement. He noted, however, the duplication between the pleadings in the Gina Mayer Rents Action and Action 716, and directed that Mhinder’s claim for rental income against Gina in Action 716 be stayed as an abuse of process.

[228] In the ensuing applications to amend his pleadings, Mhinder proposed that his claim against Gina for rental income be dealt with solely in the Gina Mayer Rents Action, and applied to amend his statement of claim in that action by properly

describing the properties at issue as assets of the Brothers' Trust. Mhinder explained these amendments in an affidavit of December 10, 2010:

> 4. I accept that all of these properties are trust properties of the Brothers' Trust. I do not recall ever disputing this and I formally accepted it on September 4, 2008, in my statement of defence and counterclaim amended in response to the amended statement of claim in action S073324. I also accepted it in my statements of claim filed in action S097716. The description of 6 of the Rental Properties as personal properties of mine in paragraph 10 of the present statement of claim in this action was a mistake.
>
> ...
>
> 7. I respectfully seek leave to amend the statement of claim in this action to correct the mistake in paragraph 10 of the statement of claim and to plead the Brothers' Trust consistently with the claims advanced by me in the other actions.

[229] In response, Gina filed an application seeking dismissal of the Gina Mayer Rents Action as an abuse of process, relying on alleged inconsistencies in Mhinder's pleadings and representations of his claim against her. She also argued Mhinder did not have standing to sue her if the properties were subject to the Brothers' Trust.

[230] The judge determined these issues at the second hearing. He accepted Gina's argument that, if the properties were subject to the Brothers' Trust, Mhinder did not have standing to bring his claim against her as a beneficiary of that trust and could only pursue it in his capacity as a trustee if the Court granted leave to do so under s. 86 of the *Trustee Act*. He stated:

> [221] Mhinder Mayer's claim for collection of rents in relation to Brothers' Trust property owned for transactions that occurred prior to June 8, 2006 (the date of the Bhagwan Mayer settlement agreement), are barred by my reasons for judgment on the first summary trial application. The only trust claims or remedies that can survive are in respect of transactions that:
>
> (a) occurred following June 8, 2006; and
>
> (b) occurred prior to June 8, 2006, and which Mhinder Mayer was not or could not reasonably have been aware of.
>
> Even then, Mhinder Mayer can only pursue those trust claims and remedies where he can demonstrate that Gina Mayer is still in possession of trust property: *Hayim v. Citibank NA,* [1987] A.C. 730 (P.C.); *Sharpe v. San Paulo Railway Co*. (1873), L.R. 8 Ch. 597.
>
> [222] Any claim brought by Mhinder Mayer for accounting of rents is not in his capacity as a beneficiary. It must be brought in his capacity as a trustee and with leave of the Court: *Hayim*; A.H. Oosterhoff et al, *Oosterhoff on*

> *Trusts: Text, Commentary and Materials* 6th ed. (Scarborough: Carswell, 2004) at 14 and 27; and D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 1203.
>
> [223] Mhinder Mayer must apply to the Court for directions pursuant to s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464 because he claims that he holds legal title to the impugned properties for the Brothers' Trust and is, therefore, a trustee of trust property.
>
> [224] Mhinder Mayer is not, in my opinion, able to bring a stand-alone claim as a trustee without leave of the Court in accordance with s. 86 of the *Trustee Act: Kordyban v. Kordyban*, 2003 BCCA 216 at para. 40; *Gibb v. McMahon*, [1905] O.J. No. 145 (C.A.); and *Bronson v. Hewitt*, 2010 BCSC 169 at para. 452.
>
> ...
>
> [227] In my view, the case cited by Mhinder Mayer, *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, is distinguishable from this case because it concerned a situation involving one beneficiary, one trustee, and a regime created by statute. Seen in that context, the case cannot stand for the proposition that the line of authority described in *Hayim* has been overturned by the Supreme Court of Canada in *Citadel*.
>
> [228] In addition, Mhinder Mayer's affidavit evidence does not disclose whether only some or all of the rents were collected prior to June 8, 2006. If they were then the claim is barred unless Mhinder Mayer could establish that he did not know and could not reasonably have known about the transactions.
>
> [229] As a trustee, Mhinder Mayer must apply for directions to advance the claim against Bhora Mayer. He must do so as the trustee. His claim is not a personal claim as a beneficiary, since the claim is one for an accounting of trust assets that must be returned to the Brothers' Trust and not to Mhinder Mayer personally.

[231] The order arising from these reasons raises three issues:

1. Does Mhinder, as a trustee of the Brothers' Trust, have standing to sue for an accounting and recovery of rental income earned by trust properties held in his name?

2. Does Mhinder, as a beneficiary of the Brothers' Trust, have standing to sue for an accounting and recovery of rental income earned by trust properties held in his name?

3. Did the judge err in holding Mhinder's claim against Gina in the Gina Mayer Rents Action was a claim for constructive trust, and thus any claim prior to June 8, 2006 was barred?

Analysis

[232] The third issue is straightforward. The limitation of June 8, 2006, the date of the Bhagwan Mayer Settlement Agreement, was based on the judge's findings in the summary trial. As those findings have been set aside, that temporal limitation is removed as well.

[233] As to Mhinder's standing to sue Gina as a trustee of the Brothers' Trust, it is common ground that there is a strong principle of unanimity that requires co-trustees to act in concert. Professor Oosterhoff, in A. H. Oosterhoff et al., *Oosterhoff on Trusts: Text Commentary and Materials,* 7th ed (Toronto: Carswell, 2009) describes this in these terms at 1050-51:

> Unless the trust instrument provides otherwise, trustees of private trusts must act jointly; that is, their decisions must be unanimous. The requirement of unanimity exists for every decision of the trustees; whether the decision relates to the exercise of a power or a duty is irrelevant for the purpose of determining how the trustees are to make decisions in relation to the exercise of the power or duty. In consequence of the unanimity requirement, if one trustee fails to agree with his or her co-trustees, there is a deadlock.

[234] Mhinder argues that principle is displaced here because the terms of the Brothers' Trust permit the trustees to hold trust property in their individual names and therefore to act unilaterally with respect to those properties. In particular, Paragraph 3 of Schedule "A" to the Brothers' Trust Agreement of March 20, 1966, states:

> 3. ANY PROPERTY OR PROPERTIES (except personal homes) held by any one or more of the brothers, shall be considered held in trust as being equally owned by all five brothers.

[235] Further, Recitals B and C of amendments made to the Brothers' Trust on January 12, 1978, in anticipation of Bhagwan's divorce, affirm that individual trustees may hold trust property in their own names:

> B. In pursuance of the Trust Agreement the Brothers have acquired many properties and carry on business through various companies and in many cases the formal registrations of title or ownership of properties and shares have been placed in the names of one or some of the Brothers as a matter of convenience rather than in the names of all.
>
> C. Bhagwan is being divorced by his wife and the Brothers do not wish to have any of the properties subject to any unnecessary restraints or limitations, and in particular, do not want Bhagwan's wife to have any power to frustrate or delay any sale, mortgaging or development of real property beneficially owned by the Brothers pursuant to the Trust Agreement.

[236] I am not persuaded those terms of the Brothers' Trust displace the principle of unanimity. In my view, the fact the trustees may own trust property in their own names as a matter of administrative convenience is insufficient, by itself, to import the right to bring suit over that property unilaterally.

[237] It appears uncontroversial that Bhora would not agree to join Mhinder in taking action against Gina to recover rental income from the trust properties held in Mhinder's name. Thus, a deadlock arises. I am satisfied the judge properly found this situation may be addressed only by bringing a petition under s. 86(1) of the *Trustee Act* for directions respecting management or administration of these trust properties. While the courts are reluctant to exercise a trustee's discretion, they have an inherent jurisdiction to intervene in certain narrow circumstances, such as a deadlock: Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds, *Waters' Law of Trusts in Canada,* 3d ed. (Toronto: Carswell, 2005) at 1098, 1102-1104; *Kordyban v. Kordyban,* 2003 BCCA 216, 13 B.C.L.R. (4th) 50.

[238] I discern no basis on which we could interfere with the judge's finding that Mhinder has no standing as a trustee to bring this action against Gina without seeking directions.

[239] Mhinder then argues the judge erred in finding he did not have standing to bring the Gina Mayer Rents Action in his capacity as a beneficiary of the Brothers' Trust pursuant to the doctrine of knowing receipt of trust property. He maintains this is a personal claim and the judge wrongly found it was not sustainable unless Gina still had possession of the trust property. As well, he says the judge misinterpreted

the relevant law by wrongly distinguishing *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, 152 D.L.R. (4th) 411 and holding that *Hayim v. Citibank N.A.,* [1987] 1 A.C. 730 (P.C., H.K.) negated this claim.

[240] The Supreme Court of Canada set out the elements of a claim for knowing receipt in *Citadel* at paras. 19, 21, and 24. In essence, a beneficiary may claim against a stranger to the trust for knowing receipt of trust funds where the stranger has improperly and knowingly received trust property for her own benefit.

[241] A beneficiary's first avenue of redress to recover trust property wrongly taken by a stranger to the trust lies, however, against the trustees to compel them to carry out their duties. It is only if the trustees are unwilling or unable to take action that a beneficiary may assume the position of the incapacitated trustees and sue to recover the trust property: *Waters' Law of Trusts*, at 1204. In *Hayim,* the principle was stated in these terms at 748:

> These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owned by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate.

[242] The judge properly recognized that Mhinder's dual role as trustee and beneficiary of the Brothers' Trust presents difficulty in advancing a claim of knowing receipt against Gina as a beneficiary. The trustees of the Brothers' Trust are not *ad idem* as to pursuing the Gina Mayer Rents Action. Thus, as both a dissenting trustee and a beneficiary, Mhinder's ability to pursue that action is circumscribed by the requirement that he first discharge his obligations as a trustee and apply to the court for directions as to whether he may pursue the action in that capacity. To hold otherwise would allow a dissenting trustee who is also a beneficiary of the trust to circumvent the requirement of trustee unanimity.

[243] I am satisfied the judge made no error in deciding Mhinder did not have standing to pursue the Gina Mayer Rents Action without leave of the court under s. 86 of the *Trustee Act*. Should Mhinder succeed in an application for leave, I

expect the court determining that issue will decide whether the proper defendant in that action is Gina, Bhora, or both of them.

[244] I would therefore dismiss the appeal arising from paragraph 5 in the order made February 11, 2011 in Action S097716, which forms part of Appeal CA38809.

[245] This result requires an ancillary order as to the future course of the Gina Mayer Rents Action. I earlier set aside the judge's orders dismissing that action and dismissing Mhinder's application to amend the pleadings in Appeal CA38805. He now cannot pursue the action unless he obtains leave to do so. The issue of standing that requires leave will not arise, however, unless he is permitted to make the amendments dealing with ownership of the properties. I would therefore order that Mhinder is at liberty to renew his application to amend the statement of claim in this action, but thereafter the action will be stayed until determination of his application under s. 86 of the *Trustee Act*.

5. Did the judge err in finding Mhinder could not pursue his claims under the BCA due to the "Disavowal Pleading"?

[246] This appeal arises from the judge's finding at the second hearing that, because Mhinder's amended statement of claim in Action 716 disavowed the relief he sought in the Bhora Mayer Action and the Oppression Proceeding, Mhinder was barred from seeking derivative relief and relief from oppression against the new parties. While this order falls with the others made at the conclusion of the second hearing, I am satisfied it is appropriate to address the import of the "Disavowal Pleading" because it remains extant in Mhinder's pleadings.

[247] The background to this issue is set out in paragraphs 21-28 of the reasons for judgment of my colleague, which describe the pre-trial motions and case management directions that preceded the summary trial. Briefly, Mhinder made several attempts to consolidate his claims by adding parties and claims to the Bhora Mayer Action. These were unsuccessful due to the positions taken by the respondents and the judge's directions on October 13, 2009, which left Mhinder no option but to pursue his claims in three separate actions. The result has been

tremendous duplication in his pleadings, as well as an inability to plead his claims in the alternative in the same action, as is the usual practice.

[248] Consequently, on October 20, 2009 Mhinder amended his statement of claim in Action 716 to include the Disavowal Pleading:

> 87 Mhinder Mayer has commenced Action No. S093607 (the "Oppression Proceeding"), and has filed a counterclaim in Action No. S073324 (the "Original Action") against Bhora Mayer and the Identified Trust Companies. In this action he disavows any relief he claims in the Oppression Proceeding and the Original Action.

[249] The respondents raised no objection to this pleading and, as Mhinder points out, both he and they continued to pursue pre-trial steps in each of the actions.

[250] The judge, apparently on his own initiative, raised a concern about the Disavowal Pleading during the summary trial and, in his reasons, stated that it raised confusion about the nature of the relief sought by Mhinder under the *BCA*, and resulted in apparent duplication in the pleadings in the three actions with respect to that relief. He left resolution of this issue "for another day", however, stating:

> [270] It is not clear therefore, whether Mhinder Mayer intends to seek any of the relief sought in his original petition that was not duplicated in the counterclaim he filed in the Bhora Mayer Action. Nor is it clear what sections of the *Business Corporations Act* Mhinder Mayer relies upon in his current action as none are mentioned in the amended statement of claim. There was a lack of consistency in oral submissions as well. I leave it for another day to resolve the nature of the statutory relief Mhinder Mayer seeks, i.e., whether he seeks any of the relief previously sought in the petitions, and whether at this stage, he is entitled to do so.

[251] The issue was picked up and pursued by the respondents during Mhinder's amendment applications. At the hearing of October 4, 2010, Mhinder's counsel clarified the Disavowal Pleading was not intended to disavow any relief substantively but simply to acknowledge he was not trying to duplicate the relief he sought as between proceedings. At the conclusion of the second hearing, however, the judge found this pleading represented an unequivocal election by Mhinder that precluded him from pursuing the relief he sought under the *BCA.* He found the trust claims Mhinder had advanced in Action 716 were based on an ownership interest in the

respondents' companies that was inconsistent with the claims he now sought to advance as a shareholder under the *BCA.* He observed that, if Mhinder had succeeded in those trust claims, he would not now be able to bring proceedings against Richard, Rita, and Gina and their companies under that legislation. He concluded:

> [268] In my view, having regard to the historical circumstances of the litigation, Mhinder Mayer's claims to add the secondary defendants as parties to the oppression proceedings after my reasons for judgment were issued in the first summary trial proceeding, and after his election to disavow in VA S097716, are abusive. They show an ongoing attempt by Mhinder Mayer to advance claims against the same parties regardless of their inconsistency with previous or existing claims.
>
> ...
>
> [272] … I am of the view that because Mhinder Mayer made his disavowal election against the secondary defendants for the matters complained of in the existing amended statement of claim in VA S097716, he should not be permitted to pursue derivative relief against the secondary defendants in respect of those matters.

[252] I am satisfied the Disavowal Pleading did not represent a formal election and was simply an indication that Mhinder intended to avoid duplication of relief, necessitated by the case management orders. Properly construed, it was limited in its application to Action 716 and evinced a present intent to continue with the claims under the *BCA* in the Bhora Mayer Action and the Oppression Proceeding. Moreover, when Mhinder amended his pleadings to include the Disavowal Pleading, the defendants to his counterclaim in the Bhora Mayer Action and in the Oppression Proceeding were different from the defendants in Action 716. It is therefore difficult to construe the Disavowal Pleading as directed to future proceedings against the Secondary Defendants.

[253] Nor is it clear to me that the claims made by Mhinder in Action 716 were necessarily inconsistent with those made under the *BCA* in the Bhora Mayer Action and the Oppression Proceeding. If he succeeded in establishing a 50 percent beneficial interest in the properties and companies of the defendants to Action 716 by virtue of his trust claims, I am not convinced this would preclude him from advancing an oppression claim as a shareholder of the Identified Trust Companies

against Bhora, and perhaps other respondents, for mismanagement or misappropriation of trust assets. In essence, rather than pleading inconsistent facts, Mhinder's allegations may be seen as allegations based on different forms of liability arising from the varying roles played by the respondents in what he claims were wrongful transactions. Had Mhinder been able to bring his trust claims and his claims under the *BCA* in the same action, I cannot see what would have precluded him from pleading these in the alternative: *Mahoney v. National Bank Financial Ltd.,* 2005 NSCA 139 at paras. 15-16, 238 N.S.R. (2d) 237, aff'g *National Bank Financial Ltd. v. Potter*, 2005 NSSC 8, 231 N.S.R. (2d) 14.

[254] I would accordingly allow the appeal from paragraph 3 of the order that forms the basis for Appeal No. CA38806 and paragraph 3 of the order that forms the basis for Appeal No. CA38809, both orders having been made on February 11, 2011.

[255] Finally, I cannot leave this matter without an observation on the extensive overlap in the claims presented by Mhinder in Action 716, the Bhora Mayer Action, and the Oppression Proceeding. While the future of any amendments to those pleadings will lie in the hands of the parties and the case management judge, it is my admittedly gratuitous view that this extensive and complex litigation cries out for simplification and consolidation of those claims.

Conclusion

[256] Appeals CA38462, CA38597, CA38598, CA38599, CA38600, CA38680, CA38681, CA38805, CA38806 and CA38807 are allowed.

[257] The appeal from paragraph 5 of Appeal CA38809 is dismissed, and the balance of this appeal is allowed.

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[258] I have read the reasons of my colleagues and I agree with both sets of reasons.

"The Honourable Mr. Justice K. Smith"

“The Honourable Madam Justice D. Smith”

“The Honourable Madam Justice K. Neilson”

APPENDIX

GLOSSARY OF TERMS

"**Acknowledgements of Trust**"

Documents signed by Richard Mayer, Rita Webb, and Gina Mayer, dated December 24, 2001, alleged by Mhinder Mayer to evidence an express trust or "new family trust" for his benefit.

"**Archer Holdings**"

Archer Holdings Ltd. An amalgamation of various companies bearing the names Archer Holdings Ltd., Malo Enterprises Ltd., Mayne Island Concrete Ltd., and Ladysmith Holdings Ltd. (formerly Wee Tree Lumber Ltd.). A company owned by Rita Mayer. "Archer Holdings" is referred to by Mhinder Mayer as "New Archer Holdings", and is to be distinguished from previous companies with an identical or similar name.

"**Aqua Pod**"

Aqua Pod Ltd. A company owned by Gina Mayer.

"**Bastion**"

Bastion Project Management Ltd. A company owned by Richard Mayer.

"**Bhagwan Mayer Action**"

VA S017022. An action commenced by Bhagwan Mayer against Bhora Mayer, Mhinder Mayer, Gina Mayer, Richard Mayer, Rita Webb (then Rita Mayer), Kelly Mayer, the Osborne Group of Companies, the Disputed Trust Companies, "Richard Mayer's Companies", "Rita Webb's Companies", R & G Equipment Rentals Ltd., and others on December 12, 2001.

"**Bhagwan Mayer Settlement Agreement**"

The Bhagwan Mayer Action was settled pursuant to an agreement dated June 8, 2006. The parties to that agreement include: Bhagwan Mayer; Mhinder Mayer; Bhora Mayer; Richard Mayer; Rita Webb; Gina Mayer; Kelly Mayer; the Osborne Group of Companies; and the companies owned by Richard Mayer, Rita Webb, and Gina Mayer. The terms of the agreement included a payment of $1.175 million to Bhagwan Mayer, and required the parties to enter into broad mutual releases and to cause the Bhagwan Mayer Action to be dismissed by entry of a (with prejudice) Consent Dismissal Order.

"**Bhora Mayer Action**"

VA S073324. An action commenced by Bhora Mayer against Mhinder Mayer on May 15, 2007, seeking, *inter alia*, a declaration as to an undivided one-half interest in the assets he claimed were owned by the Brothers' Trust and asserted by Mhinder Mayer to belong to him personally. Those companies are referred to as the "Disputed Trust Companies".

"**Brothers' Trust**"

A trust originally comprised of all five Mayer brothers (Bhim, Bhagwan, Bhora, Mhinder, and Welbier), and evidenced in documents as having been created in 1966. The Brothers' Trust was arranged so that the five brothers were equal beneficiaries and trustees of certain assets, including real property, corporate shares, corporate assets and other assets. The Brothers' Trust was amended in 1978 and again in 1984. The only brothers that remain in the Brothers' Trust today are Bhora Mayer and Mhinder Mayer.

"**Custom Pumping**"

Custom Pumping Ltd. A company owned by Rita Mayer.

"**Disputed Trust Companies**"

Mid-Isle Holdings Ltd., C.A.R. Aviation Ltd., Chemainus Ventures Ltd., and Island Structures Ltd. The ownership of these companies is the subject of a dispute between Bhora Mayer and Mhinder Mayer. That dispute is identified in the pleadings filed in the Bhora Mayer Action. The companies either belong to the Brothers' Trust or to Mhinder Mayer personally.

"**Front Street Properties**"

Front Street Properties Ltd. A company owned by Rita Mayer.

"Gina Mayer Rents Action"

VA S085604. An action commenced by Mhinder Mayer against Gina Mayer on August 6, 2008 for an accounting of rental income and repayment of compensation paid to Gina Mayer for her services collecting rent.

"Gina Mayer's Companies"

Companies owned by Gina Mayer: R & G Equipment Ltd. and Aqua Pod Ltd.

"**Identified Trust Companies**"

Osborne Contracting Ltd., Osborne Industries Ltd., Gulf Coast Materials Ltd., Mayer Truck & Equipment Ltd., Timberland Investment Ltd., and Holman Transport Ltd. They are owned by the Brothers' Trust. They are also known as the "Osborne Group of Companies".

"**Island Aggregates**"

Island Aggregates Ltd. A company owned by Richard Mayer. It is the result of an amalgamation of Island Aggregates Ltd. (formerly Nanaimo Concrete Ltd.) and Island Pumping Ltd.

"**Mack Sales**"

Mack Sales & Service of Nanaimo Ltd. A company owned by Richard Mayer.

"**New Concrete Concepts**"

New Concrete Concepts Ltd. A company owned by Richard Mayer.

"**Oppression Proceeding**"

VA S093607. An action commenced by Mhinder Mayer on May 15, 2009 against Bhora Mayer and the Osborne Group of Companies, seeking a declaration of oppression, that certain companies be liquidated, an accounting of all monies due, and the appointment of a receiver-manager.

"Other Family Companies"

Ricky Mayer's Companies, Gina Mayer's Companies, and Rita Webb's Companies.

"**Osborne Group of Companies**"

Osborne Contracting Ltd., Osborne Industries Ltd., Gulf Coast Materials Ltd., Mayer Truck & Equipment Ltd., Timberland Investment Ltd., and Holman Transport Ltd. They are also known as the "Identified Trust Companies". These companies all belong to the Brothers' Trust.

"**R & G Equipment**"

R & G Equipment Ltd. Formerly R. & G. Equipment Rentals Ltd. A company owned by Gina Mayer.

"Richard Mayer's Companies"

Companies owned by Richard Mayer: Mack Sales & Service of Nanaimo Ltd., Bastion Project Management Ltd., New Concrete Concepts Ltd., and Island Aggregates Ltd. (formerly Nanaimo Concrete Ltd.).

"Richard Mayer Defendants"

Richard Mayer, "Richard Mayer's Companies", and Anuradha Mayer.

“Rita Webb’s Companies”

Companies owned by Rita Webb: Archer Holdings Ltd., Custom Pumping Ltd., and Front Street Projects Ltd.

“**Secondary Defendants**”

A term used in the Bhagwan Mayer Settlement Agreement. It includes Richard Mayer, Rita Webb, and Gina Mayer, as well as the companies owned by them, and Marc Furnemont.

“The First Summary Trial”

VAS097716. An action commenced by Mhinder Mayer on October 20, 2009 against the “Richard Mayer Defendants”, the “Webb/Mayer Defendants” and the “Osborne Group of Companies”. After a 13 day long summary trial, the trial judge summarily dismissed most of Mhinder’s claims on September 2, 2010.

“Webb/Mayer Defendants”

Rita Webb, “Rita Webb’s Companies”, Gina Mayer, and “Gina Mayer’s Companies”.

TAB 37

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Mullen (Re)*,
2016 NSSC 203

Date: August 3, 2016
Docket: Halifax No. 38044
Estate No. 51-1847649
Registry: Halifax

In the Matter of the Bankruptcy of Randall Stephen Mullen

Decision on Motion for Stay

Judge: The Honourable Justice Gerald R. P. Moir

Heard: May 11, 2016 in Halifax, Nova Scotia

Counsel: Sharon L. Cochrane, for Mr. Leonard Dykens
Pamela Branton, for Mr. Randall Mullen
D. Bruce Clarke, Q.C., for BDO Canada Limited on trustee in bankruptcy of Randall Mullen

Moir, J:

Introduction

[1] Mr. Dykens held a judgement for nearly two hundred thousand dollars against Mr. Mullen. Mr. Dykens attempted to execute against Mr. Mullen's RRSP. Mr. Dykens made an assignment in bankruptcy.

[2] The execution order, and any other enforcement of the judgement, was stayed by operation of law. Mr. Mullen was eventually discharged. Nonetheless, Mr. Dykens seeks to lift the stay in order that he may continue his effort to realize upon the RRSP.

[3] Mr. Mullen and the trustee of his estate oppose the motion. In a nutshell, they say that (1) The motion is too late, (2) Even if it were granted, the RRSP would not become available for execution, and (3) In any case, this is not the kind of circumstance in which a stay is lifted.

[4] I will begin with some procedural objections made by Mr. Mullen. Then, I will briefly sketch the facts from the extensive evidence that has been put before me. Then, I will deal with each of the three issues:

1. Is it too late to lift the stay?
2. Is the RRSP available for execution?
3. Would the motion have merit in any case?

Procedural Objections

[5] Mr. Mullen objects that the motion is brought in the Supreme Court of Nova Scotia, rather than the Supreme Court of Nova Scotia in Bankruptcy and Insolvency. The notice of motion and supporting documents are styled according to the proceeding brought by Mr. Dykens long before the bankruptcy.

[6] There is no question about which is the right court in which to bring a motion of this kind. I am prepared to treat the motion as if it had been filed with the Registrar and made in the bankruptcy proceeding.

[7] Mr. Mullen objects to the affidavit filed by Mr. Dykens in support of the motion. He does so on two grounds.

[8] Firstly, it is an affidavit of counsel and, according to Mr. Mullen, it contains controversial evidence. On behalf of Mr. Dykens, his counsel says the affidavit is "confined to procedural matters". There is no other affidavit, and I fail to see anything that controverts the evidence in counsel's affidavit.

[9] Secondly, the affidavit contains hearsay. Rules of evidence about hearsay apply in bankruptcy hearings: *Canada Evidence Act*, s. 40. There are no conflicting laws in the *Canada Evidence Act* or the *Bankruptcy and Insolvency Act*. See also *Grande Textiles Ltd. V. Drunker* (1954), 34 C.B.R. 213 (Q.S.C) and *Re Mercier* (1963), 5 C.B.R. (N.S.) 153 (Q.S.C.).

[10] In Nova Scotia, inclusion of hearsay in affidavits is regulated by the rules of court. As there are no conflicting provisions on this subject in the *Bankruptcy and Insolvency General Rules*, the provisions in our *Civil Procedure Rules* apply: *General Rules*, s.3. Hearsay rules apply on *inter partes* applications: Rule 5.17. They apply on motions, subject to five exceptions: Rule 22.15(2).

[11] The only exception that could apply in this case is in Rule 22.15(2)(c), "a motion to determine a procedural right". A motion to lift the stay of proceedings that applies when one makes an assignment in bankruptcy is usually brought for purely procedural purposes. We will discuss that later. Mr. Dykens argues for a substantive remedy, a lifting of the stay with a determination that the RRSP will thereby become exigible.

[12] Therefore, the hearsay in the affidavit on behalf of Mr. Dykens must be excluded. For the most part, the hearsay is attributable to the Kings County sheriff.

Were it important for the determination of this motion, I would adjourn the hearing to give Mr. Dykens an opportunity to file an affidavit from the sheriff and present the sheriff if cross-examination is required. As will be seen, I am of the view that the sheriff's information is irrelevant.

Synopsis of Facts

[13] The claim by Mr. Dykens against Mr. Mullen was determined by Justice Coady in 2012. He found as a fact that the individuals had made a contract in 2005 under which Mr. Mullen was liable to pay Mr. Dykens money owed under a contract for the development of a business. Justice Coady assessed damages at $162,683. He awarded interest and costs also.

[14] There is no suggestion in Justice Coady's decision that Mr. Mullen had done anything wrongful or that the judgment debt was connected to any kind of misconduct. The liability was in simple contract. Justice Coady wrote, "I am satisfied that presently, and for some time, Mr. Mullen is not in a financial position to honour the terms of his agreement."

[15] Mr. Dykens tried to enforce the judgment. He registered a certificate of judgment, took out an execution order, and forced discovery in aid of execution. At the discovery, Mr. Dykens learned that Mr. Mullen held RRSPs and RESPs.

[16] The execution order was delivered to the sheriff in February, 2013. It was returned *nulla bona*. The discovery was held toward the end of the year, and Mr. Dykens asked the sheriff to execute on the RRSPs and RESPs. The sheriff mailed a copy of the execution order to the administrator of the RRSP and RESP plans and demanded funds.

[17] It turned out that the plans were made up of investments in shares. The sheriff asked the administrator of the plans to liquidate some of the shares. On March 6, 2014 the sheriff gave directions for liquidation of the shares in accordance with paragraph ten of the execution order. Mr. Mullens made an assignment in bankruptcy a week later.

[18] Mr. Dykens opposed Mr. Mullen's discharge. Registrar Cregan presided at the discharge hearing last March. Mr. Mullen and the trustee supported an absolute discharge, which would have been automatic had Mr. Dykens not objected. Registrar Cregan gave an oral decision. The Registrar found Mr. Mullen had a modest income, less than the minimum for a surplus income payment under the Superintendent in Bankruptcy's guidelines.

[19] The Registrar found that Mr. Mullen's was not what is sometimes called a single creditor bankruptcy. He found there was no element of turpitude or irresponsibility.

[20] The Registrar then turned his attention to the RRSP. Mr. Mullen had cashed in his own RRSP some years before to pay debts. The plan at issue was an inheritance from his late wife.

[21] The Registrar pointed out that the investments in this plan were not protected from execution under Nova Scotia law, but Parliament decided "this was unfair". So the *Bankruptcy and Insolvency Act* was amended "to say that property of the bankrupt does not include his RRSP fund." The Registrar said a large RRSP may lead to a discharge conditional on making a contribution for distribution to creditors. However, Mr. Mullen "has a rather humble amount of money for a person his age to have to look after him in his old age." The Registrar also pointed out that the trustee had realized $40,000 for the estate.

[22] Considering these circumstance, Registrar Cregan exercised his discretion to grant an absolute discharge.

[23] In the course of his decision, Registrar Cregan made some comments about Mr. Dykens theory that he could realize against the RRSP despite the *Bankruptcy*

and Insolvency Act. However, the Registrar said that someone else would have to decide that issue.

Limits on Lifting Stay after Discharge

[24] Counsel for Mr. Mullen refers me to this passage at para. F138 of *Houlden, Morawetz and Sarra* (2015-16):

> If a debt is released by a discharge of the bankrupt…, the Court will not grant leave to proceed if the debtor is simply seeking to enforce payment of its debt, since a judgment obtained against the bankrupt will be released by the discharge… .

The learned authors cite *Schroeder v. Schroeder*, [1993] S.J. No. 257 (Q.B). I agree. To lift the stay simply to enforce a discharged debt would undermine our bankruptcy law.

[25] Some years ago I wrote:

> So, we could summarize the scheme for treating debts and other liabilities under the *Bankruptcy and Insolvency Act* as involving, in the beginning, an eradication of judgments and stay of proceedings respecting claims provable in bankruptcy; through the course of the bankruptcy until discharge of the trustee, a continuation of the stay subject to any order the Bankruptcy Court might make relieving the stay; and at or near the end of the administration, a release of all claims provable in bankruptcy except those described in s.178 (1).

Hughes v. Graves 2001 NSSC 68 at para 8.

[26] The motion to lift the stay is inconsistent with the basic scheme of the *Bankruptcy and Insolvency Act* for bankruptcies of individuals. Mr. Dykens' judgment was eradicated in 2014 and the debt owed to him was released last March. There is no point in lifting the stay because Mr. Dykens has nothing left to enforce. His judgment is gone and the debt underlying it is discharged.

[27] This does not suggest that the stay can never be lifted after the trustee is discharged. "The discharge of the trustee and the bankrupt does not affect the power of the court to grant leave to proceed…": *Houlden, Morawetz and Sarra* (2015-16) para. F120, and see F121 also. The cases cited by the learned authors all involved causes that, in one way or another, could be pursued after bankruptcy without offending the collective process which is at the core of our bankruptcy law.

[28] *Re. Harding*, [1976] O.J. 1623 (H.C.) involved a claim after a motor vehicle accident and possible recovery from an insurance fund. In *OK Builders Supplies v. Wessinger*, [1983] B.C.J. (S.C.) the plaintiff sought to set aside a fraudulent conveyance and made other claims in fraud. *Re. Handleman*, [1997] O.J. 3599 (C.J) was premised on the survival of a debt owed to a creditor who was not notified of the bankruptcy. The premise is doubtful in light of s. 178(1)(f), but the point is that there was a cause seen to be independent of the other creditors.

[29] At the beginning of the bankruptcy scheme is s. 69.3: “on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor’s property”. There are exceptions, but this is otherwise the first impact of bankruptcy upon creditors. A creditor looses autonomous remedies for recovery on a debt, or on other causes. The stay assists this starting point.

[30] The calumniation of the scheme for insolvent individuals under the *Bankruptcy and Insolvency Act* is in s. 178(2): “an order of discharge releases the bankrupt from all claims provable in bankruptcy”. This is subject to the categories of debts that survive bankruptcy. Mr. Dykens’ claim against Mr. Mullen is not one of those.

[31] *Alberta (Attorney General) v. Maloney* 2015 SCC 1 concerned provincial legislation authorizing the province to refuse a driving licence to a person who owed money to the province after it paid compensation for an accident caused by the person as on uninsured motorist. When the uninsured driver makes an assignment in bankruptcy, the province proves its claim, and the bankrupt is discharged, does the provincial legislation become “constitutionally inoperative by reason of the doctrine of federal paramountcy?”: para. 12.

[32] I mention the *Maloney* case because Justice Gascon, who wrote for the majority, provided a helpful synopsis of the scheme and purposes of the bankruptcy law as they relate to bankruptcies of individuals. On the basis of his reasoning, the majority found that the provincial legislation was constitutionally inoperative.

[33] Justice Gascon began his discussion of the legislative scheme by referring to the well-known dual purposes of bankruptcy of individuals, "the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation": para. 32. He made the point that the first purpose "is achieved through a single proceeding model": para. 33. Requiring each unsecured creditor to participate in a collective proceeding "ensures that the assets of the bankrupt are distributed fairing amongst the creditors.": also para. 33.

[34] "For this model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding.": para. 34. The discretion to lift the stay under s. 69.4 is one of the exceptions, but "These exceptions reflect the policy choices made by Parliament in furthering this purpose of bankruptcy.": para. 35. As I see it, the discretion under s. 69.4 must be controlled by the first of the dual purposes because of the close connection between the stay and equal distribution.

[35] Justice Gascon then discussed the second purpose by referring to s.178(2). "Discharge is the main rehabilitative tool continued in the *BIA*…". Para 38. He referred to Professor Wood's statement about other rehabilitative tools in Roderick J. Wood, *Bankruptcy and Insolvency Law*, Toronto: Irwin Law, 2009. "The exclusion of exempt property from distribution to creditors, the surplus income provisions, and mandatory credit counselling also are directed towards this goal.": p. 273.

[36] The stay itself is one of the rehabilitative tools.

> Another means of rehabilitation is the automatic stay of proceedings contained in s. 69.3 of the BIA. The stay not only ensures that creditors are redirected into the collective proceeding described above, it also ensures that creditors are redirected into the collective proceeding described above, it also ensures that creditors are precluded from seizing property that is exempt from distribution to creditors. This is an important part of the bankrupt's financial rehabilitation… . [*Maloney*, para. 39]

As I see it, the discretion under s. 69.4 must be controlled by the second of the dual purposes because of the close connection between the stay and rehabilitation.

[37] The present motion is contrary to the fundamentals of our bankruptcy law. It seeks to break free of the equalizing collective proceeding, and of the rehabilitating discharge without reference to any exceptional ground in the statute. As I see it, the power to lift the automatic stay is constrained by the fundamental purposes of our bankruptcy law.

[38] In conclusion, the grounds asserted by Mr. Dykens are too late because Mr. Mullen is discharged. The provision for lifting the stay cannot be used to get around the fundamentals of the bankruptcy law.

The RRSP Remains Exempt

[39] Subsection 67(1) begins "The property of a bankrupt divisible among his creditors shall not comprise…". Then follows five categories of property, the last of which is in s. 67(1)(b.3): "property in a registered saving plan… other than the property contributed to any such plan… in the 12 months before the date of bankruptcy".

[40] This provision came into effect in 2008. In some provinces RRSPs are exempt from execution. In others, they are not. Nova Scotia is in the latter category, except RRSPs with a designated life beneficiary are exempt: *Insurance Act*, s. 198(2). The new provision creates uniformity across the country for exemption of RRSPs in bankruptcy.

[41] Mr. Dykens' purpose in requesting the stay be lifted is to revive his execution order and go after Mr. Mullen's RRSP.

[42] (As discussed, the Registrar refused to order a conditional discharge. He was not prepared to order a discharge on the condition Mr. Mullen pay some of his "rather humble" RRSP.)

[43] The stay must not be lifted to override the exemptions in the *Bankruptcy and Insolvency Act*. Provincial law does not revive at discharge. The federal statute continues to have paramountcy over conflicting provincial law after discharge: *Maloney*.

The Motion Has No Merit

[44] Section 69.4 permits the court to grant a declaration lifting automatic stays only if the judge is satisfied:

> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

[45] I cannot be satisfied on material prejudice, equitable grounds, or other grounds because the only prejudice is that which Parliament enacted. The judgment and underlying debt are discharged by operation of law and, if that were not enough, the object of the motion for a stay is to undermine one of Parliament's exemptions.

[46] Mr. Dykens argues that the exemption is unfair. That was for Parliament to decide, not this court. Also, there are strong statements of public policy against letting creditors get at pension funds. See for just one example, our *Pension Benefits Act*, s. 89.

Conclusion

[47] Mr. Dykens' motion to lift the *Bankruptcy and Insolvency Act* stay is dismissed. The parties may address costs in writing, if they wish.

J.

TAB 38

District of North Vancouver v. Fawcett et al.

[Indexed as: North Vancouver (District) v. Lunde]

Court File Nos. CA022799; CA022801 Vancouver Registry

British Columbia Court of Appeal
Lambert, Cumming and Goldie JJ.A.

Heard: April 27, 1998
Judgment rendered: June 30, 1998

Human rights legislation — Discrimination — Age — Legislation only applying to residential tenancies — Restrictive covenant requiring occupants of strata title lots to be over 19 and at least one to be over 50 — Not discriminatory — Did not contravene legislation because strata lot owner did not have to rent lot or could rent by complying with restrictive covenant and legislation — Human Rights Act, S.B.C. 1984, c. 22, s. 5(1), (2).

Municipal law — Municipal corporations — Powers and duties — Municipality has power as covenantee to enter into restrictive covenant respecting age of occupants — Land Title Act, R.S.B.C. 1979, c. 219, s. 215.

Real property — Restrictive covenants — Modification and discharge — Covenant could not be discharged without notice to persons enjoying benefit — Not obsolete because it remained effective — Property Law Act, R.S.B.C. 1979, c. 340, s. 31.

Appeal — Fresh evidence — No general rule permitting fresh evidence changing factual circumstance exists — Fresh evidence of fact occurring after summary trial inadmissible.

Civil procedure — Summary judgment — Summary procedure not to be used if answers straightforward and unlikely to assist in efficient resolution of proceeding — Agreement by parties to try issues summarily insufficient.

In 1989, a municipality imposed a restrictive covenant when it granted development permission for the construction of an apartment building. The covenant was imposed under s. 215 of the *Land Title Act*, R.S.B.C. 1979, c. 219. It provides that a covenant in favour of a municipality may be registered against the title to land subject to the covenant, that the covenant is enforceable against the successors in title of the covenantor, and that the covenant may include provisions respecting the use of land or of a building on the land. The covenant stated that the building would be used so that all its suites would be occupied exclusively as private residential dwelling units for one household, comprising only persons over age 19, at least one of whom should be 50 years of age or older. In 1990, the building was converted to strata titles. Some of the purchasers of units for occupation by themselves did not satisfy the age restriction in the covenant. The municipality brought an action against non-conforming occupants. The parties agreed to have three issues tried summarily, namely, whether the age restriction was: (1) discriminatory

and contravened s. 5 of the *Human Rights Act*, S.B.C. 1984, c. 22; (2) within the municipality's powers; and (3) obsolete and should be cancelled pursuant to the provisions of s. 31 of the *Property Law Act*, R.S.B.C. 1979, c. 340. The *Human Rights Act* did not prohibit discrimination on the basis of age at the time the restrictive covenant was created. However, s. 5(1) of the Act, as amended in 1992, prohibited discrimination in residential tenancies on the basis that the prospective tenant was 19 or over and less than 65 years of age. Section 5(2) provided that s-s. (1) did not apply if every rental unit in the building was reserved for rental to a person 55 years of age or older, or to two or more persons, at least one of whom was 55 years of age or older. Section 31 of the *Property Law Act* provided that the court could make an order modifying or cancelling a restrictive covenant if satisfied that it was obsolete, after giving notice to persons entitled to the benefit of the covenant. The chambers judge held: (1) that the covenant was not discriminatory and did not contravene s. 5; (2) that it was *intra vires* the municipality; and (3) that it was not obsolete and should not be cancelled. The occupants appealed. A motion was also brought to introduce fresh evidence to the effect that the strata corporation had passed a resolution after the summary trial that an owner should not allow a unit to be occupied by any person under 19 years of age and that at least one occupant of a unit had to be 55 years old or older.

Held, the appeal should be dismissed.

(1) The excepting condition in s. 5(2) of the *Human Rights Act* did not apply, so s. 5(1) applied whenever the owner of a strata lot decided to rent it. However, the age restriction in the covenant was not discriminatory and did not contravene s. 5(1) because it did not require a strata lot owner to rent the strata lot and s. 5 did not apply to owner-occupiers with respect to age. An owner-occupier who wished to rent the strata lot had to comply with both the restrictive covenant and the Act, but could do so by renting only to someone over 64, or by not renting at all.

(2) Section 215 of the *Land Title Act* gave the municipality power to enter into a restrictive covenant respecting the use of land or of a building. The age restriction was related to actual occupancy, not just to a particular design for occupancy, and it concerned either the use of land or of a building. Hence, the municipality had power to enter into the covenant.

(3) The covenant could not be modified or cancelled since no notice had been given to the persons benefiting by the restrictive covenant, as required by s. 31 of the *Property Law Act*. In any event, it was not obsolete, but continued to have full effect in relation to occupancy by an owner.

(4) The fresh evidence should not be admitted, there being no general rule that evidence of new events changing the factual circumstances is permitted on appeal. In any event, the evidence was not directly relevant.

(5) Neither the first, nor the third issue were suitable for summary disposition. The answers to them were so straightforward that they could well have been anticipated. Hence, the application for summary judgment was not likely to assist in the efficient resolution of the proceeding. When the answer to an issue sought to be tried summarily will only resolve the whole proceeding if answered one way, but

not if answered another way, the applicant must demonstrate and the judge must decide that the administration of justice will be enhanced by dealing with the issue summarily. The agreement of the parties to try the issue summarily is not enough.

Cases referred to

Christie (Guardian ad Litem of) v. Insurance Corp. of British Columbia (1993), 47 W.A.C. 262, 79 B.C.L.R. (2d) 370, 40 A.C.W.S. (3d) 1015 — **refd to**

Cory v. Marsh (1993), 38 W.A.C. 118, 77 B.C.L.R. (2d) 248, 38 A.C.W.S. (3d) 92 [leave to appeal to S.C.C. refused 53 W.A.C. 238*n*, 157 N.R. 319*n*] — **refd to**

Faminow v. North Vancouver (District) (1988), 61 D.L.R. (4th) 747, 24 B.C.L.R. (2d) 49, 8 A.C.W.S. (3d) 442 — **refd to**

Galbraith v. Madawaska Club Ltd. (1961), 29 D.L.R. (2d) 153, [1961] S.C.R. 639 — **refd to**

Knutson v. Farr (1984), 12 D.L.R. (4th) 658, 30 C.C.L.I. 8, [1984] 5 W.W.R. 315, 55 B.C.L.R. 145 [leave to appeal to S.C.C. refused 58 N.R. 78*n*] — **refd to**

R. v. Bell (1979), 98 D.L.R. (3d) 255, 10 O.M.B.R. 142, [1979] 2 S.C.R. 212, 9 M.P.L.R. 103, 26 N.R. 457 — **refd to**

Smith v. Tiny (Township) (1980), 107 D.L.R. (3d) 483, 12 M.P.L.R. 141, 27 O.R. (2d) 690; affd 114 D.L.R. (3d) 192*n*, 29 O.R. (2d) 661*n* [leave to appeal to S.C.C. refused 114 D.L.R. (3d) 192*n*, 29 O.R. (2d) 661*n*, 35 N.R. 625*n*] — **consd**

Statutes referred to

Human Rights Act, S.B.C. 1984, c. 22 (renamed *Human Rights Code* by 1995, c. 42, s. 1) — now *Human Rights Code*, R.S.B.C. 1996, c. 210
s. 1, definition "age" [rep. & sub. 1992, c. 43, s. 1(*a*)]
s. 5(1) [rep. & sub. 1992, c. 43, s. 4] — now s. 10(1)
s. 5(2)(*b*) [rep. & sub. 1992, c. 43, s. 4] — now s. 10(2)(*b*)

Interpretation Act, R.S.B.C. 1996, c. 238
s. 29, definition "prescribed"

Land Title Act, R.S.B.C. 1979, c. 219 — now R.S.B.C. 1996, c. 250
s. 215(1) [rep. & sub. 1991, c. 16, s. 16; am. 1992, c. 77, s. 4] — now s. 219(1)
s. 215(1.1)(*a*) [enacted 1991, c. 16, s. 16; am. 1994, c. 44, s. 1] — now s. 219(2)(a)
s. 215(4) — now s. 219(8)
s. 215(6) [am. 1994, c. 44, s. 1] — now s. 219(10)

Property Law Act, R.S.B.C. 1979, c. 340 — now R.S.B.C. 1996, c. 377
s. 31(1) [am. 1982, c. 46, s. 34] — now s. 35(1)
s. 31(2) — now s. 35(2)
s. 31(4) — now s. 35(4)
s. 31(5) — now s. 35(5)

Rules referred to

Supreme Court Rules, B.C. Reg. 221/90
Rule 18A(8)(*b*) [rep. & sub. B.C. Reg. 95/96, s. 7]

APPEAL from a judgment of Allan J., 68 A.C.W.S. (3d) 196, holding a restrictive covenant valid.

P.A. Spencer, for appellants, Margot Marie Sills, Susan Karen Leach and Albert Gardner.

D.A. Wade, for appellant, Elizabeth Fawcett.

J.C. Grauer, for respondent, District of North Vancouver.

The judgment of the court was delivered by

LAMBERT J.A.:—

Background

[1] The three issues in this appeal relate to a Restrictive Covenant imposed by the District of North Vancouver when development permission was granted in 1989 for the construction of a residential apartment building to be linked to the North Shore Winter Club. The development was presented as providing rental apartments for seniors and it was contemplated that there would be a synergic relationship between the Club and the seniors. If the seniors ate in the club dining room they would contribute to the financial stability of the Club, but, at the same time, they would not be heavy users of the sports or parking facilities.

[2] The Restrictive Covenant was imposed under s. 215 (now s. 219) of the *Land Title Act*, R.S.B.C. 1979, c. 219:

> *Registration of covenant as to use and alienation*
>
> 215(1) *A covenant* described in subsection (1.1) in favour of . . . a municipality . . . as covenantee, *may be registered against the title to the land subject to the covenant and is enforceable against* the covenantor and *the successors in title of the covenantor* even if the covenant is not annexed to land owned by the covenantee.
>
> (1.1) *A covenant* registrable under subsection (1) may be of a negative or positive nature and *may include one or more of the following provisions*:
>
> (*a*) *provisions in respect of*
>
> (*i*) *the use of land, or*
>
> (*ii*) *the use of a building on or to be erected on land*;
>
> . . . . .
>
> (4) No person who enters into a covenant under this section is liable for a breach of the covenant occurring after he has ceased to be the owner of the land.
>
> . . . . .
>
> (6) The registration of a covenant under this section is not a determination by the registrar of its enforceability. [My emphasis.]

[3] The relevant provisions of the Restrictive Covenant are these:

WHEREAS:

. . . . .

E. *The Residential Building is designed for and is intended to be occupied by Older Citizens.*

. . . . .

1. *DEFINITIONS.* In this Agreement:

. . . . .

e) *"Older Citizens" means persons 50 years of age and older;*

. . . . .

4. *SECTION 215 COVENANT. The Company covenants and agrees with the District* pursuant to Section 215 of the *Land Title Act*, it being the intention and agreement of the Company that the provisions of this Paragraph 4 will be a first charge (except for prior charges expressly consented to by the District) against and run with the Lands, *that*:

. . . . .

e) *the Residential Building will be used so that all suites therein will be occupied exclusively as private residential dwelling units for (1) household which shall be comprised of only persons over the age of 19 years and shall include at least one (1) Older Citizen . . .* [My emphasis.]

[4] In 1990, the developers asked the District to approve changes to the building design, and to approve stratification of the building so that it would consist of individually owned strata units rather than rental accommodation. Those changes were approved and permitted by the District. The developers also asked for the elimination of the age restriction in the Covenant. The District did not approve or permit that change.

[5] Marketing and sale of the individual strata units started in mid-1992. Some of the people who purchased units for occupation by themselves did not form a part of a household that complied with the age restriction in the Restrictive Covenant.

[6] In 1994, this action was brought by the District against some non-conforming occupants. Some additional defendants were added later and third party proceedings were begun against the developers and two agents. In 1996, the parties agreed to ask the Supreme Court of British Columbia to decide three issues of law under Rule 18A.

[7] The Rule 18A summary trial was conducted by Madam Justice Allan. From time to time the three issues have been stated somewhat differently. The parties on this appeal agreed that the statement of the issues in Madam Justice Allan's reasons should be

taken as the correct and agreed statement. The three issues and Madam Justice Allan's answers are [summarized 68 A.C.W.S. (3d) 196]:

Issue 1

Q. *Whether the age restriction in the Covenant is discriminatory and contravenes s. 5 of the Human Rights Act.*

A. It is not discriminatory and not in contravention of s. 5.

Issue 2

Q. *Whether the age restriction is intra vires or ultra vires the powers of the District.*

A. It is *intra vires* the District.

Issue 3

Q. *Whether the covenant is obsolete and should be cancelled pursuant to the provisions of s. 31 of the Property Law Act.*

A. It is not obsolete and should not be cancelled.

[8] This appeal is from Madam Justice Allan's answers on those three issues. I propose to address each of the issues in turn, then to discuss a fresh evidence motion and, finally, to discuss the procedure adopted in this case.

The Covenant and the Human Rights Act

[9] The *Human Rights Act* that was in effect when the Restrictive Covenant was created and registered was the Act as it was re-enacted in 1984 [see *Human Rights Act*, S.B.C. 1984, c. 22]. In that version there was no provision preventing differentiation between prospective purchasers of property or between prospective tenants of property on the basis of age. But in 1992 the Act was amended to change the definition of "age" and to include "age" in the section which prohibited differentiation between prospective tenants. No change was made with respect to "age" in relation to prospective purchasers. The definition of "age" and the relevant part of s. 5 (now s. 10), read in this way after 1992:

Interpretation

1. In this Act

"age" means an age of 19 years or more and less than 65 years;

. . . . .

Discrimination in tenancy premises

5(1) *No person shall*

(*a*) *deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant*, or

(*b*) *discriminate against a person or class of persons with respect to a term or condition of the tenancy of the space*,

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or *age of that person or class of persons, or of any other person or class of persons.*

(2) *Subsection (1) does not apply*

. . . . .

(*b*) *as it relates to family status or age*,

(*i*) *if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person 55 years of age or older or to 2 or more persons, at least one of whom is 55 years of age or older*, or

(ii) [to] a rental unit in a prescribed class of residential premises . . . [My emphasis; I have added the [to] at the beginning of (ii) where either [to] or some equivalent is missing.]

[10] The *Human Rights Act* has since been replaced by the *Human Rights Code*, R.S.B.C. 1996, c. 210, but the changes do not affect the issues in this appeal.

[11] It is important to note that the Restrictive Covenant relates to *occupation simpliciter*, whereas s. 5 of the *Human Rights Act* relates to *occupation as a tenant*. Under s-s. 5(1), denial of a right of occupancy as a tenant, of space that is represented as being available for occupancy by a tenant, on the grounds of age, is prohibited, unless one of the two excepting conditions in para. 5(2)(*b*) makes s-s. 5(1) inapplicable.

[12] The prohibition in s-s. 5(1) relates to a denial of a right to occupy "space", as a tenant. Sub-para. 5(2)(*b*)(i) refers to the circumstance where the "space" is a "rental unit" in "residential premises" in which every "rental unit" is reserved for rental to a person 55 years of age or older. The words and phrases that I have placed in quotation marks are not defined. But I think that the way those words and phrases are used in s. 5 of the *Human Rights Act* makes their meaning plain. In their application to this case, a strata lot becomes the "space" that is a "rental unit" when the strata lot is committed by the owner to availability for occupancy by a tenant. So owner-occupied strata lots are not rental units until they are

committed by the owner to availability for occupancy by a tenant. The entire condominium project comprising all the strata lots and the common areas constitutes the "residential premises".

[13] I turn now to whether either excepting condition in para. 5(2)(*b*) makes s-s. 5(1) inapplicable in this case. The first one, in sub-para. (i) does not, because under the Restrictive Covenant each rental unit is reserved for a person 50 years of age or older and not for a person 55 years of age or older as the Act requires. The second one, in sub-para. (ii) does not, because no class of residential premises has been "prescribed". ("Prescribed" means prescribed by regulation. See the definition of "prescribed" in s. 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238. There is no relevant regulation.)

[14] Since neither excepting condition in para. 5(2)(*b*) makes s-s. 5(1) inapplicable in this case, s-s. 5(1) applies when the owner of a strata lot commits the strata lot to availability for occupancy by a tenant. The owner cannot deny occupation to a person, or discriminate against a person with respect to a term of the tenancy, on the grounds of age. And, of course, "age" is defined in the *Human Rights Act* [s. 1] as an age between 19 and 64 inclusive.

[15] That brings me back to the question: "whether the age restriction in the Covenant is discriminatory and contravenes s. 5 of the *Human Rights Act*". The age restriction in the Covenant does not require any strata lot owner to commit the strata lot to occupancy by a tenant. The *Human Rights Act* does not apply to owner-occupiers with respect to age. As Madam Justice Allan said, an owner-occupier who is contemplating committing his or her strata lot to occupancy by a tenant must comply with both the Restrictive Covenant and the *Human Rights Act*. That can be done by either not renting out the strata lot at all or by renting it only to someone over 64. That restriction on renting out a strata lot does not involve any conclusion that the age restriction in the Covenant is discriminatory in any relevant sense, nor any conclusion that it contravenes s. 5 of the *Human Rights Act*. The Restrictive Covenant does not require or compel an owner to rent out that owner's strata lot to someone over 50, or at all. So I would answer the first question in the same way as Madam Justice Allan: "It is not discriminatory and not in contravention of s. 5 of the *Human Rights Act*."

The Age Restriction and the Powers of the District

[16] Section 215 of the *Land Title Act* confers on the District the power to enter into a covenant, as covenantee, containing provisions in respect of "the use of land" or "the use of a building". The question then is whether the age restrictions in this Covenant are in respect of "the use of land" or "the use of a building".

[17] Some of the cases suggest that a distinction should be made between the *use* of land and the *person who uses* the land, and that a power in respect of "the use of land" permits regulation of the former but not the latter. See, for example, *R. v. Bell*, [1979] 2 S.C.R. 212, 98 D.L.R. (3d) 255, and *Galbraith v. Madawaska Club Ltd.*, [1961] S.C.R. 639, particularly at p. 652, 29 D.L.R. (2d) 153. Other cases treat the describing of a class of persons who may occupy the land as a regulation in respect of "the use of land", see *Smith v. Tiny (Township)* (1980), 27 O.R. (2d) 690, 107 D.L.R. (3d) 483 (Ont. H.C.J.); affirmed 29 O.R. (2d) 661*n*, 114 D.L.R. (3d) 192*n* (Ont. C.A.), and *Faminow v. Corp. of District of North Vancouver* (1988), 24 B.C.L.R. (2d) 49, 61 D.L.R. (4th) 747 (B.C.C.A.).

[18] To some extent the cases may seem difficult to reconcile. Perhaps the key lies in deciding whether in any particular case a more ample or a more restricted interpretation and application of the word "use" is reasonable in the circumstances. If one of two alternative interpretations leads to an unreasonable provision, as in the *Bell* case, then the interpretation requiring a more reasonable application will be preferred. But as Mr. Justice Robins said in *Smith v. Tiny*, there is now widespread acceptance that a regulation of "use" as "a single family . . . dwelling" is permissible for zoning purposes. And it is noteworthy that in the *Smith v. Tiny* case itself the bylaw required that a "single-family detached dwelling" must be one "occupied by not more than one family" so that the test was related to actual occupancy and not just to a particular design for occupancy.

[19] Since this Court in *Faminow* adopted the reasoning in *Smith v. Tiny* and followed it, I must regard those two cases as the decisive authorities. Accordingly, the answer to the second issue is that the age restriction is within the powers of the District.

The Covenant and Section 31 of the Property Law Act, R.S.B.C. 1979, c. 340

[20] The relevant provisions of s. 31 (now s. 35) are these:

Court may modify or cancel charges

31(1) *A person interested in land may apply* to the Supreme Court *for an order to modify or cancel a charge* or interest *against the land*, registered either before or after this section comes into force, and *being . . . a restrictive or other covenant burdening the land or the owner . . .*

(2) *The court may make an order sought under subsection (1) on being satisfied that the application is not premature* in the circumstances, *and that*

(*a*) *by reason of changes in the character of the land*, the neighbourhood *or other circumstances the court considers material, the registered charge or interest is obsolete*;

(*b*) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled;

(*c*) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled;

(*d*) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest; or

(*e*) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

. . . . .

(4) *The court shall, as it believes advisable and before making an order under subsection (2), direct*

(*a*) inquiries to a municipality or other public authority; and

(*b*) *notices, by way of advertisement or otherwise, to the persons who appear entitled to the benefit of the charge or interest to be modified or cancelled.*

(5) An order binds all persons, whether or not parties to the proceedings or served with notice. [My emphasis.]

[21] No notice has been given in this case as required by s-ss. (4) and (5). That, in itself, is sufficient in this case to prevent a decision to cancel or modify the charge.

[22] However, I would also add that the charge is not obsolete. It continues to have its full effect in relation to occupancy by an owner. And the modification of its applicability in relation to occupancy by a tenant under the combined effect of the Covenant and the Act, so that all rentals are prohibited other than those to a person over 64, does not make the Covenant obsolete. What happens is that the *Human Rights Act* modifies the application of the Covenant in relation to occupancy by a tenant.

[23] I agree with Madam Justice Allan that the answer to this third issue is that the Covenant is not obsolete, in whole or in part,

at the present time, and should neither be cancelled nor modified under s. 31 of the *Property Law Act*.

The Fresh Evidence Motion

[24] The evidence sought to be introduced by affidavit is to the effect that a special resolution of the strata corporation controlling the residential units was said to have been passed on 5 June, 1997. It is said to contain this provision:

> An owner shall not allow a Strata Lot to be occupied by any person under nineteen (19) years of age and at least one occupant of a Strata Lot must be fifty-five (55) years of age.

[25] Of course, this evidence does not meet the usual rules for the introduction of fresh evidence. It was not in existence when the summary trial was held and so could not have affected the summary trial. However, it is sought to be admitted under the rule applied in *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 (C.A.), on the basis that the fresh evidence "falsified" the trial judgement.

[26] In my opinion the rule in *Cory v. Marsh* applies only in relation to the situation where the trial judge made assumptions about future events in order to calculate damages or for some other reason, and then, before an appeal was heard, the trial judge's assumptions are shown by the course of events to be or to have become incorrect. See also *Knutson v. Farr* (1984), 55 B.C.L.R. 145, 12 D.L.R. (4th) 658 (C.A.), and *Christie v. Insurance Corp. of British Columbia* (1993), 79 B.C.L.R. (2d) 370 (C.A.). I do not think it is a general rule that evidence of new events which change the factual circumstances is permitted to be given and permitted to have some kind of retroactive legal applicability requiring this Court to apply different laws to different facts than those which confronted the trial judge.

[27] In any case, the evidence does not seem to me to be directly relevant to any of the stated issues which were dealt with on the summary trial under Rule 18A or which are before this Court in this appeal.

[28] I would reject the fresh evidence motion.

[29] However, I would like to observe that the entirely new issue raised by the special resolution of the strata corporation, if the special resolution is valid, effective and operative, may well make every rental unit, consisting of a strata lot whose owner has committed the space in the unit to occupancy by a tenant, a rental unit reserved for rental to a person 55 years of age or older, or to two or

more persons, at least one of whom is 55 years of age or older. If that were to be so then the special resolution of the strata corporation would apply to each rental unit, but s. 5(1) of the *Human Rights Act* would not.

Trial of an Issue Under Rule 18A

[30] These proceedings were started in 1992. The summary judgment was given in 1996. Defendants who were 50 years old in 1992 are now 56. People who were occupants in 1992 may have left the premises. New occupants may have arrived. Defendants who may be thought to be in breach of the Covenant and against whom the Covenant is sought to be enforced may have other defenses than those dealt with by the three issues that have been before the Supreme Court and this Court under this Rule 18A application. Estoppel and acquiescence have been mentioned. There may be other questions of interpretation of the Covenant and the *Human Rights Act*. The defendants, or some of them, may have claims against third parties which remain unresolved. And, of course, we now know from the unadmitted "new" evidence that a new strata corporation bylaw may have been passed which may affect tenancy creation processes.

[31] Rule 18A, sub-rule 8(*b*) reads in this way:

Ancillary orders and directions

18A(8) On or before the hearing of an application under this rule, the court may

. . . . .

(*b*) dismiss the application on the ground that

(i) the issues raised by the notice of motion are not suitable for disposition under this rule, or

(ii) the application will not assist the efficient resolution of the proceeding.

[32] The applicability of that sub-rule was not argued in this Court and is not mentioned in the reasons of Madam Justice Allan. But it seems to me that neither the first issue, nor the third issue were suitable for disposition under Rule 18A. The answers to both seem so straightforward that they could well have been anticipated. It would seem to follow that the Rule 18A application may never have had much prospect of assisting in the efficient resolution of the proceeding.

[33] With respect, it seems to me that if the answer to an issue sought to be tried under Rule 18A will only resolve the whole

proceeding if one answer is given, but not if a different answer is given, then the applicant should be required to demonstrate, and the judge should be expected to decide, that the administration of justice, as it affects not just the parties to the motion, but also the orderly use of court time, will be enhanced by dealing with the issue as a separate issue. It cannot be enough simply that the parties have agreed to a summary trial of one or more issues, but not all of the issues, raised in the proceeding, without any consideration for the effective use of court time, or the efficient resolution of the proceeding.

Disposition

[34] These reasons are substantially in accordance with the reasons of Madam Justice Allan. I would dismiss this appeal.

[35] My present opinion is that the costs of the summary trial in the Supreme Court and the costs of this appeal should be costs in the cause. If either party would like to argue in favour of a different disposition on costs then I would deal with that argument on the basis of responsive written submissions. The costs of that argument, if there is one, may be dealt with differently than the costs of the summary trial and of the appeal itself.

Appeal dismissed.

Hanis v. Teevan et al.; Guardian Insurance Co. of Canada et al., Third Parties

[Indexed as: Hanis v. Teevan]

Court File No. C21503

Ontario Court of Appeal
McKinlay and Goudge JJ.A. and Southey J. (ad hoc)

Heard: April 7 and 8, and June 25, 1998
Judgments rendered: June 18 and July 13, 1998

Administrative law — Duty to act fairly — Applicability — Director of university computer laboratory dismissed without hearing — Breach of duty of procedural fairness — Employee awarded damages for wrongful dismissal.

Employment — Wrongful dismissal — Cause — Right to a hearing — Director of university computer laboratory dismissed without

TAB 39

2014 BCSC 419
British Columbia Supreme Court

J. (N.) v. Aitken Estate

2014 CarswellBC 670, 2014 BCSC 419, [2014] B.C.W.L.D. 3731, 238 A.C.W.S. (3d) 852

N.J., Plaintiff and The Estate of Mary Aitken by her personal representatives, The Estate of William John Aitken by his personal representatives, The Children's Aid Society of The Catholic Archdiocese of Vancouver, The Roman Catholic Archdiocese of Vancouver, and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Children and Families, Defendants

W.F. Ehrcke J.

Heard: January 22, 2014; January 23, 2014; January 24, 2014
Judgment: March 13, 2014
Docket: Vancouver S005710

Counsel: K.N. Ramji, for Plaintiff
K. Low, for Defendant, Roman Catholic Archdiocese of Vancouver

Subject: Civil Practice and Procedure; Estates and Trusts; Torts

APPLICATION by certain defendant seeking to have action dismissed as against that defendant, on basis of summary trial.

***W.F. Ehrcke J.*:**

Introduction

1 The plaintiff, a member of the Squamish Indian Band, was in foster care from 1956 to 1971. His foster parents were Mr. and Mrs. Aitken, both of whom are now deceased. In his amended statement of claim filed May 26, 2003, the plaintiff alleges that he was physically and sexually assaulted by Mr. Aitken while in his care. He has given evidence under oath at an examination for discovery, and although I do not have that evidence before me, I am told by counsel that he said he was sexually assaulted by Mr. Aitken on well over 100 occasions from age 5 onwards, and many of those assaults consisted of anal rape. His counsel tells me that he will be seeking very substantial monetary damages of perhaps one million dollars or more against the various defendants for the abuse that he suffered.

2 The plaintiff was placed in the care of the Aitkens by the Children's Aid Society of the Catholic Archdiocese of Vancouver (the "Society"), which was established under the *Children's Protection Act of British Columbia, 1901*, later succeeded by the *Protection of Children Act*, R.S. 1948, c. 47. Pursuant to the *Protection of Children Act*, the Society was empowered to place children that had been committed by the court into foster homes.

3 The Provincial Court of British Columbia ordered the committal of the plaintiff to the care and custody of the Society on February 14, 1955, and on February 26, 1956, the Society placed him in the care of the Aitkens. He stayed with the Aitkens until July 28, 1971. The Society was dissolved on April 1, 1974.

4 The Roman Catholic Archdiocese of Vancouver (the "Archdiocese") provided guidance to the Society on spiritual and moral matters. Pursuant to the Society's Bylaws, the Archbishop appointed a member of the Archdiocese to act as an officer and director of the Society in the role of a Chaplain. There were 25 directors in total on the Board.

5 The Archdiocese encouraged the Society to place Catholic children in Catholic homes, where possible, and encouraged Catholics to become foster parents.

6 This matter is set for a 20-day trial commencing February 23, 2015. By order dated April 21, 2006, this action is to be tried together with action No. L040219, in which a different plaintiff, M.J., also claims damages against the same defendants for sexual and physical abuse while he was in the custody of the Aitkens from 1962-1977.

7 Now before me is an application by the Archdiocese seeking to have the present action, No. S005710, dismissed as against only the Archdiocese, on the basis of a summary trial under Rule 9-7 of the *Supreme Court Civil Rules*.

8 Counsel for the plaintiff takes the position that this matter is not suitable for summary trial determination.

9 At the outset of the hearing, I indicated that I was inclined to agree with counsel for the plaintiff that there are serious concerns about whether this matter is suitable for summary determination, but counsel for the Archdiocese took the position that in order to demonstrate its suitability, it was necessary for her to proceed with the substance of her argument. Accordingly, the hearing continued, but on the understanding that at the end of the hearing, it might still be concluded that the matter should not be determined under Rule 9-7.

10 Having now heard the submissions of counsel and having read the evidence filed, I remain of the view that this case is not suitable for summary determination, and the Archdiocese's application under Rule 9-7 must be dismissed on that basis.

The Nature of the Plaintiff's Claim Against the Archdiocese

11 In his amended statement of claim, the plaintiff framed his case against the Archdiocese in the following manner:

> 20. At all material times, the Archdiocese acted for and on behalf of and under the direction of the Provincial Crown.
>
> 21. The Archdiocese was, at all material times, responsible for the funding, supervision and management of the Society and for the selection, supervision and management of the caregivers holding their homes open for and caring for children in need of temporary or long term foster care and as such was responsible for the selection of the Defendants, Mrs. Aitken and Mr. Aitken.
>
> 22. The Archdiocese was in a fiduciary relationship with the Plaintiff who was at all material times, an infant under its custody and control.
>
> 23. The Archdiocese was negligent and breached its fiduciary duties by failing to use reasonable care in the selection of Mrs. Aitken and Mr. Aitken and in permitting their continued participation as foster parents on behalf of the Provincial Crown, the Archdiocese and the Society which resulted in the Plaintiff being sexually and physically assaulted.
>
> 24. The particulars of the negligence and the breaches of the fiduciary duties of the Archdiocese are as follows:
>
> > (a) in failing to screen all individuals providing services to the children in custody, in particular the Plaintiff, to ensure their qualifications and moral turpitude;
> >
> > (b) the Archdiocese knew or ought to have known that Mr. Aitken was a pedophile and had a history of abusing children in his care;

(c) the Archdiocese had knowledge through its agents, the Society, or otherwise, that Mr. Aitken was sexually and physically assaulting the Plaintiff and, despite such knowledge, failed to take any or any reasonable steps to prevent or put an end to such assaults;

(d) the Archdiocese knew or ought to have known that Mr. Aitken and Mrs. Aitken were not exercising due care in the execution of their guardianship of the Plaintiff;

(e) the Archdiocese continued to permit the participation of Mrs. Aitken and Mr. Aitken after it knew or ought to have known that Mrs. Aitken and Mr. Aitken failed in their duty to care for the safety and protection of the Plaintiff;

(f) the Archdiocese failed to investigate allegations of physical and sexual assaults by Mr. Aitken and physical assaults by Mrs. Aitken after such abuse was reported to it; and

(g) the Archdiocese failed to exercise reasonable or any supervision or direction over Mrs. Aitken or Mr. Aitken, or to implement programs or procedures for such supervision and direction, or otherwise, which would have disclosed the neglect of duty and the physical and sexual assaults by Mr. Aitken and the neglect of duty and the physical assaults by Mrs. Aitken against the Plaintiff, or both.

25. The Archdiocese owed the Plaintiff a duty to protect him against sexual and physical assaults while he was in custody, and that there was an implied contract then existing to protect him from such sexual and physical assaults, which the Archdiocese breached.

26. In the alternative, the Archdiocese is vicariously liable for the breaches of fiduciary duty and duty of care on the part of the Society, Mrs. Aitken and Mr. Aitken.

The Rule 9-7 Application of the Archdiocese

12 The notice of application of the Archdiocese lists five issues to be decided on the Rule 9-7 hearing:

a. Is the Archdiocese vicariously liable for the alleged harm committed by the Aitkens while the plaintiff was in care of the Aitkens?

b. Is the Archdiocese vicariously liable for the alleged negligence of the Society?

c. Does the Archdiocese owe a duty of care to the plaintiff?

d. Is the plaintiff's tort action regarding his alleged physical abuse statute barred by the *Limitation Act*?

e. Is the Archdiocese, as an unincorporated association, capable of being sued?

13 In its written submissions on the Rule 9-7 hearing, counsel for the Archdiocese articulated the issues to be determined somewhat differently, as follows:

7. The Archdiocese submits that the legal issues to be decided on this 9-7 application are as follows:

a. Does the Archdiocese owe a duty of care to the plaintiff for failing to properly select, supervise and manage the Aitkens?

i. What is the appropriate standard of care applicable to the Archdiocese in selecting, supervising and managing foster parents?

ii. Did the Archdiocese breach that standard of care?

b. Does the Archdiocese owe a fiduciary duty to the plaintiff?

c. If so, was that fiduciary duty breached?

d. Is the Archdiocese vicariously liable for the alleged harm committed by the Aitkens while the plaintiff was in the care of the Aitkens?

e. Is the Archdiocese vicariously liable for the alleged negligence of the Society for failing to properly select, supervise and manage the Aitkens?

f. Is the plaintiff's tort action regarding his alleged physical abuse statute barred by the *Limitation Act*?

g. Is the Archdiocese, as an unincorporated association, capable of being sued?

14 As can be seen, this is an expansion of what was set out in the notice of application. In particular, in its written submissions, the Archdiocese seeks a ruling that the Archdiocese did not owe a fiduciary duty to the plaintiff, or if it did, then there was no breach of that duty. The plaintiff was given no notice of those issues in the notice of application.

15 Despite the fact that the Archdiocese lists specific issues that it seeks to have determined, the ultimate order sought on its Rule 9-7 application is a dismissal. As set out in the notice of application, the Archdiocese seeks an order that:

1. The action commenced by N.J. against the Roman Catholic Archdiocese of Vancouver be dismissed.

The Evidence

16 The evidence filed on behalf of the Archdiocese consists of:

(a) The affidavit of Mary Margaret MacDougall, a former Executive Director of Catholic Family Services of the Archdiocese of Vancouver. Attached to that affidavit are 16 exhibits, totalling 143 pages.

(b) The affidavit of Alfred T. Clarke, barrister and solicitor, who was a director of the Children's Aid Society of the Catholic Archdiocese of Vancouver from 1958 until 1963, and then was counsel for the Society until 1974. Attached to his affidavit are 14 exhibits, totalling 234 pages.

(c) The affidavit of Taylor-Marie Young, attaching 2 exhibits.

(d) The affidavit of Melissa Dudek, attaching 4 exhibits

(e) A Notice to Admit and the plaintiff's reply thereto.

17 The evidence filed on behalf of the plaintiff consists of:

(a) The affidavit of Fiona Scott, legal assistant for counsel for the plaintiff, to which are attached 82 exhibits comprising 470 pages.

18 The exhibits attached to the affidavits of both the Archdiocese and the plaintiff are generally historical documents such as correspondence, memoranda, and minutes of meetings.

19 Counsel for the Archdiocese has filed 55 pages of single-spaced written argument. Counsel for the plaintiff has filed 28 pages of written argument. Between them, the parties have filed more than 55 authorities.

The Positions Taken by the Parties

20 As previously noted, from the outset the plaintiff has taken the position that this matter is not suitable for summary determination, although he did file the evidence referred to above, namely, the affidavit of Fiona Scott attaching 470 pages of exhibits.

21 Counsel for the plaintiff did not file an affidavit sworn by the plaintiff or any other evidence of the facts of the alleged abuse. Counsel for the plaintiff took the position that the plaintiff's evidence about the circumstances of the abuse that he endured is evidence that cannot satisfactorily be put before the Court in written documents, but rather that the plaintiff should have the opportunity of telling the story of his abuse at the hands of his foster parents directly to the Court by way of *viva voce* testimony. He maintained that the credibility of the plaintiff's account is clearly a matter that the Court can properly assess only if he testifies in person.

22 At the outset of the hearing before me, counsel for the Archdiocese initially took the position that the summary trial must be decided in favour of the Archdiocese on this basis alone, namely, that since the fact of the abuse had not been proven by affidavit, the Archdiocese was entitled to have the case against it summarily dismissed.

23 I indicated to counsel for the Archdiocese that I was not prepared to dismiss the case on that basis, because I agreed with counsel for the plaintiff that his credibility should be determined only after hearing his *viva voce* testimony, unless the Archdiocese was prepared unequivocally to admit the facts of the abuse as alleged.

24 Counsel for the Archdiocese would not make such an unequivocal concession. However, in order to proceed with the summary trial on the issues set out in the notice of application, counsel for the Archdiocese indicated that she was prepared to have the Court assume that the plaintiff's allegations were correct, but only for the purpose of hearing the summary trial.

25 Both counsel proceeded with their submissions, and I reserved judgment, indicating again that one of the issues on which judgment was reserved was the issue of whether this matter was suitable for a summary trial.

Rule 9-7

26 In British Columbia, summary trials are now governed by Rule 9-7, and previously by Rule 18A of the former Rules of Court.

27 Rule 9-7(11) provides that a summary trial application may be dismissed on the ground that the issues raised are not suitable for summary determination or on the ground that the summary trial will not assist in the efficient resolution of the proceeding. Rule 9-7(11) reads:

> 9-7(11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
>
> (a) adjourn the summary trial application, or
>
> (b) dismiss the summary trial application on the ground that
>
> (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
>
> (ii) the summary trial application will not assist the efficient resolution of the proceeding.

28 The powers of the Court hearing a summary trial application are set out in Rule 9-7(15), which provides:

> 9-7(15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

(b) impose terms respecting enforcement of the judgment, including a stay of execution, and

(c) award costs.

29 In the well-known case of *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (B.C. C.A.), which was decided under the former Rule 18A, our Court of Appeal held that whether to grant judgment on an application for summary trial is a matter of judicial discretion. McEachern C.J.B.C. discussed some of the factors that should be considered in the exercise of that discretion, including the amount involved in the case, the complexity of the issues, and the course of the proceedings. He wrote at p. 214:

> In fact R. 18A substitutes other safeguards which are sufficient to ensure the proper attainment of justice. First, 14 days notice of the application must be given (R. 18A (1.1)); secondly, the chambers judge cannot give judgment unless he can find the facts necessary to decide issues of fact or law (R. 18A(3)(a)); and thirdly, the chambers judge, even if he can decide the necessary factual and legal issues, may nevertheless decline to give judgment if he thinks it would be unjust to do so. The procedure prescribed by R. 18A may not furnish perfect justice in every case, but that elusive and unattainable goal cannot always be assured even after a conventional trial and I believe the safeguards furnished by the Rule and the common sense of the chambers judge are sufficient for the attainment of justice in any case likely to be found suitable for this procedure. Chambers judges should be careful but not timid in using R. 18A for the purpose for which it was intended.
>
> In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.
>
> [Emphasis added.]

30 Subsequently, in *Foreman v. Foster*, 2001 BCCA 26, 84 B.C.L.R. (3d) 184 (B.C. C.A.), our Court of Appeal noted at para. 19:

> [19] The question must always be in the trial judge's mind, on hearing a challenge to the suitability of the case for disposition under Rule 18A, whether the facts can be found on the materials before the court, and whether it would be just in the circumstances to render judgment. At any stage of the application a trial judge may become satisfied that one or other of those conditions makes the case not suitable for disposition, or that the application is not improving the efficiency of the trial process, and thereupon bring the hearing to an end. This approach is consistent with the statement of Mr. Justice Taggart in *Placer Dev. Ltd. v. Skyline Explor. Ltd.* (1985), 67 B.C.L.R. 366 at 385-86, referred to with approval in *Inspiration Management*:
>
> > Clearly the opening language of subr. (3) of R. 18A contemplates the possibility of judgment being entered on one or more or all issues raised by the pleadings. But that contemplation is, for the judge hearing the application, tempered by the language of paras. (a) and (b) of subr. (3). They clothe the judge with a broad discretion to refuse to proceed with the application where he decides he cannot find the facts necessary to decide the issues of fact or law or if it would be unjust to decide the issues raised on the application. Although those two matters are stated in separate clauses of subr. (3), they will often have to be considered together. I can envisage circumstances where the judge will decide on the whole of the evidence that while it is possible to find the facts necessary to decide the issues of fact or law it would be unjust to decide those issues. On the other hand, I cannot

> think of a case where, notwithstanding his inability to find the necessary facts, the judge would be justified in proceeding with the application.
>
> . . .
>
> In summary, the rule is a means whereby the general principles stated by R.1(5) may be attained. The rule must, however, be applied only where it is possible to do justice between the parties in accordance with the requirements of the rule itself and in accordance with the general principles which govern judges in their daily task of ensuring that justice is done.

[Emphasis added.]

31 As can be seen, the jurisprudence in this Province establishes that there are two broad categories of reasons why a matter may not be suitable for summary determination: first, a case is not suitable for summary determination if the judge is unable to find the facts necessary to decide the issues, and second, a case is not suitable for summary determination if the court is of the opinion that it would be unjust to decide the issues on the application. These two categories emerged from the wording of the old Rule 18A, and are now specifically contained in Rule 9-7.

32 Counsel for the Archdiocese submits that the jurisprudence from our Court of Appeal interpreting the old Rule 18A and now Rule 9-7 has been overtaken by the recent decision of *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.), in which the Supreme Court of Canada interpreted the Ontario rules relating to summary trials and seemed to suggest that there should be a change of culture to allow more matters to be determined by summary trial.

33 In my view, *Hyrniak v. Mauldin* does not change the law regarding summary trials in British Columbia, and does not render the jurisprudence from our Court of Appeal obsolete.

34 It must be remembered that *Hyrniak v. Mauldin* was dealing with the Ontario rules, which are different from our rules in British Columbia. In particular, at para. 68, the Court stressed the fact that under Ontario Rule 20.04(2) "The court *shall* grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial ..." In contrast, our Rule 9-7(15) uses the word "may" rather than "shall". I therefore do not take *Hyrniak v. Mauldin* to derogate from the proposition that in British Columbia, the question of whether a matter is suitable for summary determination is within the discretion of the trial judge, provided, of course, that that discretion must be exercised judicially.

35 Moreover, even in the context of the Ontario rules, the Supreme Court of Canada recognized that not all cases are suitable for summary trial determination. Thus, at para. 50 the Court noted:

> [50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.
>
> [Emphasis added.]

36 At para. 59 the Court reiterated that a summary trial is only appropriate if it is in the interest of justice, and at para. 60, it recognized that a summary trial may not be in the interest of justice if it results in what has sometimes been called, "litigation by slices":

> [59] In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do

so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

[60] The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

[Emphasis added.]

37 Finally, at para. 68 the Court endorsed the proposition that even though the Ontario rules use the mandatory word "shall" (rather than "may" as in British Columbia), trial judges still retain a discretion, and they should be mindful of the risks posed by unmeritorious motions for summary judgment:

[68] While summary judgment must be granted if there is no genuine issue requiring a trial, the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary. The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

[Emphasis added.]

38 Accordingly, I am satisfied that trial courts in British Columbia are still to be guided by the existing jurisprudence from our Court of Appeal and by the wording of Rule 9-7 itself in determining whether a case is suitable for summary trial determination.

Application of the Principles to the Present Case

39 Applying those principles to the case at bar, I have concluded that the present case is not suitable for summary trial determination. There are a number of factors which point to this conclusion, but the primary consideration is that a decision on this Rule 9-7 application would not bring the litigation to an end, it would open the door to the possibility of inconsistent findings, and it would not be an efficient use of the Courts resources.

40 This is a case in which there are multiple parties. Not only is the Archdiocese not the only defendant, but as well, there is another plaintiff. While M.J. is not a plaintiff on this action No. S005710, there is an order of this Court that his action No. L040219 is to be tried along with this action. In both cases, the plaintiffs claim damages against the same defendants for sexual and physical abuse while in the custody of the Aitkens.

41 Thus, if I were to rule on the issues raised by the Archdiocese on this Rule 9-7 application, all of those same issues would have to be litigated anew on the trial where M.J. is the plaintiff. That would not only be a waste of judicial resources, but it would also put the Court in a potentially awkward position. Whatever ruling I might make on this application would not be binding on the trial judge who would hear the M.J. trial. Nevertheless, if my rulings favoured the Archdiocese, it might well appear to M.J. that he has been prejudiced by having me make those rulings when he has not been present to make submissions and tender evidence. On the other hand, if the trial judge in the M.J. case made rulings that reached different conclusions from mine, then it might appear to members of the public that the Court had arrived at inconsistent findings on essentially the same issues.

42 Similar considerations apply with respect to the multiple defendants. If I were to make rulings in favour of the Archdiocese on this Rule 9-7 application, there would still have to be a trial with respect to the liability of the Province. While the issues with respect to the Province and with respect to the Archdiocese would not be identical, there would no doubt be significant overlap, leading once again to the possibility of what might appear to be inconsistent findings. In any event, there would be a waste of judicial resources, in that similar arguments would have to be heard and determined twice.

43 To repeat what the Supreme Court of Canada has said in *Hyrniak v. Mauldin* at para. 60:

> [I]f some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice.

44 For those reasons, I find that this is one of those cases in which a determination under Rule 9-7 would not be in the interest of justice.

45 In addition, I have some concern about the ability to make proper findings of fact on the material before me. First, there is the problem that there is no evidence before me from the plaintiff, and the Archdiocese has asked to proceed with the summary trial application by assuming (without unequivocally conceding) the truth of his allegations.

46 In *Hobbs v. Robertson*, 2002 BCCA 381 (B.C. C.A.), and in *Buckley v. B.C.T.F.* (1992), 65 B.C.L.R. (2d) 155 (B.C. C.A.), our Court of Appeal was critical of bringing summary trial applications based on assumed facts.

47 As well, I disagree with the submission of the Archdiocese that the evidence put before the Court on this Rule 9-7 application raises no issues of credibility.

48 In its written submissions at para. 65, the Archdiocese submits that this action is suitable for disposition under Rule 9-7 because there are no credibility issues. As well, at para. 6 the Archdiocese contends that "Aside from the plaintiff, there are no witnesses available that can provide personal knowledge to the matters in issue."

49 Those submissions ignore the fact that the Archdiocese relies on the affidavit of Alfred T. Clarke. Mr. Clarke is a lawyer who was a director of the Children's Aid Society of the Catholic Archdiocese of Vancouver from 1958 until 1963, and was subsequently counsel for the Society until 1974. There is nothing in the material to suggest that Mr. Clarke is unavailable to testify, and in the Archdiocese's own submissions on The Admissibility of Evidence at paras. 27-31, they admit that he has relevant personal knowledge:

> 27. Mr. Clarke's involvement with the Society, as a director, Vice President and solicitor, overlapped with the period of time that the plaintiff was in the care of the Aitkens; namely between 1956 and 1971.
>
> 28. As a result of his involvement with the Society as director, Vice President and solicitor, Mr. Clarke had personal knowledge about the structure, governance and funding of the Society and in particular, personal knowledge, experience and understanding of the Society's operations and procedures.
>
> 29. Mr. Clarke deposed to a number of facts in his affidavit, which are based on his personal knowledge and experience with the Society. The evidence of Mr. Clarke is not based on inference of facts gleaned from his observation, but rather based on his personal and direct knowledge of the Society based on his involvement with it as a director, Vice President and solicitor of the Society. The court is entitled to rely on the factual evidence set out in his affidavit.
>
> 30. Specifically, as a director, Vice President and counsel for the Society, Mr. Clarke had personal knowledge about the following:

a. operations and procedures of the Society;

b. bylaws of the Society (and had in fact assisted in redrafting the bylaws);

c. funding and financial operations of the Society (and had financial signing authority during his Vice President tenure at the Society);

d. staff organization of the Society;

e. involvement of the Archbishop in the operations of the Society.

31. As a director, Vice President and counsel for the Society, Mr. Clarke had personal knowledge about the following:

a. The legal proceedings involving the Society;

b. The legal status of the Society;

c. The impact of the various legislation to the Society.

50 In his affidavit, Mr. Clarke makes assertions of fact, the credibility of which are highly contested. For example, he deposed at para. 15:

15. At no material time was the Society an organization controlled and operated by the Archdiocese or by the Roman Catholic Archbishop of Vancouver.

51 At para. 23 he deposed:

23. The Archdiocese did not at any material time involve itself in the affairs of the Society other than, in the main, to attempt to require that the Society placed Catholic children in Catholic homes, if possible...

52 And at para. 33(c) he deposed:

33. At no material times:

. . .

(c) was the Plaintiff under the custody and control of the Archdiocese or in a fiduciary relationship with the Archdiocese...

53 The Archdiocese also relies on the affidavit of Mary Margaret MacDougall, sworn October 3, 2013. She was a former Executive Director of Catholic Family Services of the Archdiocese of Vancouver. There is no suggestion in the materials that she is unavailable to give *viva voce* testimony, yet many of her assertions in her affidavit are clearly contested, making her credibility a live issue. For example, she deposed at paras. 16 and 20:

16. At no material time did the Archdiocese provide any funding to the Society, in any manner.

. . .

20. At no material time was the Society an organization controlled and operated by the Archdiocese or by the Roman Catholic Archbishop of Vancouver.

54 Not only are these assertions of fact clearly contested in the pleadings, but they appear to be inconsistent with some of the written documents that have been filed.

55 For example, in a letter to the president of the Society dated October 19, 1931, W.M. Duke, Archbishop of Vancouver wrote:

> The Catholic Children's Aid Society of Vancouver is an organ of the Catholic Church. It has its life and movement because of the Church. Its head in this Archdiocese is the head of the Church. Whatever powers it has, it has from the Church and while it is allowed by the Church to solicit aid from the Government and service from our Catholic people and to expend such monies and to direct such service, it is never an independent body but must ever remain an organ or an arm or a dependant body under the direction or the Church because it deals with the souls of children, the control over which the Church never relinquishes.

56 Again, in a letter dated October 28, 1955, Martin M. Johnson, Coadjutor Archbishop of Vancouver, wrote:

> In these areas Catholic children were placed in reception, foster or adoption homes as wards of Miss McKay [the Superintendent of Child Welfare] who had become their guardian. Foster or adoption homes according to Miss McKay were always approved by pastors in case of Catholic children.

57 I find, therefore, that in making determinations of fact in this case, the trier of fact should have the benefit of the *viva voce* testimony of Mr. Clarke and of Ms. MacDougal, as the credibility of the averments in their affidavits are clearly in issue.

Conclusion

58 For all these reasons, I am of the view that this case is not suitable for summary determination. In my view a summary determination would not be just to the other defendant and plaintiff, it would not assist in the efficient resolution of the proceedings, and the evidence raises issues of credibility that cannot properly be determined on the affidavit evidence.

59 The application of the Archdiocese under Rule 9-7 is dismissed. The plaintiff is entitled to costs of this application in the cause.

Application dismissed.

TAB 40

1974 CarswellOnt 956
Ontario Master

Pet Milk Canada Ltd. v. Olympia & York Developments Ltd.

1974 CarswellOnt 956, 4 O.R. (2d) 640

Pet Milk Canada Ltd. and Numilk Co. Ltd. v. Olympia & York Developments et al. and two other actions

Master (Ferron)

Judgment: May 7, 1974
Docket: None given.

Counsel: T. Joyce, for Pet Milk Canada Limited and Numilk Canada Limited
C.A. Keith, for Margison & Keith
P.J. Pape, for Olympia & York Developments Limited
R.A. Hummell, for White & Greer Company Limited

Subject: Corporate and Commercial; Civil Practice and Procedure

***Master (Ferron)*:**

1 There are two applications before me: one brought by Olympia & York Developments Limited and the other brought by Margison & Keith. The remedies asked for are substantially the same, namely: (a) for an order that William T. Murchie, an officer of Pet Milk Canada Limited and Numilk Company Limited, reattend for examination for discovery to answer Q. 228 in the transcript of his examination, (b) that in the alternative for an order dismissing the action of Pet Milk Canada and Numilk Canada Limited and the counterclaims of those parties, and (c) for an order requiring Pet Milk Canada Limited and Numilk Canada to post security for costs.

2 The three actions styled above arise out of the construction of an extension to a building, the owner of which was Olympia & York Developments Limited (to which I will refer as "Olympia") and the tenant of which was Numilk Canada Limited (to which I will refer as "Numilk"). Numilk is a wholly-owned subsidiary of Pet Milk Canada Limited (to which I will refer as "Pet Milk"). The extension to the building to which I have referred had constructed therein six special rooms which required a considerable expertise in order to meet certain requirements as to temperature and all the difficulties which accompany the variations of temperature which apparently was required in the storage of some of the plaintiffs' products.

3 The building was completed in or about 1965 and in or about 1966 certain problems became apparent with respect to these rooms in that the ceilings began to fail and the room became useless in whole or in part for the plaintiffs' purposes as I have mentioned. Apparently the rooms were repaired on at least two occasions and during this time Pet Milk and Numilk had to make arrangements for the storage of their products in another location.

4 The action by Pet Milk and Numilk is for damages including the cost of the repairs to which I have made reference and the cost of alternate storage space, *inter alia*. The action is brought against Olympia and against Margison & Keith, and Margison & Keith have counterclaimed for the balance due to it for its professional fees as architect of the addition to which I have referred.

5 Olympia, in a second action, has proceeded against Pet Milk and Numilk for the balance owing to it for the construction

of the addition and in a third action, White & Greer Company Limited has sued Olympia for the cost of the insulation work which it did with respect to the construction of the building.

6 The pleadings have been delivered and examinations for discovery have taken place. On September 12, 1973, William T. Murchie was examined. On that examination he was asked by counsel for Olympia to identify those invoices which he had produced on discovery which referred to the repair work which the plaintiffs had contracted for following the failure of the ceilings of the building. Specifically, the questions are as follows:

> 227. Q. The invoices you have just presented, do any of those invoices cover that repair work for the first time?
>
> A. In the cooler rooms, yes.
>
> 228. Q. Which invoices are they?

7 That question was not answered and an application was brought to compel the witness to return and answer the question. Counsel for Pet Milk and Numilk consented to an order which required Murchie to reattend and reanswer Q. 228, among other questions. Murchie, in fact, did not reattend at that time but counsel for Pet Milk and Numilk wrote on December 10, 1973, suggesting an answer to the question. The answer was not satisfactory and an application was brought on January 16, 1974, at which time the Master, Mr. Davidson, ordered that Murchie reattend and answer the question set out above. There was no appeal taken from that order. In his reasons for judgment, the learned Master refers specifically to the letter of December 10, 1973, and states that in his opinion the answer given in that letter was unsatisfactory.

8 Pursuant to the order of the Master, Murchie reattended for examination on February 8, 1974, and again Q. 228 was put to him; again, an answer was not forthcoming. Now I should state that the answer tendered with respect to that question in the letter of December 10th was as follows:

> We are informed that Thornhill Insulation is in bankruptcy and we have attempted to obtain the information about the invoices from the Trustee in Bankruptcy (The Clarkson Company), and we have not been able to obtain any of the information yet. If we obtain any information before trial we shall give such information to.

It is important to note the reference in that portion of the letter to "the invoices" in view of the argument by counsel for Pet Milk and Numilk that Q. 228 was in fact answered. It is also important to note that after the order to Master Davidson a further letter was sent by counsel for Pet Milk and Numilk in which a further attempt is made to answer Q. 228 as follows:

> Pet Milk has no further evidence than the evidence already produced and is not making a claim for any other damages than the $37,620.57 and the damages claimed in paragraph 6 of the Statement of Claim, except for a small claim for $686.48 for repairs to the ceilings which is supported by the enclosed documents.

9 Now going back to the transcript of the examination that took place on September 12, 1973, it should be pointed out that Q. 228 contains, following the excerpt which I have mentioned above, an exchange between Mr. Pape and counsel for Pet Milk and Numilk where certain other questions are asked and an undertaking is given to supply Mr. Pape with certain evidence. I have mentioned the undertaking given in Q. 228 because the argument of counsel for Pet Milk and Numilk proceeded on the basis that Murchie had answered the question, No. 228, in the letter of February 7, 1974, and that that was a full and complete answer to the question. In so arguing counsel simply ignores the main question and argues that since he has answered a part of Q. 228 that is sufficient. I suppose that where a question contains several parts, one could be led to think that in giving an answer to part of the question that the answer covers the complete question but when one has regard to the proceedings, the correspondence and the examination, that conclusion could not be drawn with respect to Q. 228. I say this because Q. 228 was asked and an answer was tendered in a letter of December 10th and that answer found not satisfactory by the Master, refers specifically to the question which is the subject of this application. Counsel for Pet Milk and Numilk could be under no illusions as to what was being asked his client and the letter of February 7th does not even approach an answer.

10 The invoices referred to in Q. 228 apparently came from Thornhill Insulation which I have indicated is now in bankruptcy and, of course, there may be some difficulty in obtaining the information asked for. However, the fact that there may be some difficulty does not preclude the witness from attempting to find the information on which to base an answer. It will be seen from the examination of Murchie, the transcript of which is dated February 8, 1974, that no attempt had been made to obtain the information from the trustee in bankruptcy; indeed, the witness was in no better position to handle the question than he was on the prior examination in spite of all that had taken place with respect to that question since the first examination.

11 In the notice of motion counsel for Olympia asks and submitted an argument that in view of the failure to answer Q. 228, the action and counterclaims of Pet Milk and Numilk should be struck. I am, however, reluctant to make that drastic order but I do order that Murchie do reattend to answer Q. 228 and all questions which arise properly therefrom.

12 When the action was commenced by Pet Milk and Numilk in 1968, both companies carried on business in the Province. Pet Milk is a company incorporated by the laws of the Dominion of Canada and has, set out in the statement of claim, its head office in the Municipality of Metropolitan Toronto where it carries on business. Numilk was incorporated by Ontario letters patent and at the time the action was commenced had its head office in the Municipality of Metropolitan Toronto and presumably carried on business in Toronto. Following the issue of the writ, the action paced leisurely along and in the interim Pet Milk sold all its assets in Toronto and both it and Numilk have ceased to carry on business anywhere in the Province or indeed anywhere in Canada. William T. Murchie, in his examination, states that Pet Milk is a "dormant Canadian company". He states that it is not operating and that the status of Numilk is the same.

13 The annual information return of Pet Consolidated Limited, which is the parent company of Pet Milk, dated September 20, 1973, indicates that there are seven directors, five of whom reside in the State of Missouri and that the three officers of the company are three directors who live in Missouri. The annual information return of Numilk Company Limited as of April 1, 1973, shows that two of the three directors and two of the three officers of the company reside out of the jurisdiction and that an application has been made for dissolution of the company. The head office in each case is shown as 58 Frank St., Brantford, Ontario, which appears to be the place of business of Hussmann Store Equipment Limited. The annual summary for each of the companies is signed by a director who resides in Ontario.

14 The affidavit on productions filed on behalf of Pet Milk and Numilk was sworn by Mary Rita Roche of the City of St. Louis in the State of Missouri who describes herself as a secretary of Pet Milk and Numilk. In the affidavit sworn by Marshall Stephen Kramer and filed on this application, it is stated that the plaintiffs would not be possessed of sufficient assets within the Province of Ontario in the event that the defendants were successful at trial and were awarded costs. No affidavit was filed by Pet Milk or Numilk in answer to that allegation in Kramer's affidavit.

15 The question, accordingly, is whether under the circumstances security for costs can be ordered having regard to the wording of Rule 373. That is to say, can it be said that a company incorporated pursuant to the laws of the Province of Ontario, as in the case of Numilk, is not under the circumstances a resident of Ontario. In this respect, Mr. Keith referred me to *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A.C. 455 at p. 458, in which it was said:

> In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of the individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business.

It is stated further in the case: "I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

16 A company can have only one domicile but it may have more than one residence. While it is true that the annual returns of the plaintiffs show the head office of the company to be in Brantford, it appears that that address can only be a mailing address in view of the plaintiffs' witnesses' own evidence that the companies are dormant and in view of the uncontradicted evidence that the plaintiffs have no assets within the Province. The plaintiffs do not carry on business or "keep house" in Ontario. The majority control of both companies is in persons living abroad and accordingly I must conclude that the plaintiffs are not now resident within Ontario and security for costs will be ordered.

17 In the affidavit of Marshall Stephen Kramer, it is stated in para. 11 that the trial of the action could take as much as a month to complete. In the affidavit of Brian Paul Goodman, filed on behalf of Olympia, it is stated that the trial of the actions could take "as much as thirty days of court sittings".

18 As I have previously mentioned, no material was filed by the plaintiffs and while it is impossible at this point to judge the duration of a trial, the only material before me indicates that the same will be of some considerable duration. Accordingly, I must make an estimate of the duration of the trial and also determine the amount of costs which the defendants, Olympia and Margison & Keith, would be able to tax if successful in their defence and if costs are awarded. I proceed on the basis that if the parties are successful they will each tax a bill of costs against the plaintiff and in this respect I have before me draft bills of costs of Olympia and of Margison & Keith. I have considered these bills of costs and without detailing my calculations, it seems to me that a fair bill for each of the defendants having regard to the information now available, would be $9,000 each or total bills of $18,000. Security for costs is not meant to be ordered on a dollar for dollar basis and accordingly I am of the opinion that if security were ordered in the amount of $12,000 that this should be satisfactory and fair and I so order. The plaintiffs shall have 30 days in which to post the security. Olympia, Margison & Keith and White & Greer Company Limited should have the costs of this application against Pet Milk and Numilk in any event of the cause.

19 *Order accordingly*.

TAB 41

1998 CarswellBC 457
British Columbia Supreme Court [In Chambers]

Porchetta v. Santucci

1998 CarswellBC 457, [1998] B.C.J. No. 348, 77 A.C.W.S. (3d) 523

P. (A.), Plaintiff and Domenico Santucci, Defendant

Warren J.

Judgment: February 16, 1998
Heard: January 29 and February 2, 1998
Docket: Vancouver C972683

Counsel: *M. Boshier*, for the Plaintiff.
E. Sands, for the Defendant.

Subject: Torts; Civil Practice and Procedure; Evidence

Headnote

Practice --- Trials — Summary trial — Summary judgment

Defendant found guilty in criminal proceedings of sexual assault on plaintiff — Plaintiff applied for judgment under Rule 18A for injuries suffered as result of sexual assaults — Affidavits submitted by plaintiff full of inadmissible statements — Counsel had responsibility to present admissible evidence rather than expect court to act as censor — Plaintiff obliged to present all evidence on application under rule 18A and not present part only and await repsonse then file reply affidavits — Photocopy of clerk's notes of conviction not proper proof of criminal conviction and expert reports filed as exhibits to counsel's assistant's affidavit not admissible — Criminal conviction for act alleged in civil proceedings raises rebuttable presumption that act committed but in this case circumstances existed to challenge presumption — Reliability of plaintiff's affidavit questionable and required testing in court — Issues of causation and assessment of damages required full hearing and so intrinsically connected to issue of reliability of plaintiff's evidence that only just process was by trial — Delay did not prejudice plaintiff where events complained of happened twenty years previously and defendant's advanced age not so overriding as to compel court to rush to judgment on improper evidence — Application for judgment dismissed — British Columbia, Rules of Court, 1990, B.C. Reg. 221/90 Rule 18A.

1998 CarswellBC 457, [1998] B.C.J. No. 348, 77 A.C.W.S. (3d) 523

Evidence --- Legal proof — Presumptions — Miscellaneous presumptions

Defendant found guilty in criminal proceedings of sexual assault on plaintiff — Plaintiff applied for judgment for injuries suffered as result of sexual assaults — Criminal conviction for act alleged in civil proceedings raises rebuttable presumption that act committed but in this case circumstances existed to challenge presumption — Plaintiff's affidavit bore such striking similarity to affidavit quoted in reported case plaintiff relied on that reliability of plaintiff's affidavit questionable and required testing in court with full examination and cross- examination — Issues of causation and assessment of damages required full hearing and so intrinsically connected to issue of reliability of plaintiff's evidence that only just process was by trial — Application for judgment dismissed.

APPLICATION for judgment by plaintiff for damages for sexual assault for which defendant criminally convicted.

***Mr. Justice Warren* (In Chambers):**

1 The plaintiff claims damages against the defendant for the injuries he says he suffered as a result of the sexual assaults of the defendant during the 1970s. The defendant was found guilty in November 1996 in criminal proceedings. The defendant has filed a statement of defence denying the assaults and saying that if there were assaults, then they were not the proximate cause of any injuries. In the further alternative, the defendant pleads contributory negligence on the part of the plaintiff to any injuries he suffered.

2 The plaintiff now applies under Rule 18A for judgment relying upon the conviction and the affidavit of the plaintiff setting out the assaults and their effect upon him. The defendant argues that there is a need for a trial on both the issue of liability and the issue of compensation.

3 Rule 18A requires that the evidence on the applications shall be on affidavit, answer[s] on interrogatories or examination for discovery, or admissions. Further, Rule 18A (5) requires that a party who applies for judgment:

> (a) shall file and serve with the notice of motion
>
> > (i) every affidavit, not already served, on which the party will rely, and ...
>
> (b) shall not file any further affidavits ... except
>
> > (i) to adduce evidence that would, at a trial, be admitted as rebuttal evidence, ... or

(iii) with leave of the court.

4 In support of his application the plaintiff filed his affidavit sworn November 18, 1997, attached to which were 16 exhibits.

5 In response, the defendant filed his own affidavit and five other affidavits replying to the statements of fact sworn to by the plaintiff. In reply, the plaintiff swore two further affidavits, one sworn January 19, 1998 and the other sworn January 26, 1998. Both attach as exhibits material which is critical to some aspect of the plaintiff's claim against the defendant. Further, the plaintiff caused to be filed an affidavit on January 22, 1998, attached to which were three reports of experts. Finally, there were six affidavits of friends or relatives of the plaintiff which were sworn and filed after the defendant had filed the affidavits in reply. It is very much of an understatement to say that each aspect of the case is in dispute.

Plaintiff's Submissions

6 The plaintiff says that this is an ideal case for disposition under the Rule. His counsel submits that the mere fact that a triable issue or an arguable defence has been raised is not sufficient to automatically defeat an application under Rule 18A. Relying upon the authority of *Soni v. Malik* (1985), 61 B.C.L.R. 36 (B.C. S.C.) plaintiff's counsel argues that the Court must be unable on the whole of the evidence to grant judgment: see also *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (B.C. C.A.).

7 On the issue of liability the plaintiff argues that while not every case where there has been a finding of criminal liability will result in issue estoppel, nevertheless where the issue of liability is identical to that in the criminal proceeding and there remains no real question of law or fact, then to deny an application would fly in the face of reason and good sense: *Holt v. MacMaster* (21 June 1993) [reported (1993), 18 C.P.C. (3d) 220 (Alta. Q.B.)]. The plaintiff also relies upon the decisions of this court in *Bush v. Bush* (October 13, 1994), Doc. Vancouver C904782 (B.C. S.C.) and *P. v. F.* (April 26, 1996), Doc. Vancouver C934103 (B.C. S.C.). In *Bush* , *supra*, Maczko J. considered the effect of a previous conviction for sexual assault on a case of damages for the assault and held that it was not now open to him to find that the defendant had not sexually assaulted the plaintiff.

8 As for the assessment of damages, the plaintiff says that there have been other cases where damages of a substantial amount have been assessed on an 18A application and that all of the necessary evidence is before the court in order to make an assessment, including the claim for future wage loss/loss of earning capacity.

9 The plaintiff also submits that there is urgency and a delay until the trial presently scheduled for June 1999 would work to the prejudice of the plaintiff given the advanced age

of the defendant and the fact that he has made an assignment in bankruptcy and disposed of his assets.

Defendant's Submissions

10 The defendant says that the case is not an appropriate one for summary disposition because there are complex and disputed issues to be determined. He further objects to the subsequent materials saying that they offend Rule 18A and amount to the plaintiff splitting his case. As well, the defendant submits that the affidavits are replete with inadmissible statements or hearsay, argument and speculation. Further, the defendant submits that the reports of the experts are not properly before the court. Finally, his counsel, in any event, argues that if liability were to be determined on the contested affidavits then the assessment of damages would require a hearing of all of the same evidence. That there would need to be a trial on the issues of compensation is obvious, given that the claim is large and complex: see *Brayshaw v. Sommerfeld* February 22, 1996, S.C.B.C. Action No. S0002803, Chilliwack Registry [reported (1996), 24 C.P.C. (4th) 262 (B.C. S.C.)].

11 During the course of her submissions on behalf of the defendant counsel referred me to *Slinn v. Morgan* (February 11, 1993), Doc. Vancouver C916543 (B.C. S.C. [In Chambers]) a case relied upon by the plaintiff. I was then referred to passages from the plaintiff's affidavit sworn November 18, 1997 and passages from the judgment of Cohen J. where he quoted from the affidavit of Mr. Slinn. The stunning similarity between the two affidavits is such that counsel says that it calls into question the entire reliability of the plaintiff's evidence and, as this affidavit is the linchpin of the plaintiff's claim against the defendant on both liability and quantum of damages, the court ought not to proceed with the application. If the court were going to consider the reports of the experts on the application, then it must be remembered that two of the important experts were given a copy of the impugned affidavit and each relied upon it in formulating his opinion. This then calls into question the reliability of the reports themselves and indeed the reliability of the conviction itself is called into question.

Conclusion

Procedural

12 There are a number of difficulties facing the plaintiff with regard to procedural and evidentiary impediments. The affidavits are indeed replete with inadmissible statements and while the court can disregard them, it may do irreparable damage to the plaintiff's case. In any event, it is the responsibility of counsel on an application under Rule 18A to present admissible evidence. It is not the duty of the court to act as censor going through an affidavit with a blue pencil and deleting those portions which the judge considers offends the rules of evidence. The summary trial must be conducted with due regard to the rules of pleading

and evidence: see *Cotton v. Wellsby* (1991), 59 B.C.L.R. (2d) 366 (B.C. C.A.) per Southin J.A. at p. 376.

13 Further, I agree that the plaintiff is obliged under the Rule to present all of his evidence on an application under this Rule and not present part only and await a response and then file affidavits in reply, plugging any gaps which may appear. Rule 18A is not designed for a paper contest requiring the judge to determine difficult issues of credibility on hotly contested facts.

14 The plaintiff relies upon the criminal conviction but has not filed a certified copy of the conviction, merely a photocopy of the clerk's notes of conviction. The defendant objects to this as proof of conviction and he is entitled to maintain that position: *Cotton* , *supra*.

15 The experts' reports have been filed with the court as exhibits to the affidavit of counsel's secretary. The expert has not filed an affidavit adopting the contents. Again, the defendant is rightly entitled to take the position that the reports are not admissible evidence before the court: *Poudrier v. The Imperial Life Assurance Company of Canada* July 11, 1994, Vancouver Registry No. C934562 S.C.B.C. [reported (1994), 25 C.C.L.I. (2d) 225 (B.C. S.C.)] Errico J. and *Leblanc v. Regan* unreported (December 5, 1995), Doc. Nanaimo 02660 (B.C. S.C. [In Chambers]) Hutchinson J.

Substantive

16 In *P. v. F.*, *supra*, I held that a Certificate of Conviction raised a rebuttable presumption that the conduct complained of in the civil action had been committed. Here, because of the stunning similarity between the affidavit of the plaintiff in the case at bar and the affidavit of the plaintiff in *Slinn* , *supra*, the defendant has raised questions of the reliability of the plaintiff's first affidavit. These questions, in my view, raise the likelihood of a serious assault by the defendant upon the presumption and this ought to be tested in court with full examination and cross examination. In any event, there will need to be a full hearing on the issues of causation and assessment of the damages. Where those issues, along with the issue of liability are so intrinsically entwined with the live issue of the reliability of the plaintiff's evidence, the only just process is by a trial.

17 With reference to the plaintiff's argument on delay going to the prejudice of the plaintiff, the fact that the plaintiff has been living with this action since he went to the police in 1994 is not compelling when one considers that the events of which he complains were committed in the early to mid 1970s. Further, the advanced age of the defendant is not so overriding as to compel the court to rush to judgment on what may turn out to be unreliable and presently inadmissible evidence. The defendant is entitled to rebut any presumption raised by his conviction and to challenge the supporting evidence advanced by the plaintiff as well as the evidence of the experts.

18 In the result the plaintiff's application for judgment is dismissed with costs to the defendant. The case should proceed to trial in the usual manner. I decline to make any orders under Rule 18A(13).

Application for judgment dismissed.

TAB 42

Citation: Prevost v. Vetter
2002 BCCA 202

Date: 20020322
Docket: CA028257
Registry: Kamloops

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

ADAM PREVOST, a person under disability by his committee, LINDA PREVOST and EDWARD PREVOST

PLAINTIFF
(RESPONDENT)

AND:

GREGORY ADAM VETTER and SHARI IRENE VETTER

DEFENDANTS
(APPELLANTS)

AND:

DESIREE NICOLE VETTER

DEFENDANT
(RESPONDENT)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Levine
The Honourable Mr. Justice Smith

Guy P. Brown	Counsel for the Appellants
Robert A. Clarke	Counsel for the Respondent Adam Prevost
Place and Date of Hearing:	Vancouver, British Columbia December 7, 2001
Place and Date of Judgment:	Vancouver, British Columbia March 22, 2002

Written Reasons by:
The Honourable Mr. Justice Smith

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] This negligence action arises from a motor vehicle accident. The plaintiff (respondent), Adam Prevost, was seriously injured when he was thrown from an automobile being driven by the defendant (respondent) Desiree Vetter (a niece of the appellants) as it left the highway and overturned. The appellants are defendants in the action because they are the joint owners of the home from which Desiree Vetter and Adam Prevost began the short trip that culminated in the accident and because Desiree Vetter had consumed alcoholic beverages on their property and was, according to the finding below, intoxicated when she and Adam entered her automobile. Thus, it is a case in which Adam Prevost asserts what is commonly described as “social-host liability” against the appellants.

[2] The appeal is from an order of a judge of the Supreme Court made after a summary trial conducted under Rule 18A of the Supreme Court ***Rules of Court*** pursuant to the appellants’ application to dismiss the action against them. The notice of motion was not included in the appeal book but the summary trial judge set out his understanding of the issues to be determined as follows:

The issues before the court on the Application were:

(a) did the Vetters owe the plaintiff a duty of care to prevent him from coming to harm while off their premises, at the hands of a person who became impaired while on their premises?

(b) if so, did the Vetters breach that standard of care?

[3] In the result, the summary trial judge made the following order:

THIS COURT DECLARES that:

1. the Defendants, Gregory Adam Vetter and Shari Irene Vetter, owed the plaintiff, Adam Prevost, a duty of care; and

2. the Defendants, Gregory Adam Vetter and Shari Irene Vetter, breached their duty of care to the Plaintiff.

His initial reasons may be found at [2001] B.C.J. No. 323 (Q.L.), 2001 BCSC 297, and his supplemental reasons at 197 D.L.R. (4th) 292, 5 C.C.L.T. (3d) 266, [2001] B.C.J. No. 495 (Q.L.), and 2001 BCSC 312.

[4] It is agreed that the parties did not intend that the summary trial judge should decide whether the appellants' breach of duty was causative of the injuries suffered by Adam Prevost. Rather, they contemplated that causation, assessment of damages, and issues of contributory negligence would be

decided in a subsequent trial, if necessary, should the appellants fail in their attempt to have the action dismissed summarily.

[5] Desiree Vetter took no part in the summary trial or in the appeal, although excerpts from her testimony on examination for discovery were relied upon by both sides below. In her statement of defence, Desiree Vetter denied that Adam Prevost's injuries were caused by her negligence and, in particular, denied Adam Prevost's allegation that the accident was caused by her driving while her ability to drive was impaired by alcohol. The appellants, in their statement of defence, denied all of the allegations in the statement of claim and, in the alternative (although obscurely), adopted the impaired-driving allegation, among others, and asserted fault against Desiree Vetter for the injuries claimed. A third party claim brought against the appellants by Desiree Vetter has been settled and I assume that the settlement resolves all issues between them. However, as we were not advised otherwise, I assume that Desiree Vetter is maintaining her defence of the action and that whether her ability to drive was impaired by alcohol at the material times and whether her impairment, if any, was a cause of the accident

and resulting injuries remain at issue between her and Adam Prevost.

[6] The appellants contend that the summary trial judge erred in finding that they owed a duty of care to Adam Prevost, in finding that they breached their duty of care to Adam Prevost, and in making those findings on a summary trial conducted pursuant to Rule 18A.

[7] I would allow the appeal on the basis that the issues ought not to have been determined summarily under Rule 18A on the grounds set out in sub-rules 18A(8)(b)(i) and (ii) and sub-rule 18A(11)(a)(ii), which are emphasized in this excerpt:

> **18A**(1) A party may apply to the court for judgment, either on an issue or generally, in any of the following:
>
> (a) an action in which a defence has been filed, ...
>
> ...
>
> (8) On or before the hearing of an application under this rule, the court may
>
> ...
>
> (b) dismiss the application on the ground that
>
> (i) the issues raised by the notice of motion are not suitable for disposition under this rule, or
>
> (ii) the application will not assist the efficient resolution of the proceeding.

> ...
>
> (11) On the hearing of the application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> ...
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application, ...

[8] In my view, it was not possible in this case for the summary trial judge to determine the existence of a duty of care, the appropriate standard of care, or a breach of the standard of care without also determining facts that the plaintiff must establish in order to succeed on the issue of causation. The summary trial judge made such findings of fact and those findings will be embarrassing to the subsequent trial judge, who will be asked by the appellants to make contrary findings on the basis of further and full evidence. The potential for prejudice to the appellants, and to Desiree Vetter if she maintains her defence, is obvious. Moreover, if the subsequent trial judge should come to different conclusions than did the summary trial judge on these important facts, the findings of duty, standard of care, and breach may have to be reconsidered.

[9] The facts to which I refer are those relating to whether Desiree Vetter's ability to drive was impaired by alcohol when she left the appellants' property to enter her automobile; whether her impairment, if any, was objectively manifest; whether she became impaired, if she did, on the appellants' property; and whether her impairment, if any, was causative of the accident and the resulting injuries to Adam Prevost.

[10] As the findings of the summary trial judge are set out comprehensively in his reasons, it is not necessary to reproduce them here in detail.

[11] It is sufficient for present purposes to note that he found the duty of care to exist on the basis that the appellants, who have two teenage sons, frequently allowed their home to be used by young persons in their small community for social gatherings; that, although they did not serve alcoholic drinks, they knew that their guests often consumed their own drinks on the property; that, although they had a rule against minors drinking on their property, they knew that minors often broke the rule; and that when Shari Vetter observed intoxicated minors at her home she took steps to try to prevent them from driving their automobiles. He expressed his conclusion on the duty-of-care issue as follows:

> [61] ... Those precautions persuade me that she was alert to the danger of minors drinking at their home and driving from it. She established a "paternalistic relationship" ... with underage drinkers at their home.
>
> [62] I find the Vetters recognized they had a duty to protect minors from the potential danger of driving under the influence of alcohol and to protect those who might drive with them.
>
> [63] ... the Vetters [created the opportunity for a dangerous situation to exist] by creating the opportunity for their home to be a place where minors congregated and consumed alcohol. The danger consisted of minors, alcohol consumption (which, according to Mr. Samila [an expert who opined on the basis of subsequent breathalyzer readings that Desiree Vetter's ability to drive was impaired by alcohol at the time of the accident], has an enhanced effect on teenagers), and driving.

[12] Having found that the appellants owed a duty of care to the classes of persons he identified ("minors" and "those who might drive with them"), the summary trial judge went on to find that the appellants had breached the standard of care on this occasion. He found that, after the appellants had fallen asleep on the evening in question and without their knowledge, their sons, Scott and Geoff, returned to their home with three or four of their friends; that shortly thereafter, at about 11:00 p.m., a group of about fifteen persons, including Desiree Vetter and two of her friends, arrived uninvited; that Adam Prevost arrived on the property about a half-hour later;

that Scott asked everyone to leave because of the appellants' rule that there should be no parties after 11:00 p.m. but no one left; that shortly thereafter a large group of intoxicated adult strangers came onto the property, where they consumed beer; that the group, that had by this time swelled to about thirty persons, created noise on the front street; that the police attended at about 1:00 a.m. in response to a complaint from a neighbour; that the police officer asked Scott to break up the party and that Scott told everyone to leave; that during the approximately one-half hour that it took to disperse the group, Scott went into the house and awakened his mother; that Scott told his mother that there had been a party going on, that the police had attended and had asked him to break it up, and that he had asked everyone to leave; that his mother asked Scott if he needed her help and that he responded that he could "handle it"; and that his mother did not get up and returned to sleep.

[13] The summary trial judge concluded:

> [64] ... The moment she spoke to her son, Scott, she knew there was a party and she knew it had resulted in a visit by the police. She did not trouble herself to ensure that young people were sober enough to drive without endangering themselves and others. In the past, the Vetters had established a "paternalistic relationship" with intoxicated teenagers. Gregory Vetter spoke of having "welcomed minors who had got drunk" on the theory it was

> better for them to be “in trouble” in a “safe environment”, namely, the Vetter home. On June 19/20, 1998, there were at least two persons at the party who were “in trouble” – Desiree Vetter who was intoxicated and Dylan Bolger who had consumed a considerable quantity of beer. In the past, Shari Vetter had exercised control when a dangerous situation was created by over-indulgence by minors at her home. She failed to do so on this occasion. She left it to her 17 year-old son, Scott, to manage the situation. She had the opportunity and the duty to exercise control and it was reasonably foreseeable that harm could result from her failure to do so.

[14] The summary trial judge went on to find that, had she “exercised control of the party”, Shari Vetter would probably have seen Desiree Vetter; that she would probably have seen and recognized Desiree’s car; that she would probably have discerned from observing Desiree that Desiree was intoxicated; that she would probably have taken steps to prevent Desiree from driving; and that, had she asked Desiree to surrender her keys, Desiree would probably have done so.

[15] He summarized his findings as follows:

> [71] In conclusion, I find that the Vetters created a dangerous situation by permitting minors to drink at their home and drive from it. They recognized the danger, and in the past, Shari Vetter had established a “paternalistic relationship” with minors who drank – she had taken steps to prevent minors who were intoxicated at their home, driving from it. She failed to do so on June 20, 1998. The danger to minors who drove with an intoxicated

> driver was foreseeable. The Vetters had a duty and they failed in that duty.

[16] The findings summarized at para. 14 above are matters that the appellants wish to contest in their defence that their breach of the standard of care, if any, was not causative of the injuries suffered. If these findings should stand, they would advance the plaintiff's case on causation substantially.

[17] On the other hand, whether Desiree Vetter was obviously intoxicated when she left the appellants' property and entered her automobile is central to whether there was, in the circumstances, a reasonable foreseeability of harm to Adam Prevost, which, in turn, is fundamental to the existence of a duty of care and to the identification of the appropriate standard of care.

[18] In order to find that the appellants owed a duty of care to Adam Prevost, it was necessary for the summary trial judge to find not only that Desiree Vetter's ability to drive was impaired by alcohol but also that the appellants ought reasonably to have foreseen that she intended to drive and that her driving while in that condition posed a risk of harm to passengers in her automobile. In ***Stewart v. Pettie***, [1995]

1 S.C.R. 131, where the question was whether a commercial host owed a duty of care to a passenger in an automobile driven by an intoxicated patron of the host's premises, Major J., giving the judgment of the Court, explained, at p. 143:

> It is clear that a bar owes a duty of care to patrons, and as a result, may be required to prevent an intoxicated patron from driving where it is apparent that he intends to drive. Equally such a duty is owed, in that situation, to third parties who may be using the highways. In fact, it is the same problem which creates the risk to the third parties as creates the risk to the patron. If the patron drives while intoxicated and is involved in an accident, it is only chance which results in the patron being injured rather than a third party. The risk to third parties from the patron's intoxicated driving is real and foreseeable.

[19] The "same problem" to which Major J. referred was earlier elucidated in ***Crocker v. Sundance Northwest Resorts Ltd.***, [1988] 1 S.C.R. 1186, where the plaintiff was injured when he participated, while grossly intoxicated, in a "tubing" competition sponsored by the operator of a ski resort. In that case, Wilson J., speaking for the Court, said at p. 1197, after reviewing previous case law concerning the imposition of a duty to take positive action to protect another:

> ... one is under a duty not to place another person in a position where it is foreseeable that that person could suffer injury. The plaintiff's inability to handle the situation in which he or she has been placed – either through youth, intoxication

> or other incapacity – is an element in determining how foreseeable the injury is.

[20] Thus, whether the appellants owed a duty of care to Adam Prevost was a function of the reasonable foreseeability of the risk of harm to him in all of the circumstances and that, in turn, depended upon what a reasonable person in the position of the appellants would have perceived as the ability or inability of Desiree Vetter "to handle the situation in which ... she [had] been placed – either through youth, intoxication or other incapacity."

[21] Accordingly, the summary trial judge could not decide the first issue placed before him without deciding facts that are important on the issue of causation.

[22] A similar difficulty arises with respect to the standard of care. In ***Crocker v. Sundance Northwest Resorts Ltd.***, *supra*, Wilson J. said, at p. 1198, that the standard of care is dependent on context. In rejecting the argument that the defendant owed only a duty to warn and that the consequences of a failure to heed the warning were the responsibility of the plaintiff she said, at p. 1200:

> The fact that Crocker was an irresponsible individual and was voluntarily intoxicated during the tubing competition is the very reason why Sundance was legally obliged to take all reasonable

> steps to prevent Crocker from competing. While it may be acceptable for a ski resort to allow or encourage sober able-bodied individuals to participate in dangerous recreational activities, it is not acceptable for the resort to open its dangerous competitions to persons who are obviously incapacitated. (emphasis added)

[23] Thus, in this case, the summary trial judge could not identify the reasonable standard of care without reference to the condition of Desiree Vetter at the material time. As before, findings of fact about her condition at that time are important on the issue of causation.

[24] Since it was not possible for the summary trial judge to determine the issues of duty of care and breach of the standard of care in this case without making findings of fact that are crucial to the issue of causation, and as the parties agree that causation remains a live issue, they should not have asked the summary trial judge to determine these issues on a summary trial and he should not have done so. In these circumstances, the issues were not suitable for determination under Rule 18A (Rule 18A(8)(b)(i)).

[25] Further, even if it could be said that the findings of duty and breach can stand and that the question of causation can be tried separately, the risk would be run that the ultimate trial judge might arrive at contrary findings as to

Desiree Vetter's impairment, or as to the manifestations thereof, after hearing full evidence on that issue. It is possible, as well, that the trial judge might find that impairment, if any, was not a causative factor in the accident. In this respect, there was evidence on the summary trial that Desiree's driving immediately before the accident was unremarkable and that the accident occurred when, as she approached a curve, she took her eyes momentarily from the road to operate the CD player in response to Adam Prevost's changing the song that was playing. There is, therefore, the possibility that the findings reached on this summary trial will be irrelevant. If so, the summary trial would have been a waste of judicial time and would have served only to delay the ultimate resolution of the case which, it appears, had been set for hearing on a conventional trial on a date shortly after the summary trial. The result would be an inefficient resolution of the proceeding (Rule 18A(8)(b)(ii)).

[26] As well, in the circumstances it would be unjust to the appellants (and perhaps to Desiree Vetter) to decide these issues on a summary trial because the decision would saddle them with important findings of fact that are adverse to them on the undecided issue of causation or would, at the least, make it awkward for the trial judge to find contrary facts.

Similarly, the findings of intoxication in relation to Desiree Vetter may embarrass the next trial judge on the issues of contributory negligence, since the nature and the degree Desiree's fault, if any, will be weighed in the balance. Where there is such an overlapping of issues, one issue ought not to be tried discretely on a summary trial: see ***Kaba v. Cambridge Western Leaseholds Ltd.***, [1997] B.C.J. No. 2152 (Q.L.)(C.A.).

[27] Finally, whether social hosts ought to be held liable for the negligent actions off their property of persons who became intoxicated while on their property is a controversial and unsettled question that might well engage the attention of the Supreme Court of Canada in this case. In ***Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited***, 2002 BCCA 138, this Court dealt with a similar situation. There, the parties held a Rule 18A trial on one issue in an action for damages for breach of a contract of purchase and sale of corporate assets, namely, whether the plaintiff was entitled to recover damages for a loss suffered by an undisclosed associated company whose assets were included with the plaintiff's in the proposed sale. In allowing an appeal, Southin J.A., speaking for the Court, observed that the case might ultimately fail on a defence pleaded but not argued on

the summary trial, and that, if it did not fail on that ground, it might raise “important, rare and unsettled questions of law” [paras. 21-23]. She went to say, at para. 25:

> The orderly development of the common law is not enhanced by this Court addressing issues of law of the nature of these issues unless the case at hand, in all its aspects, requires it to do so.

She added, at para. 29:

> ... A trial judge should bear in mind, as must we, that the loser in this Court has a right to seek leave to appeal to the Supreme Court of Canada. That court ought not to be faced, in deciding whether to grant or refuse leave, with a court of appeal having made pronouncements, allegedly erroneous, on important questions of law in an action which may ultimately fail on its facts.

Those comments are appropriate in the circumstances of this case, and I adopt them.

[28] Accordingly, I would allow the appeal, dismiss the application that was brought before the summary trial judge, and direct a new trial, all without prejudice to the rights of the parties.

[29] Subject to submissions, it is my opinion that there should be no costs awarded of the appeal because counsel

guided the summary trial judge to the mistaken course that he followed. However, I would consider written submissions on costs if counsel should file them within two weeks of the publication of these reasons.

"The Honourable Mr. Justice Smith"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Madam Justice Levine"

TAB 43

Clive Douglas Evans *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. *v.* EVANS

File No.: 22592.

1993: March 24; 1993: October 21.

Present: L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Evidence — Admissibility — Hearsay — Admissions — Purchaser of getaway car used in robbery making certain statements to vendors — Statements indicating that purchaser was the accused — Whether statements hearsay — If so, whether statements admissible as admissions of the accused — Appropriate procedure to be followed in determining whether statements were made by accused — Whether trial judge erred in use of statements — If so, whether error resulted in substantial miscarriage of justice.

The appellant and a co-accused were charged with robbery and attempted murder. Two armed men had robbed Brink's security guards as they were making a collection from a store in a mall, seriously wounding one of them. Witnesses were able to identify one of the robbers as the co-accused. The other robber was not identified. Outside the store, the robbers were pursued by another Brink's guard, and then got into a waiting car, which was driven by a third person. The getaway car had been purchased two days earlier from a married couple. A man who matched the appellant's physical and facial description had made two visits to their house before actually purchasing the car. The purchaser refused to give his name or complete a bill of sale and asked to borrow the couple's licence plate. Neither the husband nor the wife was able to make a positive photographic or dock identification. At trial the husband said that the appellant looked familiar, while his wife said he looked "vaguely familiar". Both testified that the man who bought the car told them that he worked in chain-link fencing. The wife testified that the man said he had big dogs. The husband testified that the man said his dog was going to have pups. The admissibility of these statements of the purchaser is in question in this appeal.

Clive Douglas Evans *Appelant*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ: R. *c.* EVANS

N° du greffe: 22592.

1993: 24 mars; 1993: 21 octobre.

Présents: Les juges L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Preuve — Admissibilité — Ouï-dire — Aveux — L'acheteur de l'automobile ayant servi à la fuite des voleurs avait fait certaines déclarations aux vendeurs — Déclarations indiquant que l'acheteur était l'accusé — Ces déclarations sont-elles du ouï-dire? — Dans l'affirmative, ces déclarations sont-elles admissibles comme aveux de l'accusé? — Procédure à suivre pour déterminer si des déclarations ont été faites par l'accusé — Le juge du procès a-t-il commis une erreur en utilisant les déclarations? — Dans l'affirmative, cette erreur a-t-elle entraîné une erreur judiciaire grave?

L'appelant et son coaccusé ont été inculpés pour vol qualifié et tentative de meurtre. Deux hommes armés ont volé à des agents de sécurité de la Brink's l'argent dont ils avaient pris livraison dans un magasin situé dans un centre commercial et ont gravement blessé un des agents. Des témoins ont reconnu le coaccusé comme l'un des voleurs. L'autre voleur n'a pas été identifié. À l'extérieur du magasin, un autre agent de la Brink's a poursuivi les voleurs. Ceux-ci sont montés à bord d'une automobile stationnée, qui était conduite par une troisième personne. L'automobile ayant servi à la fuite des voleurs avait été achetée deux jours plus tôt à un couple marié. Un homme correspondant au signalement de l'appelant s'était rendu à deux reprises au domicile du couple avant d'acheter l'automobile. L'acheteur a refusé de donner son nom et de signer un contrat de vente, et a demandé d'emprunter la plaque d'immatriculation. L'époux et l'épouse ont tous deux été incapables d'identifier formellement l'accusé sur une photographie ou au banc des accusés. Au procès, le mari a déclaré qu'il lui semblait avoir déjà vu l'appelant et son épouse a affirmé qu'il lui semblait «vaguement avoir déjà vu» l'appelant. Les deux ont déclaré dans leurs témoignages que l'homme qui avait acheté l'automobile leur avait dit

Subsequent evidence showed that the appellant had a large dog that was going to have pups and that he had been employed as a chain-link fencer. The appellant's townhouse was searched. It had been used as a hideout by the appellant, the co-accused and a third man. A city map was found on which there was traced a route from the mall to the point where the car was found abandoned. The trial judge found that it would be unsafe to find that the appellant had purchased the car on the basis of the identification evidence alone, but when all the circumstantial evidence was added, he was convinced beyond a reasonable doubt that the appellant was the purchaser of the car. He convicted the appellant as a party to the offences. The Court of Appeal upheld the convictions.

Held (McLachlin and Major JJ. dissenting): The appeal should be dismissed.

Per L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.: The issue in this appeal concerns the admissibility of the purchaser's hearsay statements as an admission of the accused. An out-of-court statement which is admitted for the truth of its contents is hearsay and is generally not admissible. Likewise, the statements of the purchaser in this case cannot be used as admissions (i.e. as admissions for the truth of their contents) unless they are admissible under an exception to the hearsay rule.

However, quite apart from the truth of their contents, the statements at issue here also have some probative value on the question of identity. The fact that certain representations are made is probative as it narrows the identity of the declarant to the group of people who are in a position to make similar representations. The more unique or unusual the representations, the more probative they will be on the issue of identity. The admission of this kind of evidence is not hearsay because the only issue is whether the statement was made, and the veracity, perception and memory of the witness relating the statement can be fully tested by cross-examination.

The admissibility of admissions rests on the theory of the adversary system, namely that a party can hardly

qu'il s'occupait d'installation de clôtures. Selon l'épouse, l'homme avait ajouté qu'il possédait des chiens de grande taille. L'époux a déclaré que l'individu avait dit que sa chienne allait avoir des chiots. C'est l'admissibilité de ces déclarations de l'acheteur qui est en cause en l'espèce. La preuve ultérieure a démontré que l'appelant possédait une chienne de grande taille qui allait avoir des chiots et qu'il était installateur de clôtures. La maison de l'appelant a été fouillée. Elle avait servi de cachette à l'appelant, au coaccusé et au troisième homme. Une carte de la ville a été trouvée sur laquelle était tracé le trajet du centre commercial jusqu'à l'endroit où l'on a découvert l'automobile abandonnée. Le juge du procès a jugé qu'il serait imprudent de conclure, en se fondant uniquement sur la preuve d'identification, que c'était l'appelant qui avait acheté l'automobile mais qu'en y ajoutant l'ensemble de la preuve circonstancielle, il était convaincu hors de tout doute raisonnable que l'appelant était l'acheteur de l'automobile. Il a reconnu l'appelant coupable à titre de participant aux infractions. La Cour d'appel a confirmé les déclarations de culpabilité.

Arrêt (les juges McLachlin et Major sont dissidents): Le pourvoi est rejeté.

Les juges L'Heureux-Dubé, Sopinka, Gonthier, Cory et Iacobucci: Le pourvoi porte sur la question de l'admissibilité des déclarations relatées de l'acheteur comme aveux de l'accusé. Une déclaration extrajudiciaire qui est admise pour la véracité de son contenu est une preuve par ouï-dire et, en règle générale, n'est pas recevable. Les déclarations faites par l'acheteur en l'espèce ne peuvent être utilisées comme aveux (c.-à-d. admission de la véracité de leur contenu) que si elles sont admissibles en vertu d'une exception à la règle du ouï-dire.

Toutefois, en dehors de la véracité de leur contenu, les déclarations en cause ont une certaine valeur probante pour la question de l'identité. Le fait que certaines déclarations sont faites est probant, car cela restreint l'identité de leur auteur au groupe de personnes qui peuvent faire des déclarations analogues. Plus les déclarations sont inhabituelles ou exceptionnelles, plus elles ont une valeur probante quant à l'identité. La preuve ainsi admise n'est pas une preuve par ouï-dire parce qu'il s'agit uniquement de déterminer si la déclaration a été faite et qu'il est possible, grâce à un contre-interrogatoire, de vérifier la sincérité, la perception et les souvenirs du témoin rapportant la déclaration.

L'admissibilité des aveux repose sur la théorie du système contradictoire selon laquelle une partie peut dif-

object that he had no opportunity to cross-examine himself or that he is unworthy of credence except when speaking under sanction of oath. In determining admissibility, the general rule is that preliminary questions which are a condition of admissibility are for the trial judge in his or her capacity as the judge of the law rather than as the trier of fact. If factual questions must be resolved, a *voir dire* may be required. The applicable standard of proof in both civil and criminal cases for determining such preliminary matters is the balance of probabilities.

A preliminary issue as to the authenticity of a statement which is sought to be attributed to a party may also arise and may relate to whether the statement was actually made or whether it was made by the party against whom it is tendered. This preliminary determination that the statements were those of the accused, or that the accused was in a position to make the statement, is required before the statements can be accepted as evidence of their truth. As in questions of admissibility, the appropriate standard for determining a preliminary question of fact as to authenticity is proof on a balance of probabilities. The standard is the same in the two cases regardless of the fact that the preliminary determination is shifted to the fact-finding stage of the trial.

In light of this approach regarding the authenticity of admissions, if there is some evidence to permit the issue to be submitted to the trier of fact, the matter must be considered in two stages. First, a preliminary determination must be made as to whether, on the basis of evidence admissible against the accused, the Crown has established on a balance of probabilities that the statement is that of the accused. If this threshold is met, the trier of fact should then consider the contents of the statement along with other evidence to determine the issue of innocence or guilt. In the second stage the contents are evidence of the truth of the assertions contained therein.

In this case there was evidence that it was the appellant who made the statements to the vendors of the getaway car. The trial judge should have considered whether this evidence proved on a balance of probabilities that the statements were in fact made by the appellant. The trial judge did not address this question in two stages but considered the statements along with other evidence in concluding that the Crown had proved the charges beyond a reasonable doubt. In view of the strength of the whole of the evidence, the difference in the relative probative value of the statements assuming

ficilement faire valoir qu'elle n'a pas eu l'occasion de se contre-interroger ou qu'elle n'est pas digne de foi sauf lorsqu'elle s'exprime sous serment. Pour déterminer l'admissibilité, la règle générale est que les questions préliminaires qui conditionnent l'admissibilité sont du ressort du juge du procès en sa capacité de juge du droit plutôt que de juge des faits. Il peut être nécessaire de tenir un voir-dire pour trancher des questions de fait. La norme de preuve applicable tant en matière civile que pénale pour décider de ces questions préliminaires est la prépondérance des probabilités.

Une question préliminaire relative à l'authenticité d'une déclaration que l'on cherche à attribuer à une partie peut se poser et être liée à la question de savoir si la déclaration a réellement été faite ou si elle a été faite par la partie contre laquelle elle est avancée en preuve. Avant d'accepter les déclarations comme preuve de leur véracité, il faut d'abord déterminer que les déclarations sont celles de l'accusé ou que l'accusé a eu la possibilité de les faire. Comme pour les questions d'admissibilité, la norme appropriée applicable à la détermination d'une question de fait préliminaire sur l'authenticité est une preuve selon la prépondérance des probabilités. La norme est la même dans les deux cas même si la résolution de la question préliminaire est reportée à l'étape de la recherche des faits lors du procès.

Compte tenu de cette façon d'aborder l'authenticité des aveux, si certains éléments de preuve permettent de soumettre la question au juge des faits, celle-ci doit faire l'objet d'un examen en deux temps. Tout d'abord, il faut déterminer si, compte tenu de la preuve admissible contre l'accusé, le ministère public a établi selon la prépondérance des probabilités que la déclaration est celle de l'accusé. Une fois cette exigence préliminaire satisfaite, le juge des faits doit examiner le contenu de la déclaration en même temps que les autres éléments de preuve pour décider de l'innocence ou de la culpabilité de l'accusé. Dans le deuxième temps, le contenu de la déclaration fait preuve de la véracité des affirmations que contient la déclaration.

En l'espèce, certaines preuves indiquaient que c'était l'appelant qui avait fait les déclarations en cause aux vendeurs de l'automobile ayant servi à la fuite des voleurs. Le juge du procès aurait dû examiner si ces preuves démontraient, selon la prépondérance des probabilités, que les déclarations avaient effectivement été faites par l'appelant. Le juge du procès n'a pas analysé cette question en deux temps, mais il a examiné les déclarations avec d'autres éléments de preuve pour conclure que le ministère public avait prouvé les accusations hors de tout doute raisonnable. Vu la force de l'en-

their truth, compared with their probative value on the more limited basis, was so slight that no miscarriage of justice was occasioned by the trial judge's error.

Per McLachlin and Major JJ. (dissenting): The information said to identify the appellant as the person who bought the getaway vehicle in this case was not information which only the perpetrator of the offence or a small group of people could have known, but was information which could have been obtained by anyone who had cared to observe or inquire into the appellant's affairs. The inference of identity is merely one of several plausible inferences which may be drawn from the statements, which are accordingly inadmissible. The trial judge relied heavily on the inadmissible statements in concluding that the appellant was the person who had bought the getaway vehicle. The other evidence identifying him as the guilty person is not so clear that it can safely be said that the trial judge's erroneous reliance did not result in a miscarriage of justice.

Cases Cited

By Sopinka J.

Followed: *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; **referred to:** *R. v. O'Brien*, [1978] 1 S.C.R. 591; *R. v. Ferber* (1987), 36 C.C.C. (3d) 157; *R. v. Gauthier*, [1977] 1 S.C.R. 441; *Park v. The Queen*, [1981] 2 S.C.R. 64; *R. v. Minhas* (1986), 29 C.C.C. (3d) 193; *R. v. Reburn* (1980), 55 C.C.C. (2d) 419; *R. v. Carter*, [1982] 1 S.C.R. 938.

By McLachlin J. (dissenting)

R. v. Ferber (1987), 36 C.C.C. (3d) 157.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, s. 21(2).

Authors Cited

McCormick, Charles Tilford. *McCormick on Evidence*, vol. 2, 4th ed. Edited by John William Strong. St. Paul, Minn.: West Publishing Co., 1992.

APPEAL from a judgment of the Alberta Court of Appeal (1991), 12 W.C.B. (2d) 239, upholding

semble de la preuve, la valeur probante relative des déclarations, si on présume leur véracité, est si faible lorsqu'on la compare à leur valeur probante pour un usage plus limité qu'aucune erreur judiciaire grave n'a résulté de l'erreur du juge du procès.

Les juges McLachlin et Major (dissidents): Les renseignements qui identifieraient l'appelant comme la personne qui a acheté le véhicule ayant servi à la fuite en l'espèce n'étaient pas des renseignements que seul l'auteur de l'infraction ou un petit groupe de personnes étaient susceptibles de connaître, mais des renseignements qui auraient pu être obtenus par quiconque aurait pris soin d'observer les affaires de l'appelant ou de se renseigner. La déduction de l'identité est simplement une déduction parmi plusieurs déductions plausibles qui peuvent être faites à partir des déclarations qui sont en conséquence inadmissibles. Le juge du procès s'est fortement appuyé sur les déclarations inadmissibles pour conclure que l'appelant était la personne qui avait acheté le véhicule ayant servi à la fuite. Les autres éléments de preuve qui identifient l'appelant en tant que coupable ne sont pas suffisamment clairs pour dire avec certitude que le fait que le juge du procès se soit fondé de façon erronée sur une déclaration n'a pas entraîné une erreur judiciaire.

Jurisprudence

Citée par le juge Sopinka

Arrêt suivi: *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740; **arrêts mentionnés:** *R. c. O'Brien*, [1978] 1 R.C.S. 591; *R. c. Ferber* (1987), 36 C.C.C. (3d) 157; *R. c. Gauthier*, [1977] 1 R.C.S. 441; *Park c. La Reine*, [1981] 2 R.C.S. 64; *R. c. Minhas* (1986), 29 C.C.C. (3d) 193; *R. c. Reburn* (1980), 55 C.C.C. (2d) 419; *R. c. Carter*, [1982] 1 R.C.S. 938.

Citée par le juge McLachlin (dissidente)

R. c. Ferber (1987), 36 C.C.C. (3d) 157.

Lois et règlements cités

Code criminel, S.R.C. 1970, ch. C-34, art. 21(2).

Doctrine citée

McCormick, Charles Tilford. *McCormick on Evidence*, vol. 2, 4th ed. Edited by John William Strong. St. Paul, Minn.: West Publishing Co., 1992.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1991), 12 W.C.B. (2d) 239, qui a con-

the accused's conviction on charges of robbery and attempted murder. Appeal dismissed, McLachlin and Major JJ. dissenting.

John A. Legge, for the appellant.

Peter Martin, Q.C., for the respondent.

The judgment of L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. was delivered by

SOPINKA J. — This appeal concerns the admissibility of certain statements introduced by the Crown in the appellant's trial on charges of robbery and attempted murder. The issues raised include whether the statements are hearsay, and if so, whether they are admissible as admissions, and the appropriate procedure for determining their admissibility.

I. The Facts

In a trial before judge alone, the appellant and his co-accused, Jean Guy Dipietro, were convicted of robbery and attempted murder on the basis of the following facts. On December 1, 1986 two armed men robbed Brink's security personnel as they were making a collection from a Calgary department store, located in a mall. The robbers shot at the guards, seriously wounding one of them. Witnesses were able to identify one of the robbers as Dipietro. The other robber was not identified.

Outside the store, the robbers were pursued by another Brink's guard. The robbers got into a waiting car, which already had its engine running. Neither robber got into the driver's seat. The trial judge accepted the opinion of witnesses that a third person was driving the car, a 1974 Plymouth Fury III.

firmé la déclaration de culpabilité de vol qualifié et de tentative de meurtre. Pourvoi rejeté, les juges McLachlin et Major sont dissidents.

John A. Legge, pour l'appelant.

Peter Martin, c.r., pour l'intimée.

Version française du jugement des juges L'Heureux-Dubé, Sopinka, Gonthier, Cory et Iacobucci rendu par

LE JUGE SOPINKA — Le présent pourvoi concerne l'admissibilité de certaines déclarations présentées en preuve par le ministère public au procès de l'appelant qui avait été accusé de vol qualifié et de tentative de meurtre. Il s'agit notamment de déterminer si les déclarations constituent du ouï-dire et, dans l'affirmative, si elles sont admissibles à titre d'aveux, et de préciser quelle est la procédure appropriée pour déterminer leur admissibilité.

I. Les faits

À leur procès devant un juge seul, l'appelant et son coaccusé, Jean Guy Dipietro, ont été reconnus coupables de vol qualifié et de tentative de meurtre par suite des faits suivants. Le 1er décembre 1986, deux hommes armés ont volé à des agents de sécurité de la Brink's l'argent dont ils avaient pris livraison dans un grand magasin de Calgary, situé dans un centre commercial. Les voleurs ont fait feu sur les gardiens, blessant gravement l'un d'eux. Des témoins ont reconnu Dipietro comme l'un des voleurs. L'autre voleur n'a pas été identifié.

À l'extérieur du magasin, un autre agent de la Brink's a poursuivi les voleurs. Ceux-ci sont montés à bord d'une automobile stationnée dont le moteur était en marche. Aucun des voleurs ne s'est installé à la place du conducteur. Le juge du procès a retenu l'opinion de témoins selon lesquels une troisième personne conduisait l'automobile de marque Plymouth Fury III 1974.

The getaway car had been purchased two days earlier from Mr. and Mrs. Boutet. A man who matched the appellant's physical and facial description came to the Boutet house to buy the car, making two visits before he actually purchased it for $400 cash. The man stated that he just wanted the car for its motor which he would use in his truck, and that the car would not be driven. The purchaser asked to borrow the Boutets' licence plate, saying that he would return it. He also refused to give his name and declined to complete a bill of sale.

Neither Mr. nor Mrs. Boutet was able to make a positive photographic identification or a positive dock identification. At trial, Mr. Boutet's testimony about the purchaser of the car was that the appellant looked familiar. Mrs. Boutet testified that the appellant looked "vaguely familiar".

Both Mr. and Mrs. Boutet testified that the man who bought the car told them that he worked in chain-link fencing. Mrs. Boutet testified that the man said he had big dogs. Mr. Boutet also testified that the man said his dog was going to have pups. Subsequent evidence showed that the accused, Evans, had a large dog and that it was going to have pups and that Evans had been employed as a chain-link fencer. The admissibility of these statements (hereinafter referred to as "the statements") to Mr. and Mrs. Boutet is in question in this appeal.

The appellant's townhouse was searched. It had been used as a hideout by the appellant, Dipietro and one Oresto Panacui. Dipietro and Panacui had escaped from the Calgary Remand Centre a few months earlier. A city map was found on the kitchen table. On the map there was traced a route from the mall to the point where the car was found abandoned.

L'automobile ayant servi à la fuite des voleurs avait été achetée deux jours plus tôt à M. et Mme Boutet. Un homme correspondant au signalement de l'appelant s'était rendu à deux reprises au domicile des Boutet avant d'acheter l'automobile 400 $ comptant. L'homme a déclaré qu'il voulait seulement le moteur de la voiture pour son camion et qu'il n'utiliserait pas celle-ci. Il a demandé aux Boutet de lui prêter leur plaque d'immatriculation, déclarant qu'il la leur rendrait. Il a également refusé de donner son nom et de signer un contrat de vente.

Monsieur et Madame Boutet ont tous les deux été incapables d'identifier formellement l'accusé sur une photographie ou au banc des accusés. Interrogé lors du procès au sujet de l'acheteur de l'automobile, M. Boutet a déclaré qu'il lui semblait avoir déjà vu l'appelant. Madame Boutet a pour sa part affirmé qu'il lui semblait [TRADUCTION] «vaguement avoir déjà vu» l'appelant.

Monsieur et Madame Boutet ont tous les deux déclaré dans leurs témoignages que l'homme qui avait acheté l'automobile leur avait dit qu'il s'occupait d'installation de clôtures de grillage. Selon Mme Boutet, l'homme avait ajouté qu'il possédait de grands chiens. Monsieur Boutet a déclaré aussi que l'individu avait dit que sa chienne allait avoir des chiots. La preuve ultérieure a montré que l'accusé Evans possédait une chienne de grande taille qui allait avoir des chiots et, en outre, que Evans était installateur de clôtures. C'est l'admissibilité de ces déclarations faites à M. et Mme Boutet (ci-après «les déclarations») qui est en cause dans le présent pourvoi.

La maison de l'appelant a été fouillée. Elle avait servi de cachette à l'appelant, à Dipietro et à un nommé Oresto Panacui. Dipietro et Panacui s'étaient évadés du centre de détention provisoire de Calgary quelques mois plus tôt. Une carte de la ville a été trouvée sur la table de la cuisine. On y avait tracé le trajet du centre commercial jusqu'à l'endroit où l'on a découvert l'automobile abandonnée.

II. Judgments Below

Court of Queen's Bench

The trial judge convicted Dipietro on the basis of eyewitness identification evidence at the scene of the crime.

The trial judge found that it would be unsafe to find that the appellant purchased the car on the basis of the identification evidence of Mr. and Mrs. Boutet alone. However, when all of the circumstantial evidence was added, the trial judge was convinced beyond a reasonable doubt that the appellant was the purchaser of the car.

The trial judge summarized this evidence as follows:

> In addition, in the course of his conversation with Mr. and Mrs. Boutet, he revealed that he owned a big dog and more importantly, that the dog was going to have pups. Subsequent evidence showed that the accused Evans had a large dog and that it was going to have pups. The purchaser further revealed that he had been employed as a chain link fencer. The accused Evans had been employed as a chain link fencer. In addition, there was found in the townhouse, rented and occupied by the accused Evans, a map on which there was traced in pen a route leading from the southwest area of the Market Mall, where the robbery occurred, to Vienna Drive where the 1975 [*sic*] Fury III Plymouth automobile which was used as a getaway car in the robbery was found.
>
> The residual weight of Mr. and Mrs. Boutet's photographic and dock identifications, their description of the man who purchased the car and the circumstantial evidence, taken as a whole, satisfy me beyond a reasonable doubt that the accused Evans was the person who purchased from Mr. Boutet the automobile that was used as the getaway car in the Brink's robbery and later abandoned.

Based on these facts, and the fact that the appellant provided the hide-out where the robbers stayed and planned the robbery, the trial judge convicted the appellant as a party under s. 21(2) of the *Criminal Code*, R.S.C. 1970, c. C-34.

II. Les juridictions inférieures

Cour du Banc de la Reine

Le juge du procès a reconnu Dipietro coupable sur la foi de l'identification faite par des témoins oculaires se trouvant sur les lieux du crime.

Il a jugé qu'il serait imprudent de conclure, en se fondant uniquement sur l'identification faite par M. et M^me^ Boutet, que c'était l'appelant qui avait acheté l'automobile. Cependant, en y ajoutant l'ensemble de la preuve circonstancielle, il était convaincu hors de tout doute raisonnable que l'appelant avait acheté l'automobile.

Le juge du procès a résumé la preuve de la manière suivante:

> [TRADUCTION] De plus, lors de sa conversation avec M. et M^me^ Boutet, il a indiqué qu'il possédait une chienne de grande taille et, ce qui est plus important, que celle-ci allait avoir des chiots. La preuve ultérieure a montré que l'accusé Evans possédait une grande chienne qui allait avoir des petits. L'acheteur a en outre révélé qu'il travaillait comme installateur de clôtures. C'était l'emploi de l'accusé Evans. Qui plus est, on a trouvé dans la maison en rangée louée et occupée par l'accusé Evans une carte sur laquelle on avait tracé au stylo un itinéraire allant de la zone sud-ouest du Market Mall, où a eu lieu le vol qualifié, jusqu'à Vienna Drive où l'on a découvert l'automobile de marque Plymouth Fury III 1975 [*sic*] qui avait servi à la fuite des voleurs.
>
> La force probante résiduelle de l'identification par M. et M^me^ Boutet de l'accusé sur une photographie et au banc des accusés, leur description de l'homme qui a acheté l'automobile et la preuve circonstancielle, prises ensemble, me convainquent hors de tout doute raisonnable que l'accusé Evans est la personne qui a acheté à M. Boutet l'automobile qui a servi à la fuite des voleurs lors du vol de la Brink's et qui a ensuite été abandonnée.

Compte tenu de ces faits et du fait que l'appelant a fourni aux voleurs l'endroit où ils se sont cachés et où ils ont organisé le vol qualifié, le juge du procès a reconnu l'appelant coupable à titre de participant à une infraction conformément au par. 21(2) du *Code criminel*, S.R.C. 1970, ch. C-34.

Court of Appeal of Alberta

The appellant raised various grounds of appeal. One of them was that the trial judge erred in law in relying upon the hearsay statements made by the purchaser of the car as proof that the appellant was the purchaser.

The Court of Appeal rejected this ground of appeal. From the reasons, it is not clear whether the court held that the statements were not hearsay, or that they were hearsay but nonetheless admissible. The court stated:

> It is argued that the trial judge erred in relying upon what is termed inadmissible hearsay evidence of the conversation between Mr. Boutet and the purchaser as it relates to the large pregnant dog and the purchaser's occupation of having been an installer of link fencing to prove that Evans purchased the getaway car from Boutet. In the absence of any other evidence it would have been perhaps improper for the trial judge to have used this evidence as proof of the truth of the contents of the conversation. However there is more. The Crown was able to prove by independent testimony that Evans in fact had a large pregnant dog and also that Evans had been employed as an installer of chain link fencing. Independent evidence also showed that Evans had for some weeks prior to the robbery and for approximately one month after the robbery rented a three bedroom townhouse in which was found amongst other things a map of the City of Calgary clearly outlining the route from the place where the robbery occurred to the place where the getaway car was found. While Evans did not give his name to Mr. and Mrs. Boutet he nonetheless volunteered sufficiently particular information which when proven, not by the conversation he had with Boutet, but independently, went to establish the identity of the purchaser as Evans.

When all of the above mentioned evidence is considered together, as the trial judge did, and as he must, there is ample evidence to conclude that the appellant Evans had purchased the getaway vehicle in question.

The Court of Appeal rejected the appellant's other grounds of appeal, and upheld the convictions.

Cour d'appel de l'Alberta

L'appelant a invoqué divers moyens d'appel. Il a notamment fait valoir que le juge du procès avait commis une erreur de droit en utilisant les déclarations relatées faites par l'acheteur de l'automobile comme preuve que l'appelant était l'acheteur.

La Cour d'appel a rejeté ce moyen d'appel. Les motifs de la cour n'indiquent pas clairement si elle a jugé que les déclarations ne constituaient pas du ouï-dire ou qu'elles étaient du ouï-dire mais néanmoins admissibles. La cour a dit:

> [TRADUCTION] On fait valoir que le juge du procès a commis une erreur en s'appuyant, pour prouver que Evans avait acheté aux Boutet l'automobile ayant servi à la fuite des voleurs, sur ce que l'on a qualifié de preuve par ouï-dire inadmissible relative à la conversation de M. Boutet et de l'acheteur au sujet de la chienne qui allait avoir des chiots et de l'emploi de l'acheteur comme installateur de clôtures. En l'absence de tout autre élément de preuve, le juge du procès aurait peut-être eu tort d'utiliser ce témoignage comme preuve de la véracité du contenu de la conversation. Toutefois, il y a plus. Le ministère public a pu démontrer, à l'aide de témoignages indépendants, que Evans possédait effectivement une chienne de grande taille qui allait avoir des chiots et qu'il était installateur de clôtures. Des éléments de preuve indépendants indiquaient également que Evans avait loué, pour quelques semaines avant le vol qualifié et pour environ un mois après celui-ci, une maison en rangée de trois chambres à coucher où on a notamment trouvé une carte de la ville de Calgary sur laquelle on avait clairement tracé le trajet du lieu du vol jusqu'à l'endroit où on a découvert l'automobile ayant servi à la fuite. Bien que Evans n'ait pas donné son nom à M. et M^me^ Boutet, il a néanmoins fourni volontairement assez de détails particuliers qui, une fois prouvés, non par la conversation qu'il a eue avec M. Boutet mais par d'autres éléments de preuve indépendants, ont permis d'établir que l'acheteur était Evans.

Lorsqu'on examine l'ensemble de la preuve mentionnée ci-dessus, comme l'a fait le juge et comme il se devait de le faire, on constate qu'elle permet de conclure que l'appelant Evans avait acheté le véhicule qui a servi à la fuite.

La Cour d'appel a rejeté les autres moyens d'appel invoqués par l'appelant et a confirmé les déclarations de culpabilité.

III. Issues

While a number of issues were raised in the appellant's factum, the decision of this Court in *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, intervened between the date on which the factums were prepared and the oral argument. While the parties maintained their respective positions as to whether the impugned statements were or were not hearsay, the principal submission of the appellant centered on the admissibility of the evidence as an admission of the accused. Although the Crown did not rely on *R. v. B. (K.G.)* to support the admissibility of the statements because no evidence was adduced at trial to enable the principles in that case to be invoked, the appellant submitted as his main argument that, as a result of that case, the evidence being hearsay could only be admitted if on a *voir dire* the trial judge as judge of the law found on a balance of probabilities that the statements were made by the accused. Inasmuch as this matter was not dealt with in the factums, supplementary written submissions on this point were invited by the Court and were duly received. As a result, the points which remain for decision are as follows:

1. Are the statements hearsay?
2. If the statements are hearsay, are they admissible as admissions of the accused?
3. What is the appropriate procedure to be followed in determining whether the statements were made by the accused?
4. Did the trial judge err in the use of the statements and, if so, did the error occasion a substantial miscarriage of justice?

IV. Analysis

1. *Hearsay*

An out-of-court statement which is admitted for the truth of its contents is hearsay. An out-of-court statement offered simply as proof that the statement was made is not hearsay, and is admissible as

III. Les questions en litige

Alors que diverses questions ont été soulevées dans le mémoire de l'appelant, notre arrêt *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740 a été rendu entre la date de production des mémoires et celle de l'argumentation orale. Bien que les parties aient maintenu leurs positions respectives quant à savoir si les déclarations contestées étaient du ouï-dire, le principal argument de l'appelant portait sur l'admissibilité de la preuve à titre d'aveu de l'accusé. Quoique le ministère public n'ait pas utilisé l'arrêt *B. (K.G.)* pour défendre l'admissibilité des déclarations parce qu'aucun élément de preuve n'avait été produit au procès qui permette d'invoquer les principes examinés dans cette affaire, l'appelant a fait valoir principalement que, par suite de cet arrêt, la preuve étant du ouï-dire ne pouvait être admise que si, lors d'un voir-dire, le juge du procès en sa qualité de juge du droit concluait, selon la prépondérance des probabilités, que les déclarations avaient été faites par l'accusé. Cette question n'ayant pas été abordée dans les mémoires, la Cour a invité les parties à produire des arguments écrits additionnels sur ce point, ce qu'elles ont fait. En conséquence, les points sur lesquels notre Cour doit se prononcer sont les suivants:

1. Les déclarations sont-elles du ouï-dire?
2. Dans l'affirmative, sont-elles admissibles à titre d'aveux de l'accusé?
3. Quelle est la procédure appropriée pour déterminer si les déclarations ont été faites par l'accusé?
4. Le juge du procès a-t-il commis une erreur en utilisant les déclarations et, dans l'affirmative, cela a-t-il entraîné une erreur judiciaire grave?

IV. Analyse

1. *Le ouï-dire*

Une déclaration extrajudiciaire qui est admise pour la véracité de son contenu est une preuve par ouï-dire. Une déclaration extrajudiciaire présentée tout simplement pour prouver que la déclaration a été faite n'est pas une preuve par ouï-dire et elle est admissible tant qu'elle a une certaine valeur

long as it has some probative value. See *R. v. O'Brien*, [1978] 1 S.C.R. 591, at p. 593.

The respondent argued that the statements are not hearsay because the fact that the appellant owned a large pregnant dog and had worked as a chain-link fence installer had been independently proved. This argument was apparently accepted by the Court of Appeal. The appellant argued that the statements are hearsay because they had no probative value unless assumed to be true. Each of these submissions is slightly off the mark.

The ultimate value of these statements was to prove that the appellant and the purchaser of the getaway car were one and the same person. There was independent proof that the appellant worked as a fencer, and that he owned a large pregnant dog. If the purchaser could be proved to have a large pregnant dog and have worked as a fence installer, this would suggest that the appellant was the purchaser. However, there is no proof that the purchaser owned a dog or worked as a fencer unless the statements made to the Boutets are assumed to be true. The statements cannot be used for the truth of their contents unless they are admissible under an exception to the hearsay rule.

That being said, the statements still have some probative value as non-hearsay. Quite apart from the truth of the contents, the statements have some probative value on the issue of identity. On the issue of identity, the fact that certain representations are made is probative as it narrows the identity of the declarant to the group of people who are in a position to make similar representations. The more unique or unusual the representations, the more probative they will be on the issue of identity. I emphasize that the statements are not being used as truth of their contents at this stage.

For example, if a declarant stated: "I have a tattoo on my left buttock which measures 1 centime-

probante. Voir l'arrêt *R. c. O'Brien*, [1978] 1 R.C.S. 591, à la p. 593.

L'intimée a soutenu que les déclarations ne sont pas du ouï-dire parce que l'on a démontré à l'aide de preuves indépendantes que l'appelant possédait une chienne de grande taille qui allait avoir des chiots et qu'il travaillait comme installateur de clôtures. La Cour d'appel a retenu, semble-t-il, cet argument. L'appelant a fait valoir que les déclarations sont du ouï-dire parce qu'elles n'ont aucune valeur probante à moins que l'on ne présume qu'elles sont vraies. Aucun de ces arguments n'est tout à fait exact.

La valeur première de ces déclarations était de servir à prouver que l'appelant et l'acheteur de l'automobile ayant servi à la fuite étaient une seule et même personne. Des éléments de preuve indépendants ont démontré que l'appelant était installateur de clôtures et qu'il possédait une chienne de grande taille qui allait avoir des chiots. Si l'on pouvait prouver que l'acheteur possédait un tel animal et qu'il occupait un tel emploi, cela autorisait à penser que l'appelant était l'acheteur. Toutefois, rien n'indique que l'acheteur possédait un chien ou qu'il était installateur de clôtures à moins que l'on ne présume que les déclarations qu'il a faites aux Boutet sont vraies. On ne peut pas utiliser les déclarations pour la véracité de leur contenu sauf si elles sont admissibles en vertu d'une exception à la règle du ouï-dire.

Ceci étant dit, les déclarations ont néanmoins une certaine valeur probante en tant que preuves ne constituant pas du ouï-dire. En dehors de la véracité de leur contenu, elles ont une certaine valeur probante pour la question de l'identité. En effet, le fait que certaines déclarations sont faites est probant, car cela restreint l'identité de leur auteur au groupe de personnes qui peuvent faire des déclarations analogues. Plus les déclarations sont inhabituelles ou exceptionnelles, plus elles ont une valeur probante quant à l'identité de leur auteur. Je souligne que les déclarations ne sont pas utilisées pour la véracité de leur contenu à ce stade.

Par exemple, si une personne déclare «J'ai sur la fesse gauche un tatouage de 1 centimètre par 1½

tre by 1½ centimetres and resembles a four-leaf clover" and it was proved that the accused had such a tattoo on his left buttock, the identity of the group to which the declarant belonged would be narrowed to include the accused as the most likely person, and his family or intimate friends, who would be in a position to know this fact. The statement has probative value without assuming the truth of the statement because the mere fact that it was made tells us something relevant about the declarant that connects him to the accused.

R. v. Ferber (1987), 36 C.C.C. (3d) 157, provides an illustration of a case in which statements were admitted on the basis that the mere fact that they were made was probative on the issue of the declarant's identity. The accused killed his wife. The only issues were self-defence, accident and provocation. The Crown introduced evidence of a telephone call made to and received by a third party, as proof that the deceased was alive at the time of the call, but not as proof of the truth of the contents of the conversation. The identity of the deceased as the caller was therefore essential, but the witness was unable to swear to recognizing the deceased's voice. However, the intimate details related by the caller provided some evidence that the caller was the deceased, as this detail narrowed the identity of the caller to those people who would be able to relate the information disclosed by the caller. This did not require an assumption that the information was true. "It was from the intimate detail of the conversation that the jury was asked to decide who participated in the call" (p. 160).

The point is summarized in *McCormick on Evidence* (4th ed. 1992), vol. 2, at pp. 51-52: "authentication may be accomplished by circumstantial evidence pointing to X's identity as the caller, such as if the communication received reveals that the speaker had knowledge of facts that only X would be likely to know."

The admission of this kind of evidence is not hearsay because the only issue is whether the state-

centimètre qui ressemble à un trèfle à quatre feuilles», et qu'il est démontré que l'accusé a un tel tatouage sur la fesse gauche, le groupe auquel l'auteur de la déclaration appartient se limite à l'accusé — la personne la plus probable — ainsi qu'aux membres de sa famille ou à ses amis intimes susceptibles de connaître ce fait. Cette déclaration a une valeur probante sans qu'il soit nécessaire de présumer la véracité de son contenu, car pour le simple motif qu'elle a été faite, elle révèle au sujet de son auteur un élément pertinent qui établit un lien entre celui-ci et l'accusé.

L'arrêt *R. c. Ferber* (1987), 36 C.C.C. (3d) 157, illustre un cas où des déclarations avaient été admises parce que, pour le simple motif qu'elles avaient été faites, elles avaient une valeur probante pour la question de l'identité de leur auteur. L'accusé avait tué son épouse. Les seuls points soulevés étaient la légitime défense, l'accident et la provocation. Le ministère public a présenté en preuve un appel téléphonique fait à un tiers pour prouver que la défunte était encore en vie au moment de l'appel mais non pour établir la véracité du contenu de la conversation. Il était donc essentiel de démontrer que la défunte était l'interlocutrice, mais le témoin a été incapable de jurer qu'il reconnaissait la voix de la défunte. Toutefois, les détails intimes révélés par l'interlocutrice constituaient une certaine preuve que celle-ci était bien la défunte, car ils limitaient le choix des personnes qui pouvaient être l'interlocutrice à celles qui pouvaient rapporter les renseignements qu'elle avait divulgués. Il n'était pas nécessaire de présumer que les renseignements étaient exacts. [TRADUCTION] «C'est à partir des détails intimes de la conversation que le jury a été appelé à décider qui avait participé à l'appel» (p. 160).

Ce point a été résumé dans *McCormick on Evidence* (4e éd. 1992), vol. 2, aux pp. 51 et 52: [TRADUCTION] «l'authentification peut être réalisée à l'aide de preuves circonstancielles indiquant que X est l'interlocuteur, tel le cas où la communication reçue révèle que l'interlocuteur connaissait des faits que seul X était susceptible de connaître».

La preuve admise n'est pas une preuve par ouï-dire parce qu'il s'agit uniquement de déterminer si

ment was made, and the veracity, perception and memory of the witness relating the statement can be fully tested by cross-examination. Since the truth of the declarant's assertion is not in issue, deprivation of the right to cross-examine the declarant, on which rejection of hearsay is premised, is of no consequence.

2. *Admissions*

The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-66, quoted in *McCormick on Evidence*, *supra*, at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.

3. *Procedure for Determining Admissibility*

The general rule is that preliminary questions which are a condition of admissibility are for the trial judge in his or her capacity as the judge of the law rather than as the trier of fact. See *R. v. B. (K.G.)*, *supra*, at pp. 783-84. If factual questions must be resolved, a *voir dire* may be required. The applicable standard of proof in both civil and criminal cases is on a balance of probabilities: *R. v. B. (K.G.)*, at p. 800.

A different view has been taken with respect to an issue as to the authenticity of a statement, writ-

la déclaration a été faite et qu'il est possible, grâce à un contre-interrogatoire, de vérifier la sincérité, la perception et les souvenirs du témoin rapportant la déclaration. Étant donné que la véracité de l'affirmation du déclarant n'est pas en cause, l'absence du droit de le contre-interroger, qui justifie le rejet de la preuve par ouï-dire, n'a aucune incidence.

2. *Les aveux*

L'admission des aveux ne repose pas sur les mêmes motifs que d'autres exceptions à la règle du ouï-dire. En fait, on peut se demander si la preuve constitue réellement du ouï-dire. L'effet pratique de cette distinction doctrinale est qu'au lieu de chercher des garanties circonstancielles indépendantes de fiabilité, il suffit de présenter la preuve contre une partie. L'admissibilité de cette preuve repose sur la théorie du système contradictoire voulant que les déclarations antérieures d'une partie peuvent être admises contre la partie qui ne peut se plaindre de la non-fiabilité de ses propres déclarations. Comme l'a dit Morgan, [TRADUCTION] «[u]ne partie peut difficilement faire valoir qu'elle n'a pas eu l'occasion de se contre-interroger ou qu'elle n'est pas digne de foi sauf lorsqu'elle s'exprime sous serment» (Morgan, «Basic Problems of Evidence» (1963), pp. 265 et 266, cité dans *McCormick on Evidence*, *op. cit.*, à la p. 140). La règle est la même en matière civile et en matière pénale sous réserve des règles particulières applicables aux confessions en matière pénale.

3. *La procédure pour déterminer l'admissibilité*

Suivant la règle générale, les questions préliminaires qui conditionnent l'admissibilité sont du ressort du juge du procès en sa capacité de juge du droit plutôt que de juge des faits. Voir l'arrêt *R. c. B. (K.G.)*, précité, aux pp. 783 et 784. Il peut être nécessaire de tenir un voir-dire lorsque des questions de fait doivent être tranchées. La norme de preuve applicable tant en matière civile que pénale est la prépondérance des probabilités: *R. c. B. (K.G.)*, à la p. 800.

Un point de vue différent a été adopté quant à l'authenticité d'une déclaration, écrite ou orale,

ten or oral, which is sought to be attributed to a party. Authenticity may relate to whether the statement was actually made or whether it was made by the party against whom it is tendered. In *McCormick on Evidence*, *supra*, at p. 54, the learned author states:

> . . . authenticity is not to be classed as one of those preliminary questions of fact conditioning admissibility under technical evidentiary rules of competency or privilege. As to these latter, the trial judge will permit the adversary to introduce controverting proof on the preliminary issue in support of his objection, and the judge will decide this issue, without submission to the jury, as a basis for his ruling on admissibility. On the other hand, the authenticity of a writing or statement is not a question of the application of a technical rule of evidence. It goes to genuineness and conditional relevance, as the jury can readily understand. Thus, if a prima facie showing is made, the writing or statement comes in, and the ultimate question of authenticity is left for the jury.

This Court has taken the same approach with respect to the authenticity of statements alleged to have been made by the accused. In *R. v. Gauthier*, [1977] 1 S.C.R. 441, the accused was tried by judge alone and the Crown sought to introduce statements purportedly made by the accused to the police. A *voir dire* was held to determine whether the statements were free and voluntary. The trial judge ruled that [TRANSLATION] "[o]n the *voir dire*, the fact of whether or not the accused made a statement must not be taken into consideration. . .". The trial judge admitted the statement, but acquitted the accused on the basis of a reasonable doubt about identity. Among other things, this reasonable doubt was based on the fact that at the *voir dire* the accused had denied making the statement, and the fact that the statement was not signed by the accused. The Quebec Court of Appeal dismissed the Crown's appeal.

The majority of this Court allowed the Crown's appeal. The main issue was whether the trial judge erred in considering the accused's evidence, given at the *voir dire*, in determining whether the identity of the declarant had been proved beyond a reasonable doubt. Pigeon J. (for the majority) agreed

que l'on cherche à attribuer à une partie. L'authenticité peut concerner la question de savoir si la déclaration a été réellement faite ou si elle a été faite par la partie contre laquelle elle est avancée en preuve. Dans *McCormick on Evidence, op. cit.*, à la p. 54, l'auteur dit:

> [TRADUCTION] . . . l'authenticité ne doit pas être classée parmi ces questions de fait préliminaires qui font dépendre l'admissibilité de règles de forme relatives à la preuve de l'habilité à témoigner ou aux privilèges. Quant à ces dernières, le juge du procès permettra à la partie adverse de présenter une preuve contradictoire sur la question préliminaire au soutien de son objection et il tranchera cette question, sans la soumettre au jury, avant de rendre sa décision sur l'admissibilité. Par contre, l'authenticité d'un écrit ou d'une déclaration ne dépend pas de l'application d'une règle de forme relative à la présentation de la preuve. Elle concerne leur réalité et leur pertinence hypothétique, comme le jury peut facilement le comprendre. Ainsi, lorsqu'une preuve *prima facie* est faite, la déclaration ou l'écrit est admis et la décision finale sur leur authenticité est laissée au jury.

Notre Cour a adopté le même point de vue relativement à l'authenticité de déclarations qui auraient été faites par un accusé. Dans l'arrêt *R. c. Gauthier*, [1977] 1 R.C.S. 441, l'accusé a subi son procès devant un juge seul et le ministère public a cherché à présenter en preuve des déclarations que celui-ci aurait faites à la police. Un voir-dire a été tenu afin de déterminer si les déclarations étaient libres et volontaires. Le juge du procès a statué qu'«[a]u stade du «voir-dire», le fait de savoir si l'accusé a fait ou non une déclaration ne doit pas être pris en considération. . .» Le juge du procès a admis la déclaration, mais il a acquitté l'accusé en raison du doute raisonnable quant à l'identité du déclarant. Ce doute raisonnable découlait notamment du fait que, lors du voir-dire, l'accusé avait nié avoir fait la déclaration et que celle-ci n'était pas signée par l'accusé. La Cour d'appel du Québec a rejeté l'appel formé par le ministère public.

Notre Cour à la majorité a accueilli le pourvoi formé par le ministère public. Il s'agissait principalement de déterminer si le juge du procès avait commis une erreur en prenant en considération le témoignage de l'accusé, fait lors du voir-dire, afin de déterminer si on avait prouvé l'identité du

that the question of whether or not a statement is made does not go to admissibility, but held that the evidence on the *voir dire* is not part of the trial evidence, and should not have been considered by the trial judge in reaching his ultimate conclusion. Pigeon J. stated (at p. 448):

It should first be noted that the Court of Appeal correctly held that, on the *voir dire*, the trial judge did not have to decide whether the statement that the prosecution sought to introduce in evidence had actually been made, and whether it was true. In a trial by jury, it is for the jury to answer such questions. Consequently, the judge who hears the evidence on the *voir dire* gives a final ruling only on the admissibility of the statement in question: *R. v. Mulligan* [(1955), 20 C.R. 269], (Ontario Court of Appeal). When there is no jury and the same judge has to rule on both the admissibility of the evidence and its probative value, he must necessarily withhold his conclusion on the second point until the end of the trial. In fact, with regard to the question as to whether the statement was actually made and whether it is true, the judge presiding over a *voir dire* in a trial by jury is required to decide only whether there is evidence to be submitted to the jury; it is not for him to weigh such evidence. There is no provision authorizing a judge sitting alone to do otherwise or to make a final ruling on these questions before hearing the entire case.

See also *Park v. The Queen*, [1981] 2 S.C.R. 64, and *R. v. Minhas* (1986), 29 C.C.C. (3d) 193.

In *R. v. Reburn* (1980), 55 C.C.C. (2d) 419 (Alta. C.A.), the accused was charged with murder and was tried by judge alone. A *voir dire* was held to determine the admissibility of a statement made by an unidentified man to a police officer in a telephone conversation. On the *voir dire*, the trial judge ruled that he would hear only the questions put to the caller by the police officer, and not the caller's responses to those questions. There was no direct evidence of who the caller was, and there were three people (besides the deceased) in the house when the call was made — two men and one woman. The voice identification evidence was inconclusive. The trial judge ruled that the statement was inadmissible because he was not satisfied beyond a reasonable doubt. Pigeon J. (for the majority) held that the question of whether or not a statement was made does not go to admissibility, but that the evidence on the *voir dire* is not part of the trial evidence, and should not have been considered by the trial judge in reaching his ultimate conclusion. Pigeon J. stated (at p. 448):

déclarant hors de tout doute raisonnable. Le juge Pigeon (pour la majorité) a admis que la question de savoir si une déclaration a été faite ou non ne concerne pas son admissibilité, mais il a statué que le témoignage lors du voir-dire ne fait pas partie de la preuve au procès et que le juge du procès n'aurait pas dû la prendre en considération lorsqu'il a rendu sa décision finale. Le juge Pigeon a déclaré (à la p. 448):

Disons tout d'abord que c'est à bon droit que la Cour d'appel a statué que sur le «voir-dire», le juge du procès n'était pas appelé à décider si la déclaration que la poursuite voulait mettre en preuve avait réellement été faite et si elle était vraie. Dans un procès par jury, ces questions-là sont du ressort du jury. Par conséquent, le juge qui entend la preuve sur le «voir-dire» ne statue définitivement que sur l'admissibilité de la déclaration qui en fait l'objet: *R. v. Mulligan* [(1955), 20 C.R. 269], (Cour d'appel de l'Ontario). Quand il n'y a pas de jury et que le même juge est appelé à statuer tant sur l'admissibilité de la preuve que sur sa valeur probante, il doit nécessairement garder pour la fin la conclusion sur le second aspect. En effet, sur la question de savoir si la déclaration a vraiment été faite et si elle est vraie, le juge qui préside un «voir-dire» dans un procès par jury n'a pas à aller plus loin que de décider qu'il y a une preuve à soumettre au jury, il ne lui appartient pas d'en apprécier la valeur. Rien ne lui permet d'agir autrement lorsqu'il siège seul et de statuer définitivement sur ces questions avant d'avoir entendu toute la cause.

Voir également les arrêts *Park c. La Reine*, [1981] 2 R.C.S. 64, et *R. c. Minhas* (1986), 29 C.C.C. (3d) 193.

Dans l'arrêt *R. c. Reburn* (1980), 55 C.C.C. (2d) 419 (C.A. Alb.), le prévenu a été accusé de meurtre et a subi son procès devant un juge seul. Un voir-dire a été tenu afin de déterminer l'admissibilité d'une déclaration faite à un agent de police par un homme non identifié au cours d'une conversation téléphonique. Lors du voir-dire, le juge du procès a statué qu'il n'entendrait que les questions posées par l'agent de police à son interlocuteur et non les réponses de ce dernier à ces questions. Il n'y avait aucune preuve directe permettant d'établir l'identité de l'interlocuteur et (outre le défunt) trois personnes se trouvaient dans la maison au moment de l'appel, deux hommes et une femme. La preuve relative à l'identification de la voix n'a

fied beyond a reasonable doubt that the accused had been identified as the caller. The Alberta Court of Appeal held that *Gauthier* was the proper authority. McGillivray C.J.A. stated (at p. 425):

> In my view, in this case the learned trial Judge, having *some* evidence identifying the accused with the statement, ought to have considered whether he was satisfied the statement was voluntary. If he was satisfied he would admit it in evidence. His consideration of the further point, whether he was satisfied beyond a reasonable doubt that the accused made the statement, would come only at the end of the trial as part of his deliberations as the trier of fact. The consideration would, of course, be based upon all of the evidence then before him. [Emphasis in original.]

I agree with the above statement except as to the standard of proof. This requires some elaboration. Neither *Gauthier* nor *Reburn* dealt with the question of the use of the statement itself as evidence of authenticity. It follows from my previous discussion of hearsay that the assertions in the statement cannot be accepted as evidence as to their truth until there has been a preliminary determination that the statements were those of the accused. In making that determination, however, the mere fact that the declarant was in a position to make the statement may have probative value, in which case this can be considered along with other evidence. This raises the question of the standard of proof to be applied in determining the preliminary question.

In this respect I see no reason to require a higher standard of proof than is applied in determining preliminary questions of fact in respect of admissibility. The determination of a preliminary question of fact in respect of both authenticity and admissibility is a prelude to access to the contents of the statement as proof of the truth thereof. If the standard of proof on a balance of probabilities is appropriate to determine a preliminary question of admissibility, there is no reason to exact a higher standard due to the mere fact that the determination is shifted to the fact-finding stage of the trial.

pas été concluante. Le juge du procès a statué que la déclaration était inadmissible parce qu'il n'était pas convaincu hors de tout doute raisonnable qu'on avait établi que l'accusé était l'interlocuteur. La Cour d'appel de l'Alberta a jugé que l'arrêt *Gauthier* faisait autorité. Le juge en chef McGillivray a dit (à la p. 425):

> [TRADUCTION] À mon avis, ayant été saisi en l'espèce de *quelques* éléments de preuve indiquant que l'accusé était l'auteur de la déclaration, le juge du procès devait examiner s'il était convaincu que la déclaration était volontaire et, dans l'affirmative, il devait l'admettre en preuve. Ce n'est qu'à la fin du procès, au moment de ses délibérations en tant que juge des faits, qu'il devait examiner s'il était convaincu hors de tout doute raisonnable que l'accusé était l'auteur de la déclaration. Cet examen devait évidemment reposer sur l'ensemble de la preuve dont il avait alors été saisi. [En italique dans l'original.]

Je suis d'accord avec l'extrait qui précède sauf en ce qui concerne la norme de preuve. Des explications s'imposent. Il n'est question ni dans *Gauthier* ni dans *Reburn* de l'utilisation de la déclaration elle-même comme preuve de l'authenticité. Il ressort de mon analyse préalable du ouï-dire que les affirmations que renferme la déclaration ne peuvent pas être admises comme preuve de leur véracité tant qu'on n'a pas tout d'abord déterminé que les déclarations sont celles de l'accusé. Toutefois, lors de cette détermination, le simple fait que le déclarant ait eu la possibilité de faire la déclaration peut avoir une valeur probante, auquel cas il faut en tenir compte lors de l'examen des autres éléments de preuve. Se pose alors le problème de la norme de preuve qui doit être appliquée pour trancher la question préliminaire.

À cet égard, je ne vois aucune raison d'exiger une norme de preuve plus sévère que celle qui est appliquée pour trancher des questions de fait préliminaires relatives à l'admissibilité. La détermination d'une question de fait préliminaire tant en ce qui concerne l'authenticité que l'admissibilité précède le recours au contenu de la déclaration comme preuve de sa véracité. Si la norme de preuve de la prépondérance des probabilités permet de trancher la question préliminaire de l'admissibilité, il n'y a aucune raison d'exiger une norme plus sévère pour le seul motif que cette

The appellant quite candidly conceded that this was the appropriate standard. It might be suggested that in the former case it is the trial judge in his or her capacity as judge of the law rather than as the trier of fact who determines the question, whereas in the latter case it is the trier of fact, either the judge or the jury. In my view, while this is a distinction between the two kinds of determination it is not a relevant distinction. This Court has affirmed that preliminary questions of fact by the trier of fact may be decided on a balance of probabilities. In *R. v. Carter*, [1982] 1 S.C.R. 938, the trial judge charged the jury in a conspiracy case that before resorting to evidence of the acts and declarations of co-conspirators of the respondent accused, the jury were obliged to determine in accordance with the criminal standard that the respondent was a member of the conspiracy charged. This Court allowed the appeal by the Crown on the ground that the trial judge had erred as to the standard to be applied to the preliminary question of membership in the conspiracy. The appropriate standard was on a balance of probabilities. The Court ruled that once this standard was satisfied the acts and declarations of co-conspirators were evidence admissible against the accused in accordance with the well-known exception to the hearsay rule.

In my opinion, this is the correct approach to be applied in respect of the authenticity of admissions. If there is some evidence to permit the issue to be submitted to the trier of fact, the matter must be considered in two stages. First, a preliminary determination must be made as to whether, on the basis of evidence admissible against the accused, the Crown has established on a balance of probabilities that the statement is that of the accused. If this threshold is met, the trier of fact should then consider the contents of the statement along with other evidence to determine the issue of innocence or guilt. While the contents of the statement may only be considered for the limited purpose to which I have referred above in the first

détermination est reportée à l'étape de la recherche des faits lors du procès. L'appelant a très franchement reconnu qu'il s'agissait de la norme appropriée. On pourrait dire que, dans le premier cas, c'est le juge du procès en sa qualité de juge du droit plutôt que de juge des faits qui tranche la question alors que, dans le deuxième cas, cette tâche incombe au juge des faits, soit le juge ou le jury. À mon avis, bien qu'il s'agisse d'une distinction entre les deux catégories de détermination, celle-ci n'est pas pertinente. Notre Cour a affirmé que le juge des faits peut trancher les questions de fait préliminaires en se fondant sur la prépondérance des probabilités. Dans l'arrêt *R. c. Carter*, [1982] 1 R.C.S. 938, le juge du procès a indiqué au jury dans une affaire de complot qu'avant de pouvoir invoquer la preuve relative aux actes et aux déclarations des coconspirateurs de l'accusé intimé, le jury devait conclure, conformément à la norme applicable en matière pénale, que l'intimé avait participé au complot reproché. Notre Cour a accueilli le pourvoi formé par le ministère public parce que le juge du procès avait commis une erreur en ce qui concerne la norme applicable à la question préliminaire de la participation de l'accusé au complot. Cette norme était la prépondérance des probabilités. La Cour a statué qu'une fois que cette norme était satisfaite, les actes et les déclarations des coconspirateurs constituaient des éléments de preuve admissibles contre l'accusé conformément à l'exception bien connue à la règle du ouï-dire.

À mon avis, c'est la démarche qu'il faut suivre relativement à l'authenticité des aveux. Si certains éléments de preuve permettent de soumettre la question au juge des faits, celle-ci doit faire l'objet d'un examen en deux temps. Tout d'abord, il faut déterminer si, compte tenu de la preuve admissible contre l'accusé, le ministère public a établi selon la prépondérance des probabilités que la déclaration est celle de l'accusé. Une fois cette exigence préliminaire satisfaite, le juge des faits doit examiner le contenu de la déclaration en même temps que les autres éléments de preuve pour décider de l'innocence ou de la culpabilité de l'accusé. Même si le contenu de la déclaration ne peut être pris en considération que dans le but limité que j'ai mentionné

stage, in the second stage the contents are evidence of the truth of the assertions contained therein.

4. *Application to this Case*

In this case there was evidence that it was the appellant who made the statements to the Boutets. The trial judge should have considered whether this evidence proved on a balance of probabilities that the statements were in fact made by the accused. In this determination he could have relied on the fact that the statements to the Boutets were made. It would be a most unusual coincidence that the purchaser and the accused would each have these two characteristics in combination. If he ruled out coincidence, the trial judge was entitled to consider that this narrowed the group of persons who were in a position to make this statement to the accused or someone who knew this about the accused and had some reason to make the representation as if he were the accused. Considered in light of the other evidence to which I will refer, the most likely person to make the statement was the accused.

The trial judge did not address this question in two stages but considered the statements along with other evidence in concluding that the Crown had proved the charges beyond a reasonable doubt. As pointed out by counsel for the appellant, this may be explained on the basis of the fact that counsel for the accused (who was not counsel on the appeal) made no objection to the admissibility of the evidence. It is not clear from the learned trial judge's reasons whether he relied on the statements as if they were true or whether he made the limited use of them to which I have referred. He simply referred to them as part of the circumstantial evidence without mention of this distinction. In my view, the strength of the whole of the evidence is such that even if the trial judge did consider the contents of the statements for their truth without a preliminary finding of authenticity, this did not

pour la première étape, il fait preuve, dans la deuxième, de la véracité des affirmations que contient la déclaration.

4. *L'application à l'espèce*

En l'espèce, certaines preuves indiquaient que c'était l'appelant qui avait fait les déclarations en cause aux Boutet. Le juge du procès aurait dû examiner si ces preuves démontraient, selon la prépondérance des probabilités, que les déclarations avaient effectivement été faites par l'accusé. Pour en arriver à cette conclusion, il aurait pu invoquer que les déclarations aux Boutet ont été faites. Il faudrait une coïncidence exceptionnelle pour que l'acheteur et l'accusé possèdent chacun ces deux mêmes caractéristiques. S'il écartait la possibilité d'une coïncidence, le juge du procès avait le droit de considérer que le groupe de personnes qui pouvaient faire une telle déclaration se limitait de ce fait à l'accusé ou à quelqu'un qui était au courant de ces caractéristiques de l'accusé et qui avait des raisons de faire ces déclarations comme s'il était l'accusé. Compte tenu des autres éléments de preuve que je mentionnerai plus loin, la personne la plus susceptible de faire la déclaration était l'accusé.

Le juge du procès n'a pas analysé cette question en deux temps, mais il a examiné les déclarations avec d'autres éléments de preuve pour conclure que le ministère public avait prouvé les accusations hors de tout doute raisonnable. Comme l'a signalé l'avocat de l'appelant, cela s'explique peut-être parce que l'avocat de l'accusé (qui n'était pas le même lors de l'appel) n'a soulevé aucune objection quant à l'admissibilité de la preuve. Les motifs du juge du procès n'indiquent pas clairement s'il s'est appuyé sur les déclarations en considérant qu'elles étaient vraies ou s'il en a fait l'usage limité dont j'ai fait mention. Il a simplement indiqué qu'elles faisaient partie de la preuve circonstancielle sans parler de cette distinction. À mon avis, la force de l'ensemble de la preuve est telle que, même si le juge du procès a examiné le contenu des déclarations pour établir leur véracité sans avoir tiré une conclusion préliminaire relativement à leur authenticité, cela n'a pas entraîné une erreur judiciaire grave. Les autres éléments de

occasion a substantial miscarriage of justice. The other evidence may be summarized as follows:

1. The residence rented by the appellant two months earlier, ostensibly to house himself, his wife and his child, was found actually to be used as a hideout for two escaped felons, Dipietro and Panacui. The three sleeping bags on the living room floor suggested the residence was being used by three people. The appellant paid the rent on the residence both before and after the robbery.
2. The trial judge found that the robbery was committed by three persons — two gunmen and a driver.
3. In the residence was found a City of Calgary map which had traced on it the getaway route from the Woodward's parking lot to a location where the getaway vehicle was found abandoned, and from there to an overpass crossing a major thoroughfare.
4. It was common ground that the getaway vehicle subsequently abandoned by the robbers was the same vehicle sold by the Boutets two days earlier.
5. The getaway vehicle was sold to a person who coincided with the physical description offered by the Boutets in terms of his age, height, weight, build, hair colour, mustache and facial features, which were said to be similar or familiar. The person lied about the use to be made of the vehicle.

In my view, the relative probative value of the statements, if one assumes their truth, as compared with the probative value on the more limited basis for which they were admissible without a preliminary finding of authenticity is so slight that, irrespective of the basis on which they were considered by the trial judge, the result would necessarily have been the same. In these circumstances, any error in law in considering the statements as evidence of the truth of their content did not occasion a substantial miscarriage of justice. The appeal is, therefore, dismissed.

preuve peuvent être résumés de la manière suivante:

1. On a constaté que la résidence louée par l'appelant deux mois plus tôt, officiellement pour lui-même, son épouse et son enfant, avait en fait servi de refuge à deux criminels évadés, Dipietro et Panacui. Les trois sacs de couchage trouvés sur le sol de la salle de séjour donnent à penser que la résidence a été utilisée par trois personnes. L'appelant a payé le loyer de la résidence avant et après le vol qualifié.
2. Le juge du procès a conclu que le vol qualifié avait été commis par trois personnes — deux hommes armés et un conducteur.
3. Dans la résidence, on a trouvé une carte de la ville de Calgary sur laquelle on avait tracé l'itinéraire suivi par les criminels dans leur fuite du terrain de stationnement de Woodward's jusqu'à l'endroit où le véhicule ayant servi à la fuite a été trouvé abandonné et, de là, jusqu'à un pont enjambant une rue importante.
4. Il est reconnu que le véhicule ayant servi à la fuite des voleurs qui l'ont ensuite abandonné était celui que les Boutet avaient vendu deux jours plus tôt.
5. Le véhicule ayant servi à la fuite a été vendu à une personne qui correspondait à la description physique faite par les Boutet en ce qui concerne l'âge, la taille, le poids, la carrure, la couleur des cheveux, les moustaches et les traits, qu'ils ont déclaré ressemblants ou familiers. La personne a menti au sujet de l'usage ultérieur du véhicule.

À mon avis, la valeur probante relative des déclarations, si on présume leur véracité, est si faible lorsqu'on la compare à leur valeur probante pour l'usage plus limité pour lequel elles étaient admissibles sans décision préliminaire sur leur authenticité que, peu importe en vertu de quoi le juge du procès en a tenu compte, le résultat aurait nécessairement été le même. Dans ces circonstances, aucune erreur de droit qu'il ait pu commettre en considérant que les déclarations faisaient preuve de la véracité de leur contenu n'a entraîné d'erreur judiciaire grave. En conséquence, le pourvoi est rejeté.

The reasons of McLachlin and Major JJ. were delivered by

MCLACHLIN J. (dissenting) — I have had the advantage of reading the reasons of my colleague Justice Sopinka. I agree with him on the law. I cannot agree, however, with the conclusion he draws from the principles he states.

My colleague concedes that viewed one way, the statements in question are hearsay. However, he says they are admissible as a statement of facts identifying the speaker as X on the ground that the facts could have been known only to X or to a small group of people to which X belongs. He quotes McCormick's statement of the principle (*McCormick on Evidence* (4th ed. 1992), vol. 2, at pp. 51-52): "authentication may be accomplished by circumstantial evidence pointing to X's identity as the caller, such as if the communication received reveals that the speaker had knowledge of facts that only X would be likely to know."

The probative value of such statements depends on the proposition that the person to be identified (here the accused) is one of very few people who would be able to relate the information which was disclosed by the "speaker" (here the perpetrator of the crime). If many people could have made the statement, it loses its force as an indicator that the "speaker" or perpetrator of the offence is the accused. The case my colleague cites of a "speaker" who describes in detail an unusual tattoo on his left buttock — a tattoo which also, it turns out, is possessed by the accused — is an example in point. The statement identifies both the speaker and the accused as members of the very small group of persons who could have known about the tattoo. It would be highly unusual that a "speaker" would describe himself as having such a tattoo, and that a quite different person, the accused, would possess the same characteristic. Because this would be so extraordinary, there is a strong (although not conclusive) inference that they are one and the same person.

Version française des motifs des juges McLachlin et Major rendus par

LE JUGE MCLACHLIN (dissidente) — J'ai eu l'avantage de lire les motifs de mon collègue le juge Sopinka. Je suis d'accord avec lui sur le plan du droit. Toutefois, je ne puis souscrire à la conclusion qu'il tire des principes qu'il expose.

Mon collègue admet que, selon une interprétation possible, les déclarations en question constituent du ouï-dire. Toutefois, il dit qu'elles sont admissibles à titre de déclarations de faits identifiant l'interlocuteur comme X sur le fondement que les faits n'auraient pu être connus que de X ou d'un petit groupe de personnes dont X fait partie. Il cite la déclaration de principe de McCormick (*McCormick on Evidence* (4e éd. 1992), vol. 2, aux pp. 51 et 52): [TRADUCTION] «l'authentification peut être réalisée à l'aide de preuves circonstancielles indiquant que X est l'interlocuteur, tel le cas où la communication reçue révèle que l'interlocuteur connaissait des faits que seul X était susceptible de connaître».

La valeur probante de telles déclarations dépend de l'argument que la personne à identifier (en l'espèce l'accusé) est l'une des rares personnes en mesure de donner les renseignements communiqués par l'«interlocuteur» (en l'espèce l'auteur du crime). Si un grand nombre de personnes avaient pu faire la déclaration, elle perd de sa force comme indice que l'«interlocuteur» ou l'auteur de l'infraction est l'accusé. L'exemple que mon collègue cite d'un «interlocuteur» qui décrit en détail un tatouage inhabituel sur sa fesse gauche — un tatouage que possèderait par ailleurs l'accusé — est à propos. La déclaration identifie à la fois l'interlocuteur et l'accusé comme membres du très petit groupe de personnes susceptibles d'être au courant du tatouage. Il serait hautement improbable qu'un «interlocuteur» qui se décrit comme ayant un tel tatouage et une personne différente, l'accusé, possèdent la même caractéristique. Une telle probabilité serait tellement extraordinaire, qu'il existe une forte présomption (bien que pas concluante) qu'il s'agit d'une seule et même personne.

The same inference does not follow where the characteristic is one which anyone who cares to inquire may detect. Consider the case of a criminal who wishes to "finger" another for his crime. Knowing that the other person possesses a peculiar tattoo on his left buttock, such a person might indicate in the course of committing the crime that he, the perpetrator, possessed such a tattoo. If the evidence is that only very few people could have known of the tattoo, the inference, as noted above, is strong that the speaker and the person with the tattoo are one and the same. But if the evidence is that many people could have known about the tattoo, the inference is weak. Any one of those people, whether to shift the blame to another or for a variety of other reasons, might have mentioned it. It is for this reason that the cases in which this principle has been applied uniformly insist that the information related be information which only the accused could have known (McCormick's formulation) or which, at the very least, only a few people would have known. Thus, as my colleague points out, in *R. v. Ferber* (1987), 36 C.C.C. (3d) 157, at p. 160, intimate details related by the caller provided some evidence that the caller was the deceased, "as this detail narrowed the identity of the caller to those people who would be able to relate the information disclosed by the caller." (Emphasis added.)

This brings me to the information said to identify the accused as the person who bought the getaway vehicle in the case at bar. The person who picked up the getaway vehicle gave the vendor the information that he worked as a chain-link fencer and owned a large pregnant dog. That was not information which only the perpetrator of the offence could have known. Indeed, it was not information which only a small group of people could have known. It was, on the contrary, information which could have been obtained by anyone who had cared to observe or inquire into the accused's affairs. Accordingly, it does not fall

On ne peut faire la même déduction lorsque la caractéristique peut être remarquée par quiconque prend la peine de se renseigner. Examinons le cas d'un criminel qui veut faire blâmer un autre pour le crime qu'il a commis. Sachant que l'autre personne a un tatouage particulier sur sa fesse gauche, il pourrait indiquer lors de la perpétration du crime qu'il possède lui-même un tel tatouage. Si selon la preuve, seulement très peu de gens auraient pu être au courant du tatouage, il y a une forte présomption, comme il a été indiqué précédemment, que l'interlocuteur et la personne avec le tatouage sont une seule et même personne. Toutefois, s'il ressort de la preuve qu'un grand nombre de personnes auraient pu être au courant du tatouage, la présomption est faible. N'importe laquelle de ces personnes, que ce soit pour jeter le blâme sur une autre ou pour un grand nombre de raisons, aurait pu le mentionner. C'est pour cette raison que, dans toutes les affaires où ce principe a été appliqué, on insiste pour que le renseignement communiqué n'ait pu être connu que de l'accusé (formulation de McCormick) ou, du moins, qu'il n'ait pu être connu que d'un très petit nombre de personnes. Par conséquent, comme le souligne mon collègue, des détails intimes révélés par l'interlocutrice dans l'arrêt *R. c. Ferber* (1987), 36 C.C.C. (3d) 157, à la p. 160, constituaient une certaine preuve que celle-ci était la défunte, «car ils limitaient le choix des personnes qui pouvaient être l'interlocutrice à celles qui pouvaient rapporter les renseignements qu'elle avait divulgués.» (Je souligne.)

Ceci m'amène à la question des renseignements qui identifieraient l'accusé comme la personne qui a acheté le véhicule ayant servi à la fuite en l'espèce. La personne qui a acheté le véhicule qui a servi à la fuite a donné au vendeur les renseignements selon lesquels il travaillait comme installateur de clôtures et était propriétaire d'une chienne gravide de grande taille. Il ne s'agissait pas de renseignements que seul l'auteur de l'infraction était susceptible de connaître. En fait il ne s'agissait pas de renseignements que seul un petit groupe de personnes étaient susceptibles de connaître. C'étaient au contraire des renseignements qui auraient pu être obtenus par quiconque aurait pris soin d'observer les affaires de l'accusé ou de se renseigner

within the rule as stated by McCormick and as applied in *Ferber, supra.*

Nor should it. A number of inferences may be drawn from the fact such a statement was made. One is that another chain-link fencer who owned a large pregnant dog (and there may be a number of such persons in a large city like Calgary) bought the car. Yet another inference is that the criminal, seeking to shift blame from himself to the accused Evans, went out of his way to tell the vendors falsely that he worked as a chain-link fencer and owned a large pregnant dog. Yet another is the inference which the trial judge drew — that the person who bought the getaway car and the accused Evans were one and the same person. The fact that the inference of identity is merely one of several plausible inferences which may be drawn from the statement renders it, on the authorities, inadmissible. It does not have the necessary probative value to support a conviction. The danger of an erroneous inference is simply too great.

The trial judge relied heavily upon the inadmissible statements in concluding that Evans was the person who had bought the getaway vehicle. He recited the statements and referred to the fact that Evans possessed the mentioned characteristics. In summing up, he used this "circumstantial evidence", together with other identification evidence, to conclude that "the accused Evans was the person who purchased from Mr. Boutet the automobile that was used as the getaway car . . .".

The only question remaining is whether the other evidence identifying Evans as the guilty person is so clear that it can safely be said that the trial judge's erroneous reliance did not result in a miscarriage of justice. In my view, this cannot be said. It was essential to the Crown's case that Evans be shown to be the purchaser of the getaway vehicle. The only other evidence linking Evans

sur celles-ci. En conséquence, ils ne s'inscrivent pas dans le cadre de la règle énoncée par McCormick et appliquée dans l'arrêt *Ferber*, précité.

Ce ne devrait pas non plus être le cas. Un certain nombre de déductions peuvent être tirées du fait qu'une telle déclaration a été faite. Il est possible de déduire qu'un autre installateur de clôtures qui est propriétaire d'une chienne gravide de grande taille (et il peut y avoir un certain nombre de telles personnes dans une grande ville comme Calgary) a acheté l'automobile. On peut également déduire que le criminel, voulant jeter le blâme sur l'accusé Evans, a pris la peine de dire faussement aux vendeurs qu'il travaillait comme installateur de clôtures et était propriétaire d'une chienne gravide de grande taille. Il est également possible de déduire, comme l'a fait le juge du procès, que la personne qui a acheté le véhicule qui a servi à la fuite et l'accusé Evans sont une seule et même personne. Le fait que la déduction de l'identité est simplement une déduction parmi plusieurs déductions plausibles qui peuvent être faites à partir de la déclaration la rend inadmissible d'après la doctrine et la jurisprudence. Elle n'a pas la valeur probante nécessaire pour appuyer une déclaration de culpabilité. Le danger de faire une déduction erronée est simplement trop grand.

Le juge du procès s'est fortement appuyé sur les déclarations inadmissibles pour conclure que Evans était la personne qui avait acheté le véhicule ayant servi à la fuite. Il a exposé les déclarations et a mentionné le fait que Evans possédait les caractéristiques décrites. Dans son résumé, il a utilisé la «preuve circonstancielle» avec d'autres éléments de preuve relatifs à l'identification pour conclure que [TRADUCTION] «l'accusé Evans est la personne qui a acheté à M. Boutet l'automobile qui a servi à la fuite . . .»

La seule question qui reste à trancher est de savoir si les autres éléments de preuve qui identifient Evans comme le coupable sont suffisamment clairs pour dire avec certitude que le fait que le juge du procès se soit fondé de façon erronée sur une déclaration n'a pas entraîné une erreur judiciaire. À mon avis, ce n'est pas le cas. Il était essentiel dans l'argumentation du ministère public

with the getaway vehicle were the statements of the Boutets describing the age, height, weight, build, hair colour, mustache and facial features of the person who picked up the car as similar to those of the accused, who seemed 'familiar' to them. These vague descriptions, without more, were unlikely to have established beyond a reasonable doubt that it was Evans who purchased the getaway car.

I would allow the appeal and direct a new trial.

Appeal dismissed, MCLACHLIN *and* MAJOR JJ. *dissenting.*

Solicitors for the appellant: Legge & Chisholm, Calgary.

Solicitor for the respondent: Peter Martin, Calgary.

de démontrer que Evans était l'acheteur du véhicule qui a servi à la fuite. Les seuls autres éléments de preuve qui relient Evans au véhicule qui a servi à la fuite étaient la description faite par les Boutet de l'âge, de la taille, du poids, de la stature, de la couleur des cheveux, de la moustache et des traits du visage de la personne qui a acheté la voiture comme étant semblables à ceux de l'accusé, qui leur semblait «familier». Il est improbable que ces vagues descriptions, sans plus, aient démontré hors de tout doute raisonnable que Evans avait acheté l'automobile qui a servi à la fuite.

Je suis d'avis d'accueillir le pourvoi et d'ordonner la tenue d'un nouveau procès.

Pourvoi rejeté, les juges MCLACHLIN *et* MAJOR *sont dissidents.*

Procureurs de l'appelant: Legge & Chisholm, Calgary.

Procureur de l'intimée: Peter Martin, Calgary.

TAB 44

2002 CarswellOnt 3848
Ontario Court of Appeal

R. v. Foreman

2002 CarswellOnt 3848, [2002] O.J. No. 4332, 166 O.A.C. 60, 169 C.C.C. (3d) 489, 56 W.C.B. (2d) 3, 62 O.R. (3d) 204, 6 C.R. (6th) 201

Her Majesty the Queen (Respondent) and Rory Eldon Foreman (Appellant)

Doherty, Austin, Armstrong JJ.A.

Heard: October 2, 2002
Judgment: November 15, 2002
Docket: CA C32712

Counsel: *Sharon E. Lavine*, for Appellant
Alexander Hrybinski, for Respondent

Subject: Criminal; Evidence

Annotation

The importance of *Foreman* is that it provides clear authority for the view that the principled review of existing hearsay exceptions by tests of necessity and reliability required by the Supreme Court in *R. v. Starr* (2000), 36 C.R. (5th) 1 (S.C.C.) does NOT extend to admissions of parties. According to Doherty J.A., the reason is that admissions are admitted as a concomitant of the adversary system, not as an exception to the hearsay rule.

Don Stuart *

APPEAL by accused from conviction for first degree murder.

***Doherty J.A.*:**

I

1 The appellant was charged with the first degree murder of Joan Heimbecker, his former girlfriend. He admitted that he shot and killed Ms. Heimbecker and entered a guilty plea to the included offence of manslaughter. The Crown would not accept that plea and the trial proceeded on the first degree murder charge. There were two issues at trial: did the appellant have the necessary *mens rea* for murder, and if he did, was he guilty of first or second degree murder? The jury convicted of first degree murder and the appellant appeals.

2 The grounds of appeal arise out of the trial judge's admission of two statements made by Ms. Heimbecker shortly before her death. The trial judge admitted the statements as evidence of Ms. Heimbecker's state of mind and as evidence that the appellant had threatened Ms. Heimbecker. The appellant contends that the statements were not admissible for either purpose and further, that if they were properly admitted, the trial judge's jury instruction concerning those statements was wrong in law.

3 I would dismiss the appeal. The statements were properly admitted and there was no legal error in the jury instruction concerning those statements. Alternatively, if the statements should have been excluded or if the instruction was inadequate, I would apply the *curative proviso* and dismiss the appeal.

II

4 The appellant and Ms. Heimbecker became romantically involved about nine months before her death. By early February, approximately ten weeks before her death, Ms. Heimbecker no longer wanted to be in a relationship. She told the appellant that she did not need anybody in her life at that time as she was very busy with her university studies. The appellant was upset and did not want the relationship to end. By his own admission, he phoned Ms. Heimbecker about three or four times a week for several weeks following the break-up in February. Eventually, she told him that she was seeing someone else. The appellant was angry and again, by his own admission, became abusive during several of the telephone calls. He called Ms. Heimbecker a "slut" and told her that he hoped she would "rot in hell".

5 The appellant denied that he ever threatened Ms. Heimbecker. Two long-time friends of Ms. Heimbecker, however, testified that she told them she was threatened by the appellant. This evidence is the subject of the arguments made on behalf of the appellant in this court and will be set out in more detail below.

6 The day before the homicide, the appellant rented a car and drove to Toronto from Kitchener. He purchased a 12 gauge sawed-off shotgun and ammunition from an unknown person in the Parkdale area of Toronto. This was the weapon used to kill Ms. Heimbecker. The appellant said it was just a coincidence that he purchased the sawed-off shotgun the day before the homicide. According to him, he had intended to buy a gun for some time, as he needed it for protection and to gain respect at the various after-hours clubs he frequented.

7 On the day before the homicide, the appellant also delivered a letter to another former girlfriend. In the letter he wrote "I'm just writing to say goodbye since this is probabl[y] the last time you will ever hear from me. I'm almost 90% positive I won't be back".

8 On the afternoon of the homicide, the appellant spoke with a friend. He had slept very little in the preceding two days and had been drinking. According to his friend, he looked terrible. The appellant told his friend that he was thinking of going to the deceased's apartment with gifts that he had purchased for her.

9 The appellant drove from Kitchener to Hamilton to see the deceased in the early evening of March 30th. He gave her no advance notice of his visit. He took the loaded sawed-off shotgun and the presents he had purchased for her with him. Before leaving for Ms. Heimbecker's apartment, the appellant packed personal clothing, toiletries and some photographs in two duffle bags. He also withdrew $400 from his bank account.

10 The appellant arrived at the apartment at about 8:30 p.m. He spoke to Ms. Heimbecker on the intercom and asked her to go out with him. She refused but told him he could come up to the apartment. He went up leaving the presents and the loaded sawed-off shotgun in the car.

11 Ms. Heimbecker was in the apartment with one of her roommates, Nicola Hodges. The appellant spoke with her for ten or fifteen minutes. He left and Ms. Heimbecker followed him out into the hallway. The appellant again asked Ms. Heimbecker to go out with him. She refused and made it very clear that she did not love him and had never loved him. The appellant said he became very angry and was "in shock".

12 The appellant left the apartment, went to the car, retrieved the loaded shotgun and returned to the apartment. He gained entry on the pretext that he was looking for his car keys. As he pretended to be searching through a chair for his keys, the appellant turned and pointed the shotgun at Ms. Heimbecker saying "Now you're going to have to listen to me". The appellant forced Ms. Heimbecker and Ms. Hodges towards a corner of the living room. He then locked and chained the door.

13 After locking the door, the appellant disappeared into the bedroom area of the apartment for several moments before returning to where Ms. Heimbecker and Ms. Hodges were standing. He told Ms. Heimbecker to sit on the sofa and repeatedly asked her about her current boyfriend and whether they were sleeping together. The appellant told Ms.

Hodges to move away from Ms. Heimbecker and to sit in a chair. Ms. Heimbecker attempted to calm the appellant down and suggested that he let Ms. Hodges go. The appellant assured Ms. Heimbecker that he would not hurt Ms. Hodges. Ms. Hodges testified that he also said to Ms. Heimbecker:

> You've made me suffer for the past two months. I'm going to make you suffer.

14 The appellant repeatedly asked Ms. Heimbecker how long she had been sleeping with her new boyfriend. She would not answer, but finally said "three to four weeks".

15 About ten minutes after the appellant had first confined Ms. Heimbecker and Ms. Hodges, Ms. Mathur, another roommate, arrived at the apartment door. As she attempted to open the door, the appellant ran over, grabbed Ms. Mathur's keys and slammed the door closed, leaving Ms. Mathur in the hall. Ms. Hodges sensed that the situation was now becoming very urgent. A few seconds later, a shot was fired. Several seconds later, five more shots were fired in rapid succession. The first shot missed Ms. Heimbecker. Four of the remaining five struck her. The appellant was standing about seven to twelve feet away from Ms. Heimbecker when he fired the gun. The gun had to be racked with a forward and backward hand motion before each shot. The appellant continued firing until the gun was empty.

16 The appellant testified that the first shot discharged by accident. There was expert evidence that in addition to racking the gun before each shot, considerable pressure on the trigger was required to discharge the weapon. The appellant said that after the shotgun discharged accidentally, he became very angry and "just snapped". He fired the gun five more times. The firearms expert testified that the appellant made fifteen deliberate actions in "racking" the shotgun in order to fire the five remaining shells. The appellant said "I kept on firing until the last shot, but I knew it was too late".

17 The first shot that struck Ms. Heimbecker (the second shot fired) hit her in the left knee and abdomen while she was sitting in a chair with her legs up in a defensive position. The last shot that struck Ms. Heimbecker hit her on the left side of the head, neck and face while she was lying on the floor after having moved or fallen off the chair.

18 According to a neighbour who arrived at the scene immediately after the shots were fired, the appellant opened the door, smiled at the neighbour and walked nonchalantly out of the apartment. He went to his car, drove away, discarded an overcoat, a shirt, a vest, some rubber gloves and a box of twelve gauge shotgun shells in a dumpster and drove to the United States. He surrendered himself to the authorities in the United States about two weeks later.

19 It was the position of the Crown that the appellant never got over his break-up with Ms. Heimbecker. He became increasingly angry towards her in the weeks following the break-up, especially after he learned that she had a new boyfriend. He eventually decided that he would make one last attempt to rekindle their relationship. If Ms. Heimbecker refused, he would kill her. In furtherance of this plan, he went to Ms. Heimbecker's apartment carrying both presents and a loaded sawed-off shotgun. After Ms. Heimbecker made it abundantly clear that she wanted no part of the appellant, he went to his car, retrieved the shotgun, and after holding Ms. Heimbecker and her roommate captive for some time, shot and killed Ms. Heimbecker. The Crown contended that the appellant's conduct demonstrated his intention to murder Ms. Heimbecker and that the murder was first degree either because it was planned and deliberate, or because it occurred during the course of a forcible confinement.

20 The appellant's position was that he was guilty of manslaughter. He contended that he had no intention to do any harm to Ms. Heimbecker when he went to her apartment. After she rejected him, he became angry and wanted to frighten her. The first shot was fired accidentally and the subsequent shots were fired without any intention to kill. The defence maintained that the appellant was in a state of rage, fuelled by sleep deprivation and the consumption of alcohol, and acted without any intention or purpose when he repeatedly fired the shotgun at Ms. Heimbecker from close range.

III

21 The Crown sought to lead evidence of certain statements made by Ms. Heimbecker to Paul Litt and his niece, Becky Litt. After a *voir dire*, the trial judge ruled that the statements were admissible.

22 Paul Litt was Ms. Heimbecker's boyfriend until about eighteen months before her death. They remained good friends and spoke on the phone regularly. Mr. Litt knew that the appellant and Ms. Heimbecker had been going out together and he knew that she had ended the relationship. Mr. Litt testified that a few days before Ms. Heimbecker's death he spoke with her on the telephone. She said that she was worried as the appellant had been phoning her regularly and threatening her. The appellant had said, "If I can't have you, nobody will". Mr. Litt and Ms. Heimbecker discussed the possibility of going to the police.

23 Becky Litt was also a very good friend of Ms. Heimbecker. They spoke often on the telephone and saw each other regularly on the McMaster campus. Ms. Litt testified that Ms. Heimbecker telephoned her on the night she died. Ms. Heimbecker said that the appellant had been calling her regularly, arguing with her and demanding to know who she was "sleeping with". Ms. Heimbecker said that the appellant had threatened her. She was afraid and asked Ms. Litt whether she thought the appellant would do anything to her.

24 The trial judge admitted the evidence of the statements made by Ms. Heimbecker to the Litts. He treated the statements as hearsay, and after referring to the requirements of reliability and necessity as explained in *R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.), held that the statements were sufficiently reliable to warrant their admissibility. In reaching that conclusion, he emphasized the absence of any motive for Ms. Heimbecker to lie to the Litts when she told them that the appellant had threatened her.

25 In describing the relevance of the utterances, the trial judge said:

> . . . The utterances of Joan Heimbecker made to her longtime good friends, Paul and Becky, are relevant and reliable to show the state of mind of the deceased as a result of the statements, and conduct of the accused towards her and hence, to show a possible motive for the killing and the ultimate issue of intent [emphasis added].

IV

26 Counsel for the appellant skillfully advanced four submissions. She submitted that:

(a) Insofar as the statements were evidence of Ms. Heimbecker's state of mind, they were inadmissible because her state of mind was not material to the charge.

(b) The trial judge erred in holding that evidence of Ms. Heimbecker's state of mind could afford evidence of the appellant's state of mind.

(c) Insofar as the statements were admitted as evidence that the appellant threatened Ms. Heimbecker, they were "double hearsay" and inadmissible under the principled approach described in *R. v. Starr* (2000), 147 C.C.C. (3d) 449 (S.C.C.).

(d) If the statements were properly admitted, the trial judge erred in telling the jury that the statements were admitted because they were "considered reliable".

(a) Was Ms. Heimbecker's state of mind material?

27 Counsel's first submission rests on the unchallengeable assertion that evidence which is not material to a fact in issue is inadmissible. Counsel accepts that the statements made to the Litts afforded evidence of Ms. Heimbecker's state of mind at the time she made those statements, but contends that her state of mind was not a fact in issue or relevant to a fact in issue.

28 I do not accept this submission. The statement made to the Litts, both in express terms and by inference, provided evidence that Ms. Heimbecker was afraid of the appellant and wanted no part of any relationship with him at the time of her death. It was the Crown's theory that the appellant desperately wanted to reunite with Ms. Heimbecker and decided

to murder her if she would not resume her prior relationship with him. The Crown contended that he followed through with that plan when Ms. Heimbecker rejected his advances on the evening of March 30th. Evidence that Ms. Heimbecker was afraid of the appellant and wanted no part of any relationship with him on the day of her death offered support for the contention that she declined to return to the relationship with the appellant. If the jury found as a fact that Ms. Heimbecker refused to return to the appellant, that finding could assist in establishing motive: *R. v. P. (R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.), at 338-40. Motive was relevant to intent, the crucial fact in issue: *R. v. Krugel* (2000), 143 C.C.C. (3d) 367 (Ont. C.A.), at 391.

29 The appellant's guilty plea to the included offence of manslaughter, his testimony in which he admitted that Ms. Heimbecker rejected his attempts at reconciliation, and that the rejection precipitated the homicide, does not render evidence of her state of mind irrelevant. Relevance depends on logic and human experience, not on the position of the parties. While it is true that if a fact is admitted and if evidence tendered to prove that fact has any prejudicial potential, a trial judge may properly exclude the evidence, that was not the situation in this case. When the evidence was proffered there was no clear admission from the appellant that Ms. Heimbecker had rejected his attempts at reconciliation and that this rejection had led him to retrieve the gun and confine Ms. Heimbecker. In any event, insofar as this evidence went to prove Ms. Heimbecker' state of mind, it had no potential to prejudice the appellant in that it was consistent with the appellant's own testimony as to her state of mind. The potential prejudice, and also the significant probative value of the evidence, flowed from its admission to prove that the appellant had in fact threatened Ms. Heimbecker. That issue was very much in dispute throughout the trial.

(b) Was Ms. Heimbecker's state of mind probative of the appellant's state of mind?

30 The second submission set out above was not pressed in oral argument. It can be disposed of quickly. Motive refers to an accused's a state of mind. As outlined above, the deceased's state of mind was one link in a chain of reasoning which could lead to a finding that the appellant had a motive to kill Ms. Heimbecker. In that way, evidence of Ms. Heimbecker's state of mind had an indirect connection to the appellant's state of mind. There was, however, a much more direct evidentiary connection drawn by the trial judge. He did not only admit the statements as evidence of Ms. Heimbecker's state of mind, but also admitted the statements as evidence that the appellant had in fact threatened Ms. Heimbecker. If the jury was satisfied that the threats were made, they could infer motive and intent from those threats without any inquiry into Ms. Heimbecker's state of mind: *R. v. Walker* (2002), 163 C.C.C. (3d) 29 (B.C. C.A.), at 43-48; *R. v. F. (J.G.)* (2000), 143 C.C.C. (3d) 341 (B.C. C.A.), at 346-47, leave to appeal to S.C.C. refused (S.C.C.).

(c) Was the evidence inadmissible "double" hearsay?

31 The third submission was the main argument advanced on the appeal. It relates only to the admissibility of the statements as evidence that the appellant actually threatened Ms. Heimbecker. This was by far the more important purpose for which the evidence was received. Counsel for the appellant submitted that the Litts' evidence that Ms. Heimbecker said the appellant threatened her was "double hearsay" in that it involved first, an alleged statement made by the appellant to Ms. Heimbecker ("If I can't have you, nobody will") and second, an alleged statement made by Ms. Heimbecker to the Litts ("the appellant said to me 'If I can't have you, no one will'"). Counsel submits that the trial judge failed to apply the principled approach to the admissibility of hearsay separately to each of the hearsay components of the statements tendered through the Litts.

32 This argument is built on *R. v. Starr*, *supra*. In *Starr*, the Crown sought to adduce evidence of a statement made by the deceased to a girlfriend that he could not see her that night as he and the accused were going to "do an Autopac [insurance] scam". The Crown argued that the statement provided evidence that the deceased intended to be in the company of the accused later that evening and more significantly, evidence from which it could be inferred that the appellant was in fact with the deceased later that evening when the deceased was killed: *R. v. Starr*, *supra*, at p. 517.

33 Iacobucci J., for the majority, considered whether the statement was admissible under the established exception to the hearsay rule which permits hearsay evidence as evidence of the declarant's state of mind. He observed that where

evidence is tendered under that exception, it is received to establish the declarant's state of mind and not to establish the state of mind or conduct of someone other than the declarant. It was in the context of this analysis of the state of mind exception that Iacobucci J. said at p. 519:

> Second, there are very good reasons behind the rule against allowing statements of present intention to be used to prove the state of mind of someone other than the declarant. As noted above, the central concern with hearsay is the inability of the trier of fact to test the reliability of the declarant's assertion. When the statement is tendered to prove the intentions of a third party, this danger is multiplied. If a declarant makes a statement about the intentions of a third party, there are three possible bases for this statement: first, it could be based on a prior conversation with the accused; second, it could be based on a prior conversation with a fourth party, who indicated the third party's intentions to the declarant; or third, it could be based on pure speculation on the part of the declarant. Under the first scenario, the statement is double hearsay. Since each level of double hearsay must fall within an exception, or be admissible under the principled approach, the mere fact that the declarant is making a statement of present intention is insufficient to render it admissible. The *second* level of hearsay must also be admissible.
>
> The other two scenarios also clearly require exclusion. If the statement about joint acts is based on a conversation with a fourth party, then the statement is triple hearsay, or worse. If, on the other hand, it is based on pure speculation, then it clearly is unreliable and does not fit within the rationale underlying the present intentions exception.
>
> In conclusion then, a statement of intention cannot be admitted to prove the intentions of someone other than the declarant, unless a hearsay exception can be established for each level of hearsay. . . . [emphasis added].

34 In the above passage and earlier in his reasons (*R. v. Starr*, *supra*, at p. 516), Iacobucci J. makes the important point that the admissibility of hearsay is tied to the purpose for which the evidence is tendered. The requirements for admissibility, whether under an established common law exception or under the principled approach, have to be examined in the context of the purpose for which the evidence is tendered. Hearsay evidence offered for one purpose may clear all admissibility hurdles, but the same evidence offered for a different purpose may not.

35 In the case at bar, the Crown offered the statements as evidence that the appellant actually uttered the threats attributed to him by Ms. Heimbecker in her statements to the Litts. Given that purpose, the admissibility of the statement allegedly made by the appellant to Ms. Heimbecker should have been addressed separately and in addition to the admissibility of the statement made by Ms. Heimbecker to the Litts. The trial judge did not have the benefit of *R. v. Starr*, *supra*, and understandably did not follow the analytical path cut in *R. v. Starr*. Fortunately, his failure to do so did no harm.

36 It is beyond dispute that had Ms. Heimbecker lived or had a third party overheard the alleged threats by the appellant, Ms. Heimbecker or that third party could have testified that the appellant threatened the deceased. The evidence would have been admissible as an admission offered by the Crown to prove motive and, therefore, intent: *R. v. Jackson* (1980), 57 C.C.C. (2d) 154 (Ont. C.A.), at 168; *R. v. Krugel*, *supra*, at pp. 391-93; *R. v. Merz* (1999), 140 C.C.C. (3d) 259 (Ont. C.A.), at 277-78, application for leave to appeal dismissed S.C.C. Bulletin 2000, p. 1352 [(2000), 147 C.C.C. (3d) vi (note) (S.C.C.)].

37 Admissions, which in the broad sense refer to any statement made by a litigant and tendered as evidence at trial by the opposing party, are admitted without any necessity/reliability analysis. [2] As Sopinka J. explained in *R. v. Dipietro* (1993), 85 C.C.C. (3d) 97 (S.C.C.), at 104:

> The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated

> can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-6, quoted in McCormick on Evidence, *ibid.*, p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases [emphasis added].

38 The applicability of the rule governing the admissibility of admissions distinguishes this case from *R. v. Starr*, *supra*. Here, the first level of hearsay involves an admission by the appellant. In *Starr*, *supra*, the tendered statement could not be attributed to the accused.

39 Had the trial judge given separate consideration to the admissibility of the alleged statement made by the appellant to Ms. Heimbecker, he would have concluded that the hearsay rule posed no obstruction to the admissibility of that statement. The real hearsay problem arose because Ms. Heimbecker, the person to whom the threat was allegedly made, was not available to testify at trial. The crucial question was whether the circumstances in which Ms. Heimbecker made the statements to the Litts provided sufficient *indicia* of trustworthiness to permit the Litts to tell the jury what Ms. Heimbecker had said, even though Ms. Heimbecker was unavailable for cross-examination. The inquiry conducted by the trial judge was directed at that very question. He decided, relying primarily on the absence of any motive to fabricate, that the out-of-court statement was sufficiently reliable to warrant its admissibility. The absence of a motive to fabricate is an important consideration: *R. v. Smith*, *supra*, at p. 272; *R. v. Merz*, *supra*, at pp. 276-77; *R. v. Walker*, *supra*, at p. 45.

40 The circumstances surrounding the making of the statement which potentially contributed to its reliability went largely unchallenged. The cross-examination was directed at the reliability of the Litts' evidence concerning the contents of the statements made to them by Ms. Heimbecker. In my view, the circumstances surrounding the taking of the statements were such as to permit the trial judge to conclude that the reliability threshold had been crossed. He did not err in admitting the statement as evidence that the appellant had threatened Ms. Heimbecker.

(d) The instruction to the jury

41 The fourth submission by counsel for the appellant accepts that the Litts could testify as to the statements made by Ms. Heimbecker, but challenges the trial judge's instructions in respect of those statements. At the outset of the instructions on the statements, the trial judge told the jury that out-of-court statements were generally not put before a jury, but that if the declarant of those statements was unable to testify "and it is considered reliable evidence, the courts have ruled it can be heard". The trial judge went on to review the contents of the Litts' statements and to instruct the jury at length on how it should assess the reliability of that evidence. His instructions mirrored those outlined in *R. v. A. (S.)* (1992), 76 C.C.C. (3d) 522 (Ont. C.A.). Finally, the trial judge reminded the jury of the evidence given by other friends of Ms. Heimbecker to the effect that she had never told them that the appellant threatened her.

42 The admissibility of evidence is a question for the trial judge. There is no need to explain to a jury the criteria governing admissibility or the trial judge's evaluation of that criteria. The explanation is at best superfluous and at worst may taint the jury's fact-finding function if there is an overlap between the test for admissibility and the criteria to be considered by the jury in assessing the evidence: *R. v. Gilling* (1997), 117 C.C.C. (3d) 444 (Ont. C.A.), at 449-50.

43 The trial judge should not have averted to any determination of reliability made prior to the evidence going before the jury. I am satisfied, however, that his isolated, cryptic, and somewhat oblique reference to the reliability determination made prior to admissibility caused no prejudice to the appellant. The trial judge told the jury that it was their job to decide the credibility and reliability of all of the evidence, including the statements. He reviewed at some length the considerations relevant to the jury's determination of the reliability of Ms. Heimbecker's statements. He told the jury on two occasions that it should proceed with caution before acting on those statements. The jury would have understood that it was their function to assess the reliability of the statements. My conclusion is strengthened by the observation of counsel for the appellant at trial. Counsel indicated that with one exception, the instructions on Ms. Heimbecker's out-of-court statements were "a model". His objection was not the objection raised on appeal.

V

44 Although I am satisfied that the errors as alleged by the appellant have not been established, I will consider the application of the *curative proviso* on the assumption that Ms. Heimbecker's statements to the Litts should not have been before the jury. Given the appellant's admission that he shot Ms. Heimbecker and unlawfully caused her death, there were two live issues at trial: did the appellant have the intent to commit murder as defined in s. 229(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, and if so was the murder first or second degree murder? The characterization of the murder as first or second degree murder depended on whether the Crown could prove either that the murder was planned and deliberate or that it occurred in the course of a forcible confinement.

45 The Crown's case on planning and deliberation was strong, but its contention that the homicide occurred in the course of a forcible confinement was virtually uncontested. On the appellant's own evidence, he confined Ms. Heimbecker for some time before shooting her. Furthermore, on his evidence the shooting occurred while Ms. Heimbecker was still confined by him and under his domination. His statement that he wanted Ms. Heimbecker "to suffer" is consistent only with confinement for the purpose of domination.

46 The only argument raised at trial against the contention that the homicide occurred during a confinement was that Ms. Mathur's attempt to gain entry to the apartment terminated the confinement. This argument had no merit and was not renewed on appeal. Ms. Mathur's aborted effort to gain entry to the apartment had no effect on the confinement, except to demonstrate that the appellant's domination over Ms. Heimbecker continued. If the jury concluded that the appellant was guilty of murder, a verdict of first degree murder was the only reasonably possible verdict in light of the ongoing confinement of Ms. Heimbecker: *R. v. Kimberley* (2001), 157 C.C.C. (3d) 129 (Ont. C.A.), at 163, leave to appeal to S.C.C. refused (S.C.C.); *R. v. J. (J.)*, [2002] O.J. No. 2365 (Ont. C.A.) at paras. 39-41.

47 Intent was the crucial issue at trial. The statements made to the Litts were relevant to the appellant's intent. Counsel for the appellant submits that they were central to the Crown's case that the appellant had the necessary intent for murder. In support of this argument, counsel refers to the prominence given to the appellant's words "If I can't have you, nobody will" by Crown counsel in her closing address.

48 The appellant's alleged motive was an important part of the Crown's case. The threats described by the Litts offered cogent evidence of that motive. There was, however, abundant evidence apart from the threats that the appellant was very angry over the break-up and had decided to kill Ms. Heimbecker if she would not reconcile with him. His conduct on the day before and the day of the homicide, and his conduct at Ms. Heimbecker's apartment paint a graphic picture of a person who was pursuing two options: either reconciliation as symbolized by the presents, or murder as symbolized by the loaded sawed-off shotgun. The manner in which the appellant killed Ms. Heimbecker also provides very strong evidence of intention. He retrieved the loaded shotgun only after the final rejection by Ms. Heimbecker. After confining Ms. Heimbecker and her roommate, he directed them to opposite sides of the room. Shortly afterwards, he fired six shots, four of which struck Ms. Heimbecker from close range. The final shot was delivered to Ms. Heimbecker's head while she was lying on the ground. The evidence that the appellant had packed his belongings and withdrawn $400 in cash before going to the apartment and immediately fled to the United States after the killing is also a strong indication that he went to the apartment intending to kill Ms. Heimbecker and flee the jurisdiction if there was no reconciliation.

49 Against this mass of evidence was the appellant's testimony that the first shot was fired accidentally, a highly unlikely assertion given the mechanisms necessary to fire the gun, and his claim that the subsequent five shots were fired without any intention after he became very angry and lost control. Extreme anger is not a stand-alone defence. In some, if not many cases where anger is part of the emotional mix, it will generate the necessary criminal intention for murder: *R. c. Parent*, [2001] 1 S.C.R. 761 (S.C.C.). The appellant's evidence that he fired in extreme anger was not inconsistent with the existence of an intention to kill.

50 In *R. v. Khan* (2001), 160 C.C.C. (3d) 1 (S.C.C.), at 22, Arbour J. said that s. 686(1)(b)(iii) could be applied:

> [I]f it is clear that the evidence pointing to the guilt of the accused is so overwhelming that any other verdict but a conviction would be impossible . . .

51 Entirely apart from the evidence of the statements made to the Litts, the evidence against the appellant on the issue of intent was overwhelming. It can be safely said that no reasonable jury could have had a doubt about the appellant's intent. If the statements to the Litts should not have been admitted, or if there was misdirection in respect of those statements, the *curative proviso* can be safely applied to dismiss the appeal and affirm the conviction.

52 I would dismiss the appeal.

Austin J.A.:

I agree.

Armstrong J.A.:

I agree.

Appeal dismissed.

Footnotes

* Faculty of Law, Queen's University.

2 This definition is taken from J. Sopinka, S. Lederman & A. Bryant, *The Law of Evidence in Canada* 2nd ed. (Toronto: Butterworths, 1999) at p. 291.

TAB 45

Her Majesty The Queen *Appellant*

v.

Ramnarine Khelawon *Respondent*

and

Attorney General of British Columbia and Criminal Lawyers' Association (Ontario) *Interveners*

Sa Majesté la Reine *Appelante*

c.

Ramnarine Khelawon *Intimé*

et

Procureur général de la Colombie-Britannique et Criminal Lawyers' Association (Ontario) *Intervenants*

Indexed as: R. *v.* Khelawon

Neutral citation: 2006 SCC 57.

File No.: 30857.

2005: December 16; 2006: December 14.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Hearsay — Admissibility — Trial judge admitting deceased complainants' hearsay statements to police into evidence — Whether statements admissible under principled exception to hearsay rule — Factors to be considered in determining whether hearsay statements sufficiently reliable to be admissible.

In 1999, C, a cook who worked at a retirement home, found S, a resident of the home, badly injured in his room. His belongings were packed in garbage bags. S told C that the accused, the manager of the home, had beaten him and threatened to kill him if he did not leave the home. C took S to her apartment and cared for him for a few days. She then brought S to a doctor. The doctor testified that he found three fractured ribs and bruises that were consistent with S's allegation of assault but which also could have resulted from a fall. The next day, C took S to the police and S gave a videotaped statement alleging that the accused had assaulted him and threatened to kill him. The statement was not under oath but S answered "yes" when asked if he understood it was important to tell the truth and that he could be charged if he did not tell the truth. Medical records seized from the retirement home described S as "angry", "aggressive", "depressed" and "paranoid", and

Répertorié : R. *c.* Khelawon

Référence neutre : 2006 CSC 57.

Nº du greffe : 30857.

2005 : 16 décembre; 2006 : 14 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Preuve — Ouï-dire — Admissibilité — Juge du procès admettant en preuve les déclarations relatées que des plaignants décédés avaient faites à la police — Ces déclarations étaient-elles admissibles en vertu de l'exception raisonnée à la règle du ouï-dire? — Facteurs à considérer pour décider si des déclarations relatées sont suffisamment fiables pour être admissibles.

En 1999, C, une cuisinière dans une maison de retraite, a trouvé S, un résident de cet établissement, blessé grièvement dans sa chambre. Ses effets personnels étaient entassés dans des sacs à ordures. S a raconté à C que l'accusé, directeur de l'établissement, l'avait battu et avait menacé de le tuer s'il ne quittait pas la maison de retraite. C a conduit S à son appartement et s'est occupée de lui pendant quelques jours. Elle a ensuite conduit S chez un médecin. Ce dernier a témoigné qu'il avait décelé trois côtes fracturées et des ecchymoses qui pouvaient avoir résulté de l'agression alléguée par S, mais aussi d'une chute. Le lendemain, C a conduit S au poste de police, où S a fait une déclaration enregistrée sur bande vidéo, dans laquelle il alléguait que l'accusé l'avait agressé et avait menacé de le tuer. Cette déclaration n'a pas été faite sous serment, mais S a répondu « oui » lorsqu'on lui a demandé s'il comprenait qu'il était important de dire la vérité et

revealed that he had been treated for paranoid psychosis and depression. At trial, a psychiatrist who testified at the *voir dire* concluded that S had the capacity to communicate evidence and understood at the time he made his statement to the police that it was important to tell the truth. The defence argued that C influenced S to complain out of spite because the accused previously had terminated C's employment.

The police attended the retirement home where more residents complained that they had been assaulted by the accused. The accused was charged in respect of five complainants but, by the time of the trial, four complainants, including S and D, had died of causes unrelated to the alleged assaults and the fifth was no longer competent to testify. Only one complainant had testified at the preliminary inquiry. The central issue at trial was whether the complainants' hearsay statements should be received in evidence. The trial judge admitted some of the hearsay based in large part on the striking similarity between the statements. The trial judge ultimately found videotaped statements given by S and D to the police sufficiently credible to found convictions for aggravated assault and uttering a death threat in respect of S, as well as assault causing bodily harm and assault with a weapon in respect of D. The accused was acquitted on the remaining counts. On appeal, a majority of the Court of Appeal excluded all of the hearsay statements and acquitted the accused on all charges. The dissenting judge would have upheld the convictions in respect of S. The Crown appealed as of right from the acquittals in respect of S and was denied leave to appeal from the acquittals in respect of D.

Held: The appeal should be dismissed and the acquittals affirmed.

Hearsay evidence is presumptively inadmissible unless an exception to the hearsay rule applies, primarily because of a general inability to test its reliability. The essential defining features of hearsay are the fact that the out-of-court statement is adduced to prove the truth of its contents and the absence of a contemporaneous opportunity to cross-examine the declarant. Hearsay includes an out-of-court statement made by a witness who testifies in court if the statement is tendered to prove the truth of its contents. In some

que des accusations pourraient être portées contre lui s'il mentait. Les dossiers médicaux saisis à la maison de retraite décrivaient S comme étant « en colère », « agressif », « dépressif » et « paranoïaque », en plus de révéler qu'il avait été traité pour une psychose paranoïaque et une dépression. Au procès, une psychiatre ayant témoigné lors du voir-dire a conclu que S avait la capacité de communiquer les faits dans son témoignage et qu'il comprenait l'importance de dire la vérité au moment où il a fait sa déclaration à la police. La défense a prétendu que C avait amené S à porter plainte pour se venger de l'accusé qui avait mis fin à son emploi auparavant.

Des policiers se sont rendus à la maison de retraite où d'autres résidents se sont plaints d'avoir été agressés par l'accusé. Ce dernier a fait l'objet d'accusations à l'égard de cinq plaignants, mais, au moment du procès, quatre plaignants, dont S et D, étaient décédés de causes non liées aux agressions alléguées, et le cinquième n'était plus habile à témoigner. Un seul plaignant avait témoigné à l'enquête préliminaire. La principale question en litige était de savoir s'il y avait lieu d'admettre en preuve les déclarations relatées des plaignants. Le juge du procès a admis une partie de la preuve par ouï-dire en raison, dans une large mesure, de la similitude frappante des déclarations. En fin de compte, il a estimé que les déclarations enregistrées sur bande vidéo que S et D avaient faites à la police étaient suffisamment crédibles pour justifier des déclarations de culpabilité de voies de fait graves et de menaces de mort à l'endroit de S, ainsi que d'agression ayant causé des lésions corporelles et d'agression armée à l'endroit de D. L'accusé a été acquitté quant aux autres chefs. En appel, la Cour d'appel à la majorité a exclu toutes les déclarations relatées et a acquitté l'accusé relativement à toutes les accusations. Le juge dissident aurait maintenu les déclarations de culpabilité relatives à S. Le ministère public a formé un pourvoi de plein droit contre les acquittements relatifs à S et s'est vu refuser l'autorisation d'appeler à l'égard de ceux relatifs à D.

Arrêt : Le pourvoi est rejeté et les acquittements sont confirmés.

La preuve par ouï-dire est présumée inadmissible à moins qu'une exception à la règle du ouï-dire ne s'applique, essentiellement en raison de l'incapacité générale d'en vérifier la fiabilité. Les caractéristiques déterminantes essentielles du ouï-dire sont le fait que la déclaration extrajudiciaire soit présentée pour établir la véracité de son contenu et l'impossibilité de contre-interroger le déclarant au moment précis où il fait cette déclaration. Le ouï-dire inclut une déclaration extrajudiciaire d'un témoin qui dépose en cour lorsque cette

circumstances, hearsay evidence presents minimal dangers and its exclusion rather than its admission would impede accurate fact finding. Hence over time a number of traditional exceptions to the exclusionary rule were created by the courts. Hearsay evidence that does not fall under a traditional exception may still be admitted under the principled approach if indicia of reliability and necessity are established on a *voir dire*. The reliability requirement is aimed at identifying those cases where the concerns arising from the inability to test the evidence are sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. The reliability requirement will generally be met by showing (1) that there is no real concern about whether the statement is true or not because of the circumstances in which it came about; or (2) that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested by means other than contemporaneous cross-examination. These two principal ways of satisfying the reliability requirement are not mutually exclusive categories and they assist in identifying the factors that need to be considered on the admissibility inquiry. [2-3] [35] [37] [42] [49] [61-63] [65]

The trial judge acts as a gatekeeper in making the preliminary assessment of the threshold reliability of a hearsay statement and leaves the ultimate determination of its worth to the fact finder. The factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. Comments to the contrary in previous decisions of this Court, including *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40, should no longer be followed. In determining admissibility, the court should adopt a more functional approach focussed on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. Whether certain factors will go only to ultimate reliability will depend on the context. In each case, the inquiry is limited to determining the evidentiary question of admissibility. Corroborating or conflicting evidence may be considered in the admissibility inquiry in appropriate cases. When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need for the trial judge to inquire further into the

déclaration est présentée pour établir la véracité de son contenu. Dans certains cas, la preuve par ouï-dire présente des dangers minimes et son exclusion au lieu de son admission gênerait la constatation exacte des faits. C'est ainsi que les tribunaux ont établi, au fil du temps, un certain nombre d'exceptions traditionnelles à la règle d'exclusion. La preuve par ouï-dire qui ne relève pas d'une exception traditionnelle peut tout de même être admissible suivant la méthode d'analyse raisonnée, si l'existence d'indices de fiabilité et de nécessité est établie lors d'un voir-dire. L'exigence de fiabilité vise à déterminer les cas où les préoccupations découlant de l'impossibilité de vérifier la preuve sont suffisamment surmontées pour justifier l'admission de cette preuve à titre d'exception à la règle d'exclusion générale. En général, il est possible de satisfaire à l'exigence de fiabilité en démontrant (1) qu'il n'y a pas de préoccupation réelle quant au caractère véridique ou non de la déclaration, vu les circonstances dans lesquelles elle a été faite, ou (2) que le fait que la déclaration soit relatée ne suscite aucune préoccupation réelle étant donné que, dans les circonstances, sa véracité et son exactitude peuvent néanmoins être suffisamment vérifiées autrement qu'au moyen d'un contre-interrogatoire effectué au moment précis où elle est faite. Ces deux principales façons de satisfaire à l'exigence de fiabilité ne constituent pas des catégories mutuellement exclusives et peuvent aider à reconnaître les facteurs à considérer pour déterminer l'admissibilité. [2-3] [35] [37] [42] [49] [61-63] [65]

Le juge du procès joue le rôle de gardien en effectuant cette appréciation préliminaire du seuil de fiabilité d'une déclaration relatée et laisse au juge des faits le soin d'en déterminer en fin de compte la valeur. Les facteurs à considérer lors de l'examen de l'admissibilité ne sauraient être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Plus exactement, tous les facteurs pertinents devraient être considérés, y compris, dans les cas appropriés, la présence d'éléments de preuve à l'appui ou contradictoires. Les observations contraires formulées dans la jurisprudence de notre Cour, dont l'arrêt *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40, ne devraient plus être suivies. Pour se prononcer sur l'admissibilité, le tribunal devrait adopter une approche plus fonctionnelle axée sur les dangers particuliers que comporte la preuve par ouï-dire qu'on cherche à présenter, de même que sur les caractéristiques ou circonstances que la partie qui veut présenter la preuve invoque pour écarter ces dangers. La question de savoir si certains facteurs toucheront uniquement la fiabilité en dernière analyse dépendra du contexte. Dans chaque cas, l'examen ne porte que sur la question de l'admissibilité en matière de preuve. Lors de l'examen de l'admissibilité, il est possible, dans les cas appropriés, de prendre en considération une preuve

likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not. [2] [4] [92-93]

In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively inadmissible. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary or the reliability of which is neither readily apparent from the trustworthiness of its contents nor capable of being meaningfully tested by the ultimate trier of fact. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. As in all cases, the trial judge has a residual discretion to exclude admissible hearsay evidence where its prejudicial effect is out of proportion to its probative value. [2-3]

R. v. Khan, [1990] 2 S.C.R. 531, and *R. v. Smith*, [1992] 2 S.C.R. 915, are examples where the reliability requirement was met because the circumstances in which hearsay statements came about provided sufficient comfort in their truth and accuracy. *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, and *R. v. Hawkins*, [1996] 3 S.C.R. 1043, provide examples where threshold reliability was based on the presence of adequate substitutes for traditional safeguards relied upon to test the evidence. Similarly, in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, the striking similarities between the complainant's prior inconsistent out-of-court statement and the accused's independent statement were so compelling that the very high reliability of the complainant's statement rendered its substantive admission necessary. [67-68] [73] [82] [86] [88]

S's videotaped statement to the police was inadmissible. Although S's death before trial made his hearsay statement necessary, the statement was not sufficiently reliable to overcome the dangers it presented. The circumstances in which it came about did not provide reasonable assurances of inherent reliability. A number of serious issues arise including: whether S was mentally

corroborante ou contradictoire. Dans le cas où l'exigence de fiabilité est remplie parce que le juge des faits dispose d'une base suffisante pour apprécier la véracité et l'exactitude de la déclaration, il n'est pas nécessaire que le juge du procès vérifie davantage si la déclaration est susceptible d'être véridique. Lorsque la fiabilité dépend de la fiabilité inhérente de la déclaration, le juge du procès doit examiner les facteurs tendant à démontrer que la déclaration est véridique ou non. [2] [4] [92-93]

En tranchant la question du seuil de fiabilité, le juge du procès doit être conscient que la preuve par ouï-dire est présumée inadmissible. Son rôle est de prévenir l'admission d'une preuve par ouï-dire qui n'est pas nécessaire ou dont la fiabilité ne ressort pas clairement de la véracité de son contenu ou ne peut, en dernière analyse, être vérifiée utilement par le juge des faits. Si la partie qui veut présenter la preuve ne peut satisfaire au double critère de la nécessité et de la fiabilité, la règle d'exclusion générale l'emporte. Dans une affaire criminelle, l'incapacité de l'accusé de vérifier la preuve risque de compromettre l'équité du procès, d'où la dimension constitutionnelle de la règle. Comme dans tout litige, le juge du procès a le pouvoir discrétionnaire résiduel d'exclure une preuve admissible lorsque son effet préjudiciable est disproportionné par rapport à sa valeur probante. [2-3]

Les arrêts *R. c. Khan*, [1990] 2 R.C.S. 531, et *R. c. Smith*, [1992] 2 R.C.S. 915, sont des exemples où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles des déclarations relatées avaient été faites étaient suffisamment rassurantes quant à leur véracité et à leur exactitude. Les arrêts *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, et *R. c. Hawkins*, [1996] 3 R.C.S. 1043, sont des exemples où le seuil de fiabilité reposait sur l'existence de substituts adéquats aux garanties traditionnelles invoquées pour vérifier la preuve. De même, dans l'arrêt *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764, les similitudes frappantes entre la déclaration extrajudiciaire incompatible que la plaignante avait faite antérieurement et celle que l'accusé avait faite de façon indépendante étaient si convaincantes qu'il était nécessaire d'admettre quant au fond la déclaration de la plaignante en raison de sa très grande fiabilité. [67-68] [73] [82] [86] [88]

La déclaration enregistrée sur bande vidéo que S avait faite à la police était inadmissible. Même s'il était nécessaire de recourir à la déclaration relatée de S parce que celui-ci était décédé avant l'ouverture du procès, cette déclaration n'était pas suffisamment fiable pour écarter les dangers qu'elle présentait. Les circonstances dans lesquelles elle avait été faite ne constituaient pas

competent; whether he understood the consequences of making his statement; whether he was influenced by C; whether his statement was motivated by dissatisfaction about the management of the home; and, whether his injuries were caused by a fall. S's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and on the trier of fact's ability to properly assess its worth. While the presence of a striking similarity between statements from different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case, the statements made by the other complainants in this case posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of S's allegations. The admission of the evidence risked impairing the fairness of the trial. Furthermore, S's evidence could have been taken before his death in the presence of a commissioner and the accused or his counsel thereby preserving both the evidence and the rights of the accused. [7] [108]

Cases Cited

Modified: *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40; **explained:** *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Hawkins*, [1996] 3 S.C.R. 1043; **discussed:** *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; *Idaho v. Wright*, 497 U.S. 805 (1990); **referred to:** *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. O'Brien*, [1978] 1 S.C.R. 591; *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16.
Canadian Charter of Rights and Freedoms, s. 7.
Criminal Code, R.S.C. 1985, c. C-46, ss. 709 to 714.

Authors Cited

Paciocco, David M. "The Hearsay Exceptions: A Game of 'Rock, Paper, Scissors'", in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence*. Toronto: Irwin Law, 2004, 17.

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. III, 2nd ed. Boston: Little, Brown, 1923.

un gage raisonnable de fiabilité inhérente. Un certain nombre de questions sérieuses se posent, notamment celles de savoir si S jouissait de toutes ses facultés mentales, s'il comprenait les conséquences de sa déclaration, s'il a été influencé par C, si sa déclaration était motivée par une insatisfaction à l'égard de l'administration de la maison de retraite et si ses blessures étaient dues à une chute. L'impossibilité de contre-interroger S limitait substantiellement la capacité de l'accusé de vérifier la preuve et la capacité du juge des faits d'en déterminer correctement la valeur. Même si l'existence d'une similitude frappante entre les déclarations de divers plaignants pourrait bien être suffisamment probante pour justifier l'admission d'une preuve par ouï-dire dans un cas approprié, les déclarations des autres plaignants en l'espèce présentaient des difficultés encore plus grandes et n'étaient pas admissibles quant au fond pour aider à apprécier la fiabilité des allégations de S. L'admission de cette preuve risquait de compromettre l'équité du procès. En outre, la déposition de S aurait pu être prise, avant son décès, par un commissaire en présence de l'accusé ou de son avocat, ce qui aurait permis de préserver à la fois la preuve et les droits de l'accusé. [7] [108]

Jurisprudence

Arrêt modifié : *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40; **arrêts interprétés :** *R. c. Khan*, [1990] 2 R.C.S. 531; *R. c. Smith*, [1992] 2 R.C.S. 915; *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764; *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740; *R. c. Hawkins*, [1996] 3 R.C.S. 1043; **arrêts analysés :** *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; *Idaho c. Wright*, 497 U.S. 805 (1990); **arrêts mentionnés :** *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. O'Brien*, [1978] 1 R.C.S. 591; *R. c. Mapara*, [2005] 1 R.C.S. 358, 2005 CSC 23; *Dersch c. Canada (Procureur général)*, [1990] 2 R.C.S. 1505; *R. c. Rose*, [1998] 3 R.C.S. 262; *R. c. Mills*, [1999] 3 R.C.S. 668; *R. c. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. c. Czibulka* (2004), 189 C.C.C. (3d) 199.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7.
Code criminel, L.R.C. 1985, ch. C-46, art. 709 à 714.
Loi sur la preuve au Canada, L.R.C. 1985, ch. C-5, art. 16.

Doctrine citée

Paciocco, David M. « The Hearsay Exceptions : A Game of "Rock, Paper, Scissors" », in *Special Lectures of the Law Society of Upper Canada 2003 : The Law of Evidence*. Toronto : Irwin Law, 2004, 17.

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. III, 2nd ed. Boston : Little, Brown, 1923.

APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Armstrong and Blair JJ.A.) (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL), setting aside the accused's convictions. Appeal dismissed.

John S. McInnes and *Eliott Behar*, for the appellant.

Timothy E. Breen, for the respondent.

Alexander Budlovsky, for the intervener the Attorney General of British Columbia.

Louis P. Strezos and *Joseph Di Luca*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

CHARRON J. —

1. Overview

1 This appeal turns on the admissibility of hearsay statements under the principled case-by-case exception to the hearsay rule based on necessity and reliability. In particular, guidance is sought on what factors should be considered in determining whether a hearsay statement is sufficiently reliable to be admissible. This Court's decision in *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40, has generally been interpreted as standing for the proposition that circumstances "extrinsic" to the taking of the statement go to ultimate reliability only and cannot be considered by the trial judge in ruling on its admissibility. The decision has generated much judicial commentary and academic criticism on various grounds, including the difficulty of defining what constitutes an "extrinsic" circumstance and the apparent inconsistency between this holding in *Starr* and the Court's consideration of a semen stain on the declarant's clothing in *R. v. Khan*, [1990] 2 S.C.R. 531, the declarant's motive to lie in *R. v. Smith*, [1992] 2 S.C.R. 915, and most relevant to this case, the striking

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Rosenberg, Armstrong et Blair) (2005), 195 O.A.C. 11, 194 C.C.C. (3d) 161, 26 C.R. (6th) 1, [2005] O.J. No. 723 (QL), qui a annulé les déclarations de culpabilité prononcées contre l'accusé. Pourvoi rejeté.

John S. McInnes et *Eliott Behar*, pour l'appelante.

Timothy E. Breen, pour l'intimé.

Alexander Budlovsky, pour l'intervenant le procureur général de la Colombie-Britannique.

Louis P. Strezos et *Joseph Di Luca*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Version française du jugement de la Cour rendu par

LA JUGE CHARRON —

1. Aperçu

Le présent pourvoi porte sur l'admissibilité des déclarations relatées en vertu de l'exception raisonnée à la règle du ouï-dire, qui s'applique cas par cas et repose sur la nécessité et la fiabilité. Plus particulièrement, des indications sont requises sur les facteurs à considérer pour décider si une déclaration relatée est suffisamment fiable pour être admissible. L'arrêt de notre Cour *R. c. Starr*, [2000] 2 R.C.S. 144, 2000 CSC 40, est généralement interprété comme signifiant que les circonstances « extrinsèques » dans lesquelles la déclaration a été recueillie n'ont une incidence que sur sa fiabilité en dernière analyse et ne peuvent pas être prises en considération par le juge du procès lorsqu'il se prononce sur son admissibilité. Cet arrêt a suscité une multitude de commentaires dans la jurisprudence et de critiques dans la doctrine pour diverses raisons, dont la difficulté de définir ce qui constitue une circonstance « extrinsèque » et l'incohérence manifeste entre cette conclusion de l'arrêt *Starr* et le fait que la Cour a pris en considération une tache de sperme trouvée sur les vêtements de la déclarante dans l'affaire *R. c. Khan*,

similarities between statements in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764.

As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gatekeeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

[1990] 2 R.C.S. 531, la raison de mentir de la déclarante dans l'affaire *R. c. Smith*, [1992] 2 R.C.S. 915, et, ce qui est le plus pertinent en l'espèce, les similitudes frappantes entre les déclarations dans l'affaire *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764.

En général, tout élément de preuve pertinent est admissible. La règle excluant le ouï-dire est une exception bien établie à ce principe général. Bien qu'aucun raisonnement unique n'en sous-tende l'évolution historique, l'exclusion dont les déclarations relatées sont présumées faire l'objet tient essentiellement à l'incapacité générale d'en vérifier la fiabilité. Si le déclarant n'est pas présent en cour, il peut se révéler impossible de mettre à l'épreuve sa perception, sa mémoire, sa relation du fait en question ou sa sincérité. Il se peut que la déclaration elle-même ne fasse pas l'objet d'un compte rendu exact. Des erreurs, des exagérations ou des faussetés délibérées peuvent passer inaperçues et mener à des verdicts injustes. Ainsi, la règle interdisant le ouï-dire est censée accroître l'exactitude des conclusions de fait du tribunal et non entraver sa fonction de recherche de la vérité. Toutefois, la difficulté de déterminer la valeur de la preuve par ouï-dire varie selon le contexte. Dans certains cas, cette preuve présente des dangers minimes et son *exclusion* au lieu de son admission gênerait la constatation exacte des faits. C'est ainsi que les tribunaux ont établi, au fil du temps, un certain nombre d'exceptions à la règle. Tout comme les exceptions traditionnelles à la règle d'exclusion ont été largement conçues en fonction des circonstances où les dangers liés à l'admission de la preuve étaient suffisamment atténués, il doit en être de même pour l'exception générale raisonnée à la règle du ouï-dire. Lorsqu'il est nécessaire de recourir à ce type de preuve, une déclaration relatée peut être admise si son contenu est fiable en raison de la manière dont elle a été faite ou si les circonstances permettent, en fin de compte, au juge des faits d'en déterminer suffisamment la valeur. Si la partie qui veut présenter la preuve ne peut satisfaire au double critère de la nécessité et de la fiabilité, la règle d'exclusion générale l'emporte. Le juge du procès joue le rôle de gardien en effectuant cette appréciation préliminaire du « seuil de fiabilité » de la déclaration relatée et laisse au juge des faits le soin d'en déterminer en fin de compte la valeur.

3 The distinction between threshold and ultimate reliability reflects the important difference between admission and reliance. Admissibility is determined by the trial judge based on the governing rules of evidence. Whether the evidence is relied upon to decide the issues in the case is a matter reserved for the ultimate trier of fact to decide in the context of the entirety of the evidence. The failure to respect this distinction would not only result in the undue prolongation of admissibility hearings, it would distort the fact-finding process. In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively *inadmissible*. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. Concerns over trial fairness not only permeate the decision on admissibility, but also inform the residual discretion of the trial judge to exclude the evidence even if necessity and reliability can be shown. As in all cases, the trial judge has the discretion to exclude admissible evidence where its prejudicial effect is out of proportion to its probative value.

La distinction entre seuil de fiabilité et fiabilité en dernière analyse reflète la différence importante entre admettre un élément de preuve et s'y fier. Le juge du procès détermine l'admissibilité en fonction des règles de preuve applicables. C'est au juge des faits qu'il appartient en fin de compte de décider, au regard de l'ensemble de la preuve, s'il y a lieu de se fier à cet élément de preuve pour trancher les questions en litige. L'omission de respecter cette distinction aurait pour effet non seulement de prolonger indûment les audiences portant sur l'admissibilité, mais également de fausser le processus de constatation des faits. En tranchant la question du seuil de fiabilité, le juge du procès doit être conscient que la preuve par ouï-dire est présumée *inadmissible*. Son rôle est de prévenir l'admission d'une preuve par ouï-dire qui n'est pas nécessaire pour trancher la question en litige ou dont la fiabilité ne ressort pas clairement de la véracité de son contenu ou ne peut, en dernière analyse, être vérifiée utilement par le juge des faits. Dans une affaire criminelle, l'incapacité de l'accusé de vérifier la preuve risque de compromettre l'équité du procès, d'où la dimension constitutionnelle de la règle. Les préoccupations relatives à l'équité du procès imprègnent non seulement la décision concernant l'admissibilité, mais encore guident l'exercice du pouvoir discrétionnaire résiduel du juge du procès d'exclure des éléments de preuve même si leur nécessité et leur fiabilité peuvent être démontrées. Comme dans tout litige, le juge du procès a le pouvoir discrétionnaire d'exclure une preuve admissible lorsque son effet préjudiciable est disproportionné par rapport à sa valeur probante.

4 As I will explain, I have concluded that the factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Comments to the contrary in previous decisions of this Court should no longer be followed. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.

Comme je l'expliquerai, je suis arrivée à la conclusion que les facteurs à considérer lors de l'examen de l'admissibilité ne sauraient être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Les observations contraires formulées dans la jurisprudence de notre Cour ne devraient plus être suivies. Plus exactement, tous les facteurs pertinents devraient être considérés, y compris, dans les cas appropriés, la présence d'éléments de preuve à l'appui ou contradictoires. Dans chaque cas, l'examen doit être fonction des dangers particuliers que présente la preuve et ne porter que sur la question de l'admissibilité.

In May 1999, five elderly residents of a retirement home told various people that they were assaulted by the manager of the home, the respondent, Ramnarine Khelawon. At the time of trial, approximately two and a half years later, four of the complainants had died of causes unrelated to the assaults, and the fifth was no longer competent to testify. Only one of the complainants had testified at the preliminary inquiry. The central issue at trial was whether the hearsay statements provided by the complainants had sufficient threshold reliability to be received in evidence. Grossi J. held that the hearsay statements from each of the complainants were sufficiently reliable to be admitted in evidence, based in large part on the "striking" similarity between them. He ultimately found Mr. Khelawon guilty of the offences in respect of two of the complainants, Mr. Skupien and Mr. Dinino, and acquitted him on the remaining counts. Mr. Khelawon was sentenced to two and a half years of imprisonment for the offences relating to Mr. Skupien and an additional two years for the offences related to Mr. Dinino.

5 En mai 1999, cinq personnes âgées résidant dans une maison de retraite ont dit à différentes personnes que le directeur de l'établissement, l'intimé Ramnarine Khelawon, les avaient agressées. Au moment du procès, environ deux ans et demi plus tard, quatre des plaignants étaient décédés de causes non liées aux agressions et le cinquième n'était plus habile à témoigner. Un seul des plaignants avait témoigné à l'enquête préliminaire. La principale question en litige était de savoir si les déclarations relatées des plaignants atteignaient un seuil de fiabilité suffisant pour qu'elles puissent être admises en preuve. Le juge Grossi a conclu que les déclarations relatées de chacun des plaignants étaient suffisamment fiables pour être admises en preuve, en raison, dans une large mesure, de leur similitude « frappante ». En fin de compte, il a déclaré M. Khelawon coupable des infractions relatives à deux des plaignants, soit MM. Skupien et Dinino, et l'a acquitté à l'égard des autres chefs. M. Khelawon a été condamné à une peine d'emprisonnement de deux ans et demi pour les infractions relatives à M. Skupien et à une peine additionnelle de deux ans pour celles relatives à M. Dinino.

On appeal to the Court of Appeal for Ontario, Rosenberg J.A. (Armstrong J.A. concurring) excluded all statements and acquitted Mr. Khelawon. Blair J.A., in dissent, would have upheld the convictions in respect of Mr. Skupien only. The Crown appeals to this Court as of right, seeking to restore the convictions relating to Mr. Skupien. The Crown also sought but was denied leave in respect of the charges relating to Mr. Dinino.

6 Lors de l'appel devant la Cour d'appel de l'Ontario, le juge Rosenberg (avec l'appui du juge Armstrong) a exclu toutes les déclarations et a acquitté M. Khelawon. Le juge Blair, dissident, aurait pour sa part maintenu les déclarations de culpabilité relatives à M. Skupien seulement. Dans son pourvoi de plein droit devant notre Cour, le ministère public sollicite le rétablissement des déclarations de culpabilité relatives à M. Skupien. Il a également sollicité l'autorisation d'appeler des accusations relatives à M. Dinino, mais celle-ci lui a été refusée.

In my view, Mr. Skupien's videotaped statement to the police was inadmissible. Although Mr. Skupien's death before the commencement of the trial made it necessary to resort to his evidence in this form, the statement was not sufficiently reliable to overcome the dangers it presented. The circumstances in which it came about did not provide reasonable assurances of inherent reliability. To the contrary, they gave rise to a number of serious issues including: whether Mr. Skupien was

7 À mon avis, la déclaration enregistrée sur bande vidéo que M. Skupien a faite à la police était inadmissible. Même s'il était nécessaire de recourir à ce type de témoignage de M. Skupien parce que celui-ci était décédé avant l'ouverture du procès, la déclaration n'était pas suffisamment fiable pour écarter les dangers qu'elle présentait. Les circonstances dans lesquelles elle a été faite ne constituaient pas un gage raisonnable de fiabilité inhérente. Au contraire, elles soulevaient un certain nombre de

mentally competent, whether he understood the consequences of making his statement, whether he was influenced in making the allegations by a disgruntled employee who had been fired by Mr. Khelawon, whether his statement was motivated by a general dissatisfaction about the management of the home, and whether his injuries were caused by a fall rather than the assault. In these circumstances, Mr. Skupien's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and, in turn, on the trier of fact's ability to properly assess its worth. The statements made by other complainants posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of Mr. Skupien's allegations. In all the circumstances, particularly given that the Crown's case against Mr. Khelawon was founded on the hearsay statement, the admission of the evidence risked impairing the fairness of the trial and should not have been permitted. As Rosenberg J.A. aptly noted, the admission of the evidence under the principled approach to the hearsay rule is not the only way the evidence of witnesses who may not be available for trial may be preserved. Sections 709 to 714 of the *Criminal Code*, R.S.C. 1985, c. C-46, expressly contemplate this eventuality and provide a procedure for the taking of the evidence before a commissioner in the presence of the accused or his counsel thereby preserving both the evidence and the rights of the accused.

8 For reasons that follow, I would therefore dismiss the appeal and affirm the acquittals.

2. Background

9 Mr. Khelawon was charged with aggravated assault on Teofil Skupien and threatening to cause him death. He was also charged with aggravated assault and assault with a weapon on Atillio Dinino, and assault causing bodily harm on three other complainants. The offences were alleged to have occurred during the month of May 1999 and, at the time, all the complainants were residents

questions sérieuses, notamment celles de savoir si M. Skupien jouissait de toutes ses facultés mentales, s'il comprenait les conséquences de sa déclaration, s'il avait été influencé, dans ses allégations, par une employée mécontente qui avait été congédiée par M. Khelawon, si sa déclaration était motivée par une insatisfaction générale à l'égard de l'administration de la maison de retraite et si ses blessures étaient dues à une chute plutôt qu'à l'agression. Dans ces circonstances, l'impossibilité de contre-interroger M. Skupien limitait substantiellement la capacité de l'accusé de vérifier la preuve et, partant, la capacité du juge des faits d'en déterminer correctement la valeur. Les déclarations des autres plaignants présentaient des difficultés encore plus grandes et n'étaient pas admissibles quant au fond pour aider à apprécier la fiabilité des allégations de M. Skupien. Compte tenu de l'ensemble des circonstances et, en particulier, du fait que la preuve du ministère public contre M. Khelawon reposait sur la déclaration relatée, l'admission de ce témoignage risquait de compromettre l'équité du procès et n'aurait pas dû être autorisée. Comme l'a judicieusement fait remarquer le juge Rosenberg, l'admission de la preuve suivant la méthode d'analyse raisonnée de la règle du ouï-dire n'est pas la seule façon de préserver le témoignage de personnes qui peuvent être dans l'impossibilité de se présenter au procès. Les articles 709 à 714 du *Code criminel*, L.R.C. 1985, ch. C-46, envisagent expressément cette éventualité et établissent une procédure de prise de déposition par un commissaire en présence de l'accusé ou de son avocat, ce qui permet de préserver à la fois la preuve et les droits de l'accusé.

Pour les motifs qui suivent, je suis d'avis de rejeter le pourvoi et de confirmer les acquittements.

2. Contexte

M. Khelawon a été accusé de voies de fait graves et de menaces de mort à l'endroit de Teofil Skupien. Il a également été accusé de voies de faits graves et d'agression armée à l'endroit d'Atillio Dinino ainsi que d'agression ayant causé des lésions corporelles à trois autres plaignants. Ces infractions auraient été commises au cours du mois de mai 1999 et, à l'époque, tous les plaignants étaient des

at the Bloor West Village Retirement Home. Mr. Khelawon was the manager of the retirement home and his mother was the owner. As indicated earlier, none of the complainants was available to testify at trial. Hence, the central issue concerned the admissibility of their hearsay statements made to various people. There were 10 statements in total, four of which consisted of videotaped statements made to the police. The trial, held before Grossi J. without a jury, proceeded essentially as a *voir dire* into the admissibility of the evidence, with counsel agreeing that it would not be necessary to repeat the evidence about any statements later ruled admissible. None of the statements fit within any traditional exception to the hearsay rule. Their admissibility, rather, was contingent upon the Crown meeting the twin requirements of necessity and reliability under the principled approach to the hearsay rule, as established in *Khan*, *Smith* and, later, *Starr.*

résidents de Bloor West Village Retirement Home. M. Khelawon était le directeur de l'établissement et sa mère en était la propriétaire. Comme je l'ai indiqué précédemment, aucun des plaignants n'était disponible pour témoigner au procès. En conséquence, la principale question concernait l'admissibilité des déclarations relatées qu'ils avaient faites à diverses personnes. Il y avait en tout 10 déclarations, dont quatre à la police qui étaient enregistrées sur bande vidéo. Le procès tenu devant le juge Grossi siégeant sans jury s'est déroulé essentiellement comme un voir-dire sur l'admissibilité de la preuve, les avocats ayant convenu qu'il ne serait pas nécessaire de reprendre la preuve concernant les déclarations qui seraient par la suite jugées admissibles. Aucune des déclarations n'était visée par quelque exception traditionnelle à la règle du ouï-dire. Pour qu'elles soient admissibles, le ministère public devait plutôt satisfaire à la double exigence de nécessité et de fiabilité selon la méthode d'analyse raisonnée de la règle du ouï-dire, établie dans les arrêts *Khan*, *Smith* et, par la suite, *Starr.*

The charges concerning Mr. Skupien are the only matters before this Court. I will therefore summarize the evidence concerning Mr. Skupien's statements in more detail. I will also describe the circumstances surrounding the taking of the statements from the other complainants to the extent that it is relevant to dispose of this appeal. The Crown sought to introduce three statements made by Mr. Skupien: the first to an employee of the retirement home, the second to the doctor who treated him for his injuries, and the third to the police. Only the latter was admitted at trial. I will describe each statement in turn.

10 Les accusations relatives à M. Skupien sont les seules soumises à notre Cour. Je vais donc faire un résumé plus détaillé de la preuve concernant les déclarations de M. Skupien. Je vais également décrire les circonstances entourant l'obtention des déclarations des autres plaignants dans la mesure où elles sont pertinentes pour trancher le présent pourvoi. Le ministère public a cherché à produire trois déclarations de M. Skupien : la première faite à une employée de la maison de retraite, la deuxième, au médecin qui a soigné ses blessures, et la troisième, à la police. Seule la dernière déclaration a été admise en preuve au procès. Je décrirai chacune des déclarations à tour de rôle.

2.1 *Mr. Skupien's Statement to Ms. Stangrat*

2.1 *La déclaration de M. Skupien à M^me^ Stangrat*

Mr. Skupien was 81 years old and, at the time of the events in question, he had lived at the Bloor West Village Retirement Home for four years. Mr. Skupien's initial complaint was made to one of the employees at the retirement home, Joanna Stangrat. Ms. Stangrat, also known under several other names, was a cook who had been working

11 Au moment des faits en question, M. Skupien était âgé de 81 ans et vivait depuis quatre ans dans l'établissement Bloor West Village Retirement Home. Il a adressé sa première plainte à l'une des employés de la maison de retraite, M^me^ Joanna Stangrat. Celle-ci, connue également sous plusieurs autres noms, était cuisinière à la maison de retraite

at the retirement home for a few months. She had come to know Mr. Skupien because he would often visit the kitchen and would sometimes walk her to the subway at the end of her shifts. Ms. Stangrat played a prominent role in the case concerning Mr. Skupien. In part, it was the theory of the defence at trial that she had influenced Mr. Skupien and the other complainants in making their complaints out of spite because Mr. Khelawon had given her a notice of termination a few weeks earlier.

depuis quelques mois. Elle connaissait M. Skupien parce que celui-ci se rendait souvent à la cuisine et l'accompagnait parfois jusqu'au métro à la fin de son quart de travail. M^me^ Stangrat a joué un rôle important dans le dossier concernant M. Skupien. La thèse de la défense voulait notamment qu'elle ait amené M. Skupien et les autres plaignants à porter plainte pour se venger de M. Khelawon qui lui avait remis un avis de cessation d'emploi quelques semaines auparavant.

12 On May 8, 1999, Ms. Stangrat noticed that Mr. Skupien did not come to breakfast. She went to check on him in his room and found him lying on his bed. His face was red and there was blood around his mouth. When she got closer to him she saw bruising on his eye and nose. His eyes were swollen. When Mr. Skupien saw her, he asked her to come in and close the door. He appeared to be in shock and very shaky. Ms. Stangrat noticed two full green garbage bags on the floor. She closed the door and asked him what had happened and what was in the green garbage bags. Mr. Skupien told her what had happened the previous evening. He also showed her bruises on his upper left chest area.

Le 8 mai 1999, M^me^ Stangrat a remarqué que M. Skupien n'était pas venu prendre son petit déjeuner. Elle s'est rendue à sa chambre pour vérifier s'il allait bien et l'a trouvé étendu sur son lit. Son visage était rouge et il avait du sang autour de la bouche. Lorsqu'elle s'est approchée de lui, elle a constaté que son œil et son nez étaient contusionnés. Ses yeux étaient enflés. Lorsque M. Skupien l'a aperçue, il lui a demandé d'entrer et de fermer la porte. Il semblait être en état de choc et très mal en point. M^me^ Stangrat a remarqué la présence sur le plancher de deux grands sacs à ordures verts remplis. Elle a fermé la porte et lui a demandé ce qui s'était passé et ce que contenaient les deux sacs à ordures. M. Skupien lui a raconté ce qui s'était passé le soir précédent. Il lui a aussi montré les ecchymoses qu'il avait sur la partie supérieure gauche de sa poitrine.

13 Mr. Skupien told Ms. Stangrat that he had to leave before twelve o'clock that day because "Tony", the name Mr. Khelawon went by, would come back and kill him. Mr. Skupien described to Ms. Stangrat how Mr. Khelawon had come into his room in anger at about 8:00 p.m. the previous evening, and had punched him repeatedly in the face and ribs. After beating him up, Mr. Khelawon had packed the clothes into the green garbage bags and left them on the floor. Ms. Stangrat asked Mr. Skupien why Mr. Khelawon would attack him in this way. He told her that Tony was angry because Mr. Skupien had been going to the kitchen when he had no reason to go there. When the assault ended, Mr. Khelawon threatened Mr. Skupien that either he moved out of the home by noon the next day or he would return and kill him. Mr. Skupien asked her what he should do. Ms. Stangrat told him

M. Skupien a dit à M^me^ Stangrat qu'il devait quitter la maison de retraite avant midi ce même jour parce que « Tony », le surnom de M. Khelawon, reviendrait pour le tuer. Il a expliqué à M^me^ Stangrat que M. Khelawon était entré dans sa chambre en colère vers 20 h le soir précédent et l'avait roué de coups de poing au visage et dans les côtes. Après l'avoir battu, M. Khelawon avait entassé ses vêtements dans les sacs à ordures verts qu'il avait ensuite laissés sur le plancher. M^me^ Stangrat a demandé à M. Skupien pourquoi M. Khelawon l'avait ainsi attaqué. Celui-ci a répondu que Tony lui reprochait de se rendre à la cuisine alors qu'il n'avait aucune raison d'y aller. Après avoir agressé M. Skupien, M. Khelawon l'a menacé en lui disant de quitter la maison de retraite avant midi le lendemain, sinon il reviendrait pour le tuer. M. Skupien a demandé à M^me^ Stangrat ce qu'il devait faire. Elle

she would phone her daughter to come and get him and that he should stay in his room until she was finished her duties for the day.

Ms. Stangrat arranged for Mr. Skupien to stay at her daughter's home later that day, and then to her apartment. Mr. Skupien was in pain but he was scared and did not want to see a doctor at that time. Ms. Stangrat kept Mr. Skupien at her apartment where she and a friend of hers alternated caring for him. A few days later, Mr. Skupien agreed to go to the doctor. Ms. Stangrat and her friend took him to see Dr. Pietraszek.

2.2 *Mr. Skupien's Statement to the Treating Physician*

On May 12, 1999, Dr. Pietraszek examined Mr. Skupien. He found visible bruising to Mr. Skupien's face as well as bruises to his back and on the left side of his chest and noted that Mr. Skupien appeared to be in pain while breathing. X-rays revealed that he had suffered fractures to three ribs. Dr. Pietraszek testified that Mr. Skupien told him he had been hit in the face and body with something that was either a cane or a pipe. He denied any suggestion that Ms. Stangrat had related the story but acknowledged that she was present and may have helped him in describing what had happened. Dr. Pietraszek considered that the injuries were consistent with Mr. Skupien's account of how they were caused. He also testified that the injuries could have resulted from a fall.

2.3 *Mr. Skupien's Videotaped Statement to the Police*

The following day, on May 13, 1999, Ms. Stangrat took Mr. Skupien to the police. Detective Karpow took his complaint. He observed bruising to the left side of Skupien's face, in the eye area. He arranged for Mr. Skupien to give a videotaped statement. Both Detective Karpow and Constable John Birrell were present. The statement was not

lui a dit qu'elle téléphonerait à sa fille pour qu'elle vienne le chercher et lui a conseillé de rester dans sa chambre jusqu'à ce qu'elle ait terminé ses tâches de la journée.

14 M^me^ Stangrat a fait en sorte que M. Skupien demeure chez sa fille plus tard le même jour, et ensuite à son propre appartement. M. Skupien était souffrant, mais il refusait alors de consulter un médecin parce qu'il avait peur. M^me^ Stangrat l'a gardé à son appartement où elle et une de ses amies se sont occupées de lui à tour de rôle. Quelques jours plus tard, M. Skupien a accepté de se rendre chez le médecin. M^me^ Stangrat et son amie l'ont amené voir le D^r^ Pietraszek.

2.2 *La déclaration de M. Skupien au médecin traitant*

15 Le 12 mai 1999, le D^r^ Pietraszek a examiné M. Skupien. Il a constaté la présence d'ecchymoses dans son visage ainsi que dans son dos et sur la partie gauche de sa poitrine. Il a aussi remarqué que M. Skupien semblait éprouver de la douleur en respirant. Des radiographies ont permis de constater que trois de ses côtes étaient fracturées. Dans son témoignage, le D^r^ Pietraszek a affirmé que M. Skupien lui avait dit avoir été frappé au visage et sur le corps avec ce qui lui avait semblé être une canne ou un tuyau. Le médecin a rejeté toute idée que M^me^ Stangrat ait raconté cette histoire, mais il a reconnu qu'elle était présente et qu'elle pouvait avoir aidé M. Skupien à décrire ce qui s'était passé. Le D^r^ Pietraszek a estimé que les blessures pouvaient avoir été causées de la façon relatée par M. Skupien. Il a également témoigné que les blessures pouvaient être dues à une chute.

2.3 *La déclaration enregistrée sur bande vidéo que M. Skupien a faite à la police*

16 Le lendemain, soit le 13 mai 1999, M^me^ Stangrat a conduit M. Skupien au poste de police. Le détective Karpow a reçu sa plainte. Il a remarqué la présence d'ecchymoses sur la partie gauche du visage de M. Skupien, près de l'œil. Le détective s'est arrangé pour que M. Skupien fasse une déclaration enregistrée sur bande vidéo. Le détective Karpow

given under oath; however, Mr. Skupien was asked if he understood that it was very important that he tell the truth and that if he did not tell the truth "[he] could be charged with that". Mr. Skupien answered "Yes" to both questions. After a few other preliminary questions, he was asked what his complaint was. Mr. Skupien described how, on May 7, 1999, Tony came to his room and said: "enough is enough". He then began beating him by slapping and punching him in the face, the ribs and all over, telling him not to go into the kitchen. He said that if he did not leave, he would come by 12 o'clock the next day and shoot him. Mr. Skupien then went on at some length to make several complaints about the general management of the retirement home until Detective Karpow brought him back to the matter at hand by asking him further questions about the incident and the events that followed. Mr. Skupien was generally responsive to the officer's questions.

et l'agent John Birrell étaient présents. La déclaration n'a pas été faite sous serment, mais on a demandé à M. Skupien s'il comprenait qu'il était très important de dire la vérité et que, s'il mentait, [TRADUCTION] « des accusations en ce sens pourraient être portées contre [lui] ». M. Skupien a répondu « oui » aux deux questions. Après quelques autres questions préliminaires, on lui a demandé en quoi consistait sa plainte. Il a alors expliqué comment, le 7 mai 1999, Tony s'était rendu à sa chambre et lui avait dit « en voilà assez ». Il s'était ensuite mis à le battre en lui administrant des gifles et des coups de poing au visage, dans les côtes et un peu partout, et en lui interdisant d'aller à la cuisine. Tony avait dit à M. Skupien que s'il ne partait pas, il reviendrait à midi le lendemain pour l'abattre. M. Skupien a ensuite pris la peine d'ajouter plusieurs plaintes concernant l'administration générale de la maison de retraite, jusqu'à ce que le détective Karpow lui rappelle l'objet de sa démarche en lui posant d'autres questions sur l'épisode en cause et la suite des événements. M. Skupien a généralement bien répondu aux questions du policier.

17 After the interview was completed, Mr. Khelawon was arrested.

À la suite de cet entretien, M. Khelawon a été arrêté.

2.4 *Further Investigation*

2.4 *L'enquête plus approfondie*

18 Ms. Stangrat gave the police a list of other people that she thought they should speak to at the retirement home. The next day, on May 14, 1999, several police officers attended the home to seek these people out. Because there were no markings on the doors, the police had to search through the residence, speaking to residents and nursing staff. When some of the people were located, they were found to be "unresponsive" and no meaningful interviews could be conducted with them. Others, however, were able and willing to speak. The police would identify themselves as police, then ask the residents how things were going at the home and if anything had happened to them that they wanted to talk about. The police arranged to take videotaped statements from those who wanted to speak to them. These included three of the other

M^me^ Stangrat a remis aux policiers une liste d'autres personnes auxquelles, selon elle, ils devraient aller s'adresser à la maison de retraite. Le lendemain, soit le 14 mai 1999, plusieurs policiers sont allés rencontrer ces personnes à la maison de retraite. Comme il n'y avait pas d'inscriptions sur les portes, les agents ont dû visiter tout l'établissement, s'entretenant avec des résidents et des membres du personnel infirmier. Parmi les personnes trouvées, certaines se sont montrées [TRADUCTION] « peu réceptives », d'où l'impossibilité d'avoir un entretien utile avec elles. D'autres, toutefois, ont pu et ont voulu parler. Après avoir divulgué leur identité, les policiers demandaient aux résidents comment ça allait à la maison de retraite et s'ils souhaitaient discuter de ce qui pouvait leur être arrivé. Les policiers se sont arrangés pour enregistrer sur bande

complainants, Mr. Dinino, Ms. Poliszak and Mr. Grocholska. The fourth complainant, Mr. Peiszterer, could not communicate with the police; however, his son provided a videotaped statement.

2.5 *Medical Records*

On May 15, 1999, Detective Karpow attended at the retirement home and met with Dr. Michalski, a physician who attended regularly at the home to see the residents. On May 18, 1999, the police returned to the home and seized the medical records and a journal containing nursing notes.

Documentation from Mr. Skupien's file revealed that he had been living in an apartment before suffering a stroke in February 1995. He was transferred to the retirement home in April 1995. A report dated April 13, 1995 noted his condition after the stroke. He suffered occasional periods of confusion, could not go outside on his own, needed help with meal preparation and banking, and had to be reminded to take his medication, but was able to perform all self-care tasks.

Dr. Michalski's file noted frequent contact with Mr. Skupien during his stay at the retirement home. From time to time, he was described as "depressed", "aggressive", "angry", and "paranoid". A diagnosis of paranoid psychoses was made in June 1998 and medication was prescribed. In July 1998, "some improvement in paranoia" was noted. In August 1998, he was described as "angry, hostile" and his dosage was increased. In August 1998, he was described as "confused". The possibility of dementia was first noted. In September 1998, he was diagnosed with "depression" and prescribed medication. In September 1998, improvement with the depression was noted, and although apparently "eliminated" in January 1999, depression was again noted in February 1999. The notes

vidéo les déclarations des personnes qui voulaient leur parler, dont celles de trois autres plaignants, M. Dinino, M^me^ Poliszak et M. Grocholska. Le quatrième plaignant, M. Peiszterer, n'a pas été en mesure de communiquer avec la police, mais son fils a fourni une déclaration enregistrée sur bande vidéo.

2.5 *Les dossiers médicaux*

19 Le 15 mai 1999, le détective Karpow s'est rendu à la maison de retraite où il a rencontré le D^r^ Michalski, un médecin appelé régulièrement à y soigner les résidents. Le 18 mai 1999, la police est retournée à la maison de retraite et a saisi les dossiers médicaux et un journal contenant des notes du personnel infirmier.

20 La documentation tirée du dossier de M. Skupien a révélé que celui-ci habitait en appartement jusqu'à ce qu'il soit victime d'un accident vasculaire cérébral (AVC) en février 1995. Il a été transféré à la maison de retraite en avril 1995. Un rapport daté du 13 avril 1995 fait état de sa condition après l'AVC. Il connaissait parfois des périodes de confusion, il ne pouvait sortir seul à l'extérieur et il avait besoin d'aide pour préparer ses repas, effectuer ses opérations bancaires et se rappeler de prendre ses médicaments, mais il était en mesure d'accomplir toutes les tâches en matière de soins personnels.

21 Le dossier du D^r^ Michalski faisait état de rencontres fréquentes avec M. Skupien pendant son séjour à la maison de retraite. Parfois, il était décrit comme étant [TRADUCTION] « dépressif », « agressif », « en colère » et « paranoïaque ». En juin 1998, un diagnostic de psychose paranoïaque a été établi et des médicaments ont été prescrits. En juillet 1998, « la paranoïa a diminué quelque peu ». En août 1998, M. Skupien a été décrit comme étant « en colère et agressif » et la dose a été augmentée. En août 1998, il était qualifié de « confus ». La possibilité de démence était notée pour la première fois. En septembre 1998, un diagnostic de « dépression » a été établi et des médicaments ont été prescrits. Toujours en septembre 1998, une note indique que la dépression est

also reflect a number of complaints of fatigue, weakness and dizziness.

2.6 *Expert Evidence on the Voir Dire*

22 Dr. Susan Lieff, a geriatric psychiatrist, was qualified to provide opinion evidence on the *voir dire* with respect to Mr. Skupien's capacity to understand the importance of telling the truth and communicate evidence. She also provided an opinion with respect to Mr. Dinino. Her opinion was based solely on her review of the videotaped interviews and medical records. With regard to Mr. Skupien, Dr. Lieff testified that the videotape did not reveal any impaired judgment, delusions or hallucinations, or intellectual pathology. He seemed to comprehend what was asked and responded appropriately. In Dr. Lieff's view, Mr. Skupien's affirmative answer "Yes", when advised of the need to be truthful, reflected a clear understanding. Dr. Lieff did not consult with Dr. Michalski but took issue with his diagnosis of "dementia". In her opinion, the symptoms observed by Dr. Michalski were more likely side-effects of the anti-psychotic medication he was taking at the time. Dr. Lieff concluded that Mr. Skupien understood that it was important to tell the truth and that he had the capacity to communicate evidence.

3. Trial Judge's Ruling on Admissibility

23 As a preliminary issue, the trial judge ruled that the four complainants who had given videotaped statements were competent at the time within the meaning of s. 16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, which he interpreted as requiring that "witnesses must know the importance of telling the truth and must be able to communicate the evidence". In support of this finding, the trial judge relied on his own viewing of the videotapes and on Dr. Lieff's opinion evidence. (The

atténuée et, même si elle était apparemment « éliminée » en janvier 1999, la dépression a de nouveau été notée en février 1999. Ces notes font également état d'un certain nombre de plaintes de fatigue, de faiblesse et d'étourdissements.

2.6 *Le témoignage d'expert lors du voir-dire*

La D^re^ Susan Lieff, une psychiatre gériatrique, a été autorisée à présenter, lors du voir-dire, un témoignage d'opinion sur la capacité de M. Skupien de comprendre l'importance de dire la vérité et de communiquer les faits dans son témoignage. Elle a également exprimé une opinion au sujet de M. Dinino. Son opinion était fondée uniquement sur son examen des entretiens enregistrés sur bande vidéo et des dossiers médicaux. En ce qui concerne M. Skupien, la D^re^ Lieff a témoigné que l'enregistrement ne révélait aucun affaiblissement de jugement, aucun délire, aucune hallucination ni aucune pathologie mentale. Il paraissait comprendre les questions posées et il donnait des réponses pertinentes. Selon la D^re^ Lieff, le « oui » que M. Skupien a répondu lorsqu'il a été informé de la nécessité de dire la vérité indiquait qu'il avait bien compris ce qu'on lui disait. La D^re^ Lieff n'a pas consulté le D^r^ Michalski, mais elle a contesté son diagnostic de « démence ». À son avis, les symptômes observés par le D^r^ Michalski s'apparentaient davantage à des effets secondaires du médicament antipsychotique que M. Skupien prenait à l'époque. La D^re^ Lieff a conclu que M. Skupien comprenait l'importance de dire la vérité et qu'il était capable de communiquer les faits dans son témoignage.

3. La décision du juge du procès concernant l'admissibilité

À titre préliminaire, le juge du procès a conclu que les quatre plaignants ayant fait des déclarations enregistrées sur bande vidéo avaient à l'époque la capacité requise au sens de l'art. 16 de la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, qu'il a interprété comme exigeant que [TRADUCTION] « les témoins connaissent l'importance de dire la vérité et soient capables de communiquer les faits dans leur témoignage ». Il a fondé sa conclusion sur son propre visionnement des bandes vidéo et sur

mental capacity of the hearsay declarant is a relevant factor on an inquiry into the statement's admissibility as it may impact on the reliability of the hearsay statement; however, it is important to note that s. 16 has no application here. Section 16 sets out the threshold competency requirement for receiving the testimony of a witness *in court*. The threshold is a low one and the witness's testimony, if received, is then subject to cross-examination in the usual way, including on any relevant matter concerning the witness's mental state. The inquiry into the admissibility of a hearsay statement may require more extensive probing into the declarant's mental competency at the time of making the statement when there is no opportunity to cross-examine the declarant.)

le témoignage d'opinion de la D^re^ Lieff. (La capacité mentale du déclarant est pertinente pour examiner l'admissibilité d'une déclaration relatée étant donné qu'elle peut avoir une incidence sur la fiabilité de cette déclaration; cependant, il importe de souligner que l'art. 16 ne s'applique pas en l'espèce. Cet article établit la capacité minimale requise pour qu'un témoignage soit admis *en cour*. Ce seuil est bas et si le témoignage est reçu, il fait ensuite l'objet du contre-interrogatoire habituel qui porte notamment sur toute question pertinente concernant l'état d'esprit du témoin. L'examen de l'admissibilité d'une déclaration relatée peut requérir un examen plus approfondi de la capacité mentale du déclarant au moment où il a fait la déclaration, dans le cas où il est impossible de le contre-interroger.)

After determining the s. 16 issue, the trial judge considered the necessity criterion. Although certain questions were raised at trial as to whether this criterion was met with respect to some of the complainants' statements, none of the issues concerned Mr. Skupien and hence need not be reviewed here.

24 Après avoir tranché la question de l'art. 16, le juge du procès s'est penché sur le critère de la nécessité. Bien que des questions soulevées au procès aient visé à déterminer si certaines déclarations des plaignants satisfaisaient à ce critère, aucune de ces questions ne concernaient M. Skupien et c'est pourquoi il n'est pas nécessaire de les examiner en l'espèce.

Finally, the trial judge turned to the question of threshold reliability. He determined that all videotaped statements to the police met the reliability requirement. In support of this finding, he noted that there was "nothing untoward in the police procedure in taking the statements" and, although three of the complainants' statements were taken at the retirement home, rather than at the police station, he found that the "circumstances of taking the statements [were] as formal and solemn as could be expected in the situation". He noted that there was "no animosity directed at the accused" by the complainants in their statements other than voicing their complaint. The complainants "appeared forthright", they were "not evasive", and they did not "attempt to overstate their injuries". There were no "exceedingly leading" questions and, to the extent that there was leading, it went to weight rather than admissibility. All the statements were contemporaneous or made shortly after the events that they described. They knew their assailant well and there was no realistic alternative suspect. Further, both

25 Enfin, le juge du procès a examiné la question du seuil de fiabilité. Il a conclu que toutes les déclarations enregistrées sur bande vidéo qui ont été faites à la police satisfaisaient à l'exigence de fiabilité. À l'appui de cette conclusion, il a souligné qu'il n'y avait [TRADUCTION] « rien de malencontreux dans la procédure suivie par la police pour recueillir les déclarations », et il a conclu que, bien que trois des déclarations des plaignants aient été recueillies à la maison de retraite plutôt qu'au poste de police, « les circonstances dans lesquelles les déclarations ont été recueillies [étaient], en l'occurrence, aussi formelles et solennelles que possible ». Le juge du procès a fait remarquer que, dans leurs déclarations, les plaignants ne faisaient que formuler leurs plaintes respectives « sans montrer de l'animosité pour l'accusé ». Les plaignants « paraissaient francs », ils n'étaient « pas évasifs » et ils « ne tentaient pas d'exagérer leurs blessures ». Les questions posées n'étaient pas « trop suggestives », et les seules questions suggestives touchaient la valeur probante plutôt que l'admissibilité. Toutes

Mr. Skupien and Mr. Dinino had corroborating injuries.

26 The crux of the trial judge's ruling, however, appears to have been his application of the decision of this Court in *U. (F.J.)* in which the complainant's out-of-court statement was admitted on the ground of its "striking similarity" with the accused's statement concerning the same events. Throughout his reasons, the trial judge made repeated references to the similarity between the statements and concluded that "the cumulative combination of similar points renders the overall similarity between the statements sufficiently distinctive to reject coincidence as a likely explanation". While he found that the oral statements were also "sufficiently similar to fit the principle in *R. v. U. (F.J.)*", he held, citing para. 217 in *Starr* as authority, that "to admit them would be oath-helping in that I have the video statements".

27 In the trial judge's view, the only real hearsay danger raised by the admission of the statements was the absence of cross-examination but, citing *Smith* as authority, he concluded that reliable evidence should not be excluded for this reason alone. The public interest in "the elderly receiving good care" allowed him "to take video statements together to bolster the complainants' credibility". He therefore ruled the videotaped statements admissible and the oral statements inadmissible.

28 At the conclusion of the trial, Grossi J. ultimately found only two of the videotaped statements sufficiently credible to found a conviction, those of Mr. Dinino and Mr. Skupien. Since this appeal concerns the admissibility ruling only, it is

les déclarations avaient été effectuées au moment où les faits décrits étaient survenus, ou peu après. Les plaignants connaissaient bien leur agresseur et il n'y avait aucune autre possibilité réaliste de soupçonner quelqu'un d'autre. De plus, MM. Skupien et Dinino avaient tous les deux des blessures corroborantes.

Toutefois, la décision du juge du procès semble reposer essentiellement sur son application de l'arrêt *U. (F.J.)* de notre Cour, où la déclaration extrajudiciaire de la plaignante a été admise en preuve à cause de sa « similitude frappante » avec la déclaration de l'accusé concernant les mêmes faits. Dans ses motifs, le juge du procès a mentionné, à maintes reprises, la similitude entre les déclarations et a conclu que [TRADUCTION] « la combinaison cumulative de points semblables rend[ait] la similitude globale entre les déclarations suffisamment distinctive pour rejeter la coïncidence comme explication probable ». Tout en estimant que les déclarations orales étaient également « suffisamment similaires pour être visées par le principe de l'arrêt *R. c. U. (F.J.)* », il a conclu, en se fondant sur le par. 217 de l'arrêt *Starr*, que « les admettre en preuve équivaudrait à admettre un témoignage justificatif du fait que je suis en possession des déclarations sur bande vidéo ».

Selon le juge du procès, le seul véritable danger en matière de ouï-dire que comportait l'admission en preuve des déclarations était l'absence de contre-interrogatoire, mais, s'appuyant sur l'arrêt *Smith*, il a décidé qu'une preuve fiable ne devrait pas être exclue pour ce seul motif. L'intérêt public à ce que [TRADUCTION] « les personnes âgées soient bien traitées » l'autorisait à « considérer les déclarations sur bande vidéo dans leur ensemble pour renforcer la crédibilité des plaignants ». Il a donc conclu à l'admissibilité des déclarations enregistrées sur bande vidéo et à l'inadmissibilité des déclarations orales.

À la fin du procès, le juge Grossi a décidé, en fin de compte, que seules deux des déclarations enregistrées sur bande vidéo étaient suffisamment crédibles pour justifier une déclaration de culpabilité, à savoir celles de MM. Dinino et Skupien. Comme le présent

not necessary to review the reasons for conviction. It is common ground between the parties that if Mr. Skupien's statements are inadmissible, the convictions must be set aside and the appeal dismissed.

4. Court of Appeal for Ontario (2005), 195 O.A.C. 11

Mr. Khelawon appealed his convictions on the ground that the trial judge erred in admitting the videotaped statements. The Court of Appeal was unanimous in finding that Mr. Dinino's statement was not sufficiently reliable to warrant admission. A majority of the court found that Mr. Skupien's statement was also inadmissible due to its unreliability.

All three justices interpreted the trial judge's reasons as holding that without the similarity among the statements of the various complainants, none met the requirement of reliability and would therefore have been inadmissible (Rosenberg J.A., at para. 90; Blair J.A., at para. 29). The court therefore focussed on this aspect of the evidence and, indeed, the source of the disagreement between the majority and the dissent was whether the similarity of the statements was a permissible consideration in assessing reliability under the principled approach.

Rosenberg J.A., writing for the majority, held that the principle from *U. (F.J.)* could be applied only where the statements relate to the same event, and in most cases would be applied only where the declarant is available for cross-examination (para. 114). Here, the statements related to different incidents. Although a trier of fact might conclude, using similar fact reasoning, that the same person committed all of the crimes, this is an issue going to ultimate reliability, not threshold reliability (para. 115). Only the latter is relevant in determining admissibility. In addition, Rosenberg J.A. held that the comparator statements must also be substantively admissible, because the final decision as to the likelihood of coincidence or collusion

pourvoi ne porte que sur la décision concernant l'admissibilité, il n'est pas nécessaire d'examiner les motifs de la déclaration de culpabilité. Les parties conviennent que si les déclarations de M. Skupien sont inadmissibles, les déclarations de culpabilité doivent être annulées et le pourvoi, rejeté.

4. Cour d'appel de l'Ontario (2005), 195 O.A.C. 11

29 M. Khelawon a interjeté appel contre ses déclarations de culpabilité en faisant valoir que le juge du procès avait commis une erreur en admettant en preuve les déclarations enregistrées sur bande vidéo. La Cour d'appel a statué à l'unanimité que la déclaration de M. Dinino n'était pas suffisamment fiable pour être admise en preuve. Les juges majoritaires ont estimé que la déclaration de M. Skupien était également inadmissible en raison de sa non-fiabilité.

30 Les trois juges ont tous interprété les motifs du juge du procès comme signifiant que, n'eût été la similitude entre les déclarations des divers plaignants, aucune d'elles n'aurait satisfait à l'exigence de fiabilité, de sorte qu'elles auraient toutes été inadmissibles (le juge Rosenberg, par. 90; le juge Blair, par. 29). La cour a donc mis l'accent sur cet aspect de la preuve et, en fait, le désaccord entre les juges majoritaires et le juge dissident tenait à la question de savoir si la similitude entre les déclarations pouvait être prise en considération pour apprécier la fiabilité suivant la méthode d'analyse raisonnée.

31 Le juge Rosenberg, s'exprimant au nom des juges majoritaires, a conclu que le principe de l'arrêt *U. (F.J.)* ne pouvait s'appliquer que lorsque les déclarations concernent les mêmes faits et que, dans la plupart des cas, il ne serait appliqué que s'il est possible de contre-interroger le déclarant (par. 114). En l'espèce, les déclarations concernaient des faits différents. Un juge des faits pourrait conclure, suivant le raisonnement des faits similaires, que la même personne a commis tous les crimes, mais c'est là une question de fiabilité en dernière analyse et non de seuil de fiabilité (par. 115). Seul le dernier est pertinent pour déterminer l'admissibilité. De plus, selon le juge Rosenberg, les déclarations de comparaison doivent également être admissibles quant au fond,

rests with the trier of fact (para. 128), and it would be odd for the trier of fact to be assessing ultimate reliability without access to "the very piece of evidence that convinced the trial judge that the statement was reliable" (para. 130). Grossi J.'s decision, therefore, was an impermissible expansion of the principle in *U. (F.J.)*. Rosenberg J.A. also held, at para. 92, that such an expansion was inconsistent with the statement of Iacobucci J. in *Starr*, at para. 217, that "corroborating . . . evidence" should not be considered in determining threshold reliability.

32 In dissent, Blair J.A. held that the central notion underpinning the *U. (F.J.)* "exception" was that absent collusion, prior knowledge, or improper influence, "striking similarities between statements belie coincidence and therefore bolster the reliability of the statement under consideration" (para. 44). While he held that the absence of cross-examination remained a factor to be weighed in assessing threshold reliability, he was of the view that its absence, in and of itself, was not an impediment to the principled application of the *U. (F.J.)* exception. He also found that the exception could apply where the statements related to different events, stating that, for the purpose of finding threshold reliability, he could see no "logical difference" between statements concerning the same accused "doing the same thing on the same occasion" and "the same accused doing the same thing on different occasions" (para. 48), drawing on the rationale for similar-fact reasoning, since both involve admitting evidence on the basis of the "improbability of coincidence" (para. 49). Finally, he found that a finding that the comparator statements are not substantively admissible should not exclude them from the reliability analysis, pointing out that otherwise reliable statements could be held inadmissible for a variety of reasons, including a finding that they were not necessary (para. 53).

parce que la décision finale concernant la probabilité de coïncidence ou de collusion appartient au juge des faits (par. 128), et il serait étrange que celui-ci apprécie la fiabilité en dernière analyse sans avoir accès à [TRADUCTION] « l'élément de preuve même qui a convaincu le juge du procès que la déclaration était fiable » (par. 130). La décision du juge Grossi constituait donc un élargissement inacceptable de la portée du principe de l'arrêt *U. (F.J.)*. Le juge Rosenberg a également décidé, au par. 92, qu'un tel élargissement était incompatible avec l'affirmation du juge Iacobucci dans l'arrêt *Starr*, au par. 217, selon laquelle il n'y a pas lieu de tenir compte d'une « preuve corroborante » pour établir le seuil de fiabilité.

Le juge Blair, dissident, a conclu que la notion fondamentale sous-tendant « l'exception » de l'arrêt *U. (F.J.)* veut que, en l'absence de collusion, de connaissance préalable ou d'influence indue, [TRADUCTION] « les similitudes frappantes entre les déclarations écartent toute coïncidence et renforcent donc la fiabilité de la déclaration examinée » (par. 44). Bien qu'il ait décidé que l'absence de contre-interrogatoire demeurait un élément à soupeser en appréciant le seuil de fiabilité, le juge Blair était d'avis que cette absence, en soi, ne faisait pas obstacle à l'application raisonnée de l'exception de l'arrêt *U. (F.J.)*. Il a également conclu que cette exception pouvait s'appliquer quand les déclarations concernaient des faits différents, ajoutant que, pour déterminer le seuil de fiabilité, il ne voyait — compte tenu de la raison d'être du raisonnement des faits similaires — aucune « différence logique » entre une déclaration voulant que le même accusé « ait accompli le même acte à la même occasion » et une déclaration voulant que « le même accusé ait accompli le même acte à différentes occasions » (par. 48), étant donné que les deux situations comportent l'admission d'un élément de preuve fondée sur « l'improbabilité d'une coïncidence » (par. 49). Enfin, il a estimé que les déclarations de comparaison jugées inadmissibles quant au fond ne devraient pas être exclues de l'analyse de la fiabilité, faisant remarquer que des déclarations par ailleurs fiables pourraient être jugées inadmissibles pour diverses raisons, dont la conclusion qu'elles n'étaient pas nécessaires (par. 53).

On the basis of these conclusions, Blair J.A. held that the trial judge had not erred in considering the similarity among the statements in determining their threshold reliability. He then went on to apply "the *U. (F.J.)* exception" to the statements at issue on appeal, and held that although the videotaped statement of Mr. Dinino was inadmissible, the videotaped statement of Mr. Skupien was.

33 Compte tenu de ces conclusions, le juge Blair a statué que le juge du procès n'avait commis aucune erreur en tenant compte de la similitude des déclarations pour en déterminer le seuil de fiabilité. Il a ensuite appliqué [TRADUCTION] « l'exception de l'arrêt *U. (F.J.)* » aux déclarations visées par l'appel et a conclu que, même si la déclaration de M. Dinino enregistrée sur bande vidéo était inadmissible, celle de M. Skupien aussi enregistrée sur bande vidéo était par ailleurs admissible.

5. Rule Against Hearsay

5.1 *General Exclusionary Rule*

The basic rule of evidence is that all relevant evidence is admissible. There are a number of exceptions to this basic rule. One of the main exceptions is the rule against hearsay: absent an exception, hearsay evidence is *not* admissible. Hearsay evidence is not excluded because it is irrelevant — there is no need for a special rule to exclude irrelevant evidence. Rather, as we shall see, it is the difficulty of testing hearsay evidence that underlies the exclusionary rule and, generally, the alleviation of this difficulty that forms the basis of the exceptions to the rule. Although hearsay evidence includes communications expressed by conduct, I will generally refer to hearsay statements only.

5. La règle interdisant le ouï-dire

5.1 *Une règle d'exclusion générale*

34 La règle de preuve fondamentale veut que tous les éléments de preuve pertinents soient admissibles. Cette règle fondamentale comporte un certain nombre d'exceptions. L'une des principales exceptions est la règle interdisant le ouï-dire : sauf exception, la preuve par ouï-dire *n*'est *pas* admissible. La preuve par ouï-dire n'est pas exclue parce qu'elle n'est pas pertinente — une règle spéciale n'est pas nécessaire pour exclure une preuve non pertinente. Comme nous le verrons, c'est plutôt la difficulté de vérifier la preuve par ouï-dire qui sous-tend la règle d'exclusion et, en général, l'atténuation de cette difficulté qui constitue le fondement des exceptions à la règle. Bien que la preuve par ouï-dire comprenne la conduite expressive, je m'en tiendrai généralement aux déclarations relatées.

5.2 *Definition of Hearsay*

At the outset, it is important to determine what is and what is not hearsay. The difficulties in defining hearsay encountered by courts and learned authors have been canvassed before and need not be repeated here: see *R. v. Abbey*, [1982] 2 S.C.R. 24, at pp. 40-41, *per* Dickson J. It is sufficient to note, as this Court did in *Starr*, at para. 159, that the more recent definitions of hearsay are focussed on the central concern underlying the hearsay rule: the difficulty of testing the reliability of the declarant's assertion. See, for example, *R. v. O'Brien*, [1978] 1 S.C.R. 591, at pp. 593-94. Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose

5.2 *Définition du ouï-dire*

35 Au départ, il importe de déterminer ce qui constitue du ouï-dire et ce qui n'en constitue pas. Les difficultés que les tribunaux et les auteurs de doctrine ont eues à définir le ouï-dire ont déjà fait l'objet d'un examen approfondi et il n'est pas nécessaire de les reprendre en l'espèce : voir *R. c. Abbey*, [1982] 2 R.C.S. 24, p. 40-41, le juge Dickson. Il suffit de noter, comme notre Cour l'a fait au par. 159 de l'arrêt *Starr*, que les plus récentes définitions du ouï-dire sont axées sur la préoccupation majeure qui sous-tend cette règle du ouï-dire, soit la difficulté de vérifier la fiabilité de l'affirmation du déclarant. Voir, par exemple, l'arrêt *R. c. O'Brien*, [1978] 1 R.C.S. 591, p. 593-594. Notre

demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves. The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. I will deal with each defining feature in turn.

5.2.1 Statements Adduced for Their Truth

36 The purpose for which the out-of-court statement is tendered matters in defining what constitutes hearsay because it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises. Consider the following example. At an accused's trial on a charge for impaired driving, a police officer testifies that he stopped the accused's car because he received information from an unidentified caller that the car was driven by a person who had just left a local tavern in a "very drunk" condition. If the statement about the inebriated condition of the driver is introduced for the sole purpose of establishing the police officer's grounds for stopping the vehicle, it does not matter whether the unidentified caller's statement was accurate, exaggerated, or even false. Even if the statement is totally unfounded, that fact does not take away from the officer's explanation of his actions. If, on the other hand, the statement is tendered as proof that the accused was in fact impaired, the trier of fact's inability to test the

système accusatoire attache une grande importance à l'assignation de témoins qui déposent sous la foi du serment ou d'une affirmation solennelle et dont le comportement peut être observé par le juge des faits, et le témoignage, vérifié au moyen d'un contre-interrogatoire. Nous considérons que ce processus représente la meilleure façon de vérifier la preuve testimoniale. Parce qu'elle se présente sous une forme différente, la preuve par ouï-dire suscite des préoccupations particulières. La règle d'exclusion générale reconnaît la difficulté pour le juge des faits d'apprécier le poids à donner, s'il y a lieu, à une déclaration d'une personne qui n'a été ni vue ni entendue et qui n'a pas eu à subir un contre-interrogatoire. On craint que la preuve par ouï-dire non vérifiée se voie accorder plus de poids qu'elle n'en mérite. Les caractéristiques déterminantes essentielles du ouï-dire sont donc les suivantes : (1) le fait que la déclaration soit présentée pour établir la véracité de son contenu et (2) l'impossibilité de contre-interroger le déclarant au moment précis où il fait cette déclaration. J'examinerai chacune de ces caractéristiques déterminantes à tour de rôle.

5.2.1 Déclarations présentées pour établir la véracité de leur contenu

Le but dans lequel la déclaration extrajudiciaire est présentée revêt de l'importance lorsqu'il s'agit de déterminer ce qui constitue du ouï-dire, car c'est seulement lorsque la preuve est présentée pour établir la véracité de son contenu qu'il devient nécessaire d'en vérifier la fiabilité. Prenons l'exemple suivant. Au procès d'un accusé inculpé de conduite avec facultés affaiblies, un policier témoigne qu'il a intercepté l'automobile de l'accusé à la suite d'un appel d'un inconnu l'informant que le véhicule était conduit par une personne en état d'« ébriété avancée » qui venait tout juste de quitter une taverne de quartier. Si la déclaration concernant l'état d'ébriété du conducteur est présentée dans le seul but d'établir les motifs que le policier avait d'intercepter le véhicule, il importe peu de savoir si la déclaration de l'auteur inconnu de l'appel était exacte, exagérée ou même fausse. Même si la déclaration est totalement dénuée de fondement, cela n'enlève rien à l'explication que le policier a donnée au sujet de ses actes. Si, par contre, la déclaration est présentée

reliability of the statement raises real concerns. Hence, only in the latter circumstance is the evidence about the caller's statement defined as hearsay and subject to the general exclusionary rule.

dans le but de prouver que l'accusé avait effectivement les facultés affaiblies, l'incapacité du juge des faits d'en vérifier la fiabilité suscite des préoccupations réelles. Ce n'est donc que dans ce dernier cas que la preuve relative à la déclaration de l'auteur de l'appel constitue du ouï-dire et est assujettie à la règle d'exclusion générale.

5.2.2 Absence of Contemporaneous Cross-Examination

The previous example, namely where the witness tells the court what A told him, is the more obvious form of hearsay evidence. A is not before the court to be seen, heard and cross-examined. However, the traditional law of hearsay also extends to out-of-court statements made by the witness who does testify in court when that out-of-court statement is tendered to prove the truth of its contents. This extended definition of hearsay has been adopted in Canada: *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at pp. 763-64; *Starr*, at para. 158. It is important to understand the rationale for treating a witness's out-of-court statements as hearsay.

When the witness repeats or adopts an earlier out-of-court statement, in court, under oath or solemn affirmation, of course no hearsay issue arises. The statement itself is not evidence, the testimony is the evidence and it can be tested in the usual way by observing the witness and subjecting him or her to cross-examination. The hearsay issue does arise, however, when the witness does not repeat or adopt the information contained in the out-of-court statement and the statement itself is tendered for the truth of its contents. Consider the following example to illustrate the concerns raised by this evidence.

In an out-of-court statement, W identifies the accused as her assailant. At the trial of the accused on a charge of assault, W testifies that the accused is *not* her assailant. The Crown seeks to tender the out-of-court statement as proof of the fact that the

5.2.2 L'impossibilité de contre-interroger au moment précis où la déclaration est faite

37 L'exemple précédent, à savoir lorsque le témoin raconte au tribunal ce que A lui a dit, est la forme la plus évidente de preuve par ouï-dire. A n'est pas devant le tribunal de manière à pouvoir être vu, entendu et contre-interrogé. Toutefois, la règle traditionnelle du ouï-dire s'applique également à la déclaration extrajudiciaire du témoin qui dépose en cour lorsque cette déclaration extrajudiciaire est présentée pour établir la véracité de son contenu. Cette définition élargie du ouï-dire a été adoptée au Canada : *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, p. 763-764; *Starr*, par. 158. Il est important de comprendre pourquoi les déclarations extrajudiciaires d'un témoin sont considérées comme étant du ouï-dire.

38 Lorsque, devant le tribunal, le témoin réitère ou adopte — sous la foi du serment ou d'une affirmation solennelle — une déclaration extrajudiciaire antérieure, il va de soi qu'aucune question de ouï-dire ne se pose. Ce n'est pas la déclaration elle-même qui constitue un élément de preuve, mais plutôt le témoignage, qui peut être vérifié de la façon habituelle en observant le témoin et en lui faisant subir un contre-interrogatoire. Toutefois, la question du ouï-dire se pose lorsque le témoin ne réitère pas ou n'adopte pas le contenu de la déclaration extrajudiciaire, et que la déclaration elle-même est présentée pour établir la véracité de son contenu. Prenons l'exemple suivant pour illustrer les préoccupations suscitées par cet élément de preuve.

39 Dans une déclaration extrajudiciaire, W désigne l'accusé comme étant son agresseur. Au procès de l'accusé pour voies de fait, W témoigne que l'accusé *n*'est *pas* son agresseur. Le ministère public cherche à présenter la déclaration extrajudiciaire

accused did assault W. In these circumstances, the trier of fact is asked to accept the out-of-court statement over the sworn testimony of the witness. Given the usual premium placed on the value of in-court testimonial evidence, a serious issue arises as to whether it is at all necessary to introduce the statement. In addition, the reliability of that statement becomes crucial. How trustworthy is it? In what circumstances did W make that statement? Was it made casually to friends at a social function, or rather, to the police as a formal complaint? Was W aware of the potential consequences of making that statement, did she intend that it be acted upon? Did she have a motive to lie? In what condition was W at the time she made the statement? Many more questions can come to mind on matters that relate to the reliability of that out-of-court statement. When the trier of fact is asked to consider the out-of-court statement as proof that the accused in fact assaulted W, assessing its reliability may prove to be difficult.

pour prouver que l'accusé a effectivement agressé W. Dans ces circonstances, on demande au juge des faits de retenir la déclaration extrajudiciaire plutôt que le témoignage sous serment du témoin. Compte tenu de l'importance habituellement accordée au témoignage devant le tribunal, une question sérieuse se pose, soit celle de savoir s'il est absolument nécessaire de présenter la déclaration. De plus, la fiabilité de cette déclaration devient déterminante. Jusqu'à quel point est-elle fiable? Dans quelles circonstances W a-t-elle fait cette déclaration? L'a-t-elle faite à brûle-pourpoint à des amis lors d'une activité sociale, ou plutôt à la police à titre de plainte formelle? W était-elle consciente des conséquences que pouvait avoir cette déclaration, voulait-elle qu'on y donne suite? Avait-elle une raison de mentir? Dans quel état était W au moment où elle a fait la déclaration? Bien d'autres questions peuvent venir à l'esprit au sujet de la fiabilité de cette déclaration extrajudiciaire. Lorsqu'on demande au juge des faits de considérer que la déclaration extrajudiciaire prouve que l'accusé a effectivement agressé W, il peut se révéler difficile d'apprécier la fiabilité de cette preuve.

40 Concerns over the reliability of the statement also arise where W does not recant the out-of-court statement but testifies that she has no memory of making the statement, or worse still, no memory of the assault itself. The trier of fact does not see or hear the witness making the statement and, because there is no opportunity to cross-examine the witness *contemporaneously* with the making of the statement, there may be limited opportunity for a meaningful testing of its truth. In addition, an issue may arise as to whether the prior statement is fully and accurately reproduced.

Des préoccupations concernant la fiabilité de la déclaration naissent également lorsque W ne revient pas sur sa déclaration extrajudiciaire, mais témoigne qu'elle ne se souvient pas l'avoir faite, ou pis encore, qu'elle n'a aucun souvenir de l'agression elle-même. Le juge des faits ne voit pas ou n'entend pas le témoin faire la déclaration et, puisque qu'il n'y a aucune possibilité de contre-interroger le témoin *au moment précis* où il fait sa déclaration, la possibilité de vérifier utilement la véracité de cette déclaration peut être limitée. De plus, il peut y avoir lieu de se demander si la déclaration antérieure est reproduite intégralement et fidèlement.

41 Hence, although the underlying rationale for the general exclusionary rule may not be as obvious when the declarant is available to testify, it is the same — the difficulty of testing the reliability of the out-of-court statement. The difficulty of assessing W's out-of-court statement is the reason why it falls within the definition of hearsay and is subject to the general exclusionary rule. As one may readily appreciate, however, the degree of difficulty

Ainsi, bien qu'il se puisse que la raison d'être de la règle d'exclusion générale ne soit pas aussi évidente lorsque le déclarant est disponible pour témoigner, elle reste la même, soit la difficulté de vérifier la fiabilité de la déclaration extrajudiciaire. La difficulté d'apprécier la déclaration extrajudiciaire de W explique pourquoi elle est visée par la définition du ouï-dire et est assujettie à la règle d'exclusion générale. Toutefois, on le comprendra aisément, la

may be substantially alleviated in cases where the declarant is available for cross-examination on the earlier statement, particularly where an accurate record of the statement can be tendered in evidence. I will come back to that point later. My point here is simply to explain why, by definition, hearsay extends to out-of-court statements tendered for their truth even when the declarant is before the court.

5.3 *Hearsay Exceptions: A Principled Approach*

It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (*Wigmore on Evidence* (2nd ed. 1923), vol. III, § 1420, at p. 153). This Court first accepted this approach in *Khan* and later recognized its primacy in *Starr*. The governing framework, based on *Starr*, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23, at para. 15:

> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.

difficulté peut être atténuée substantiellement lorsque le déclarant peut être contre-interrogé au sujet de sa déclaration antérieure, en particulier lorsqu'il est possible de déposer en preuve un compte rendu exact de la déclaration. Je reviendrai sur cette question plus loin. Je ne tiens ici qu'à expliquer pourquoi, par définition, le ouï-dire englobe les déclarations extrajudiciaires présentées pour établir la véracité de leur contenu, et ce, même lorsque le déclarant est devant le tribunal.

5.3 *Les exceptions à la règle du ouï-dire : une méthode d'analyse raisonnée*

42

On reconnaît depuis longtemps qu'une application rigide de la règle d'exclusion entraînerait la perte injustifiée d'éléments de preuve très précieux. La déclaration relatée peut, en raison de la manière dont elle a été faite, être intrinsèquement fiable, ou il peut exister suffisamment de moyens de la vérifier en dépit du fait qu'elle est relatée. Partant, un certain nombre d'exceptions de common law ont peu à peu fait leur apparition. Une application rigide de ces exceptions s'est révélée, à son tour, problématique et a donné lieu, dans certains cas, à l'exclusion inutile d'éléments de preuve ou, dans d'autres cas, à leur admission injustifiée. Wigmore a préconisé une application plus souple de la règle, fondée sur les deux principes directeurs qui sous-tendent les exceptions de common law traditionnelles, à savoir la nécessité et la fiabilité (*Wigmore on Evidence* (2e éd. 1923), vol. III, § 1420, p. 153). Notre Cour a d'abord retenu cette approche dans l'arrêt *Khan* et en a, par la suite, reconnu la primauté dans l'arrêt *Starr*. Le cadre d'analyse applicable selon l'arrêt *Starr* a été résumé récemment dans l'arrêt *R. c. Mapara*, [2005] 1 R.C.S. 358, 2005 CSC 23, par. 15 :

> a) La preuve par ouï-dire est présumée inadmissible à moins de relever d'une exception à la règle du ouï-dire. Les exceptions traditionnelles continuent présomptivement de s'appliquer.
>
> b) Il est possible de contester une exception à l'exclusion du ouï-dire au motif qu'elle ne présenterait pas les indices de nécessité et de fiabilité requis par la méthode d'analyse raisonnée. On peut la modifier au besoin pour la rendre conforme à ces exigences.

(c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

43 In this case, we are concerned with the admission of evidence under item (d). In particular, the courts below were divided over two main questions: (1) what factors must be considered in deciding whether the evidence is sufficiently reliable to be admitted; and (2) whether the "exception" recognized by this Court in *U. (F.J.)* can be extended to the facts of this case. I will comment first on the second question.

44 In my view, the discussion over whether the "*U. (F.J.)* exception" applies here exemplifies the concern expressed in *U. (F.J.)* itself, that the "new approach to hearsay does not itself become a rigid pigeon-holing analysis" (para. 35). In *U. (F.J.)*, there was a similar debate over whether the "*B. (K.G.)* exception" to the rule against the substantive admission of prior inconsistent statements extended to circumstances where the reliability of the complainant's statement was based, not so much on the circumstances in which it came about as was the case in *B. (K.G.)*, but on its striking similarity to a statement made by the accused. Lamer C.J. explained how his decision in *B. (K.G.)* was an application of the principled approach to hearsay, and how "[i]n addition . . . a threshold of reliability can sometimes be established, in cases where the witness is available for cross-examination, by a striking similarity between two statements" (para. 40). He concluded his analysis by anticipating that yet other situations may arise. He stated the following (at para. 45):

I anticipate that instances of statements so strikingly similar as to bolster their reliability will be rare.

c) Dans de « rares cas », la preuve relevant d'une exception existante peut être exclue parce que, dans les circonstances particulières de l'espèce, elle ne présente pas les indices de nécessité et de fiabilité requis.

d) Si la preuve par ouï-dire ne relève pas d'une exception à la règle d'exclusion, elle peut tout de même être admissible si l'existence d'indices de fiabilité et de nécessité est établie lors d'un voir-dire.

Dans la présente affaire, il est question d'admission de preuve selon l'al. d). En particulier, les tribunaux d'instance inférieure étaient partagés quant à deux questions principales : (1) Quels facteurs doit-on considérer pour décider si la preuve est suffisamment fiable pour être admise? (2) L'« exception » reconnue par notre Cour dans l'arrêt *U. (F.J.)* peut-elle s'appliquer aux faits de la présente affaire? Je vais d'abord commenter la deuxième question.

À mon avis, le débat entourant la question de savoir si « l'exception de l'arrêt *U. (F.J.)* » s'applique en l'espèce illustre le souci exprimé dans l'arrêt *U. (F.J.)* lui-même, à savoir que la « nouvelle façon d'aborder le ouï-dire ne devienne pas en soi une analyse rigide de catégories » (par. 35). Dans l'arrêt *U. (F.J.)*, un débat semblable a porté sur la question de savoir si « l'exception de l'arrêt *B. (K.G.)* » à la règle interdisant l'admission quant au fond des déclarations antérieures incompatibles s'appliquait dans le cas où la fiabilité de la déclaration du plaignant tenait non pas tant aux circonstances dans lesquelles elle avait été faite, comme l'affaire dans *B. (K.G.)*, mais plutôt à sa similitude frappante avec une déclaration de l'accusé. Le juge en chef Lamer a expliqué comment sa décision dans l'affaire *B. (K.G.)* était une application de la méthode d'analyse raisonnée au ouï-dire et comment en outre « l'établissement d'un seuil de fiabilité est parfois possible, dans les cas où le témoin peut être contre-interrogé, lorsqu'il existe une similitude frappante entre deux déclarations » (par. 40). Il a conclu son analyse en prévoyant que d'autres situations peuvent encore se présenter. Voici ce qu'il a affirmé (par. 45) :

Je m'attends à ce que soient rares les cas de déclarations dont la similitude est frappante au point d'étayer

In keeping with our principled and flexible approach to hearsay, other situations may arise where prior inconsistent statements will be judged substantively admissible, bearing in mind that cross-examination alone provides significant indications of reliability. It is not necessary in this case to decide if cross-examination alone provides an adequate assurance of threshold reliability to allow substantive admission of prior inconsistent statements.

leur fiabilité. Conformément à notre démarche en matière de ouï-dire fondée sur des principes et souple, il peut y avoir d'autres situations où les déclarations antérieures incompatibles seront jugées admissibles quant au fond, compte tenu du fait que le contre-interrogatoire seul donne d'importants indices de fiabilité. En l'espèce, il n'est pas nécessaire de décider si le contre-interrogatoire seul donne une assurance suffisante quant au seuil de fiabilité pour permettre l'admission, quant au fond, de déclarations antérieures incompatibles.

As I will discuss later, both *B. (K.G.)* and *U. (F.J.)* highlight the particular concerns raised in cases of prior inconsistent statements. However, following Lamer C.J.'s own words of caution against "rigid pigeon-holing analysis", it is my view that neither *B. (K.G.)* nor *U. (F.J.)* should be interpreted as creating categorical exceptions to the rule against hearsay based on fixed criteria. The majority judgment in *B. (K.G.)* itself leaves room for appropriate substitutes for the criteria it sets out. Further, to interpret these cases as creating new categories of exceptions would not be in keeping with the flexible case-by-case principled approach. We would simply be replacing the traditional set of exceptions with a new and (for the time being) less ossified one. Rather, these cases provide guidance — not fixed categories — on the application of the principled case-by-case approach by identifying the relevant concerns and the factors to be considered in determining admissibility.

45 Comme je l'expliquerai plus loin, les arrêts *B. (K.G.)* et *U. (F.J.)* font tous les deux ressortir les préoccupations particulières suscitées dans des cas de déclaration antérieure incompatible. Toutefois, compte tenu de la mise en garde du juge en chef Lamer contre une « analyse rigide de catégories », j'estime que ni l'arrêt *B. (K.G.)* ni l'arrêt *U. (F.J.)* ne devraient être interprétés comme créant des catégories d'exceptions — fondées sur des critères fixes — à la règle interdisant le ouï-dire. Le jugement majoritaire dans l'affaire *B. (K.G.)* permet lui-même de remplacer par des substituts adéquats les critères qu'il énonce. De plus, interpréter ces arrêts comme créant de nouvelles catégories d'exceptions ne serait pas conforme à la méthode souple d'analyse raisonnée applicable cas par cas. Nous nous trouverions simplement à remplacer la série d'exceptions traditionnelles par une nouvelle série moins sclérosée (pour l'instant). Au lieu d'établir des catégories fixes, ces arrêts donnent plutôt des indications sur l'application cas par cas de la méthode d'analyse raisonnée en décrivant les préoccupations pertinentes et les facteurs à considérer pour déterminer l'admissibilité.

I will review *B. (K.G.)* and *U. (F.J.)* in this light as well as some other relevant decisions from this Court. Since the issues raised on this appeal relate to the assessment of reliability, my analysis will be focussed on that criterion. However, as I will explain, necessity and reliability should not be considered in isolation. One criterion may impact on the other. For example, as we shall see, in some cases the need for the evidence may, in large part, be based on the fact that the hearsay statement is highly reliable and the fact-finding process would be distorted without it. However, before I discuss the factors relating to reliability, I want to

46 J'examinerai sous cet angle les arrêts *B. (K.G.)* et *U. (F.J.)*, de même que certains autres arrêts pertinents de notre Cour. Puisque les questions soulevées dans le présent pourvoi concernent l'appréciation de la fiabilité, mon analyse portera sur ce critère. Toutefois, comme je l'expliquerai, la nécessité et la fiabilité ne devraient pas être examinées séparément. Un critère peut influer sur l'autre. Par exemple, comme nous le verrons, la nécessité de la preuve peut, dans certains cas, découler en grande partie du fait que la déclaration relatée est très fiable et que le processus de constatation des faits serait faussé sans elle. Toutefois, avant d'analyser

say a word on the overarching principle of trial fairness.

5.4 *Constitutional Dimension: Trial Fairness*

47 Prior to admitting hearsay statements under the principled exception to the hearsay rule, the trial judge must determine on a *voir dire* that necessity and reliability have been established. The onus is on the person who seeks to adduce the evidence to establish these criteria on a balance of probabilities. In a criminal context, the inquiry may take on a constitutional dimension, because difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused's ability to make full answer and defence, a right protected by s. 7 of the *Canadian Charter of Rights and Freedoms*: *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505. The right to make full answer and defence in turn is linked to another principle of fundamental justice, the right to a fair trial: *R. v. Rose*, [1998] 3 S.C.R. 262. The concern over trial fairness is one of the paramount reasons for rationalizing the traditional hearsay exceptions in accordance with the principled approach. As stated by Iacobucci J. in *Starr*, at para. 200, in respect of Crown evidence: "It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception."

48 As indicated earlier, our adversary system is based on the assumption that sources of untrustworthiness or inaccuracy can best be brought to light under the test of cross-examination. It is mainly because of the inability to put hearsay evidence to that test, that it is presumptively inadmissible. However, the constitutional right guaranteed under s. 7 of the *Charter* is not the right to confront or cross-examine adverse witnesses in itself. The adversarial trial process, which includes

les facteurs liés à la fiabilité, je tiens à dire un mot sur le principe dominant de l'équité du procès.

5.4 *La dimension constitutionnelle : l'équité du procès*

Avant d'admettre les déclarations relatées en vertu de l'exception raisonnée à la règle du ouï-dire, le juge du procès doit décider, lors d'un voir-dire, que la nécessité et la fiabilité ont été établies. Il incombe à la personne qui cherche à présenter la preuve d'établir ces critères selon la prépondérance des probabilités. En matière criminelle, l'examen peut comporter une dimension constitutionnelle parce que la difficulté de vérifier la preuve ou, à l'inverse, l'impossibilité de présenter une preuve fiable peut compromettre la capacité de l'accusé de présenter une défense pleine et entière, qui est un droit garanti par l'art. 7 de la *Charte canadienne des droits et libertés* : *Dersch c. Canada (Procureur général)*, [1990] 2 R.C.S. 1505. Le droit de présenter une défense pleine et entière est, à son tour, lié à un autre principe de justice fondamentale, à savoir le droit à un procès équitable : *R. c. Rose*, [1998] 3 R.C.S. 262. La préoccupation relative à l'équité du procès est l'une des raisons primordiales de rationaliser les exceptions traditionnelles à la règle du ouï-dire conformément à la méthode d'analyse raisonnée. Comme l'a précisé le juge Iacobucci, au par. 200 de l'arrêt *Starr*, quant à la preuve du ministère public, « [s]i on permettait au ministère public de présenter une preuve par ouï-dire non fiable contre l'accusé, peu importe qu'elle se trouve ou non à relever d'une exception existante, cela compromettrait l'équité du procès et ferait apparaître le spectre des déclarations de culpabilité erronées. »

Comme je l'ai indiqué précédemment, notre système accusatoire repose sur l'hypothèse voulant que le contre-interrogatoire représente le meilleur moyen de révéler les causes d'inexactitude ou de manque de fiabilité. C'est principalement en raison de l'incapacité de la vérifier de cette façon que la preuve par ouï-dire est présumée inadmissible. Toutefois, le droit constitutionnel garanti par l'art. 7 de la *Charte* n'est pas en soi le droit de confronter ou contre-interroger des témoins opposés. Le

cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved. Trial fairness embraces more than the rights of the accused. While it undoubtedly includes the right to make full answer and defence, the fairness of the trial must also be assessed in the light of broader societal concerns: see *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 69-76. In the context of an admissibility inquiry, society's interest in having the trial process arrive at the truth is one such concern.

The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other. In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its

processus judiciaire accusatoire, qui comprend le contre-interrogatoire, n'est que le moyen de parvenir à la fin recherchée. L'équité du procès, en tant que principe de justice fondamentale, est la fin qui doit être atteinte. L'équité du procès englobe plus que les droits de l'accusé. Bien qu'elle comprenne indubitablement le droit de présenter une défense pleine et entière, l'équité du procès doit aussi être évaluée à la lumière de préoccupations sociales plus globales : voir *R. c. Mills*, [1999] 3 R.C.S. 668, par. 69-76. Dans le contexte d'un examen de l'admissibilité, l'une de ces préoccupations est l'intérêt qu'a la société à ce que le processus judiciaire permette de découvrir la vérité.

49

La gamme plus vaste d'intérêts compris dans l'équité du procès se reflète dans le double principe de la nécessité et de la fiabilité. Le critère de la nécessité repose sur l'intérêt qu'a la société à découvrir la vérité. Étant donné qu'il n'est pas toujours possible de satisfaire au critère optimal du contre-interrogatoire effectué au moment précis où la déclaration est faite, au lieu de simplement perdre la valeur de la preuve en question, il devient nécessaire dans l'intérêt de la justice de se demander si cette preuve devrait néanmoins être admise sous sa forme relatée. Le critère de la fiabilité vise à assurer l'intégrité du processus judiciaire. Bien qu'elle soit nécessaire, la preuve n'est pas admissible, sauf si elle est suffisamment fiable pour écarter les dangers que comporte la difficulté de la vérifier. Comme nous le verrons, deux motifs différents, qui ne s'excluent pas mutuellement, permettent généralement de satisfaire à l'exigence de fiabilité. Dans certains cas, il se peut que, en raison des circonstances dans lesquelles la déclaration relatée a été faite, le contenu de cette déclaration soit si fiable qu'il aurait été peu ou pas utile de contre-interroger le déclarant au moment précis où il s'est exprimé. Dans d'autres cas, il peut arriver que la preuve ne soit pas aussi convaincante, mais les circonstances permettront de la vérifier suffisamment autrement qu'au moyen d'un contre-interrogatoire effectué au moment précis où elle est présentée. Dans ces circonstances, l'admission de la preuve compromettra rarement l'équité du procès. Toutefois, vu que l'équité du procès peut englober des facteurs allant

probative value is outweighed by its prejudicial effect.

6. The Admissibility Inquiry

6.1 *Distinction Between Threshold and Ultimate Reliability: A Source of Confusion*

50 As stated earlier, the trial judge only decides whether hearsay evidence is admissible. Whether the hearsay statement will or will not be ultimately relied upon in deciding the issues in the case is a matter for the trier of fact to determine at the conclusion of the trial based on a consideration of the statement in the context of the entirety of the evidence. It is important that the trier of fact's domain not be encroached upon at the admissibility stage. If the trial is before a judge and jury, it is crucial that questions of ultimate reliability be left for the jury — in a criminal trial, it is constitutionally imperative. If the judge sits without a jury, it is equally important that he or she not prejudge the ultimate reliability of the evidence before having heard all of the evidence in the case. Hence, a distinction must be made between "ultimate reliability" and "threshold reliability". Only the latter is inquired into on the admissibility *voir dire*.

51 The distinction between threshold and ultimate reliability has been made in a number of cases (see, for example, *B. (K.G.)* and *R. v. Hawkins*, [1996] 3 S.C.R. 1043), but we are mainly concerned here with the elaboration of this principle in *Starr*. In particular, the following excerpt from the Court's analysis has been the subject of much of the discussion and commentary (at paras. 215 and 217):

> In this connection, it is important when examining the reliability of a statement under the principled approach to distinguish between threshold and ultimate reliability. Only the former is relevant to admissibility: see *Hawkins*, *supra*, at p. 1084. Again, it is

au-delà de l'examen rigoureux de la nécessité et de la fiabilité, le juge du procès a le pouvoir discrétionnaire d'exclure la preuve par ouï-dire lorsque son effet préjudiciable l'emporte sur sa valeur probante, et ce, même si les deux critères sont respectés.

6. L'examen de l'admissibilité

6.1 *La distinction entre seuil de fiabilité et fiabilité en dernière analyse : source de confusion*

Comme nous l'avons vu, le juge du procès décide uniquement si la preuve par ouï-dire est admissible. Il appartient au juge des faits de décider, à l'issue du procès, s'il s'en remettra, en fin de compte, à la déclaration relatée pour trancher les questions en litige, après l'avoir examinée en fonction de l'ensemble de la preuve. Au stade de l'admissibilité, il importe de ne pas empiéter sur la compétence du juge des faits. Si le procès a lieu devant un juge et un jury, il est essentiel que les questions de fiabilité en dernière analyse soient laissées au jury — dans un procès criminel, c'est un impératif constitutionnel. Si le juge siège sans jury, il importe tout autant qu'il ne préjuge pas de la fiabilité en dernière analyse de la preuve avant d'avoir entendu l'ensemble de la preuve au dossier. Il faut donc établir une distinction entre « fiabilité en dernière analyse » et « seuil de fiabilité ». Lors d'un voir-dire portant sur l'admissibilité, l'examen se limite au seuil de fiabilité.

La distinction entre seuil de fiabilité et fiabilité en dernière analyse (ou fiabilité ultime ou absolue) a été établie dans un certain nombre d'arrêts (voir, par exemple, *B. (K.G.)* et *R. c. Hawkins*, [1996] 3 R.C.S. 1043). Cependant, nous nous intéressons surtout en l'espèce à l'explication de ce principe contenue dans l'arrêt *Starr*. Une bonne partie des discussions et des commentaires a porté notamment sur l'extrait suivant de l'analyse de la Cour (par. 215 et 217) :

> À cet égard, lorsque la fiabilité d'une déclaration est examinée selon la méthode fondée sur des principes, il importe d'établir une distinction entre le seuil de fiabilité et la fiabilité absolue. Seul le seuil de fiabilité est pertinent relativement à l'admissibilité : voir

not appropriate in the circumstances of this appeal to provide an exhaustive catalogue of the factors that may influence threshold reliability. However, our jurisprudence does provide some guidance on this subject. Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide *circumstantial* guarantees of trustworthiness. This could be because the declarant had no motive to lie (see *Khan*, *supra*; *Smith*, *supra*), or because there were safeguards in place such that a lie could be discovered (see *Hawkins*, *supra*; *U. (F.J.)*, *supra*; *B. (K.G.)*, *supra*).

. . .

At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805 (1990). In summary, under the principled approach a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable. However, it will need to examine whether the circumstances in which the statement was made lend sufficient credibility to allow a finding of threshold reliability. [Underlining added.]

The Court's statement that "[t]hreshold reliability is concerned not with whether the statement is true or not" has created some uncertainty. While it is clear that the trial judge does not determine whether the statement will ultimately be relied upon as true, it is not so clear that in every case threshold reliability is *not* concerned with whether the statement is true or not. Indeed, in *U. (F.J.)*, the rationale for admitting the complainant's hearsay statement was based on the fact that "the only likely explanation" for its striking similarity with the independent statement of the accused was that "they were both telling the truth" (para. 40).

Hawkins, précité, à la p. 1084. Là encore, il ne convient pas, dans les circonstances du présent pourvoi, de fournir une liste détaillée des facteurs qui peuvent influer sur le seuil de fiabilité. Toutefois, notre jurisprudence est utile dans une certaine mesure à ce sujet. Le seuil de fiabilité ne concerne pas la question de savoir si la déclaration est véridique ou non; c'est une question de fiabilité absolue. Il concerne plutôt la question de savoir si les circonstances ayant entouré la déclaration elle-même offrent des garanties *circonstancielles* de fiabilité. Ces garanties pourraient découler du fait que le déclarant n'avait aucune raison de mentir (voir *Khan* et *Smith*, précités) ou du fait qu'il y avait des mesures de protection qui permettaient de déceler les mensonges (voir *Hawkins*, *U. (F.J.)* et *B. (K.G.)*, précités).

. . .

À l'étape de l'admissibilité de la preuve par ouï-dire, le juge du procès ne devrait pas tenir compte de la réputation générale de sincérité du déclarant, ni d'aucune déclaration antérieure ou ultérieure, compatible ou incompatible. Ces facteurs n'ont pas trait aux circonstances de la déclaration elle-même. De même, je ne tiendrais pas compte de la présence d'une preuve corroborante ou contradictoire. Sur ce point, je suis d'accord avec l'arrêt de la Cour d'appel de l'Ontario *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; voir également *Idaho c. Wright*, 497 U.S. 805 (1990). En résumé, en vertu de la méthode fondée sur des principes, le tribunal ne doit pas empiéter sur la compétence du juge des faits ni subordonner l'admissibilité de la preuve par ouï-dire à la question de savoir si la preuve est absolument fiable. Il devra cependant examiner si les circonstances ayant entouré la déclaration confèrent suffisamment de crédibilité pour pouvoir conclure que le seuil de fiabilité est atteint. [Je souligne.]

52

L'affirmation de la Cour selon laquelle « [l]e seuil de fiabilité ne concerne pas la question de savoir si la déclaration est véridique ou non » a créé une certaine incertitude. Même s'il est évident que le juge du procès ne décide pas si la déclaration sera tenue pour véridique en définitive, il n'est pas aussi évident que, dans toute affaire, le seuil de fiabilité *ne* concerne *pas* la question de savoir si la déclaration est véridique ou non. En fait, dans l'arrêt *U. (F.J.)*, on a justifié l'admission de la déclaration relatée de la plaignante par le fait que « la seule explication probable » de la similitude frappante entre cette déclaration et la déclaration faite de façon indépendante par l'accusé était que « tous les deux disaient la vérité » (par. 40).

53 Further, it is not easy to discern what is or is not a circumstance "surrounding the statement itself". For example, in *Smith*, the fact that the deceased may have had a motive to lie was considered by the Court in determining threshold admissibility. As both Rosenberg J.A. and Blair J.A. point out in their respective reasons, "in determining whether the declarant had a motive to lie, the judge will necessarily be driven to consider factors outside the statement itself or the immediately surrounding circumstances" (para. 97).

54 Much of the confusion in this area of the law has arisen from this attempt to categorically label some factors as going only to ultimate reliability. The bar against considering "corroborating or conflicting evidence", because it is only relevant to the question of ultimate reliability, is a further example. Quite clearly, the corroborative nature of the semen stain in *Khan* played an important part in establishing the threshold reliability of the child's hearsay statement in that case.

55 This part of the analysis in *Starr* therefore requires clarification and, in some respects, reconsideration. I will explain how the relevant factors to be considered on an admissibility inquiry cannot invariably be categorized as relating either to threshold or ultimate reliability. Rather, the relevance of any particular factor will depend on the particular dangers arising from the hearsay nature of the statement and the available means, if any, of overcoming them. I will then return to the impugned passage in *Starr*, dealing more specifically with the question of supporting evidence since that reference appears to have raised the most controversy.

6.2 *Identifying the Relevant Factors: A Functional Approach*

6.2.1 Recognizing Hearsay

56 The first matter to determine before embarking on a hearsay admissibility inquiry, of course, is whether the proposed evidence is hearsay. This

De plus, il n'est pas facile de discerner ce qui est et ce qui n'est pas une circonstance « ayant entouré la déclaration elle-même ». Par exemple, lorsqu'elle s'est prononcée sur le seuil d'admissibilité dans l'affaire *Smith*, la Cour a tenu compte du fait que la victime pouvait avoir eu une raison de mentir. Comme l'ont souligné les juges Rosenberg et Blair dans leurs motifs respectifs, [TRADUCTION] « pour décider si le déclarant avait une raison de mentir, le juge sera nécessairement amené à considérer des facteurs extérieurs à la déclaration elle-même ou aux circonstances immédiates qui l'ont entourée » (par. 97).

La confusion qui règne dans ce domaine du droit tient en grande partie à cette tentative de classer certains facteurs comme touchant uniquement la fiabilité en dernière analyse. Un autre exemple est l'interdiction de tenir compte d'une « preuve corroborante ou contradictoire » parce qu'elle n'est pertinente qu'en ce qui concerne la question de la fiabilité en dernière analyse. De toute évidence, la nature corroborante de la tache de sperme, dans l'affaire *Khan*, a joué un rôle important dans l'établissement du seuil de fiabilité de la déclaration relatée de l'enfant.

Cette partie de l'analyse de l'arrêt *Starr* a donc besoin d'être clarifiée et, à certains égards, d'être reconsidérée. J'expliquerai comment les facteurs à considérer lors de l'examen de l'admissibilité ne peuvent pas toujours être classés comme ayant trait soit au seuil de fiabilité, soit à la fiabilité en dernière analyse. La pertinence d'un facteur dépendra plutôt des dangers particuliers découlant du fait que la déclaration constitue du ouï-dire, et des moyens possibles, s'il en est, de les écarter. Je reviendrai ensuite au passage contesté de l'arrêt *Starr*, en m'attardant plus précisément à la question de la preuve à l'appui étant donné que cette mention paraît avoir soulevé le plus de controverse.

6.2 *Détermination des facteurs pertinents : une approche fonctionnelle*

6.2.1 Reconnaissance du ouï-dire

La première question à trancher avant de procéder à l'examen de l'admissibilité d'une preuve par ouï-dire est bien sûr celle de savoir si la preuve

may seem to be a rather obvious matter, but it is an important first step. Misguided objections to the admissibility of an out-of-court statement based on a misunderstanding of what constitutes hearsay are not uncommon. As discussed earlier, not all out-of-court statements will constitute hearsay. Recall the defining features of hearsay. An out-of-court statement will be hearsay when: (1) it is adduced to prove the truth of its contents *and* (2) there is no opportunity for a contemporaneous cross-examination of the declarant.

Putting one's mind to the defining features of hearsay at the outset serves to better focus the admissibility inquiry. As we have seen, the first identifying feature of hearsay calls for an inquiry into the purpose for which it is adduced. Only when the evidence is being tendered for its truth will it constitute hearsay. The fact that the out-of-court statement is adduced for its *truth* should be considered in the context of the issues in the case so that the court may better assess the potential impact of introducing the evidence in its hearsay form.

Second, by putting one's mind, at the outset, to the second defining feature of hearsay — the absence of an opportunity for contemporaneous cross-examination of the declarant, the admissibility inquiry is immediately focussed on the dangers of admitting hearsay evidence. Iacobucci J. in *Starr* identified the inability to test the evidence as the "central concern" underlying the hearsay rule. Lamer C.J. in *U. (F.J.)* expressed the same view but put it more directly by stating: "Hearsay is inadmissible as evidence because its reliability cannot be tested" (para. 22).

6.2.2 Presumptive Inadmissibility of Hearsay Evidence

Once the proposed evidence is identified as hearsay, it is presumptively *inadmissible*. I stress the

proposée constitue du ouï-dire. Cela peut paraître assez évident, mais c'est une première étape importante. Les objections malencontreuses à l'admissibilité d'une déclaration extrajudiciaire, qui tiennent à une méprise sur ce qui constitue du ouï-dire, ne sont pas rares. Comme nous l'avons vu, les déclarations extrajudiciaires ne constituent pas toutes du ouï-dire. Rappelons-nous les caractéristiques déterminantes du ouï-dire. Une déclaration extrajudiciaire constituera du ouï-dire, premièrement, si elle est présentée pour établir la véracité de son contenu *et*, deuxièmement, s'il y a impossibilité de contre-interroger le déclarant au moment précis où il fait cette déclaration.

57 S'arrêter au départ aux caractéristiques déterminantes du ouï-dire permet de mieux orienter l'examen de l'admissibilité. Comme nous l'avons vu, la première caractéristique particulière du ouï-dire oblige à examiner le but dans lequel la preuve est présentée. Ce n'est que si elle est présentée pour établir la véracité de son contenu que la preuve constitue du ouï-dire. Le fait que la déclaration extrajudiciaire soit présentée pour établir la *véracité* de son contenu devrait être examiné dans le contexte des questions en litige afin que le tribunal soit mieux en mesure d'évaluer l'effet potentiel de la présentation de cette preuve relatée.

58 Deuxièmement, si on s'arrête au départ à la seconde caractéristique déterminante du ouï-dire, soit l'impossibilité de contre-interroger le déclarant au moment précis où il fait sa déclaration, l'examen de l'admissibilité porte aussitôt sur les dangers d'admettre la preuve par ouï-dire. Dans l'arrêt *Starr*, le juge Iacobucci a décrit l'impossibilité de vérifier la preuve comme étant la « préoccupation majeure » qui sous-tend la règle du ouï-dire. Dans l'arrêt *U. (F.J.)*, le juge en chef Lamer a exprimé le même point de vue, mais plus directement en ces termes : « Le ouï-dire n'est pas admissible comme preuve parce que sa fiabilité ne peut être vérifiée » (par. 22).

6.2.2 La présomption d'inadmissibilité de la preuve par ouï-dire

59 Dès que la preuve proposée est désignée comme étant du ouï-dire, elle est présumée

nature of the hearsay rule as a general exclusionary rule because the increased flexibility introduced in the Canadian law of evidence in the past few decades has sometimes tended to blur the distinction between admissibility and weight. Modifications have been made to a number of rules, including the rule against hearsay, to bring them up to date and to ensure that they facilitate rather than impede the goals of truth seeking, judicial efficiency and fairness in the adversarial process. However, the traditional rules of evidence reflect considerable wisdom and judicial experience. The modern approach has built upon their underlying rationale, not discarded it. In *Starr* itself, where this Court recognized the primacy of the principled approach to hearsay exceptions, the presumptive exclusion of hearsay evidence was reaffirmed in strong terms. Iacobucci J. stated as follows (at para. 199):

> By excluding evidence that might produce unfair verdicts, and by ensuring that litigants will generally have the opportunity to confront adverse witnesses, the hearsay rule serves as a cornerstone of a fair justice system.

6.2.3 Traditional Exceptions

60 The Court in *Starr* also reaffirmed the continuing relevance of the traditional exceptions to the hearsay rule. More recently, this Court in *Mapara* reiterated the continued application of the traditional exceptions in setting out the governing analytical framework, as noted in para. 42 above. Therefore, if the trial judge determines that the evidence falls within one of the traditional common law exceptions, this finding is conclusive and the evidence is ruled admissible, unless, in a rare case, the exception itself is challenged as described in both those decisions.

6.2.4 Principled Approach: Overcoming the Hearsay Dangers

61 Since the central underlying concern is the inability to test hearsay evidence, it follows that under

inadmissible. J'insiste sur le fait que la règle du ouï-dire est par nature une règle d'exclusion générale, car l'assouplissement accru du droit canadien de la preuve au cours des dernières décennies a parfois eu tendance à estomper la distinction entre admissibilité et valeur probante. Des modifications ont été apportées à un certain nombre de règles — dont la règle interdisant le ouï-dire — afin de les mettre à jour et d'assurer qu'elles favorisent la réalisation des objectifs de recherche de la vérité, d'efficacité du système judiciaire et d'équité du processus accusatoire, au lieu de l'entraver. Toutefois, les règles de preuve traditionnelles témoignent d'une sagesse et d'une expérience judiciaire considérables. L'approche moderne a consolidé, et non écarté, leur raison d'être fondamentale. Dans l'arrêt *Starr* lui-même, où notre Cour a reconnu la primauté de la méthode d'analyse raisonnée des exceptions à la règle du ouï-dire, la présomption d'exclusion de la preuve par ouï-dire a été réaffirmée de manière non équivoque. Le juge Iacobucci s'est ainsi exprimé (par. 199) :

> En écartant les éléments de preuve susceptibles de donner lieu à des verdicts inéquitables et en assurant que les parties aient généralement la possibilité de confronter des témoins opposés, la règle du ouï-dire est une pierre angulaire d'un système de justice équitable.

6.2.3 Les exceptions traditionnelles

Dans l'arrêt *Starr*, la Cour a aussi réaffirmé que les exceptions traditionnelles à la règle du ouï-dire sont toujours pertinentes. Plus récemment, dans l'arrêt *Mapara*, notre Cour a confirmé le maintien des exceptions traditionnelles en établissant le cadre d'analyse applicable, exposé plus haut au par. 42. Par conséquent, si le juge du procès conclut que la preuve relève de l'une des exceptions de common law traditionnelles, cette conclusion est définitive et la preuve est jugée admissible sauf si, dans de rares cas, l'exception elle-même est contestée, comme le précisent ces deux arrêts.

6.2.4 La méthode d'analyse raisonnée : écarter les dangers du ouï-dire

Étant donné que la préoccupation majeure sous-jacente est l'impossibilité de vérifier la preuve par

the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. As some courts and commentators have expressly noted, the reliability requirement is usually met in two different ways: see, for example, *R. v. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199 (Ont. C.A.); D. M. Paciocco, "The Hearsay Exceptions: A Game of 'Rock, Paper, Scissors'", in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 17, at p. 29.

ouï-dire, il s'ensuit que, selon la méthode d'analyse raisonnée, l'exigence de fiabilité vise à déterminer les cas où cette difficulté est suffisamment surmontée pour justifier l'admission de la preuve à titre d'exception à la règle d'exclusion générale. Comme certains tribunaux et commentateurs ont pris soin de le souligner, il y a deux manières de satisfaire à l'exigence de fiabilité : voir, par exemple, *R. c. Wilcox* (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45; *R. c. Czibulka* (2004), 189 C.C.C. (3d) 199 (C.A. Ont.); D. M. Paciocco, « The Hearsay Exceptions : A Game of "Rock, Paper, Scissors" », dans *Special Lectures of the Law Society of Upper Canada 2003 : The Law of Evidence* (2004), 17, p. 29.

One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:

62 Une manière consiste à démonter qu'il n'y a pas de préoccupation réelle quant au caractère véridique ou non de la déclaration, vu les circonstances dans lesquelles elle a été faite. Le bon sens veut que, si on peut avoir suffisamment confiance en la véracité et l'exactitude de la déclaration, le juge des faits devrait en tenir compte indépendamment du fait qu'elle est relatée. À cet égard, Wigmore a donné l'explication suivante :

> There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. [§ 1420, p. 154]

> [TRADUCTION] Dans de nombreux cas, on peut facilement voir qu'une telle épreuve requise [c'est-à-dire le contre-interrogatoire] ajouterait peu comme garantie parce que ses objets ont en grande partie déjà été atteints. Si une déclaration a été faite dans des circonstances où même un sceptique prudent la considérerait comme très probablement fiable (en temps normal), il serait trop pointilleux d'insister sur une épreuve dont l'objet principal est déjà atteint. [§ 1420, p. 154]

Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested. Recall that the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination. This preferred method is not just a vestige of past traditions. It remains a tried and true method, particularly when credibility issues must be resolved. It is one thing for a person to make a damaging

63 Une autre manière de satisfaire à l'exigence de fiabilité consiste à démontrer que le fait que la déclaration soit relatée ne suscite aucune préoccupation réelle étant donné que, dans les circonstances, sa véracité et son exactitude peuvent néanmoins être suffisamment vérifiées. Rappelons-nous que, dans notre système accusatoire, la meilleure façon de vérifier la preuve est de faire témoigner le déclarant sous serment devant le tribunal, tout en lui faisant subir un contre-interrogatoire minutieux. Cette méthode privilégiée n'est pas seulement un vestige de traditions passées. Elle demeure une méthode éprouvée et fiable, particulièrement

statement about another in a context where it may not really matter. It is quite another for that person to repeat the statement in the course of formal proceedings where he or she must commit to its truth and accuracy, be observed and heard, and be called upon to explain or defend it. The latter situation, in addition to providing an accurate record of what was actually said by the witness, gives us a much higher degree of comfort in the statement's trustworthiness. However, in some cases it is not possible to put the evidence to the optimal test, but the circumstances are such that the trier of fact will nonetheless be able to sufficiently test its truth and accuracy. Again, common sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence.

lorsqu'il faut résoudre des questions de crédibilité. C'est une chose de faire une déclaration préjudiciable à propos d'autrui dans un contexte où il se peut que cette déclaration n'ait pas vraiment d'importance; c'est une toute autre chose que le déclarant répète sa déclaration dans le cadre de procédures formelles où il doit en garantir la véracité et l'exactitude, être observé et entendu, et être appelé à l'expliquer ou à la défendre. Cette dernière situation, en plus de fournir un compte rendu exact de ce qu'a réellement dit le témoin, nous rassure beaucoup plus quant à la fiabilité de la déclaration. Toutefois, dans certains cas, il n'est pas possible de vérifier la preuve de la meilleure façon, mais les circonstances sont telles que le juge des faits sera néanmoins en mesure d'en vérifier suffisamment la véracité et l'exactitude. Là encore, le bon sens nous indique qu'il ne faudrait pas perdre l'avantage de cette preuve lorsqu'il existe d'autres façons adéquates de la vérifier.

64 These two principal ways of satisfying the reliability requirement can also be discerned in respect of the traditional exceptions to the hearsay rule. Iacobucci J. notes this distinction in *Starr*, stating as follows:

Il est également possible de distinguer ces deux principales façons de satisfaire à l'exigence de fiabilité dans le cas des exceptions traditionnelles à la règle du ouï-dire. Le juge Iacobucci note ainsi cette distinction dans l'arrêt *Starr* :

> For example, testimony in former proceedings is admitted, at least in part, because many of the traditional dangers associated with hearsay are not present. As pointed out in Sopinka, Lederman and Bryant, *supra*, at pp. 278-79:
>
> > . . . a statement which was earlier made under oath, subjected to cross-examination and admitted as testimony at a former proceeding is received in a subsequent trial *because the dangers underlying hearsay evidence are absent*.
>
> Other exceptions are based not on negating traditional hearsay dangers, but on the fact that the statement provides circumstantial guarantees of reliability. This approach is embodied in recognized exceptions such as dying declarations, spontaneous utterances, and statements against pecuniary interest. [Emphasis added by Iacobucci J.; para. 212.]

> Par exemple, le témoignage fait dans le cadre d'une instance antérieure est admis, du moins en partie, parce que bien des dangers qui se rattachent traditionnellement à la preuve par ouï-dire ne se posent pas. Comme il a été souligné dans Sopinka, Lederman et Bryant, *op. cit.*, aux pp. 278 et 279 :
>
> > [TRADUCTION] . . . une déclaration qui a été faite antérieurement sous la foi du serment, qui a fait l'objet d'un contre-interrogatoire et qui a été admise en tant que preuve testimoniale lors d'une instance antérieure est admise lors d'un procès ultérieur *parce que les dangers que comporte la preuve par ouï-dire ne se posent pas*.
>
> D'autres exceptions sont fondées non pas sur la suppression des dangers traditionnels de la preuve par ouï-dire, mais sur le fait que la déclaration offre des garanties circonstancielles de fiabilité. Cette méthode se retrouve dans des exceptions reconnues comme les déclarations de mourants, les déclarations spontanées et les déclarations au détriment des intérêts financiers de leur auteur. [Souligné par le juge Iacobucci; par. 212.]

65 Some of the traditional exceptions stand on a different footing, such as admissions from parties

Certaines exceptions traditionnelles ont une assise différente, tels les aveux de parties

(confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. In those cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement or that of his or her co-conspirators. Hence, the criteria for admissibility are not established in the same way. However, in cases where the exclusionary rule is based on the usual hearsay dangers, this distinction between the two principal ways of satisfying the reliability requirement, although not by any means one that creates mutually exclusive categories, may assist in identifying what factors need to be considered on the admissibility inquiry.

Khan is an example where the reliability requirement was met because the circumstances in which the statement came about provided sufficient comfort in its truth and accuracy. Similarly in *Smith*, the focus of the admissibility inquiry was also on those circumstances that tended to show that the statement was true. On the other hand, the admissibility of the hearsay statement in *B. (K.G.)* and *Hawkins* was based on the presence of adequate substitutes for testing the evidence. As we shall see, the availability of the declarant for cross-examination goes a long way to satisfying the requirement for adequate substitutes. In *U. (F.J.)*, the Court considered both those circumstances tending to show that the statement was true and the presence of adequate substitutes for testing the evidence. *U. (F.J.)* underscores the heightened concern over reliability in the case of prior inconsistent statements where the trier of fact is invited to accept an out-of-court statement over the sworn testimony from the same declarant. I will briefly review how the analysis of the Court in each of those cases was focussed on overcoming the particular hearsay dangers raised by the evidence.

6.2.4.1 *R. v. Khan, [1990] 2 S.C.R. 531*

As stated earlier, *Khan* is an example where the reliability requirement was met because the circumstances in which the statement came about

(confessions en matière criminelle) et les déclarations de coconspirateurs : voir l'arrêt *Mapara*, par. 21. Dans ces cas, les préoccupations relatives à la fiabilité tiennent à des considérations autres que l'incapacité de la partie en question de vérifier l'exactitude de sa propre déclaration ou de celles de ses coconspirateurs. Partant, les critères d'admissibilité ne sont pas établis de la même façon. Toutefois, dans les cas où la règle d'exclusion repose sur les dangers habituels du ouï-dire, la distinction entre les deux principales façons de satisfaire à l'exigence de fiabilité — bien qu'elle ne crée aucunement des catégories mutuellement exclusives — peut aider à reconnaître les facteurs à considérer pour déterminer l'admissibilité.

66 L'affaire *Khan* est un exemple où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles la déclaration avait été faite étaient suffisamment rassurantes quant à sa véracité et à son exactitude. De même, dans l'affaire *Smith*, l'examen de l'admissibilité était aussi axé sur les circonstances qui tendaient à démontrer la véracité de la déclaration. Par contre, dans les affaires *B. (K.G.)* et *Hawkins*, l'admissibilité de la déclaration relatée reposait sur l'existence d'autres moyens adéquats de vérifier la preuve. Comme nous le verrons, la possibilité de contre-interroger le déclarant permet dans une large mesure de satisfaire à l'exigence de substituts adéquats. Dans l'arrêt *U. (F.J.)*, la Cour a pris en considération tant les circonstances tendant à démontrer la véracité de la déclaration que l'existence d'autres moyens adéquats de vérifier la preuve. L'arrêt *U. (F.J.)* souligne que la préoccupation relative à la fiabilité augmente dans le cas de déclarations antérieures incompatibles, où le juge des faits est invité à retenir une déclaration extrajudiciaire au lieu du témoignage sous serment du même déclarant. J'examinerai brièvement comment, dans chacune de ces affaires, l'analyse de la Cour était axée sur la possibilité d'écarter les dangers particuliers du ouï-dire soulevés par la preuve.

6.2.4.1 *R. c. Khan, [1990] 2 R.C.S. 531*

67 Comme je l'ai déjà dit, l'arrêt *Khan* est un exemple où l'exigence de fiabilité était remplie parce que les circonstances dans lesquelles la déclaration avait

provided sufficient comfort in its truth and accuracy. The facts are well known. *Khan* involved a sexual assault on a very young child by her doctor. The child was incompetent to testify. The child's statements to her mother about the incident were inadmissible under any of the traditional hearsay exceptions. However, the child's statement had several characteristics that suggested the statement was true. Those characteristics answered many of the concerns that one would expect would be inquired into in testing the evidence, had it been available for presentation in open court in the usual way. McLachlin J., in the following oft-quoted statement, summarized them in this way:

> I conclude that the mother's statement in the case at bar should have been received. It was necessary, the child's viva voce evidence having been rejected. It was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence. [p. 548]

The facts also revealed that the statement was made almost immediately after the event. That feature removed any concern about inaccurate memory. The fact that the child had no reason to lie alleviated the concern about sincerity. Because the statement was made naturally and without prompting, there was no real danger that it came about because of the mother's influence. Most importantly, as stated in the above excerpt, the event described was one that would ordinarily be outside the experience of a child of her age giving it a "peculiar stamp of reliability". Finally, the statement was confirmed by a semen stain on the child's clothing. These characteristics each went to the truth and accuracy of the statement and, taken together, amply justified its admission. The criterion of reliability was met. There is nothing controversial about the factors considered in *Khan*, except for the supportive evidence of the semen stain. I will come back to that point later.

été faite étaient suffisamment rassurantes quant à sa véracité et à son exactitude. Les faits sont bien connus. Il y était question d'une agression sexuelle commise par un médecin sur une très jeune enfant. L'enfant était inhabile à témoigner. Les déclarations que l'enfant avait faites à sa mère au sujet de l'épisode n'étaient pas admissibles en application des exceptions traditionnelles à la règle du ouï-dire. Toutefois, la déclaration de l'enfant présentait plusieurs caractéristiques qui donnaient à penser que la déclaration était véridique. Ces caractéristiques répondaient à de nombreuses préoccupations qui auraient été censées être examinées à l'étape de la vérification de la preuve si celle-ci avait pu être présentée en cour de la façon habituelle. La juge McLachlin les a ainsi résumées dans un énoncé souvent cité :

> Je conclus qu'en l'espèce la déclaration de la mère aurait dû être reçue en preuve. Elle était nécessaire puisque le témoignage de vive voix de l'enfant avait été rejeté. Elle était également fiable. L'enfant n'avait aucune raison d'inventer son histoire qu'elle a racontée naturellement sans être incitée à le faire. En outre, le fait qu'on ne pouvait s'attendre à ce que l'enfant connaisse ce genre d'acte sexuel confère à sa déclaration une fiabilité toute particulière. Enfin, sa déclaration a été corroborée par une preuve matérielle. [p. 548]

Les faits révélaient aussi que la déclaration avait suivi presque immédiatement les faits reprochés. Cette caractéristique écartait toute crainte de souvenir inexact. Le fait que l'enfant n'avait aucune raison de mentir atténuait la préoccupation relative à la sincérité. Puisque la déclaration avait été faite naturellement et sans avoir été provoquée, il n'y avait pas de véritable danger qu'elle ait été faite sous l'influence de la mère. Qui plus est, comme l'indique la citation précédente, les faits décrits dépassaient l'expérience normale d'une enfant de son âge, ce qui conférait à la déclaration une « fiabilité toute particulière ». Enfin, la déclaration était confirmée par la présence d'une tache de sperme sur les vêtements de l'enfant. Chacune de ces caractéristiques touchait la véracité et l'exactitude de la déclaration et, ensemble, elles justifiaient amplement son admission. Le critère de fiabilité était rempli. À l'exception de la preuve à l'appui constituée de la tache de sperme, les facteurs considérés dans l'affaire *Khan* n'avaient rien de controversé. Je reviendrai plus loin sur cette question.

6.2.4.2 *R. v. Smith, [1992] 2 S.C.R. 915*

In *Smith*, this Court's inquiry into the circumstantial guarantees of reliability was also focussed on those circumstances that tended to show that the statement was true.

Smith was charged with the murder of K. The Crown's evidence included the testimony of K's mother about four telephone calls K made to her on the night of the murder. Defence counsel did not object to this evidence. Smith was convicted at trial. The Court of Appeal allowed the appeal and ordered a new trial on the ground that the phone calls were hearsay, and only the first two were admissible for the purpose of establishing K's state of mind. In refusing to apply the curative proviso, the Court of Appeal found that the hearsay had been used to place Smith with K at the time of her death, thereby "buttressing certain identification evidence of questionable reliability" (pp. 922-23). The Crown appealed to this Court.

After ruling that the state of mind, or "present intentions" exception did not apply to the phone calls, Lamer C.J. went on to elaborate on and then apply the approach outlined in *Khan*. After quoting extensively from Wigmore on the underlying rationale for the hearsay rule and its exceptions, he elaborated on the reliability prong of the principled analysis and stated as follows (at p. 933):

> If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established. [Emphasis added.]

In determining whether the phone calls were reliable, Lamer C.J. held that the first two were, but the third was not (the fourth was not in issue on appeal to this Court). With respect to the first two, there was no reason to doubt K's veracity — "[s]he had no known reason to lie" — and the traditional dangers associated with hearsay — perception, memory and

6.2.4.2 *R. c. Smith, [1992] 2 R.C.S. 915*

68 Dans l'arrêt *Smith*, l'examen des garanties circonstancielles de fiabilité effectué par notre Cour était axé également sur les circonstances tendant à démontrer la véracité de la déclaration.

69 M. Smith était accusé du meurtre de K. La preuve du ministère public incluait le témoignage de la mère de K au sujet de quatre appels téléphoniques que K lui avait faits la nuit du meurtre. L'avocat de la défense ne s'est pas opposé à la présentation de cette preuve. M. Smith a été déclaré coupable en première instance. La Cour d'appel a accueilli l'appel et ordonné la tenue d'un nouveau procès pour le motif que les appels téléphoniques constituaient du ouï-dire et que seuls les deux premiers appels étaient admissibles pour établir l'état d'esprit de K. En refusant d'appliquer la disposition réparatrice, la Cour d'appel a conclu que le ouï-dire avait servi à établir que K était avec M. Smith au moment de son décès, ce qui avait eu pour effet « de renforcer une certaine preuve d'identification d'une fiabilité douteuse » (p. 922-923). Le ministère public s'est pourvu devant notre Cour.

70 Après avoir décidé que l'exception de l'état d'esprit ou des « intentions existantes » ne s'appliquait pas aux appels téléphoniques, le juge en chef Lamer a explicité puis appliqué la méthode exposée dans l'arrêt *Khan*. Après avoir cité longuement Wigmore au sujet de la raison d'être de la règle du ouï-dire et de ses exceptions, il s'est attardé au volet « fiabilité » de la méthode d'analyse raisonnée et a déclaré ce qui suit (p. 933) :

> Si une déclaration qu'on veut présenter par voie de preuve par ouï-dire a été faite dans des circonstances qui écartent considérablement la possibilité que le déclarant ait menti ou commis une erreur, on peut dire que la preuve est « fiable », c'est-à-dire qu'il y a une garantie circonstancielle de fiabilité. [Je souligne.]

71 Au sujet de la fiabilité des appels téléphoniques, le juge en chef Lamer a décidé que les deux premiers appels étaient fiables, mais que le troisième ne l'était pas (le quatrième n'étant pas en cause devant notre Cour). Dans le cas des deux premiers appels, il n'y avait aucune raison de douter de la véracité des propos de K — « [e]lle n'avait aucune raison connue

credibility — "were not present to any significant degree" (p. 935). As we can see, the Court looked at factors that would likely have been inquired into during the course of cross-examination if the declarant had been available to testify and found that these usual concerns were largely alleviated because of the way in which the statements came about. Hence, the Court concluded that the absence of the ability to cross-examine K should go to the weight given to this evidence, not its admissibility.

72 With respect to the third phone call, however, Lamer C.J. held that "the conditions under which the statement was made do not . . . provide that circumstantial guarantee of trustworthiness that would justify its admission without the possibility of cross-examination" (p. 935). First, he held that she may have been mistaken about Smith returning to the hotel, or about his purpose in returning (p. 936). Second, he held that she might have lied to prevent her mother from sending another man to pick her up. With respect to this second possibility, Lamer C.J. held that the fact that K had been travelling under an assumed name with a credit card which she knew was either stolen or forged demonstrated that she was "at least capable of deceit" (p. 936). Again, the Court looked at factors that would likely have been inquired into during the course of cross-examination if the declarant had been available to testify and concluded that these "hypotheses" showed that the circumstances of the statement were not such as to "justify the admission of its contents" since it was impossible to say that the evidence was unlikely to change under cross-examination (p. 937). It is important to note that the Court did not go on to determine whether, on its view of the evidence, the declarant was mistaken or whether she had lied — those would be matters for the ultimate trier of fact to decide. On the admissibility inquiry, it sufficed that the circumstances in which the statement was made gave rise to these issues to bar its admission.

de mentir » — et les dangers traditionnellement associés au ouï-dire, à savoir les problèmes de perception, de mémoire et de crédibilité, « étaient dans une large mesure inexistants » (p. 935). Comme nous pouvons le constater, la Cour a pris en considération des facteurs qui auraient vraisemblablement été examinés en contre-interrogatoire si la déclarante avait été disponible pour témoigner, et a conclu que ces préoccupations habituelles étaient grandement atténuées en raison de la façon dont les déclarations avaient été faites. La Cour a donc conclu que l'incapacité de contre-interroger K devait influer sur le poids accordé à cette preuve et non sur son admissibilité.

Toutefois, en ce qui a trait au troisième appel téléphonique, le juge en chef Lamer a statué que « les conditions dans lesquelles la déclaration a été faite ne fournissent pas la garantie circonstancielle de fiabilité qui justifierait son admission sans possibilité de contre-interroger » (p. 935). Premièrement, il a conclu que K a pu se tromper quant au retour de M. Smith à l'hôtel ou quant à la raison de son retour (p. 936). Deuxièmement, il a décidé qu'elle pouvait avoir menti pour empêcher sa mère d'envoyer un autre homme la chercher. Quant à cette seconde possibilité, le juge en chef Lamer a estimé que le fait que K voyageait sous un nom d'emprunt en utilisant une carte de crédit qu'elle savait volée ou contrefaite démontrait qu'elle était « à tout le moins capable de tromper » (p. 936). Là encore, la Cour a pris en considération des facteurs qui auraient vraisemblablement été examinés en contre-interrogatoire si la déclarante avait été disponible pour témoigner, et a conclu que ces « hypothèses » démontraient que les circonstances dans lesquelles la déclaration avait été faite n'étaient pas de nature à « justifie[r] l'admission de son contenu » puisqu'il était impossible de dire que cette preuve ne serait pas susceptible de changer lors d'un contre-interrogatoire (p. 937). Il importe de noter que la Cour n'a pas ensuite décidé si, selon sa perception de la preuve, la déclarante était dans l'erreur ou avait menti — ce sont là des questions qui devaient être tranchées en fin de compte par le juge des faits. Lors de l'examen de l'admissibilité, il suffisait que les circonstances dans lesquelles la déclaration avait été faite aient soulevé ces questions pour en empêcher l'admission.

6.2.4.3 *R. v. B. (K.G.), [1993] 1 S.C.R. 740*

B. (K.G.) provides an example where threshold reliability was essentially based on the presence of adequate substitutes for the traditional safeguards relied upon to test the evidence.

The issue in *B. (K.G.)* was the substantive admissibility of prior inconsistent statements made by three of B's friends, in which they told the police that B was responsible for stabbing and killing the victim in the course of a fight. The three recanted their statements at trial. (They subsequently plead guilty to perjury.) The Crown sought to admit the prior statements to police for the truth of their contents. Although the trial judge had no doubt the recantations were false, he followed the traditional common law ("orthodox") rule that the statements could be used only to impeach the witnesses. In light of the doubtfulness of the other identification evidence, the trial judge acquitted B.

The issue before this Court was whether the orthodox rule in respect of prior inconsistent statements should be maintained. In reviewing its history, Lamer C.J. noted that, although the prohibition on hearsay was not always recognized as the basis for the rule, similar "dangers" were cited as reasons against admission, namely absence of an oath or affirmation, inability of the trier of fact to assess demeanour, and lack of contemporaneous cross-examination (pp. 763-64). After reviewing the academic criticism, the views of law reform commissioners, legislative changes in Canada and elsewhere, and developments in the law of hearsay, Lamer C.J. concluded that it was the province and duty of the Court to formulate a new rule (p. 777). He held that "evidence of prior inconsistent statements of a witness other than an accused should be substantively admissible on a principled basis, following this Court's decisions in *Khan* and *Smith*" with the requirements of reliability and necessity "adapted and refined in this

6.2.4.3 *R. c. B. (K.G.), [1993] 1 R.C.S. 740*

73 L'arrêt *B. (K.G.)* est un exemple où le seuil de fiabilité reposait essentiellement sur l'existence de substituts adéquats aux garanties traditionnelles invoquées pour vérifier la preuve.

74 La question litigieuse dans l'arrêt *B. (K.G.)* portait sur l'admissibilité quant au fond de déclarations antérieures incompatibles de trois amis de B, dans lesquelles ceux-ci avaient dit à la police que B avait poignardé à mort la victime au cours d'une bagarre. Les trois sont revenus sur leurs déclarations au procès. (Ils ont, par la suite, plaidé coupable à des accusations de parjure.) Le ministère public sollicitait l'admission des déclarations antérieures faites à la police pour établir la véracité de leur contenu. Bien qu'il n'ait aucunement douté de la fausseté des rétractations, le juge du procès a suivi la règle de common law traditionnelle (« orthodoxe ») selon laquelle les déclarations ne pouvaient servir qu'à attaquer la crédibilité des témoins. Vu le caractère douteux des autres éléments de preuve d'identification, le juge du procès a acquitté B.

75 La question soumise à notre Cour était de savoir s'il y avait lieu de maintenir l'application de la règle orthodoxe à l'égard des déclarations antérieures incompatibles. En faisant l'historique, le juge en chef Lamer a constaté que, bien que l'interdiction du ouï-dire n'ait pas toujours été reconnue comme étant le fondement de la règle, des « dangers » semblables avaient été évoqués pour interdire l'admission d'une déclaration, à savoir l'absence de serment ou d'affirmation solennelle, l'incapacité du juge des faits d'apprécier le comportement et l'absence de contre-interrogatoire au moment précis où la déclaration avait été faite (p. 763-764). Après avoir examiné les critiques d'auteurs de doctrine, les opinions de membres de commissions de réforme du droit, les changements apportés par le législateur au Canada et ailleurs, ainsi que l'évolution de la règle du ouï-dire, le juge en chef Lamer a conclu qu'il était du ressort et du devoir de la Cour de formuler une nouvelle règle (p. 777). Il a estimé que « la preuve des déclarations antérieures incompatibles

particular context, given the particular problems raised by the nature of such statements" (p. 783).

76 The most important contextual factor in *B. (K.G.)* is the availability of the declarant. Unlike the situation in *Khan* or *Smith*, the trier of fact is in a much better position to assess the reliability of the evidence because the declarant is available to be cross-examined on his or her prior inconsistent statement. The admissibility inquiry into threshold reliability, therefore, is not so focussed on the question whether there is reason to believe the statement is true, as it is on the question whether the trier of fact will be in a position to rationally evaluate the evidence. The search is for adequate substitutes for the process that would have been available had the evidence been presented in the usual way, namely through the witness, under oath or affirmation, and subject to the scrutiny of contemporaneous cross-examination.

77 Since the declarant testifies in court, under oath or affirmation, and is available for cross-examination, the question becomes why there is any remaining concern over the reliability of the prior statement. As I have indicated earlier, necessity and reliability should not be considered in isolation. One criterion may have an impact on the other. The situation in *B. (K.G.)* is one example. As noted by Lamer C.J., "[p]rior inconsistent statements present vexing problems for the necessity criterion" (p. 796). Indeed, the declarant is available as a witness. Why should not the usual rule apply and the recanting witness's sworn testimony alone go to the truth of the matter? After all, is that not the optimal test on reliability — that the witness come forth to be seen and heard, swear or affirm to tell the truth in the formal context of court proceedings, and be subjected to

d'un témoin, autre que l'accusé, doit être admissible quant au fond, d'après l'analyse fondée sur les principes élaborée dans les arrêts de notre Cour, *Khan* et *Smith* », et que les exigences de fiabilité et de nécessité « doivent être adapté[e]s et raffiné[e]s dans le contexte présent, vu les problèmes particuliers soulevés par la nature de ces déclarations » (p. 783).

Le facteur contextuel le plus important dans l'arrêt *B. (K.G.)* est la disponibilité du déclarant. Contrairement à la situation dans l'affaire *Khan* ou l'affaire *Smith*, le juge des faits est beaucoup mieux en mesure d'apprécier la fiabilité de la preuve parce que le déclarant est disponible pour être contre-interrogé au sujet de sa déclaration antérieure incompatible. Par conséquent, l'examen du seuil de fiabilité applicable en matière d'admissibilité ne porte pas tant sur la question de savoir s'il y a un motif de croire que la déclaration est véridique que sur celle de savoir si le juge des faits sera en mesure d'apprécier rationnellement la preuve. Il faut chercher des substituts adéquats au processus qui aurait été disponible si la preuve avait été présentée de la façon habituelle, à savoir par l'entremise du témoin qui vient déposer sous la foi du serment ou d'une affirmation solennelle et qui subit un contre-interrogatoire au moment précis où la déclaration est faite.

Étant donné que le déclarant témoigne en cour sous la foi du serment ou d'une affirmation solennelle et qu'il est possible de le contre-interroger, la question est alors de savoir pourquoi se préoccupe-t-on encore de la fiabilité de la déclaration antérieure. Comme je l'ai indiqué précédemment, la nécessité et la fiabilité ne devraient pas être examinées séparément. Un critère peut influer sur l'autre. La situation dans l'affaire *B. (K.G.)* en est un exemple. Comme l'a fait remarquer le juge en chef Lamer, « [l]es déclarations antérieures incompatibles posent des problèmes embarrassants par rapport au critère de la nécessité » (p. 796). En fait, le déclarant est disponible pour témoigner. Pourquoi la règle habituelle ne devrait-elle pas s'appliquer, et pourquoi le témoignage sous serment du témoin qui se rétracte ne devrait-il pas seul permettre de découvrir la vérité? Après

cross-examination? If a witness recants a prior statement and denies its truth, the default position is to conclude that the trial process has worked as intended — untruthful or inaccurate information will have been weeded out. There must be good reason to present the prior inconsistent statement as substantive proof over the sworn testimony given in court.

tout, n'est-ce pas là le critère optimal en matière de fiabilité — à savoir que le témoin se présente pour être vu et entendu, pour promettre, sous la foi du serment ou d'une affirmation solennelle, de dire la vérité dans le cadre formel de procédures judiciaires, et pour faire l'objet d'un contre-interrogatoire? Si un témoin revient sur une déclaration antérieure et en nie la véracité, la solution par défaut consiste à conclure que le procès a eu les résultats escomptés : les renseignements faux ou inexacts ont été éliminés. Il doit y avoir une bonne raison de présenter la déclaration antérieure incompatible comme preuve quant au fond de préférence au témoignage sous serment devant le tribunal.

78 As we know, the Court ultimately ruled in *B. (K.G.)*, and the principle is now well established, that necessity is not to be equated with the unavailability of the witness. The necessity criterion is given a flexible definition. In some cases, such as in *B. (K.G.)* where a witness recants an earlier statement, necessity is based on the unavailability of the *testimony*, not the witness. Notwithstanding the fact that the necessity criterion can be met on varied bases, the context giving rise to the need for the evidence in its hearsay form may well impact on the *degree* of reliability required to justify its admission. As stated by Lamer C.J. in *B. (K.G.)*, where the hearsay evidence is a prior inconsistent statement, reliability is a "key concern" (at pp. 786-87):

78 Comme nous le savons, dans l'arrêt *B. (K.G.)*, la Cour a statué en fin de compte — et ce principe est maintenant bien établi — que la nécessité ne saurait être assimilée à la non-disponibilité du témoin. Le critère de la nécessité reçoit une définition souple. Dans certains cas, comme dans l'affaire *B. (K.G.)* où un témoin revient sur une déclaration antérieure, la nécessité tient à la non-disponibilité du *témoignage* et non du témoin. Malgré le fait qu'il peut être satisfait de diverses manières au critère de la nécessité, le contexte qui engendre la nécessité de la preuve par ouï-dire peut bien avoir une incidence sur le *degré* de fiabilité exigé pour en justifier l'admission. Comme l'a dit le juge en chef Lamer dans l'arrêt *B. (K.G.)*, lorsque la preuve par ouï-dire est une déclaration antérieure incompatible, la fiabilité est une « préoccupation fondamentale » (p. 787) :

> The reliability concern is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered. In other words, the focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony offered at trial, and so additional indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence.

> Cette préoccupation s'accentue dans le cas des déclarations antérieures incompatibles parce que le juge des faits doit choisir entre deux déclarations faites par le même témoin, par opposition aux autres formes de ouï-dire dans lesquelles une seule version des faits est présentée. Autrement dit, dans le cas des déclarations antérieures incompatibles, l'examen est axé sur la fiabilité relative de la déclaration antérieure et du témoignage entendu au procès, de sorte que des indices et garanties de fiabilité autres que ceux énoncés dans les arrêts *Khan* et *Smith* doivent être prévus afin que la déclaration antérieure soit soumise à une norme de fiabilité comparable avant que les déclarations de ce genre soient admises quant au fond.

79 Lamer C.J. went on to describe the general attributes of in-court testimony that provide the usual safeguards for reliability. He reviewed at some length the compelling reasons to prefer statements made under oath or affirmation, the value of seeing and hearing the witness in assessing credibility, the importance of having an accurate record of what was actually said, and the value of contemporaneous cross-examination. In considering what would constitute an adequate substitute in respect of the prior inconsistent statement, he concluded (at pp. 795-96) that there will be "sufficient circumstantial guarantees of reliability" to render such statements substantively admissible where

> (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party . . . has a full opportunity to cross-examine the witness respecting the statement . . . . Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires.

80 To say that a statement is sufficiently reliable because it is made under oath, in person, and the maker is cross-examined is somewhat of a misnomer. A lot of courtroom testimony proves to be totally unreliable. However, therein lies the safeguard — in the *process* that has uncovered its untrustworthiness. Hence, the presence of adequate substitutes for that process establishes a threshold of reliability and makes it safe to admit the evidence.

81 Lamer C.J. also added an important proviso, to which I will return later, on the trial judge's discretion to refuse to allow the jury to make substantive use of the statement, even where the criteria outlined above are satisfied when there is any concern that the statement may be the product of some form of investigatory misconduct (pp. 801-2). Here, although the statements were videotaped, and the

Le juge en chef Lamer a ensuite décrit les caractéristiques générales d'un témoignage en cour qui offre les garanties habituelles de fiabilité. Il a examiné longuement les raisons impérieuses de préférer les déclarations faites sous la foi du serment ou d'une affirmation solennelle, l'utilité de voir et d'entendre le témoin pour apprécier la crédibilité, l'importance d'avoir un compte rendu exact de ce qui a réellement été dit, et l'avantage du contre-interrogatoire effectué au moment précis où la déclaration est faite. En étudiant ce qui constituerait un substitut adéquat à l'égard de la déclaration antérieure incompatible, il a conclu, aux p. 795-796, qu'il y aura des « garanties circonstancielles de fiabilité suffisantes » pour rendre de telles déclarations admissibles quant au fond

> (i) si la déclaration est faite sous serment ou affirmation solennelle après une mise en garde quant à l'existence de sanctions et à l'importance du serment ou de l'affirmation solennelle, (ii) si elle est enregistrée intégralement sur bande vidéo, et (iii) si la partie adverse [. . .] a la possibilité voulue de contre-interroger le témoin au sujet de la déclaration [. . .] Subsidiairement, il se peut que d'autres garanties circonstancielles de fiabilité suffisent à rendre une telle déclaration admissible quant au fond, à la condition que le juge soit convaincu que les circonstances offrent des garanties suffisantes de fiabilité qui se substituent à celles que la règle du ouï-dire exige habituellement.

Il n'est pas tout à fait juste d'affirmer qu'une déclaration est suffisamment fiable parce qu'elle est faite en personne et sous serment, et que le déclarant est contre-interrogé. Maints témoignages en cour s'avèrent tout à fait indignes de foi. Toutefois, c'est là que se situe la garantie — dans le *processus* qui en a révélé le manque de fiabilité. L'existence de substituts adéquats à ce processus établit donc un seuil de fiabilité et permet d'admettre sans risque la preuve.

Le juge en chef Lamer a également assujetti à une réserve importante — sur laquelle je reviendrai plus loin — le pouvoir discrétionnaire du juge du procès de refuser que la déclaration soit soumise au jury comme preuve de fond même dans le cas où les critères susmentionnés sont respectés, s'il y a quelque crainte que la déclaration soit le produit d'une forme d'inconduite de la part des enquêteurs

witnesses were cross-examined, the statements were not made under oath. Whether there was a sufficient substitute to warrant substantive admission was sent back to be determined by the trial judge (p. 805). The appeal was allowed and a new trial ordered. Cory J. (L'Heureux-Dubé J. concurring) agreed with the result but for different reasons that, for the purpose of our analysis, need not be reviewed here.

(p. 801-802). En l'espèce, bien que les déclarations aient été enregistrées sur bande vidéo et que les témoins aient été contre-interrogés, ces déclarations n'ont pas été faites sous serment. La question de savoir s'il y avait un substitut suffisant pour justifier l'admission quant au fond a été renvoyée au juge du procès pour qu'il la tranche (p. 805). Le pourvoi a été accueilli et un nouveau procès a été ordonné. Le juge Cory (avec l'appui de la juge L'Heureux-Dubé) était d'accord avec le résultat, mais pour des motifs différents qui, pour les besoins de notre analyse, n'ont pas à être examinés ici.

6.2.4.4 *R. v. U. (F.J.), [1995] 3 S.C.R. 764*

U. (F.J.) brought back to the Court the issue of admissibility of prior inconsistent statements. In an interview with police, the complainant, J.U., told the interviewing officer that the accused, her father, was having sex with her "almost every day" (para. 4). She gave considerable details about the sexual activity and also described two physical assaults. The interviewing police officer later testified that he had attempted to tape the interview, but that the tape recorder had malfunctioned. He subsequently prepared a summary, based partly on notes and partly on his memory.

Immediately after interviewing J.U., the same officer interviewed the accused. Again, the interview was not taped. The accused admitted to having sex with J.U. "many times", describing similar sexual acts and the two physical assaults that J.U. had described (para. 5). At trial, J.U. recanted the allegations of sexual abuse. She claimed to have lied at the behest of her grandmother. The accused denied having told police that he had engaged in sexual activity with J.U.

The focus of the discussion before this Court was whether the "rule" in *B. (K.G.)* applied to this case. Although the criteria in *B. (K.G.)* were based on the principled approach in *Khan* and *Smith*, it was not clear whether *B. (K.G.)* established a distinct "rule"

6.2.4.4 *R. c. U. (F.J.), [1995] 3 R.C.S. 764*

82 Dans l'affaire *U. (F.J.)*, la question de l'admissibilité des déclarations antérieures incompatibles a de nouveau été soumise à la Cour. Au cours d'un entretien avec la police, la plaignante, J.U., a déclaré au policier qui l'interrogeait que l'accusé, son père, avait eu des rapports sexuels avec elle [TRADUCTION] « presque chaque jour » (par. 4). Elle a donné de nombreux détails concernant ces activités sexuelles et a également fait état de deux agressions physiques. Le policier qui l'a interrogée a témoigné plus tard qu'il avait tenté d'enregistrer l'entretien, mais que le magnétoscope avait mal fonctionné. Il a, par la suite, préparé un résumé en se fondant en partie sur les notes qu'il avait prises et en partie sur ce qu'il avait retenu.

83 Immédiatement après avoir interrogé J.U., le même policier a interrogé l'accusé. Là encore, l'entretien n'a pas été enregistré. L'accusé a reconnu avoir eu des rapports sexuels avec J.U. [TRADUCTION] « bien des fois », décrivant des actes sexuels similaires et les deux agressions physiques dont elle avait fait état (par. 5). Au procès, J.U. est revenue sur ses allégations d'abus sexuel. Elle a soutenu avoir menti à la demande de sa grand-mère. L'accusé a nié avoir dit à la police qu'il avait eu des rapports sexuels avec J.U.

84 Le débat devant la Cour portait sur la question de savoir si la « règle » de l'arrêt *B. (K.G.)* s'appliquait à l'affaire. Bien que les critères de l'arrêt *B. (K.G.)* aient été fondés sur la méthode d'analyse raisonnée adoptée dans les arrêts *Khan* et *Smith*, il

for admitting prior inconsistent statements. Lamer C.J. sought to clarify the relationship between these cases, stating as follows (at para. 35):

> *Khan* and *Smith* establish that hearsay evidence will be substantively admissible when it is necessary and sufficiently reliable. Those cases also state that both necessity and reliability must be interpreted flexibly, taking account of the circumstances of the case and ensuring that our new approach to hearsay does not itself become a rigid pigeon-holing analysis. My decision in *B. (K.G.)* is an application of those principles to a particular branch of the hearsay rule, the rule against the substantive admission of prior inconsistent statements. The primary distinction between *B. (K.G.)*, on the one hand, and *Khan* and *Smith*, on the other, is that in *B. (K.G.)* the declarant is available for cross-examination. This fact alone goes part of the way to ensuring that the reliability criterion for admissibility is met. The case at bar differs from *B. (K.G.)* only in terms of available indicia of reliability. Necessity is met here in the same way it was met in *B. (K.G.)*: the prior statement is necessary because evidence of the same quality cannot be obtained at trial. For that reason, assessing the reliability of the prior inconsistent statement at issue here is determinative.

85 Lamer C.J. went on to determine how the indicia of reliability could be founded on different criteria than those set out in *B. (K.G.)*. The complainant's statement to the police was not made under oath. Nor was it videotaped. Most importantly, however, the declarant was available for cross-examination, thereby significantly alleviating the usual dangers arising from the introduction of hearsay evidence. Yet, the same concerns about the reliability of the prior inconsistent statement arose in this case. The complainant had recanted her earlier allegations. In the usual course of the trial process, this should be the end of the matter. Consider, for example, if the complainant had made the earlier allegations about being sexually assaulted by her father to some girlfriends in the context of playing a game of "Truth or Dare" where each player was being encouraged to outdo the previous one by saying or doing something outrageous. It would be difficult

n'était pas évident que l'arrêt *B. (K.G.)* établissait une « règle » distincte applicable à l'admission des déclarations antérieures incompatibles. Le juge en chef Lamer a cherché à clarifier en ces termes le lien entre ces affaires (par. 35) :

> Il ressort des arrêts *Khan* et *Smith* que la preuve par ouï-dire sera admissible quant au fond lorsqu'elle est nécessaire et suffisamment fiable. Il y est également dit qu'on doit interpréter de façon souple tant la nécessité que la fiabilité, tenant compte des circonstances de l'affaire et veillant à ce que notre nouvelle façon d'aborder le ouï-dire ne devienne pas en soi une analyse rigide de catégories. Ma décision dans *B. (K.G.)* est une application de ces principes à une branche particulière de la règle du ouï-dire, la règle interdisant l'admission quant au fond des déclarations antérieures incompatibles. La principale distinction entre l'arrêt *B. (K.G.)* d'une part, et les arrêts *Khan* et *Smith* d'autre part, réside dans le fait que, dans l'arrêt *B. (K.G.)*, l'auteur de la déclaration peut être contre-interrogé. Ce seul fait contribue à l'assurance du respect du critère de l'admissibilité quant à la fiabilité. L'espèce diffère de l'arrêt *B. (K.G.)* seulement quant aux indices de fiabilité disponibles. Le critère de la nécessité est rempli en l'espèce de la même façon qu'il y est satisfait dans *B. (K.G.)* : la déclaration antérieure est nécessaire parce qu'une preuve de la même qualité ne peut être obtenue au procès. C'est pour cette raison qu'il est déterminant d'évaluer la fiabilité de la déclaration antérieure incompatible en question en l'espèce.

Le juge en chef Lamer a ensuite déterminé comment les indices de fiabilité pouvaient reposer sur d'autres critères que ceux énoncés dans l'arrêt *B. (K.G.)*. La déclaration de la plaignante à la police n'avait pas été faite sous serment et n'avait pas non plus été enregistrée sur bande vidéo. Qui plus est cependant, la déclarante pouvait être contre-interrogée, ce qui atténuait considérablement les dangers habituels découlant de la présentation d'une preuve par ouï-dire. Pourtant, cette affaire suscitait les mêmes préoccupations quant à la fiabilité de la déclaration antérieure incompatible. La plaignante était revenue sur ses allégations antérieures. Dans le cours normal du processus judiciaire, cela devrait mettre un terme à l'affaire. Supposons, par exemple, qu'en jouant avec certaines de ses amies au jeu de la vérité « Truth or Dare », dans lequel chaque joueur est encouragé à surpasser le joueur précédent en disant ou faisant quelque chose qui

to find justification for introducing her casual statement as substantive proof over her sworn testimony that the events never happened. Hence, the focus must turn on the reliability of the prior inconsistent statement.

choque, la plaignante aurait allégué avoir été agressée sexuellement par son père. L'utilisation, à titre de preuve quant au fond, de la déclaration qu'elle a faite à brûle-pourpoint — de préférence à son témoignage sous serment voulant que ces faits ne se soient jamais produits — serait difficilement justifiable. L'accent doit donc être mis sur la fiabilité de la déclaration antérieure incompatible.

In *B. (K.G.)*, the Court held that a prior inconsistent statement is sufficiently reliable for substantive admission if it is made in circumstances comparable to the giving of in-court testimony. In *U. (F.J.)*, the reliability requirement was met rather by showing that there was no real concern about whether the complainant was speaking the truth in her statement to the police. The striking similarities between her statement and the independent statement made by her father were so compelling that the only likely explanation was that they were both telling the truth. Again here, the criteria of necessity and reliability intersect. In the interest of seeking the truth, the very high reliability of the statement rendered its substantive admission necessary.

86 Dans l'arrêt *B. (K.G.)*, la Cour a conclu qu'une déclaration antérieure incompatible est suffisamment fiable pour être admise quant au fond si elle est faite dans des circonstances comparables à celles d'un témoignage devant le tribunal. Dans l'affaire *U. (F.J.)*, on a satisfait à l'exigence de fiabilité en démontrant plutôt que la question de savoir si la plaignante avait dit la vérité dans sa déclaration à la police n'était pas vraiment un sujet de préoccupation. Les similitudes frappantes entre sa déclaration et celle faite de façon indépendante par son père étaient si convaincantes que la seule explication vraisemblable était qu'ils disaient tous les deux la vérité. Là encore, les critères de la nécessité et de la fiabilité se recoupent. Par souci de recherche de la vérité, il était nécessaire d'admettre quant au fond la déclaration en raison de sa très grande fiabilité.

Again here, Lamer C.J. added the following proviso (at para. 49):

> I would also highlight here the proviso I specified in *B. (K.G.)* that the trial judge must be satisfied on the balance of probabilities that the statement was not the product of coercion of any form, whether involving threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct.

87 Là encore, le juge en chef Lamer a ajouté la condition suivante (par. 49) :

> Je soulignerais également les conditions que j'ai précisées dans *B. (K.G.)*, à savoir que le juge du procès doit être convaincu, selon la prépondérance des probabilités, que la déclaration n'est pas le produit de la coercition, que ce soit menaces, promesses, questions trop suggestives de l'enquêteur ou d'une autre personne en situation d'autorité, ou autres manquements des enquêteurs.

6.2.4.5 *R. v. Hawkins, [1996] 3 S.C.R. 1043*

This Court's decision in *Hawkins* was concerned mainly with the issue of spousal incompetency. However, it is also instructive on the application of the principled approach to the hearsay rule. My remarks here are confined to the latter aspect of the case. It exemplifies how, in some circumstances, the reliability requirement may be established solely by the presence of adequate substitutes

6.2.4.5 *R. c. Hawkins, [1996] 3 R.C.S. 1043*

88 L'arrêt *Hawkins* de notre Cour portait surtout sur la question de l'inhabilité à témoigner du conjoint. Toutefois, cet arrêt est également intéressant en ce qui concerne l'application de la méthode d'analyse raisonnée à la règle du ouï-dire. Mes remarques ne visent ici que ce dernier aspect de l'arrêt. Il illustre comment, dans certaines circonstances, seule l'existence de substituts adéquats aux garanties

for the safeguards traditionally relied upon to test trial testimony. As we shall see, again here, the opportunity to cross-examine the declarant was a crucial factor. Because there were sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement, the Court concluded that the trial judge erred in excluding the statement based on its perceived lack of probative value.

traditionnelles invoquées pour vérifier le témoignage au procès peut permettre de satisfaire à l'exigence de fiabilité. Comme nous le verrons, là encore, la possibilité de contre-interroger la déclarante était un facteur crucial. Parce qu'il y avait suffisamment d'indices de fiabilité pour que le juge des faits dispose d'une base satisfaisante pour examiner la véracité de la déclaration, la Cour a conclu que le juge du procès avait commis une erreur en excluant la déclaration parce qu'il la croyait dépourvue de valeur probante.

89 Hawkins, a police officer, was charged with obstructing justice and corruptly accepting money. His then girlfriend, G, testified at his preliminary inquiry. After testifying the first time, G brought an application to testify again and recanted much of what she had said, with explanations. By the time of the trial, Hawkins and G were married and therefore G was incompetent to testify under s. 4 of the *Canada Evidence Act*. After ruling that the common law rule of spousal incompetency applied, and that G's testimony at the preliminary inquiry could not be read in at trial under s. 715 of the *Criminal Code*, the trial judge held that the evidence was not admissible under the principled approach because it was not sufficiently reliable. Hawkins was acquitted. The verdict was overturned by majority decision of the Court of Appeal for Ontario. On further appeal to this Court, the appeal was dismissed but for different reasons. This Court refused to modify the common law rule of spousal incompetency as it was invited to do. The Court agreed with the trial judge that the common law rule applied, and the testimony could not be read in under s. 715. However, a majority of the Court held that the preliminary inquiry testimony could be read in at trial under the principled approach to the admission of hearsay. The three dissenting judges held that this violated the policy underlying s. 4 and should not be permitted.

M. Hawkins, un policier, a été accusé d'avoir entravé la justice et d'avoir par corruption accepté de l'argent. G, qui était sa petite amie à l'époque, a témoigné à l'enquête préliminaire. Après avoir témoigné la première fois, G a demandé à témoigner de nouveau, et elle est revenue, en s'expliquant, sur une grande partie de ce qu'elle avait dit. Au moment du procès, M. Hawkins et G étaient mariés, et G était, de ce fait, inhabile à témoigner en vertu de l'art. 4 de la *Loi sur la preuve au Canada*. Après avoir décidé que la règle de common law de l'inhabilité du conjoint à témoigner s'appliquait et que le témoignage de G recueilli à l'enquête préliminaire ne pouvait pas être lu au procès en application de l'art. 715 du *Code criminel*, le juge du procès a conclu que la preuve n'était pas admissible selon la méthode d'analyse raisonnée parce qu'elle n'était pas suffisamment fiable. M. Hawkins a été acquitté. Le verdict a été écarté par une décision majoritaire de la Cour d'appel de l'Ontario. Le pourvoi formé par la suite devant notre Cour a été rejeté, mais pour des motifs différents. La Cour a refusé de se rendre à l'invitation de modifier la règle de common law de l'inhabilité du conjoint à témoigner. Elle a convenu avec le juge du procès que la règle de common law s'appliquait et que le témoignage ne pouvait pas être lu en application de l'art. 715. Toutefois, les juges majoritaires de la Cour ont décidé que le témoignage recueilli à l'enquête préliminaire pouvait être lu au procès suivant la méthode d'analyse raisonnée applicable à l'admission du ouï-dire. Les trois juges dissidents ont estimé que cela dérogeait à la politique sous-jacente de l'art. 4 et ne devait pas être permis.

After determining that the necessity criterion was met, Lamer C.J. and Iacobucci J. (Gonthier and Cory JJ. concurring) addressed reliability. In the circumstances of this case, it could hardly be said that the complainant's testimony was inherently trustworthy. She had given contradictory versions, all under oath. Rather, the Court looked for the presence of a satisfactory basis for evaluating the truth of the statement, stating as follows, at para. 75:

> The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. More specifically, the judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers. The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact. [Emphasis added.]

The Court held that, generally, a witness's testimony before a preliminary inquiry will satisfy the test for threshold reliability, since the fact that it was given under oath and subject to contemporaneous cross-examination in a hearing involving the same parties and mainly the same issues will provide sufficient guarantees of its trustworthiness (para. 76). In addition, the accuracy of the statement is certified by a written transcript which is signed by the judge, and the party against whom the hearsay evidence is tendered has the power to call the declarant as a witness. The inability of the trier of fact to observe demeanour was found to be "more than compensated by the circumstantial guarantees of trustworthiness inherent in the adversarial, adjudicative process of a preliminary inquiry" (para. 77). The fact that the early common law was prepared to admit former testimony under certain circumstances indicated an implicit acceptance of its reliability notwithstanding the lack of the declarant's presence (para. 78). Therefore, Lamer C.J. and Iacobucci J. concluded (at para. 79):

90 Après avoir déterminé que le critère de la nécessité était rempli, le juge en chef Lamer et le juge Iacobucci (avec l'appui des juges Gonthier et Cory) ont abordé la question de la fiabilité. Dans les circonstances de cette affaire, on ne pouvait guère affirmer que le témoignage de la plaignante était en soi digne de foi. Les versions qu'elle avait toutes présentées sous serment étaient contradictoires. La Cour a plutôt vérifié s'il existait une base satisfaisante pour examiner la véracité de la déclaration, affirmant ceci (par. 75) :

> Le critère de la fiabilité vise un seuil de fiabilité et non une fiabilité absolue. La tâche du juge du procès se limite à déterminer si la déclaration relatée en question renferme suffisamment d'indices de fiabilité pour fournir au juge des faits une base satisfaisante pour examiner la véracité de la déclaration. Plus particulièrement, le juge doit cerner les dangers spécifiques du ouï-dire auxquels donne lieu la déclaration et déterminer ensuite si les faits entourant cette déclaration offrent suffisamment de garanties circonstancielles de fiabilité pour contrebalancer ces dangers. Il continue d'appartenir au juge des faits de se prononcer sur la fiabilité absolue de la déclaration et le poids à lui accorder. [Je souligne.]

91 La Cour a statué qu'en général un témoignage recueilli à l'enquête préliminaire satisfait au critère du seuil de fiabilité puisque le fait qu'il a été présenté sous serment et que le témoin a alors été contre-interrogé dans le cadre d'une audience mettant en cause les mêmes parties et essentiellement les mêmes questions en litige fournit suffisamment de garanties de fiabilité de ce témoignage (par. 76). De plus, l'exactitude de la déclaration est certifiée par une transcription signée par le juge, et la partie contre laquelle la preuve par ouï-dire est présentée a le pouvoir d'assigner le déclarant à témoigner. L'impossibilité pour le juge des faits d'observer le comportement a été qualifiée de « plus que contrebalancé[e] par les garanties circonstancielles de fiabilité propres à la procédure décisionnelle de nature accusatoire que constitue l'enquête préliminaire » (par. 77). Le fait qu'à l'origine on était disposé en common law à admettre en preuve un témoignage antérieur dans certaines circonstances indiquait qu'on en reconnaissait implicitement la fiabilité malgré l'absence du déclarant (par. 78). Le juge en chef Lamer et le juge Iacobucci ont donc conclu ceci (par. 79) :

For these reasons, we find that a witness's recorded testimony before a preliminary inquiry bears sufficient hallmarks of trustworthiness to permit the trier of fact to make substantive use of such statements at trial. The surrounding circumstances of such testimony, particularly the presence of an oath or affirmation and the opportunity for contemporaneous cross-examination, more than adequately compensate for the trier of fact's inability to observe the demeanour of the witness in court. The absence of the witness at trial goes to the weight of such testimony, not to its admissibility.

Applying this reasoning to the statement at issue, it was found to be reliable (para. 80).

92 Lamer C.J. and Iacobucci J. added that the trial judge had erred in considering the internal contradictions contained in the testimony because these considerations properly related to the ultimate assessment of the actual probative value of the testimony, a matter for the trier of fact. Although some of the analysis on this last point is couched in terms of categorizing factors as relevant to either threshold or ultimate reliability, an approach which should no longer be adopted, the Court's conclusion on this point exemplifies where the line should be drawn on an inquiry into threshold reliability. When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the statement. That question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not — recall *U. (F.J.)*.

6.3 *Revisiting Paragraphes 215 and 217 in Starr*

93 As I trust it has become apparent from the preceding discussion, whether certain factors will go only to ultimate reliability will depend on the

Pour ces motifs, nous sommes d'avis qu'un témoignage enregistré lors d'une enquête préliminaire comporte suffisamment de garanties de fiabilité pour permettre au juge des faits d'en faire une utilisation quant au fond au cours du procès. Les circonstances entourant ce témoignage, tout particulièrement l'existence d'un serment ou d'une affirmation et la possibilité de contre-interrogatoire au moment de la déclaration font plus que contrebalancer l'impossibilité pour le juge des faits d'observer le comportement du témoin en cour. L'absence du témoin au procès influe sur le poids et non sur l'admissibilité du témoignage.

Appliquant ce raisonnement à la déclaration en cause, la Cour a estimé qu'elle était fiable (par. 80).

Le juge en chef Lamer et le juge Iacobucci ont ajouté que le juge du procès avait commis une erreur en tenant compte des contradictions internes du témoignage parce que ces considérations se rapportaient, à juste titre, à l'appréciation en dernière analyse de la valeur probante même du témoignage, qui doit être faite par le juge des faits. Bien qu'une partie de l'analyse relative à ce dernier point consiste à classer des facteurs comme se rapportant soit au seuil de fiabilité soit à la fiabilité en dernière analyse — méthode qui ne devrait plus être suivie —, la conclusion de la Cour à cet égard illustre où doit être tracée la ligne de démarcation en matière d'examen du seuil de fiabilité. Lorsque l'exigence de fiabilité est remplie parce que le juge des faits dispose d'une base suffisante pour apprécier la véracité et l'exactitude de la déclaration, il n'est pas nécessaire de vérifier davantage si la déclaration est susceptible d'être véridique. Cette question relève alors entièrement, en dernière analyse, du juge des faits et le juge du procès outrepasse son rôle en vérifiant si la déclaration est susceptible d'être véridique. Lorsque la fiabilité dépend de la fiabilité inhérente de la déclaration, le juge du procès doit examiner les facteurs tendant à démontrer que la déclaration est véridique ou non — qu'on se rappelle l'arrêt *U. (F.J.)*.

6.3 *Réexamen des par. 215 et 217 de l'arrêt Starr*

Comme le révèle, je l'espère, l'analyse qui précède, la question de savoir si certains facteurs toucheront uniquement la fiabilité en dernière analyse

context. Hence, some of the comments at paras. 215 and 217 in *Starr* should no longer be followed. Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach as discussed above and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. In addition, the trial judge must remain mindful of the limited role that he or she plays in determining admissibility — it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be predetermined on the admissibility *voir dire*.

dépendra du contexte. Partant, certains des commentaires formulés aux par. 215 et 217 de l'arrêt *Starr* ne devraient plus être suivis. Les facteurs pertinents ne doivent plus être rangés dans des catégories de seuil de fiabilité et de fiabilité en dernière analyse. Le tribunal devrait plutôt adopter une approche plus fonctionnelle, comme nous l'avons vu précédemment, et se concentrer sur les dangers particuliers que comporte la preuve par ouï-dire qu'on cherche à présenter, de même que sur les caractéristiques ou circonstances que la partie qui veut présenter la preuve invoque pour écarter ces dangers. De plus, le juge du procès doit demeurer conscient du rôle limité qu'il joue lorsqu'il se prononce sur l'admissibilité — il est essentiel pour assurer l'intégrité du processus de constatation des faits que la question de la fiabilité en dernière analyse ne soit pas préjugée lors du voir-dire portant sur l'admissibilité.

I want to say a few words on one factor identified in *Starr*, namely "the presence of corroborating or conflicting evidence" since it is that comment that appears to have raised the most controversy. I repeat it here for convenience:

94 Je tiens à dire quelques mots sur un facteur décrit dans l'arrêt *Starr*, à savoir « la présence d'une preuve corroborante ou contradictoire », puisqu'il semble que ce soit ce commentaire qui a soulevé le plus de controverse. Pour des raisons de commodité, je reproduis le commentaire en question :

> Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805 (1990). [para. 217]

> De même, je ne tiendrais pas compte de la présence d'une preuve corroborante ou contradictoire. Sur ce point, je suis d'accord avec l'arrêt de la Cour d'appel de l'Ontario *R. c. C. (B.)* (1993), 12 O.R. (3d) 608; voir également *Idaho c. Wright*, 497 U.S. 805 (1990). [par. 217]

I will briefly review the two cases relied upon in support of this statement. The first does not really provide assistance on this question and the second, in my respectful view, should not be followed.

95 J'examinerai brièvement les deux décisions invoquées à l'appui de cet énoncé. La première n'est pas vraiment utile à cet égard et la seconde, selon moi, ne devrait pas être suivie.

In *R. v. C. (B.)* (1993), 12 O.R. (3d) 608 (C.A.), the trial judge, in convicting the accused, had used a co-accused's statement as evidence in support of the complainant's testimony. The Court of Appeal held that this constituted an error. While a statement made by a co-accused was admissible for its truth against the co-accused, it remained hearsay as against the accused. The co-accused had recanted his statement at trial. His statement was not shown to be reliable so as to be admitted as an exception to the hearsay rule against the accused.

96 Dans l'affaire *R. c. C. (B.)* (1993), 12 O.R. (3d) 608 (C.A.), en déclarant l'accusé coupable, le juge du procès avait utilisé la déclaration d'un coaccusé comme preuve étayant le témoignage de la plaignante. La Cour d'appel a conclu que cela constituait une erreur. Alors que la déclaration d'un coaccusé était admissible contre lui comme preuve de sa véracité, elle restait du ouï-dire à l'égard de l'accusé. Le coaccusé était revenu sur sa déclaration au procès. Il n'a pas été démontré que sa déclaration était suffisamment fiable pour être admise

Therefore, this case is of no assistance on the question of whether supporting evidence should be considered or not in determining hearsay admissibility. It simply reaffirms the well-established rule that an accused's statement is only admissible against its maker, not the co-accused.

97 *Idaho v. Wright*, 497 U.S. 805 (1990), is more on point. In that case, five of the nine justices of the United States Supreme Court were not persuaded that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness'" (p. 822). In the majority's view, the use of corroborating evidence for that purpose "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility" (p. 823). By way of example, the majority observed that a statement made under duress may happen to be true, but evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial. The majority also raised the concern, arising mostly in child sexual abuse cases, that a jury may rely on the partial corroboration provided by medical evidence to mistakenly infer the trustworthiness of the entire allegation.

98 In his dissenting opinion, Kennedy J., with whom the remaining three justices concurred, strongly disagreed with the position of the majority on the potential use of supporting or conflicting evidence. In my view, his reasons echo much of the criticism that has been voiced about this Court's position in *Starr*. He said the following:

> I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable.

contre l'accusé à titre d'exception à la règle du ouï-dire. Cette affaire n'est donc d'aucun secours pour ce qui est de savoir s'il y a lieu de considérer une preuve à l'appui pour décider de l'admissibilité d'un ouï-dire. On y réaffirme simplement la règle bien établie selon laquelle la déclaration d'un accusé n'est admissible que contre lui et non contre un coaccusé.

L'arrêt *Idaho c. Wright*, 497 U.S. 805 (1990), est plus à propos. Dans cette affaire, cinq des neuf juges de la Cour suprême des États-Unis n'étaient pas convaincus que [TRADUCTION] « la preuve corroborant la véracité d'une déclaration relatée puisse étayer, à juste titre, la conclusion que la déclaration comporte "des garanties particulières de fiabilité" » (p. 822). Selon les juges majoritaires, l'utilisation d'une preuve corroborante à cette fin « permettrait d'admettre une déclaration présumée peu fiable en se fondant sur la fiabilité d'un autre élément de preuve au procès, résultat que nous croyons contraire à l'exigence que la preuve par ouï-dire admise en vertu de la clause de confrontation des témoins soit à ce point digne de foi qu'il serait peu utile de contre-interroger le déclarant » (p. 823). Par exemple, les juges majoritaires ont fait observer qu'une déclaration faite sous la contrainte peut se révéler véridique, mais qu'une preuve tendant à corroborer la véracité de cette déclaration ne saurait être substituée au contre-interrogatoire du déclarant au procès. Les juges majoritaires ont aussi exprimé la crainte, surtout dans les affaires d'abus sexuels d'enfants, qu'un jury s'appuie sur la corroboration partielle fournie par la preuve médicale pour inférer à tort la fiabilité de toute l'allégation.

Dans ses motifs dissidents, le juge Kennedy, avec l'appui des trois autres juges, s'est dit en profond désaccord avec le point de vue des juges majoritaires concernant l'utilisation potentielle d'un élément de preuve à l'appui ou contradictoire. À mon avis, ses motifs reprennent une bonne partie des critiques formulées au sujet de la position de notre Cour dans l'arrêt *Starr*. Il a affirmé ceci :

> [TRADUCTION] Je ne vois rien qui justifie constitutionnellement cette décision de dissocier la preuve corroborante de l'examen de la question de savoir si les

It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. In the context of child abuse, for example, if part of the child's hearsay statement is that the assailant tied her wrists or had a scar on his lower abdomen, and there is physical evidence or testimony to corroborate the child's statement, evidence which the child could not have fabricated, we are more likely to believe that what the child says is true. Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child's statements is substantially undermined. Under the Court's analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. [pp. 828-29]

Kennedy J. also strongly disagreed with the majority's view that only circumstances surrounding the making of the statement should be considered:

The [majority] does not offer any justification for barring the consideration of corroborating evidence, other than the suggestion that corroborating evidence does not bolster the "inherent trustworthiness" of the statements. But for purposes of determining the reliability of the statements, I can discern no difference between the factors that the Court believes indicate "inherent trustworthiness" and those, like corroborating evidence, that apparently do not. Even the factors endorsed by the Court will involve consideration of the very evidence the Court purports to exclude from the reliability analysis. The Court notes that one test of reliability is whether the child "use[d] . . . terminology unexpected of a child of similar age." But making this determination requires consideration of the child's vocabulary skills and past opportunity, or lack thereof, to learn the terminology at issue. And, when all of the extrinsic circumstances of a case are considered, it may be shown that use of a particular word or vocabulary in fact supports the inference of prolonged contact with the defendant, who was known to use the vocabulary in question. As a further example, the Court notes that motive to fabricate is an index of reliability. But if the suspect charges that a third person concocted a false case against him and coached the child, surely it is relevant to show that the third person had no contact with the child or no opportunity to suggest false testimony. Given the contradictions inherent in the Court's

déclarations d'un enfant sont fiables. Il va de soi pour la plupart des gens que l'un des meilleurs moyens de savoir si quelqu'un est digne de foi consiste à vérifier si ses propos sont corroborés par une autre preuve. Par exemple, dans un cas de violence envers une enfant, si une partie de la déclaration relatée de l'enfant veut que l'assaillant lui ait lié les poignets ou qu'il ait eu une cicatrice au bas de l'abdomen, et qu'une preuve matérielle ou un témoignage corrobore cette déclaration — preuve que l'enfant n'aurait pas pu fabriquer —, nous serons probablement plus enclins à croire que l'enfant dit la vérité. À l'inverse, on peut penser à la déclaration qu'un enfant fait de manière spontanée ou, par ailleurs dans des circonstances indiquant qu'elle est fiable, mais qui contient aussi des inexactitudes factuelles incontestées si énormes que la crédibilité de ses déclarations s'en trouve considérablement minée. Selon l'analyse de la Cour, la déclaration satisferait aux exigences de la clause de confrontation des témoins malgré un doute ineconsidérable quant à sa fiabilité. [p. 828-829]

99

Le juge Kennedy était aussi en profond désaccord avec le point de vue des juges majoritaires selon lequel seules les circonstances entourant la déclaration doivent être considérées :

[TRADUCTION] L[es juges majoritaires] n'offre[nt] aucune justification pour écarter l'examen de la preuve corroborante, si ce n'est qu'[ils] indique[nt] que celle-ci ne renforce pas la « fiabilité inhérente » des déclarations. Mais pour déterminer la fiabilité des déclarations, je ne vois aucune différence entre les facteurs qui, selon la Cour, indiquent l'existence de « fiabilité inhérente » et ceux qui, comme la preuve corroborante, ne paraissent pas le faire. Même les facteurs retenus par la Cour obligeront à examiner la preuve même que celle-ci entend soustraire à l'analyse de la fiabilité. La Cour note que l'un des critères de fiabilité est de savoir si l'enfant a « utilis[é] [. . .] un vocabulaire inattendu de la part d'un enfant de son âge ». Mais pour se prononcer sur ce point, il faut examiner les connaissances de l'enfant sur le plan du vocabulaire et la possibilité qu'il a eu ou non d'apprendre le vocabulaire en cause. Et lorsque toutes les circonstances extrinsèques d'une affaire sont prises en compte, il peut se révéler que l'usage d'un mot ou d'un vocabulaire particulier étaye en fait l'inférence d'un contact prolongé avec le défendeur, qui était connu pour son utilisation du vocabulaire en question. Comme autre exemple, la Cour note qu'un motif d'inventer une histoire est significatif en ce qui concerne la question de la fiabilité. Mais si le suspect accuse un tiers d'avoir inventé une fausse preuve contre lui et d'avoir préparé l'enfant, il est sûrement utile de démontrer que ce tiers n'a eu aucun contact avec l'enfant ni aucune possibilité

test when measured against its own examples, I expect its holding will soon prove to be as unworkable as it is illogical.

The short of the matter is that both the circumstances existing at the time the child makes the statements and the existence of corroborating evidence indicate, to a greater or lesser degree, whether the statements are reliable. If the Court means to suggest that the circumstances surrounding the making of a statement are the best indicators of reliability, I doubt this is so in every instance. And, if it were true in a particular case, that does not warrant ignoring other indicators of reliability such as corroborating evidence, absent some other reason for excluding it. If anything, I should think that corroborating evidence in the form of testimony or physical evidence, apart from the narrow circumstances in which the statement was made, would be a preferred means of determining a statement's reliability for purposes of the Confrontation Clause, for the simple reason that, unlike other indicators of trustworthiness, corroborating evidence can be addressed by the defendant and assessed by the trial court in an objective and critical way. [References omitted; pp. 833-34.]

100 In my view, the opinion of Kennedy J. better reflects the Canadian experience on this question. It has proven difficult and at times counterintuitive to limit the inquiry to the circumstances surrounding the making of the statement. This Court itself has not always followed this restrictive approach. Further, I do not find the majority's concern over the "bootstrapping" nature of corroborating evidence convincing. On this point, I agree with Professor Paciocco who commented on the reasoning of the majority in *Idaho v. Wright* as follows (at p. 36):

The final rationale offered is that it would involve "bootstrapping" to admit evidence simply because it is shown by other evidence to be reliable. In fact, the "bootstrapping" label is usually reserved to circular arguments in which a questionable piece of evidence "picks itself up by its own bootstraps" to fit within an exception. For example, a party claims it can rely on a hearsay statement because the statement was made under such pressure or involvement that the prospect of concoction can fairly be disregarded, but then relies on the contents of the hearsay statement to prove the existence of that pressure or involvement [*Ratten v. R.*, [1972] A.C. 378 (P.C.)]. Or, a party claims it can rely on the truth of the contents of a statement because it

de proposer un faux témoignage. Vu les contradictions inhérentes du critère de la Cour qui se dégagent de ses propres exemples, je pense que sa conclusion se révélera rapidement aussi inapplicable qu'illogique.

Bref, tant les circonstances entourant les déclarations de l'enfant que l'existence d'une preuve corroborante indiquent plus ou moins si les déclarations sont fiables. Si la Cour veut donner à entendre que les circonstances entourant une déclaration sont les meilleurs indices de fiabilité, je doute qu'il en soit ainsi dans tous les cas. Et, si cela était vrai dans une affaire donnée, cela ne justifie pas de passer sous silence d'autres indices de fiabilité comme la preuve corroborante, s'il n'y a aucune autre raison de les écarter. D'ailleurs, je crois que la preuve corroborante sous forme de témoignage ou de preuve matérielle, outre les circonstances bien précises entourant la déclaration, serait un moyen privilégié de déterminer la fiabilité d'une déclaration pour les besoins de la clause de confrontation, pour la simple raison que, contrairement aux autres indices de fiabilité, la preuve corroborante peut être étudiée par le défendeur et appréciée de façon objective et critique par le tribunal de première instance. [Renvois omis; p. 833-834.]

À mon avis, l'opinion du juge Kennedy reflète mieux l'expérience canadienne sur cette question. Il s'est révélé difficile et parfois paradoxal de limiter l'enquête aux circonstances entourant la déclaration. Notre Cour elle-même n'a pas toujours adopté cette approche restrictive. De plus, je ne juge pas convaincante la préoccupation des juges majoritaires quant au caractère « autocorroborant » de la preuve corroborante. À cet égard, je suis d'accord avec les commentaires suivants du professeur Paciocco concernant le raisonnement majoritaire de l'arrêt *Idaho c. Wright* (p. 36) :

[TRADUCTION] Le raisonnement final proposé veut qu'admettre une preuve simplement parce qu'une autre preuve établit qu'elle est fiable en ferait une preuve « autocorroborante ». En fait, on réserve généralement cette étiquette aux arguments circulaires selon lesquels un élément de preuve douteux « s'appuie sur lui-même » pour s'ériger en exception. Par exemple, une partie soutient qu'elle peut s'appuyer sur une déclaration relatée parce qu'elle a été faite sous une pression ou contrainte telle que la possibilité d'invention peut être écartée à juste titre, mais s'appuie ensuite sur le contenu de cette même déclaration pour prouver l'existence de cette pression ou contrainte [*Ratten c. R.*, [1972] A.C. 378 (P.C.)]. Ou encore, une partie affirme

was a statement made by an opposing party litigant, but then relies on the contents of the statement to prove it was made by an opposing party litigant: see *R. v. Evans*, [1991] 1 S.C.R. 869. Looking to *other* evidence to confirm the reliability of evidence, the thing *Idaho v. Wright* purports to prevent, is the very antithesis of "bootstrapping".

qu'elle peut compter sur la véracité d'une déclaration parce qu'elle a été faite par une partie opposée, mais s'appuie ensuite sur le contenu de la déclaration pour prouver qu'elle a été faite par une partie opposée : voir *R. c. Evans*, [1991] 1 R.C.S. 869. S'en remettre à un *autre* élément de preuve pour confirmer la fiabilité d'une preuve, ce que l'arrêt *Idaho c. Wright* vise à prévenir, est l'antithèse même de la preuve « autocorroborante ».

7. Application to This Case

Mr. Skupien's statements to the cook, Ms. Stangrat, to the doctor and to the police constituted hearsay. The Crown sought to introduce the statements for the truth of their contents. In the context of this trial, the evidence was very important — indeed the two charges against Mr. Khelawon in respect of this complainant were entirely based on the truthfulness of the allegations contained in his statements.

Mr. Skupien's hearsay statements were presumptively inadmissible. None of the traditional hearsay exceptions could assist the Crown in proving its case. The evidence could only be admitted under the principled exception to the hearsay rule.

Mr. Skupien's death before the trial made it necessary for the Crown to resort to Mr. Skupien's evidence in its hearsay form. It was conceded throughout that the necessity requirement had been met. The case therefore turned on whether the evidence was sufficiently reliable to warrant admission.

Since Mr. Skupien had died before the trial, he was no longer available to be seen, heard and cross-examined in court. There was no opportunity for contemporaneous cross-examination. Nor had there been an opportunity for cross-examination at any other hearing. Although Mr. Skupien was elderly and frail at the time he made the allegations, there is no evidence that the Crown attempted to preserve his evidence by application under ss. 709 to 714 of the *Criminal Code*. He did not testify at the preliminary hearing. The record does not disclose if he had died by that time. In making these comments, I

7. Application à la présente affaire

101 Les déclarations que M. Skupien a faites à la cuisinière, M^me^ Stangrat, au médecin et à la police constituaient du ouï-dire. Le ministère public cherchait à présenter ces déclarations pour établir la véracité de leur contenu. Dans le contexte du présent procès, cette preuve était très importante — en fait, les deux accusations portées contre M. Khelawon relativement à ce plaignant reposaient entièrement sur la véracité des allégations contenues dans les déclarations de ce dernier.

102 Les déclarations relatées de M. Skupien étaient présumées inadmissibles. Aucune des exceptions traditionnelles à la règle du ouï-dire ne pouvait aider le ministère public à établir sa preuve. La preuve ne pouvait être admise qu'en application de l'exception raisonnée à la règle du ouï-dire.

103 Le décès de M. Skupien avant le procès a forcé le ministère public à recourir à son témoignage sous sa forme relatée. Il a été concédé dans toutes les cours que l'on avait satisfait à l'exigence de nécessité. Il s'agissait donc de savoir si le témoignage était suffisamment fiable pour être admis en preuve.

104 Comme M. Skupien était décédé avant le procès, il ne pouvait plus être vu, entendu et contre-interrogé en cour. Il ne pouvait pas être contre-interrogé au moment précis de sa déclaration. Il n'y avait pas eu non plus d'autre possibilité de le contre-interroger à aucune autre audience. Même si M. Skupien était âgé et frêle au moment de ses allégations, rien ne prouve que le ministère public a tenté de préserver son témoignage en application des art. 709 à 714 du *Code criminel*. M. Skupien n'a pas témoigné à l'enquête préliminaire. Le dossier n'indique pas s'il était décédé à cette époque. En

do not question the fact that it was necessary for the Crown to resort to Mr. Skupien's evidence in hearsay form. Necessity is conceded. However, in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that also preserves the rights of the other party. That issue is not raised here.

105 The fact remains however that the absence of any opportunity to cross-examine Mr. Skupien has a bearing on the question of reliability. The central concern arising from the hearsay nature of the evidence is the inability to test his allegations in the usual way. The evidence is not admissible unless there is a sufficient substitute basis for testing the evidence or the contents of the statement are sufficiently trustworthy.

106 Obviously, there was no case to be made here on the presence of adequate substitutes for testing the evidence. This is not a *Hawkins* situation where the difficulties presented by the unavailability of the declarant were easily overcome by the availability of the preliminary hearing transcript where there had been an opportunity to cross-examine the complainant in a hearing that dealt with essentially the same issues. Nor is this a *B. (K.G.)* situation where the presence of an oath and a video were coupled with the availability of the declarant at trial. There are no adequate substitutes here for testing the evidence. There is the police video — nothing more. The principled exception to the hearsay rule does not provide a vehicle for founding a conviction on the basis of a police statement, videotaped or otherwise, without more. In order to meet the reliability requirement in this case, the Crown could only rely on the inherent trustworthiness of the statement.

107 In my respectful view, there was no case to be made on that basis either. This was not a situation

faisant ces commentaires, je ne remets pas en question la nécessité pour le ministère public de recourir au témoignage sous forme relatée de M. Skupien. Je reconnais que c'était nécessaire. Toutefois, dans une instance appropriée, il se peut bien que, pour trancher la question de la nécessité, le tribunal se demande si la partie qui veut présenter la preuve a déployé tous les efforts raisonnables pour préserver la preuve du déclarant de manière à préserver également les droits de l'autre partie. Cette question ne se pose pas en l'espèce.

Il reste toutefois que l'absence de possibilité de contre-interroger M. Skupien a une incidence sur la question de la fiabilité. La préoccupation majeure que suscite le caractère relaté de la preuve est l'incapacité de vérifier de la manière habituelle les allégations que cette preuve comporte. La preuve est inadmissible à moins qu'il y ait un autre motif suffisant de la vérifier ou que le contenu de la déclaration soit suffisamment fiable.

De toute évidence, il n'y avait aucune preuve à faire en l'espèce au sujet de l'existence d'autres moyens adéquats de vérifier la preuve. Il ne s'agit pas d'une situation comme celle dans l'affaire *Hawkins* où les difficultés présentées par la non-disponibilité de la déclarante pouvaient facilement être surmontées par le fait que l'on disposait de la transcription de l'audience préliminaire où on avait eu l'occasion de contre-interroger la plaignante dans le cadre d'une audience portant essentiellement sur les mêmes questions en litige. Il ne s'agit pas non plus d'une situation comme celle dans l'affaire *B. (K.G.)* où un serment et une bande vidéo s'ajoutaient à la disponibilité du déclarant au procès. Il n'y a en l'espèce aucun autre moyen adéquat de vérifier la preuve. Il y a la bande vidéo de la police — rien d'autre. L'exception raisonnée à la règle du ouï-dire ne constitue pas un moyen de fonder une déclaration de culpabilité sur une déclaration faite à la police sur bande vidéo ou autrement, sans plus. Pour satisfaire à l'exigence de fiabilité en l'espèce, le ministère public ne pouvait se fonder que sur la fiabilité inhérente de la déclaration.

À mon avis, il n'y avait aucune preuve à faire sur ce fondement non plus. Il ne s'agissait pas d'une

as in *Khan* where the cogency of the evidence was such that, in the words of Wigmore, it would be "pedantic to insist on a test whose chief object is already secured" (§ 1420, at p. 154). To the contrary, much as in the case of the third statement ruled inadmissible in *Smith*, the circumstances raised a number of serious issues such that it would be impossible to say that the evidence was unlikely to change under cross-examination. Mr. Skupien was elderly and frail. His mental capacity was at issue — the medical records contained repeated diagnoses of paranoia and dementia. There was also the possibility that his injuries were caused by a fall rather than an assault — the medical records revealed a number of complaints of fatigue, weakness and dizziness and the examining physician, Dr. Pietraszek, testified that the injuries could have resulted from a fall (A.R., vol. II, at p. 259). The evidence of the garbage bags filled with Mr. Skupien's possessions provided little assistance in assessing the likely truth of his statement — he could have filled those bags himself. Ms. Stangrat's obvious motive to discredit Mr. Khelawon presented further difficulties. The initial allegations were made to her — Dr. Pietraszek acknowledged in his evidence that when he saw Mr. Skupien, Ms. Stangrat was present and may have helped him by giving some indication of what happened. The extent to which Mr. Skupien may have been influenced in making his statement by this disgruntled employee was a live issue. Mr. Skupien had issues of his own with the way the retirement home was managed. This is apparent from his rambling complaints on the police video itself. The absence of an oath and the simple "yes" in answer to the police officer's question as to whether he understood that it was important to tell the truth do not give much insight on whether he truly understood the consequences for Mr. Khelawon of making his statement. In these circumstances, Mr. Skupien's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and, in turn, on the trier of fact's ability to properly assess its worth.

situation comme celle dans l'arrêt *Khan* où la force probante de la preuve était telle que, comme l'a affirmé Wigmore, il serait [TRADUCTION] « trop pointilleux d'insister sur une épreuve dont l'objet principal est déjà atteint » (§ 1420, p. 154). Au contraire, tout comme dans le cas de la troisième déclaration jugée inadmissible dans l'arrêt *Smith*, les circonstances soulevaient un certain nombre de questions sérieuses de sorte qu'il était impossible de dire que cette preuve ne serait pas susceptible de changer lors d'un contre-interrogatoire. M. Skupien était âgé et frêle. Sa capacité mentale était en cause — les dossiers médicaux faisaient état de diagnostics répétés de paranoïa et de démence. Il y avait également la possibilité que ses blessures aient résulté d'une chute plutôt que d'une agression — les dossiers médicaux révélaient un certain nombre de plaintes de fatigue, de faiblesse et d'étourdissements et le médecin traitant, le D^r^ Pietraszek, a témoigné que les blessures pouvaient être dues à une chute (d.a., vol. II, p. 259). Les sacs à ordures remplis d'effets personnels de M. Skupien étaient peu utiles pour déterminer si la déclaration était susceptible d'être véridique — il pouvait avoir rempli ces sacs lui-même. D'autres difficultés résultaient du motif évident que M^me^ Stangrat avait de discréditer M. Khelawon. Les premières allégations ont été formulées devant elle — dans son témoignage, le D^r^ Pietraszek a reconnu que M^me^ Stangrat était présente lorsqu'il a rencontré M. Skupien et qu'elle pouvait avoir aidé ce dernier en fournissant des indices sur ce qui s'était produit. Il fallait déterminer dans quelle mesure cette employée mécontente pouvait avoir influencé M. Skupien lorsqu'il a fait sa déclaration. M. Skupien avait lui-même certaines récriminations au sujet de la façon dont la maison de retraite était gérée. Cela ressort de ses plaintes incohérentes contenues dans l'enregistrement vidéo de la police. L'absence de serment et le simple « oui » répondu lorsque le policier lui a demandé s'il comprenait qu'il était important de dire la vérité n'aident pas beaucoup à déterminer s'il saisissait vraiment les conséquences de sa déclaration pour M. Khelawon. Dans ces circonstances, l'impossibilité de contre-interroger M. Skupien limitait considérablement la capacité de l'accusé de vérifier la preuve et, partant, la capacité du juge des faits d'en déterminer correctement la valeur.

108 As indicated earlier, the crux of the trial judge's finding that the evidence was sufficiently trustworthy was based on the "striking similarities" between the statements of the five complainants. As Rosenberg J.A., I too would not reject the possibility that the presence of a striking similarity between statements from different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case. However, the statements made by the other complainants in this case posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of Mr. Skupien's allegations. For example, the videotaped interview with Mr. Dinino which formed the basis of the second conviction against Mr. Khelawon was nine minutes in length. It was preceded by a 30-minute interview with the police. The police officer had no notes of the initial interview. Constable Pietroniro acknowledged that it "was very difficult" to get Mr. Dinino to answer questions and that much of the videotape is inaudible. Constable Pietroniro would generally put to Mr. Dinino what he thought Mr. Dinino was saying and Mr. Dinino would respond "yes" or "yeah". Constable Pietroniro agreed that he was making an educated guess as to what Mr. Dinino was saying and that there were some things said by Mr. Dinino that he did not understand. Quite apart from these difficulties, it is also far from clear on the record on precisely what features the trial judge based his finding that there was a "striking similarity" between the various statements. However, I do not find it necessary to elaborate on this point. The admissibility of the other statements is no longer in issue. The Court of Appeal unanimously ruled them inadmissible.

109 I conclude that the evidence did not meet the reliability requirement. The majority of the Court of Appeal was correct to rule it inadmissible.

8. Conclusion

110 For these reasons, I would dismiss the appeal.

Comme nous l'avons vu, la conclusion du juge du procès que la preuve était suffisamment fiable reposait essentiellement sur les « similitudes frappantes » entre les déclarations des cinq plaignants. À l'instar du juge Rosenberg, je suis moi aussi d'avis de ne pas écarter le fait que l'existence d'une similitude frappante entre les déclarations de divers plaignants pourrait bien être suffisamment probante pour justifier l'admission d'une preuve par ouï-dire dans un cas approprié. Toutefois, les déclarations des autres plaignants en l'espèce présentaient des difficultés encore plus grandes et ne pouvaient être admises quant au fond pour aider à apprécier la fiabilité des allégations de M. Skupien. Par exemple, l'entretien enregistré sur bande vidéo de M. Dinino, sur lequel reposait la deuxième déclaration de culpabilité de M. Khelawon, durait neuf minutes et avait été précédé d'un entretien de 30 minutes avec la police. Le policier ne possédait aucune note de l'entretien initial. L'agent Pietroniro a reconnu qu'il était [TRADUCTION] « très difficile » d'obtenir des réponses de M. Dinino et qu'une grande partie de l'enregistrement était inaudible. Il répétait généralement à M. Dinino ce qu'il croyait que celui-ci avait dit, et M. Dinino répondait par « oui » ou « ouais ». L'agent Pietroniro a reconnu qu'il faisait des suppositions éclairées au sujet de ce que M. Dinino disait et qu'il n'avait pas saisi certains propos de ce dernier. Outre ces difficultés, le dossier est loin d'indiquer clairement sur quelles caractéristiques précises le juge du procès s'est fondé pour conclure à l'existence d'une « similitude frappante » entre les diverses déclarations. Toutefois, je ne juge pas nécessaire de m'étendre sur cette question. L'admissibilité des autres déclarations n'est plus en cause. La Cour d'appel a décidé, à l'unanimité, qu'elles étaient inadmissibles.

Je conclus que la preuve ne satisfait pas à l'exigence de fiabilité. Les juges majoritaires de la Cour d'appel ont eu raison de la déclarer inadmissible.

8. Conclusion

Pour ces motifs, je suis d'avis de rejeter le pourvoi.

Appeal dismissed.

Solicitor for the appellant: Ministry of the Attorney General of Ontario, Toronto.

Solicitors for the respondent: Fleming, Breen, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of the Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Louis P. Strezos and Associate, and Di Luca Barristers, Toronto.

Pourvoi rejeté.

Procureur de l'appelante : Ministère du Procureur général de l'Ontario, Toronto.

Procureurs de l'intimé : Fleming, Breen, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Ministère du Procureur général de la Colombie-Britannique, Vancouver.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Louis P. Strezos and Associate, et Di Luca Barristers, Toronto.

TAB 46

Her Majesty the Queen v. Matte

[Indexed as: R. v. Matte]

111 O.R. (3d) 791

2012 ONCA 504

Court of Appeal for Ontario,
Juriansz, Watt and Hoy JJ.A.
July 19, 2012

Criminal law -- Evidence -- Hearsay -- Accused convicted of breaching long-term supervision order by taking non-prescribed drug -- Accused convicted based solely on his admission that took pill held out to be Dilaudid -- Trial judge entitled to conclude that accused's admission reflected his acceptance of truth of his supplier's statement -- Conviction not unreasonable.

Criminal law -- Sentencing -- Long-term offenders -- Breach of long-term supervision order -- Accused breaching long-term supervision order ("LTSO") by taking one pill held out to be Dilaudid -- Trial judge sentencing accused to one year's incarceration -- Trial judge erring in holding that protection of public was sole purpose of LTSO and in failing to recognize that rehabilitation may also be appropriate sentencing consideration -- Sentence proportionate to gravity of offence and degree of accused's responsibility -- Accused having lengthy history of violence linked to drug abuse, having three prior breaches of LTSO and poor institutional conduct -- Appeal from sentence dismissed.

The accused, a long-term offender ("LTO"), was charged with

breaching his long-term supervision order ("LTSO"). When asked by his parole officer to provide a random sample of urine to test for drugs, the accused admitted that he took a pill held out to be Dilaudid by another residence of the community correctional facility in which the accused was required to reside. His LTSO required him to abstain from non-prescribed drugs. Dilaudid was not detected when a urine sample was analyzed, so the case for the Crown consisted of the accused's admission. The trial judge convicted the accused and sentenced him to one year's incarceration. The accused appealed the conviction, arguing that it was unreasonable in the absence of proof that the pill he took was Dilaudid, and that the trial judge erred in relying on the accused's admission to carry the full burden assigned to the Crown because the admission was based on hearsay unconfirmed by other evidence. He also appealed the sentence.

Held, the appeal should be dismissed.

A party making an admission may adopt a hearsay statement for the purpose of admitting the facts disclosed in that statement. Where a party indicates a belief in, or acceptance of, a hearsay statement, such a belief or acceptance is some evidence of the truth of the contents of the hearsay statement. It was open to the trial judge to conclude that the accused's admission provided some evidence that he took Dilaudid.

The trial judge did not have the benefit of the Supreme Court of Canada's analysis in Ipeelee setting out the principles of sentencing relevant to breaches of LTSOs. The trial judge erred in characterizing the protection of the public as the "entire purpose" of the LTO provisions. Long-term supervision has two specific objectives: protecting the public from the risk of re-offence, and rehabilitating the LTO and reintegrating him or her into the community. However, despite the trial judge's error in principle, the sentence imposed was consistent with the [page792] fundamental principle of proportionality. The drug prohibition was included in the LTSO because the accused had a lengthy history of drug abuse which was inextricably interwoven with his equally lengthy history of violent offences. This was the accused's third conviction for breach of

his LTSO. He had violated the terms of his statutory release four times and had a robust history of institutional offences. Despite many chances to participate in programs for violent offenders and drug abusers, he had a history of failures to attend, suspensions for inappropriate behaviour and superficial responses. As the accused had been unswerving in his resistance to rehabilitative efforts, it would not have been appropriate to give rehabilitation a prominent place in the sentencing decision. The sentence imposed was proportionate to the gravity of the offence and the degree of the accused's responsibility.

Cases referred to

R. v. Ipeelee, [2012] S.C.J. No. 13, 2012 SCC 13, 428 N.R. 1, 91 C.R. (6th) 1, 318 B.C.A.C. 1, 2012EXP-1208, J.E. 2012-661, 288 O.A.C. 224, EYB 2012-204040, 280 C.C.C. (3d) 265, 99 W.C.B. (2d) 642, [2012] 2 C.N.L.R. 218; R. v. Streu, [1989] 1 S.C.R. 1521, [1989] S.C.J. No. 59, 96 N.R. 58, [1989] 4 W.W.R. 577, J.E. 89-954, 97 A.R. 356, 48 C.C.C. (3d) 321, 70 C.R. (3d) 1, 7 W.C.B. (2d) 332, apld

Other cases referred to

R. v. Biniaris, [2000] 1 S.C.R. 381, [2000] S.C.J. No. 16, 2000 SCC 15, 184 D.L.R. (4th) 193, 252 N.R. 204, J.E. 2000-838, 134 B.C.A.C. 161, 143 C.C.C. (3d) 1, 32 C.R. (5th) 1, 45 W.C.B. (2d) 454; R. v. Corbett, [1975] 2 S.C.R. 275, [1973] S.C.J. No. 157, 42 D.L.R. (3d) 142, 1 N.R. 258, [1974] 2 W.W.R. 524, 14 C.C.C. (2d) 385, 25 C.R.N.S. 296; R. v. Labine, [1975] O.J. No. 235, 23 C.C.C. (2d) 567 (C.A.); R. v. Morrissey (1995), 22 O.R. (3d) 514, [1995] O.J. No. 639, 80 O.A.C. 161, 97 C.C.C. (3d) 193, 38 C.R. (4th) 4, 26 W.C.B. (2d) 436 (C.A.); R. v. Schmidt, [1948] S.C.R. 333, [1948] S.C.J. No. 24, [1948] 4 D.L.R. 217, 92 C.C.C. 53, 6 C.R. 317; R. v. Yebes, [1987] 2 S.C.R. 168, [1987] S.C.J. No. 51, 43 D.L.R. (4th) 424, 78 N.R. 351, [1987] 6 W.W.R. 97, J.E. 87-995, 17 B.C.L.R. (2d) 1, 36 C.C.C. (3d) 417, 59 C.R. (3d) 108

Statutes referred to

Criminal Code, R.S.C. 1985, c. C-46, ss. 718.1 [as am.], 718.2 [as am.], Part XXIII [as am.]

Authorities referred to

Wigmore on Evidence, vol. 4 (Chadbourn Rev.)

APPEAL from the conviction entered by Masse J. of the Ontario Court of Justice dated January 13, 2011 for breach of a long-term supervision order and from the sentence imposed by Masse J. on February 4, 2011.

Fergus J. (Chip) O'Connor, for appellant.

Holly Loubert, for respondent.

The judgment of the court was delivered by

[1] WATT J.A.: -- The appellant, Corey Matte, is long-term offender ("LTO"). Contrary to a term of his long-term supervision [page793] order ("LTSO"), he took a pill held out by a fellow offender to be Dilaudid. A judge convicted Matte of breaching his LTSO and sentenced him to nearly a year in jail in addition to the time he had already spent in custody awaiting trial.

[2] Matte appeals both his conviction and sentence. He says that the conviction is unreasonable because the Crown did not prove that the pill he admitted taking was Dilaudid. But even if he were properly convicted, he contends that the sentence imposed was out of proportion to the offence he committed.

[3] These reasons explain why I disagree with the appellant and would dismiss his appeal against conviction and sentence.
The Conviction Appeal

[4] The evidence adduced at trial was brief and uncomplicated.

The background

[5] In early 2010, the appellant lived under the supervision of his parole officer at the Portsmouth Community Correctional Centre in accordance with the terms of his LTSO. The LTSO required the appellant to abstain from the use of drugs, other than those prescribed by a doctor and over-the-counter drugs

taken as directed by the manufacturer.

[6] To ensure the appellant's compliance with this prohibition on drug use, his parole supervisor was authorized to make random demands for urine samples for analysis. The appellant was required to comply with such demands.

The demand

[7] Around January 19, 2010, the appellant's parole supervisor, concerned about possible drug use, issued a demand for a urine sample for analysis. The appellant attempted to avoid providing the sample. When questioned by his parole supervisor, the appellant, who worked part-time as a fitness instructor, explained that he was taking creatine, a body-building supplement. The appellant expressed concern that the presence of creatine might interfere with the urinalysis.

[8] When his supervisor pressed further, the appellant said that the night before the demand was made, two other residents at Portsmouth had pressured him to take an orange or red pill. The appellant, a person with a lengthy history of drug addiction, took the pill, which he had been told was Dilaudid. In the same conversation, the appellant admitted to his parole supervisor that he had a drug problem and needed to participate in a residential treatment program. [page794]

The test results

[9] About a week later, the urinalysis results came back. Neither Dilaudid nor creatine was detected. The parole supervisor suspected that someone else's urine had been substituted for testing.

The case for the Crown

[10] The case for the Crown consisted of the appellant's admission to his parole supervisor that he had taken a 2 milligram pill offered to him by another offender as Dilaudid. The pill was orange or red in colour.

The arguments on appeal

[11] For the appellant, Mr. O'Connor reinvigorates the argument advanced, but rejected, at trial. He says that the conviction is unreasonable in the absence of proof, by certificate of analysis or otherwise, that the pill the appellant took was in fact Dilaudid. The trial judge relied on the appellant's admission to carry the full burden assigned to the Crown. It was an error to do so because the admission was based on hearsay unconfirmed by other evidence. Further, the trial judge reversed the onus of proof, essentially requiring the appellant to establish that the pill was not Dilaudid.

[12] For the respondent, Ms. Loubert says that the finding of guilt was reasonable: it was a conclusion that a reasonable trier of fact, properly instructed and acting judicially, could have rendered.

[13] Ms. Loubert says that the existence of a drug may be proven by direct or circumstantial evidence. The manner of proof includes, but is not limited to, a certificate or other proof of the results of analysis. As a matter of law and in the circumstances of this case, the trial judge could rely on the appellant's admission, which accepted or reflected his belief in the truth of the statement of another about the nature of the pill. The conclusion of guilt in this case was based on the evidence as a whole untainted by any shift or reversal of the onus of proof.

The governing principles

[14] Several basic principles are at work in connection with this ground of appeal.

[15] First, the standard to be applied in determining whether a finding of guilt is unreasonable or cannot be supported by the evidence is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered: [page795] R. v. Biniaris, [2000] 1 S.C.R. 381, [2000] S.C.J. No. 16, 2000 SCC 15, at para. 36; R. v. Yebes, [1987] 2 S.C.R. 168, [1987] S.C.J. No. 51, at p. 185 S.C.R.; and R. v.

Corbett, [1975] 2 S.C.R. 275, [1973] S.C.J. No. 157, at p. 282 S.C.R.

[16] The test or standard to be applied in determining whether a finding of guilt is reasonable includes both objective and subjective assessments. The reviewing court must determine what verdict a reasonable jury, properly instructed, could judicially have reached. In doing so, the court must review, analyze and, within the limits of appellate disadvantage, weigh the evidence: Biniaris, at para. 36.

[17] Second, submissions that allege a trial judge misapprehended the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake about the substance of the evidence, or a failure to give proper effect to an item or items of evidence: R. v. Morrissey (1995), 22 O.R. (3d) 514, [1995] O.J. No. 639 (C.A.), at p. 538 O.R. A finding that a trial judge misapprehended the evidence may become the centerpiece of an argument that the verdict was unreasonable: Morrissey, at p. 540 O.R. It seems to logically follow that a failure to give proper effect to an item of evidence that plays an essential part in the reasoning process leading to a finding of guilt yields a conviction that is not based exclusively on the evidence and, thus, constitutes a miscarriage of justice: Morrissey, at p. 541 O.R.

[18] Third, as with other issues of fact, the Crown may prove the nature or character of a substance by circumstantial evidence. Proof by introduction of a certificate of analysis is one, but not the exclusive, method of proof: R. v. Labine, [1975] O.J. No. 235, 23 C.C.C. (2d) 567 (C.A.), at pp. 570-71 C.C.C. In each case, it is incumbent on the trial judge to consider the circumstantial evidence in its entirety and to assess its ability to satisfy the Crown's obligation to prove the unlawful character of the substance beyond a reasonable doubt.

[19] Fourth, a party making an admission may adopt a hearsay statement as his or her own for the purpose of admitting the facts disclosed in that statement: R. v. Streu, [1989] 1 S.C.R. 1521, [1989] S.C.J. No. 59, at p. 1529 S.C.R. Admissions are

not subject to the rules for testimonial qualifications of personal knowledge: R. v. Schmidt, [1948] S.C.R. 333, [1948] S.C.J. No. 24, at p. 336 S.C.R.; Streu, at p. 1528 S.C.R.; and Wigmore on Evidence, vol. 4 (Chadbourn Rev.), 1053, at p. 16.

[20] Finally, we exclude hearsay, in part at least, because we consider extrajudicial statements tendered without affording an opportunity to the party against whom it is adduced to cross-examine the declarant inherently untrustworthy. But this [page796] rationale is sapped of much of its vigour when the party against whom the statement is tendered chooses him or herself to rely on the hearsay statement in making the admission: Streu, at p. 1529 S.C.R. Where a party indicates a belief in, or acceptance of, a hearsay statement of another, such a belief or acceptance is some evidence of the truth of the contents of the hearsay statement: Streu, at p. 1530 S.C.R.; Wigmore, at 1053, p. 16.

The principles applied

[21] I would not give effect to this ground of appeal.

[22] In this case, the appellant told his parole supervisor that he had taken an orange or red pill provided to him by a fellow offender at Portsmouth Community Correctional Centre and described by the supplier as Dilaudid. The appellant made this admission in the context of a demand by his supervisor that he provide a urine sample for drug analysis. The appellant, an experienced consumer of illicit drugs, admitted that he needed help for his ongoing addiction problems and expressed concern about the results of the urinalysis.

[23] In accordance with the principles in Streu, set out above, it was open to the trial judge on the evidence adduced in this case to conclude that the appellant's admission reflected his belief in, or acceptance of, the truth of his supplier's statement that the pill was Dilaudid. In the result, there was evidence that the appellant took Dilaudid. The weight to be assigned to this evidence was for the trial judge to determine.

[24] A careful examination of the trial judge's reasons, considered as a whole, puts paid to any submission that he misapprehended the substance or effect of evidence of the appellant's admission, or for that matter, any other evidence adduced at trial, or that he shifted the onus of proof to the appellant to disprove the unlawful character of the pill he admittedly took.

The Sentence Appeal

[25] The appellant also appeals the sentence imposed by the trial judge, a net sentence of 350 days' imprisonment. The trial judge considered this sentence to be the functional equivalent of a sentence of two years when considered alongside the credit he awarded for pre-sentence custody (380 days).

The reasons for sentence

[26] In his lengthy reasons for sentence, the trial judge noted the significant role of the appellant's acknowledged drug addiction in his personal life and relationships, and in the commission of the offences of which he has been convicted. Prevalent themes [page797] in the appellant's lengthy history of violent recidivism include emotional instability exacerbated by substance abuse. The appellant's relationships require close supervision because he poses a high risk of domestic violence and a very high risk of violent or sexual recidivism.

[27] The trial judge also expressed concern about the appellant's response to conditional release and community supervision, as well as his response to recommended programming. The appellant has been deceptive in reporting his community activities, tending to deny or minimize his bad behaviour. His compliance with the LTSO has been less than satisfactory, and with community supervision, superficial. The appellant fails to recognize the importance of his LTSO conditions to the management of the risk he presents in the community. He is an untreated violent offender with psychopathic tendencies.

[28] In his discussion of the applicable objectives and principles of sentencing, the trial judge characterized the

protection of the public as "the whole purpose" of the LTO provisions. He said:

> Persons who are subject to long-term supervision are deemed to be very likely to reoffend unless restrictions are placed on them and unless they follow these restrictions. They must be made to know that they are on a very short leash and that society will not tolerate any breach, no matter how insignificant and that any breach will result in the offender being separated from society for the protection of society.

[29] The sentencing judge considered the paramount sentencing objective was protection of the public achieved by separating the appellant from the community, thereby reducing the palpable risk of violent recidivism. He acknowledged the relevance of the principle of proportionality, the possibility of rehabilitation and the continuing importance of specific deterrence.

The positions of the parties

[30] For the appellant, Mr. O'Connor says that the trial judge erred in failing to appreciate that the objectives and principles of sentencing, provided for in Part XXIII of the Criminal Code, R.S.C. 1985, c. C-46, apply to sentencing proceedings for breaches of LTSOs. The trial judge failed to give effect to the fundamental principle of sentencing -- proportionality. Instead, the trial judge considered the appellant's LTO status dispositive. The sentence imposed was disproportionate to the gravity of the offence and the appellant's moral responsibility. It was driven by deterrence and denunciation, took no account of rehabilitation and ignored proportionality.

[31] For the respondent, Ms. Loubert acknowledges that the trial judge erred in principle in assigning prominence to the [page798] protection of the public and only minimal weight to rehabilitation. She concedes that, as a result of the decision in R. v. Ipeelee, [2012] S.C.J. No. 13, 2012 SCC 13, 280 C.C.C. (3d) 265, which was rendered after the imposition of sentence, the deference that would normally be accorded to the

sentencing decision falls away and leaves us to consider the matter afresh.

[32] Ms. Loubert submits that in the end, deference or no deference, the sentence imposed was fit. The appellant has a substantial record for offences of violence and represents a significant risk of violent recidivism. The risks of violence and recidivism are enhanced when the appellant uses drugs. The breach here involved drug consumption. The prohibition breached was inserted in the LTSO to eliminate drug consumption as a risk-enhancing factor; thus, what appears at first a minor transgression is anything but.

[33] Ms. Loubert underscores the appellant's dismal performance on any form of conditional release, his established history of non-compliance, his intransigent attitude towards supervision and counselling, and his thinly veneered response to community supervision.

The governing principles

[34] In Ipeelee, a decision not available to the sentencing judge, the Supreme Court of Canada examined the principles that govern sentencing of offenders for breaches of LTSOs. Although Ipeelee dealt specifically with aboriginal offenders convicted of breaches of LTSOs, several principles of fundamental importance to all LTOs emerge.

[35] First, long-term supervision, as a form of conditional release, has two specific objectives:
(i) protecting the public from the risk of re-offence; and
(ii) rehabilitating the LTO and reintegrating him or her into the community.
Ipeelee, at para. 48.

[36] Second, it is wrong to say that the main consideration in sentencing an LTO is the protection of the public and that significant sentences must be imposed even for slight breaches of LTSOs: Ipeelee, at paras. 48-49.

[37] Third, the severity of a breach of an LTSO depends on

all the circumstances, including, but not only,
(i) the circumstances of the breach; [page799]
(ii) the nature of the condition breached; and
(iii) the relationship between the condition breached and the management of offender's risk of re-offence.
Ipeelee, at paras. 52 and 55.

[38] Fourth, rehabilitation will not always be the foremost consideration when determining a fit sentence for breach of an LTSO. The duty of the sentencing judge is to apply all the principles mandated by ss. 718.1 and 718.2 of the Criminal Code in order to devise a sentence that furthers the overall objectives of sentencing. The relative weight to assign to each sentencing principle or objective varies with the circumstances of the particular breach. But in the end, the sentence imposed must be faithful to the fundamental principle of proportionality: it must be proportionate not only to the gravity of the offence, but also to the degree of the offender's responsibility: Ipeelee, at para. 51.

The principles applied

[39] Despite what both parties agree was an error in principle, I would not interfere with the sentence imposed by the trial judge.

[40] Under Ipeelee, our task is to ensure that the sentence imposed is faithful to the fundamental principle of proportionality in s. 718.1 of the Criminal Code: Ipeelee, at para. 39. Compliance with our mandate requires a consideration of all the circumstances to ensure that the sentence imposed is proportional to both the gravity of the offence and the degree of responsibility of the offender: Ipeelee, at para. 39.

[41] At first light, the appellant's offence seems minor, almost trivial. He took a tiny pill, 2 milligrams of Dilaudid. He wasn't supposed to take pills unless they were prescribed by a doctor, or available over-the-counter and taken in accordance with the manufacturer's directions.

[42] The drug prohibition term of the LTSO was included

because the appellant has a lengthy history of drug abuse. His lengthy history of drug abuse is inextricably interwoven with his equally lengthy history of crime, most of it violent offences against others. Management of the risk of re-offence, in this case the risk of violent recidivism, is linked to abstinence from drugs. Risk assessments have consistently identified drug abuse as a significant factor in the appellant's uninterrupted string of violent crime. And so it is that taking that tiny pill is more serious than, shorn of context, it first appears. [page800]

[43] An assessment of the degree of the appellant's responsibility for the offence begins with an acknowledgement that he was the sole principal, not some secondary party. The offence involved non-compliance with a regulated scheme of conditional release. The appellant has a rich and lengthy history of non-compliance. Said in another way, the appellant does not do compliance well. He simply doesn't get it.

[44] This conviction is the appellant's third for breach of his LTSO. He has violated the terms of his statutory release four times. He has a robust record of institutional offences. When granted release into the community at various times in 2006, 2007 and 2009, his conduct resulted in parole suspensions after only a few days or, at most, four months from the date of his release.

[45] The appellant's response to long-term supervision has been tepid, characterized by minimal effort, negligible motivation and spotty and superficial participation.

[46] Of greater concern in the assessment of responsibility is the appellant's attitude towards rehabilitative programs. Despite many chances to participate in programs for violent offenders and drug abusers, the appellant's history is littered with failures to attend, suspensions for inappropriate behaviour and superficial responses. His attitude towards authority is consistently negative and he disagrees with the conditions of his release.

[47] The trial judge was wrong in failing to recognize that

rehabilitation was an appropriate sentencing objective to consider in determining a fit sentence for breach of the LTSO. But, as Ipeelee points out, rehabilitation is not always the foremost consideration in sentencing for LTSO breaches: Ipeelee, at para. 51.

[48] Rehabilitation requires effort on an offender's part. It cannot be force fed to the unwilling. It ill lies in the mouth of the unwilling to complain that rehabilitation should have been accorded a prominent place in the sentencing decision, particularly where, as here, the offender complaining has been unswerving in his resistance to rehabilitative efforts for several years.

[49] In my view, despite the conceded error, the sentence imposed was proportionate to the gravity of the offence and the degree of the appellant's responsibility.

Conclusion

[50] For these reasons, I would dismiss the appeal from conviction and grant leave, but dismiss the appeal from sentence.

Appeal dismissed.

TAB 47

1934 CarswellNat 1
Supreme Court of Canada

Reference re Companies' Creditors Arrangement Act (Canada)

1934 CarswellNat 1, [1934] 4 D.L.R. 75, [1934] S.C.R. 659, 16 C.B.R. 1

In the Matter of a Reference Concerning the Constitutional Validity of The Companies' Creditors Arrangement Act, 1933 (Dom.), Ch. 36

Attorney-General of Canada v. Attorney-General for Quebec and Attorney-General for Ontario

Duff, C.J.C., Rinfret, Lamont, Cannon, Crocket and Hughes, JJ.

Judgment: June 11, 1934

Counsel: *L. E. Beaubien, K.C.* and *F. P. Varcoe, K.C.*, for Attorney-General of Canada.
C. Lanctot, K.C. and *L. St. Laurent, K.C.*, for Attorney-General for Quebec.
I. A. Humphries, K.C., for Attorney-General for Ontario.

Subject: Corporate and Commercial; Insolvency

***Duff, C.J.C.* (concurred in by *Rinfret, Crocket* and *Hughes, JJ.*):**

1 The history of the law seems to show clearly enough that legislation in respect of compositions and arrangements is a proper component of a system of bankruptcy and insolvency law.

2 Under *The Bankruptcy Act*, as it now exists, proposals for compositions and arrangements cannot be dealt with before a receiving order or assignment has been made. This, however, was not always the case. Under *The Bankruptcy Act* of 1919 [sec. 13, 1 C.B.R. 20], a proposal for composition or arrangement could be made prior to an assignment or receiving order. *The Winding-Up Act*, R.S.C., 1927, ch. 213, contains brief provisions in secs. 65 and 66 which, in substance, differ very little indeed from the legislation now before us with the, no doubt, important exception that the provisions of *The Winding-Up Act* apply only in the case of a company which is in course of being wound up. Similar provisions affecting the subject-matter of this legislation are to be found in Canadian legislation before and after Confederation.

3 The powers conferred upon the Court under *The Companies' Creditors Arrangement Act, 1933*, (Dom.), ch. 36, come into operation when a compromise or arrangement is proposed between "a company which is bankrupt or insolvent or which has committed an act of bankruptcy within the meaning of the *Bankruptcy Act* or which is deemed insolvent within the meaning of the *Winding-Up Act*, and its unsecured creditors and any class of them." The important difference, as already observed, between the provisions of *The Companies' Creditors Arrangement Act* and those of *The Bankruptcy Act* itself in relation to compromises and arrangements is that the powers of the first named Act may be exercised notwithstanding the fact that no proceedings have been taken under *The Bankruptcy Act* or *The Winding-Up Act*. The Act, however, creates powers to be exercised in case, and only in case, of insolvency.

4 Furthermore, the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation. As Lord Cave impliedly states in *Atty.-Gen. for Que. and Royal Bank v. Larue*, 8 C.B.R. 579, at 584, [1928] A.C. 187, 97 L.J.P.C. 49, [1928] 1 W.W.R. 534, the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament.

5 Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial Legislature; but, when treated as matters pertaining to bankruptcy and insolvency they clearly fall within the legislative authority of the Dominion.

6 The argument mainly pressed upon us in opposition to the validity of the legislation was that it does not endeavour to treat equally all contracts of debts between the debtor and his creditors but allows the interest of some of them to be sacrificed in the interest of the company and of other classes of creditors.

7 We think an adequate answer to this objection is put forward in the argument on behalf of the Attorney-General for the Dominion. Apart altogether from the judicial control over the proceedings, there is the circumstance that the legislation applies to insolvent companies only; and, consequently, that it is within the power of any creditor to apply for a winding-up order or a receiving order. It seems difficult, therefore, to suppose that the purpose of the legislation is to give a sanction to arrangements in the exclusive interests of a single creditor or of a single class of creditors and having no relation to the benefit of the creditors as a whole. The ultimate purpose would appear to be to enable the Court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well, it may be, as to the shareholders. We think it is not unimportant to note the circumstance to which our attention was called by counsel for the Attorney-General for the Dominion that the Court may order shareholders to be summoned although they are not authorized to vote.

***Cannon, J.* (concurred in by *Lamont, J.*):**

8 This is a reference by the Governor-General in Council submitting for hearing and consideration of this Court the following question:

> Is the Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, ch. 36, *ultra vires* of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

9 This Act is designed to apply to insolvent or bankrupt companies; and it is contended on behalf of the Dominion that Parliament could pass this legislation under sec. 91, par. 21 of *The British North America Act*, which gives it paramount jurisdiction to make laws concerning bankruptcy and insolvency. The provinces represent that in enacting it Parliament disregarded their exclusive jurisdiction under sec. 92, par. 13, in relation to property and civil rights in the province.

10 The whole argument before us was finally directed to one point: Are the proceedings contemplated by the Act, in pith and substance, *bankruptcy* or *insolvency* enactments within the fair and ordinary meaning of these words? One of the features which distinguishes this Act from *The Bankruptcy Act* now in force is that, under the latter, a composition or arrangement cannot be proceeded with before a receiving order or assignment has been made [sec. 11, 9 C.B.R. 46]. Another difference is that under *The Bankruptcy Act* the secured creditor is dealt with on the footing that he may realize his security or value or surrender the same; it is only in respect of what he claims apart from the security that he is affected by the composition or arrangement. It was pointed out also that similar provisions giving binding effect to this approval by a certain majority of creditors are found in our legislation before and after Confederation: *Insolvency Act*, 1864, 27-28 Vict., ch. 17, sec. 9; *Insolvency Act*, 1869 (Can.), 32-33 Vict., ch. 16, sec. 94 et seq.; *Insolvency Act*, 1875 (Can.), 38 Vict., ch. 16, sec. 54 *et seq.*

11 As far as Lower Canada is concerned, it may be of interest to note that ch. 87 of The Consolidated Statutes of Lower Canada, 1859, allowed the issue of a *capias* if the debtor "had refused to compromise or arrange with his creditors or to make a *cession de biens*," and provides that the debtor may be discharged if, when the affidavit for *capias* was made, he had "not refused to compromise or arrange with his creditors."

12 Moreover, I find that, before and since Confederation, arrangements with the creditors have always been of the very essence of any system of bankruptcy or insolvency legislation. Civil rights and the sanctity of contracts are certainly

affected by sec. 5 of *The Companies' Creditors Arrangement Act 1933*, ch. 36, under which a minority of creditors would be bound by the vote of "a majority in number representing three-fourths in value of the creditors *** present and voting either in person or by proxy," if "the compromise or arrangement" to which they agreed "be sanctioned by the court." I find that this feature existed long before Confederation and was at that time generally accepted.

13 *Pardessus, Droit Commercial*, vol. 3, éd. 1843, p. 92, no. 1232, says:

> 1232. Les créanciers d'un failli ont presque toujours intérêt à faire avec lui un arrangement quelconque, plutôt que d'éprouver les lenteurs et les embarras d'une union qui finit souvent par consumer la fortune du débiteur. Mais, comme rarement tous sont d'accord, et qu'il est naturel de présumer qu'un grand nombre prendra les arrangements les plus convenables à l'intérêt commun, on a cru devoir faira céder la volonté de la minorité à celle de la majorité; les créanciers présents ont donc été admis à décider pour les absents.
>
> Cette minorité, ces absents, doivent au moins avoir l'assurance que de mûres réflexions ont dirigé ceux dont le voeu doit devenir une loi pour eux. Tel est l'objet des règles prescrites pour la validité du concordat.

14 Under number 1236, classes or categories having different interests are already recognized by this author, and he adds (No. 1237):

> Le concordat est valablement consenti par la majorité des créanciers présents, pourvu que les sommes dues aux personnes qui forment cette majorité égalent les trois quarts de la totalité des créances vérifiées et affirmées, ou admises par provision, dues à des créanciers ayant droit de prendre part à la déllibération du concordat.

15 Therefore, the very clause objected to in our Act of 1933 seems to be copied from the law of bankruptcy as it existed in France in 1843, when this work was published.

16 Under our system and the English *Bankruptcy Act* of 1914, bankruptcy legislation deals with the proceedings necessary for the distribution, under judicial authority, of the property of an insolvent person among his creditors. It assumes the commission of an "act of bankruptcy" followed by a petition to the Court for a receiving order for the protection of the estate. The property of the debtor then vests in an Official Receiver. The debtor must submit a statement of affairs to the Official Receiver who calls a meeting of the creditors. The debtor is examined; and *if no composition or scheme of arrangement is approved*, he is adjudged bankrupt; and his property becomes divisible among his creditors and vests in a trustee.

17 Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, "bankruptcy" proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as "insolvency proceedings" with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. Provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation and were incorporated in our *Insolvency Act of 1864*, ch. 17; and such a deed of composition and discharge could be validly made either before, pending or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent. What was considered as being within the scope of the word "insolvency" when it was used in sec. 91 of *The British North America Act* is to be found in the preamble of the 1864 *Insolvency Act*, which reads:

> Whereas it is expedient that provision be made for the settlement of the estates of insolvent debtors, for giving effect to arrangements between them and their creditors, and for the punishment of fraud.

18

Cushing v. Dupuy (1880), 5 App. Cas. 409, 49 L.J.P.C. 63; Atty.-Gen. for Que. and Royal Bank v. LaRue, 8 C.B.R. 579, [1928] A.C. 187, 97 L.J.P.C. 49, [1928] 1 W.W.R. 534.

19 I therefore reach the conclusion that arrangements as provided for by this Act are and have been, before and since Confederation, an essential component part of any system devised to protect the creditors of insolvents and, at the same time, help the honest debtor to rehabilitate himself and obtain a discharge.

20 I would, therefore, answer the question submitted to us in the negative.

End of Document

TAB 48

2002 FCA 97
Federal Court of Appeal

Richardson International Ltd. v. Zao RPK "Starodubskoe"

2002 CarswellNat 4198, 2002 CarswellNat 622, 2002 FCA 97, [2002] 4 F.C. 80, [2002] F.C.J. No. 425, 113 A.C.W.S. (3d) 557, 220 F.T.R. 320 (note), 288 N.R. 96

Bering Trawlers Ltd., Owner of the Ship "MYS Chikhacheva" (Appellant) and Richardson International Ltd. (Respondent)

Strayer J.A., Sharlow J.A. and Malone J.A.

Heard: March 5, 2002
Judgment: March 22, 2002
Docket: A-121-01

Proceedings: affirming (2001), 200 F.T.R. 76 (Fed. T.D.)

Counsel: *Mr. Peter G. Berrnard, Mr. Andrew Meyer*for Appellant
*Mr. David McEwen, Mr. Gregory Blue*for Respondent

Subject: International; Contracts; Public

Headnote

Conflict of laws --- Contracts — Choice of law — Where no law specified — Proper law

Plaintiff U.S. corporation loaned Russian fishing collective $4,000,000 to refit fishing vessel for processing fish products in exchange for exclusive right to market products — Parties entered related agreement which provided for assignment of all products produced by three ships owned by collective to plaintiff as security for refit loan — Fishing collective began selling product from vessels to third parties in violation of marketing agreement and notified plaintiff of termination of agreement — Ship previously owned by collective registered to defendant B Ltd. was arrested in British Columbia — Plaintiff's action to enforce U.S. law remedy of Maritime lien for necessaries was allowed — Trial judge reviewed the contractual agreement and concluded that American law applied in circumstances — Trial judge found that B Ltd. was owner of ship but that lien claim was valid based on fact that fishing collective was bareboat charterer of vessel — B Ltd. appealed — Appeal dismissed — Trial judge properly considered totality of contractual relationship between plaintiff and

fishing collective — Marketing contract provided no express choice of law but contained arbitration clause from which implicit intention to have American law apply could be construed — Although trial judge erred in accepting parole evidence of plaintiff's principal, parole evidence was minor component on which trial judge based conclusion and ultimate conclusion remained supportable in absence of such evidence.

Maritime law --- Ships — Maritime liens — General principles

Plaintiff U.S. corporation loaned Russian fishing collective $4,000,000 to refit fishing vessel for processing fish products in exchange for exclusive right to market products — Parties entered related agreement which provided for assignment of all products produced by three ships owned by collective to plaintiff as security for refit loan — Fishing collective began selling product from vessels to third parties in violation of marketing agreement and notified plaintiff of termination of agreement — Ship previously owned by collective registered to defendant B Ltd. was arrested in British Columbia — Plaintiff's action to enforce U.S. law remedy of Maritime lien for necessaries was allowed — Trial judge reviewed the contractual agreement and concluded that American law applied in circumstances — Trial judge found that B Ltd. was owner of ship but that lien claim was valid based on fact that fishing collective was bareboat charterer of vessel — B Ltd. appealed — Appeal dismissed — Trial judge found as fact that strong presumption against waiver existed under American law — In light of mortgage agreement which indicated express intention on plaintiff's part to preserve any lien rights available and in absence of express waiver, trial judge correctly concluded that no waiver of Maritime lien had occurred.

Maritime law --- Ships — Maritime liens — Priorities

Plaintiff U.S. corporation loaned Russian fishing collective $4,000,000 to refit fishing vessel for processing fish products in exchange for exclusive right to market products — Parties entered related agreement which provided for assignment of all products produced by three ships owned by collective to plaintiff as security for refit loan — Fishing collective began selling product from vessels to third parties in violation of marketing agreement and notified plaintiff of termination of agreement — Ship previously owned by collective registered to defendant B Ltd. was arrested in British Columbia — Plaintiff's action to enforce U.S. law remedy of Maritime lien for necessaries was allowed — Trial judge reviewed the contractual agreement and concluded that American law applied in circumstances — Trial judge found that B Ltd. was owner of ship but that lien claim was valid based on fact that fishing collective was bareboat charterer of vessel — B Ltd. appealed — Appeal dismissed — Proof of foreign law is question of fact, and as such trial judge's finding that American Maritime law precluded application of set-off provisions of marketing agreement was entitled to considerable deference — Lien for necessaries ranked first in priority and set-off

provisions of marketing contract did not operate to take priority over lien in terms of allocation of funds as between debts.

Maritime law --- Practice and procedure — Pleadings — Statement of claim — Amendment

Plaintiff U.S. corporation loaned Russian fishing collective $4,000,000 to refit fishing vessel for processing fish products in exchange for exclusive right to market products — Parties entered related agreement which provided for assignment of all products produced by three ships owned by collective to plaintiff as security for refit loan — Fishing collective began selling product from vessels to third parties in violation of marketing agreement and notified plaintiff of termination of agreement — Ship previously owned by collective registered to defendant B Ltd. was arrested in British Columbia — Plaintiff's action to enforce U.S. law remedy of Maritime lien for necessaries was allowed — Just prior to closing argument, trial judge permitted plaintiff to amend amount claimed for Maritime lien — B Ltd. appealed — Appeal dismissed — Despite fact that plaintiff's application to amend pleading came at extremely late stage in trial, B Ltd. failed to demonstrate any prejudice — Trial judge correctly weighed equities and concluded that B Ltd. should not be allowed to gain benefit of windfall resulting from plaintiff's bankruptcy caused by collective's breach of contract — Federal Court Rules, 1998, SOR/98-106, R. 75(1).

APPEAL by defendant from judgment reported at (2001), 200 F.T.R. 76 (Fed. T.D.) allowing plaintiff's action for maritime lien against vessel owned by defendant.

***Malone J.A.*:**

1 This is an appeal from a judgment of Dubé J. ("the Trial Judge") dated February 2nd, 2001, as amended on February 20th, 2001. Richardson International Ltd. ("Richardson") arrested the vessel *Mys Chikhacheva* owned by Bering Trawlers Ltd. ("Bering"), at Nanaimo, British Columbia on October 13, 1998 by virtue of a warrant arising from a maritime lien for necessaries. The Trial Judge held that Bering owned the vessel, that the proper law of the contract governing the provision of necessaries was American law, and that Richardson was entitled to a maritime lien and judgment against the vessel.

2 [1]

3 A maritime lien has been defined as a secured right peculiar to maritime law. It is a privilege against a vessel which attaches and gains priority without any court action or any deed or any registration. It passes with the vessel when the vessel is sold to another owner, who may not know of the existence of the lien. In this sense the maritime lien is a secret

lien which has no equivalent in the common law; rather, it fulfils the concept of a "privilege" under the civil law and the *lex mercatoria* (see Tetley, *Maritime Liens and Claims,* 2nd ed. (Montreal: Blais, 1998) at 59-60)).

4 Maritime liens for necessaries are not recognized under Canadian law (see *Mount Royal/ Walsh Inc. v. "Jensen Star" (The)* (1989), [1990] 1 F.C. 199 (Fed. C.A.)), but are provided for in American maritime law. Generally speaking, a lien for necessaries will arise where a supplier has, on the order of the owner or person authorized by the owner, provided an item to a vessel which is reasonably necessary for the vessel to perform its business. Such items explicitly include repairs, supplies, towage, and use of a dry dock or marine railway: 46 U.S.C.A. 31301(4). The list has been extended by case law to include those items reasonably needed in the ship's business.

FACTS

5 A detailed understanding of the facts as determined by the Trial Judge is essential in order to dispose of this appeal.

6 Richardson is a corporation incorporated under the laws of the State of Washington, one of the United States of America, and carries on the business of purchasing and marketing fish products on a worldwide basis. As early as 1988-89, Richardson began purchasing fish from the Polish fishing fleet operating in the Sea of Okhotsk. In 1989-90, Lynn Richardson, the chief executive officer of Richardson, travelled to Moscow and Vladivostok to arrange logistical support for the Polish fishers. Later, Richardson began to have contacts with Russian fishing enterprises in the Far East, some of which were collective enterprises originally established in the Soviet period.

7 As its business expanded, Richardson began to explore commercial activities with Russian fishers, hoping to find a Russian fishing enterprise with a processing vessel capable of producing a sufficient quantity and quality of fish product to meet its standards. In exchange for marketing rights to fish products, Richardson intended to provide the eventual Russian fishing collective with management services or financing for vessel improvements and operations, or both.

8 Bering is the owner of the ship *Mys Chikhacheva*, which is the subject of these proceedings, and itself is owned by the Sakhalin Union of Fishing Collectives ("the Union"). The Union has some 10,000 members, including ZAO RPK Starodubskoe ("Starodubskoe"), a corporation formed under the laws of Russia, and also owns a number of organizations including Bering. The Union carries on general marketing activities, and provides technical advice on the operations of vessels, as well as legal services and government relations.

9 In late 1994, Ms. Richardson was introduced to V. Moukhin, the general director of Starodubskoe which operated 15 fishing vessels, including the *Yuzhnie Kurily*, a factory processing vessel, and two trawlers, the *Mys Chikhacheva* and the *Mys Slepikovskogo.* In January 1995, Ms. Richardson again went to Russia and was shown certificates of ownership for the three vessels indicating that they were all owned by Kotovsky, Starodubskoe's corporate predecessor. Mr. Moukhin provided Ms. Richardson with a copy of an official document relating to the change of name from Kotovsky to Starodubskoe and an English translation.

10 Richardson agreed to lend up to US$4,000,000 to Starodubskoe ("the Refit Loan") for the purpose of refitting the *Yuzhnie Kurily* so that this vessel could process fish products which met both North American and Western European standards. Richardson was to have the exclusive right to market the products of the three vessels until the debt for the conversion of the *Yuzhnie Kurily* was repaid, and thereafter until the arrangement was terminated by one of the parties. This arrangement was reflected in a group of documents ("the Security Package") executed in English and Russian in October of 1995, consisting of a mortgage on the *Yuzhnie Kurily*, a promissory note, a marketing agreement ("the Marketing Contract"), and addenda to each of these documents.

11 Richardson did not intend to profit from the loan in isolation from its other transactions with Starodubskoe. Richardson borrowed funds from the U.S. Bank of Washington at 1.5% over the prime rate, and in turn lent those funds at the same rate to Starodubskoe. The promissory note stipulated that all payments under the mortgage and promissory note were to made in United States currency at Richardson's civic address in Bellevue, Washington.

12 The documents comprising the Security Package were originally drawn by Richardson's American lawyers, but were amended by non-legal personnel of Starodubskoe and Richardson during the give and take of their negotiations. Key to the issue of the existence of a maritime lien in this appeal are certain provisions in the Security Package documents. For example:

> a. A mortgage of the *Yuznhie Kurily* granted to Richardson by Starodubskoe ("the mortgage"), the relevant portions of which read as follows:
>
> RECITALS
>
> ...
>
> B. The Loan Agreement. The Mortgagee [Richardson] has agreed to make a loan to the Owner [Starodubskoe] in an amount not to exceed [US$4,000,000.00] (the "Loan"), which is evidenced by a promissory note of even date herewith (the "Note"). The

> Loan may be advanced in one or more installments, may be subject to repayment and subsequent relending, and may be less than the above-indicated amount, but in all cases the Loan shall be evidenced by the Note.
>
> C. Purpose of the Mortgage. The purpose of this Mortgage is to secure the Mortgagee's interest under the Note and in respect of the Loan. ...
>
> COVENANTS, TERMS, AND CONDITIONS
>
> 1. Promise to Comply. The Owner shall pay the indebtedness evidenced by the Note, the Loan and this Mortgage with interest and shall observe, perform, and comply with each and every one of the covenants, terms, and conditions in the Note and this Mortgage, express or implied. The Note is incorporated herein by reference. In the event of any conflict or inconsistency between the terms of this Mortgage and the terms of the Note, the terms of the Note shall control.
>
> ...

4. Perfection of Mortgage. The Owner [Starodubskoe] shall comply with and satisfy at its cost all the provisions of the laws of Russia in order to establish, perfect, and maintain this Mortgage as a first preferred mortgage on the Vessel and on all additions, improvements, and replacements made in or to it.

13 ...

14 5.3 Vessel Registration. The Vessel is and shall remain registered or documented under the laws of Russia. Owner represents and warrants that the Vessel is not presently registered or documented in any other jurisdiction. The Owner shall maintain the Vessel's documents under the laws of Russia and comply with all the provisions of the laws of Russia for operation in the Russian fisheries.

15 . Recording of Instruments; Other Security. ... This Mortgage shall not prevent Mortgagee from asserting any maritime lien rights it may otherwise have in respect of the Vessel as a result of payments it makes to the shipyard undertaking work on the Vessel and shall not otherwise displace or otherwise effect [sic] such lien rights, even if the sums which give rise to such maritime lien rights are also the subject of this mortgage.

16 ...

17 19.2. Foreclosure. The Mortgagee may exercise all the rights and remedies of foreclosure and otherwise given to mortgagees by the laws of Russia, and by the laws of other jurisdictions, to the extent necessary and desirable.

18 ...

19 19.6. Remedies Under Law. The Mortgagee may exercise any and all remedies available to the Mortgagee under the laws of the Russian Federation, and the Uniform Commercial Code of the State of Washington and other laws of United States.

20 ...

21 27. Governing Law. To the extent not governed by the laws of Russia, the Mortgage shall in all respects be governed by and construed in accordance with the laws of the State of Washington. The Owner irrevocably submits to the nonexclusive jurisdiction of the state and federal courts situated in King County, Washington in any proceeding relating to this Mortgage and agree that any process or summons in any such action may be served by mailing to Owner a copy thereof. As used in this Section 27, "the laws of the State of Washington" include all laws of the State of Washington except the conflicts of laws principles, it being the intent that the substantive laws of Washington shall always apply.

b. A promissory note from Starodubskoe to Richardson, incorporated by reference in the Mortgage, the last paragraph of which reads as follows:

22 The provisions of the Marketing Agreement that concern dispute resolution, including, without limitation, arbitration and the exceptions thereto, and governing law are incorporated by this reference.

c. The Marketing Contract made in favour of Richardson, in which the arbitration clause reads as follows:

IX. ARBITRATION

23 Any dispute which might arise from or in relation to this contract, if not settled by negotiations, shall be settled by arbitration in accordance with UNCITRAL arbitration rules presently in force.

24 Place of arbitration shall be Seattle, Washington USA, the appointing authority shall be the President of Chamber of Commerce in Seattle. The number of arbitrators shall be three (3) and the language used for all documents and proceedings shall be English. Parties desire to execute the award of arbitration voluntarily. Court of arbitration shall base its award on the respective contract.

25 [12] The refit of the *Yuzhnie Kurily* was completed in Korea in February of 1996 at a cost of over US$2.9 million, and was paid with advances from Richardson under the Refit Loan. When the three vessels began fishing in the Sea of Okhotsk in early 1996, Starodubskoe orally

requested that Richardson supply fuel and provisions and Richardson agreed. Amounts paid out by Richardson for these supplies were added to the indebtedness under the mortgage, as were amounts paid by Richardson pursuant to the Marketing Contract for the costs of fish processing machine technicians ("Baader Technicians") required for the vessels. These expenditures made by Richardson for the benefit of Starodubskoe ultimately gave rise to the maritime lien at issue in this appeal.

26 [13] While Richardson was supplying the three vessels in the early spring of 1996, Starodubskoe was selling the product from the vessels to third parties in violation of the Marketing Contract, specifically the provisions of the addendum to that contract, which provided for the assignment of all product of the ship to Richardson as security for the Refit Loan. Richardson protested the breaches of the Marketing Contract but further transhipments nonetheless continued to third parties as well as to Richardson. Finally, Starodubskoe sent a fax in May of 1996 purporting to terminate its relationship with Richardson.

27 [14] On September 6, 1996, Starodubskoe signed an acknowledgment of "global indebtedness" to Richardson in the amount of US$1,828,728.40, but it was never paid. Richardson and Starodubskoe both eventually entered forms of bankruptcy in their respective countries. In October of 1997, Starodubskoe's arbitration manager, a form of trustee, confirmed in a written acknowledgment that the debt to Richardson then stood at US $2,206,344, but nothing was paid to Richardson by or on behalf of Starodubskoe. Included in the total accounts that Richardson rendered to Starodubskoe were accounts in respect of the vessel *Mys Chikhacheva* for the following amounts:

28

a. Invoices for fuel supplied to the vessel in a total amount of:	$247,017.15
b. Reimbursement to [Richardson] for the cost of Baader Technicians including travel expenses:	$28, 916.74
c. Invoices for provisions supplied to the vessels:	$17.510.02
d. In respect of commissions on account of product transhipped from the *Mys Chikhacheva*:	$29,678.41
TOTAL	**$323,122.32**

29 Following the arrest of the *Mys Chikhacheva*, Richardson obtained a default judgment against Starodubskoe in the U.S. District Court at Seattle, Washington but was unable to recover on the judgment. The evidence disclosed that Starodubskoe was the bareboat charterer of the *Mys Chikhacheva* from Bering, the real owner of the vessel. Richardson

learned of Bering for the first time at the commencement of its action, and had no prior notice of Bering's existence or its ownership of the *Mys Chikhacheva*.

30 At trial, Richardson abandoned the component of its maritime lien claim for commissions in the amount of US$29,678.41. However, Dubé J. allowed Richardson's application, made during final submissions, to amend its pleadings to include a new claim for port expenses in the amount of US$43,525.93 for a total claim of US$336,969.84.

31 Based on expert evidence provided by Richardson, the Trial Judge found that Bering was the owner of the *Mys Chikhacheva*, but that Richardson's maritime lien for necessaries was nonetheless valid in the amount of US$336,969.84, based on the fact that Starodubskoe was a bareboat charterer of the *Mys Chikhacheva*. The issues on this appeal now include the proper law of the contract for the provision of necessaries, whether a maritime lien exists, as well as questions of waiver, set-off, and the calculation of the total amount of the lien.

ISSUES

32 The appellant raises four types of errors on the part of the Trial Judge:

33 a. Errors relating to determination of the proper law of the contract;

34 b. Errors relating to determination of whether Richardson had waived its right to a maritime lien over the *Mys Chikhacheva*;

35 c. Errors relating to requirements in the Marketing Contract that the costs of supplies and services were to be set-off against the value of fish transhipments; and

36 d. Errors relating to the amount awarded by the Trial Judge.

Issue 1: Errors related to determination of the proper law of the contract

37 In its pleadings, Richardson alleged that the proper law of the contract was American, and produced an American legal expert, Russel R. Williams, to testify with respect to its laws of necessaries and maritime liens. While Bering did not plead the applicability of Russian law or produce a Russian expert, the Trial Judge correctly noted that the burden remained on Richardson to show that American law applied. The parties agreed at trial, however, that if the Canadian choice of law rules were to be applied, those rules were established by this Court in *Ontario Bus Industries Inc. v. "Federal Calumet" (The)* (1992), 150 N.R. 149 (Fed. C.A.).

38 Bering now asserts that the Trial Judge erred in law and fact in his conclusion that the proper law of the contract was American law. Bering argues that the proper law is that of Russia, but since it has not been proven, the applicable law is the law of Canada, applying "*Mercury Bell*" *(The) v. Amosin*, [1986] 3 F.C. 454 (Fed. C.A.).

39 In particular, Bering suggests that Dubé J. erred insofar as he relied on various clauses in the Security Package to find both an express and implied choice of American law as the proper law of the contract, and that American law had the closest and most substantial connection to the contract. Bering argues that, since Richardson has admitted in its statement of claim that the necessaries were provided under the terms of the Marketing Contract and addendum, only the terms of that contract are relevant. In Bering's view, the other documents, namely, the promissory note and the mortgage, were ancillary to the Marketing Contract. It follows from this assertion that all connecting factors arising from the mortgage and promissory note must be disregarded, and that the Trial Judge's reliance on the House of Lords decision in *Tomkinson v. First Pennsylvania Banking & Trust Co.* (1960), [1961] A.C. 1007 (U.K. H.L.) pointing to the law of the lender is misplaced.

40 Turning to the Marketing Contract, Bering notes that there is no explicit choice of law clause in that document, and, accordingly, this Court must apply the rule in "*Federal Calumet*", *supra*, and determine, with reference to all the circumstances, which law has the closest and most substantial connection to the contract. In asserting that Russian law, not American law meets this test, Bering relies on Castel, *Canadian Conflict of Laws,* 3rd ed. (Toronto: Butterworths, 1994), at 561. There, the author indicates that "when the place of contracting is the same as the place of performance, the Court may find it practically impossible to apply any other law to the contract."

41 In this case, Bering points to the nature and location of the subject matter, and the place and residence of the parties, which, in its view, indicates that Russian law is closest in connection to the contract. In particular, it stresses that:

42 a. All contracts were negotiated and executed in Russia;

43 b. The vessels harvested fish in waters off eastern Russia, in the Sea of Ohkotsk, which is surrounded on three sides by Russia;

44 c. The vessels sailed under the Russian flag;

45 d. The vessels were either owned or bareboat chartered by Russian corporations;

46 e. Fish transhipments were to take place either in or adjacent to Russian waters;

47 f. It is "implicit" that supplies and services would be likewise provided, and were in fact so provided;

48 g. The vessels were Russian and Polish in origin; and

49 h. Starodubskoe's place of residence is Russia, and Richardson carried on business in Russia (though its head office was in Washington).

50 Bering also argues that the Trial Judge placed too much weight on the arbitration clause in the Marketing Contract. That clause indicate that the *situs* of the arbitration is to be Washington, the appointing authority is the President of the Seattle Chamber of Commerce, the language of the arbitration is to be English, and the arbitration is to proceed under UNCITRAL Arbitration Rules. Bering refers specifically to Rule 33, which provides that the parties themselves must choose the proper law and that, should they fail to do so, the arbitral tribunal will apply the conflict of laws rules it deems applicable. Accordingly, since the parties did not explicitly choose the proper law, Bering submits that Russian law has the closest connection to the contract, and should apply.

51 Finally, Bering also argues that the Trial Judge erred in considering parole evidence from Lynn Richardson as to the intention of the parties when the Security Package was executed. This evidence is said to be irrelevant and self-serving, and should not have been admitted.

52 This Court in "*Federal Calumet*", *supra*, indicated that a trial judge's determination of the proper law of a contract will be granted high levels of curial deference, being analogous to a finding of fact. In that case, Marceau J.A. stated orally:

53 His finding must be seen, therefore, essentially as a finding of fact which should not be overturned on appeal, since it is based on an appreciation of the circumstances from which the legal system that was most closely connected to the transaction could be inferred.

54 I also note, however, that in the very recent decision of this Court in *Imperial Oil Ltd. v. Petromar Inc.*, 2001 FCA 391 (Fed. C.A.), Stone J.A. concluded that the determination of the proper law of a contract, in a case where the parties to the litigation have proceeded on an agreed statement of facts, was a question of mixed law and fact rather than one of fact *simpliciter*. In this case, it is not necessary to determine whether the question of the proper law is purely factual or a question of mixed law and fact, because, in my analysis, there is no basis under either characterization for interfering with the determination made by Dubé J.

55 The parties agree, and are correct to say, that "*Federal Calumet*", *supra*, mandates the proper process for determining the proper law of a contract. First, the Court must determine whether there is an express choice of law by the parties. If there is none, then the Court must determine whether the proper law can be inferred from the terms of the contract and the surrounding circumstances, an exercise that requires the Court to determine the system of law that has the closest and most real connection to the contract: see *Imperial Life Assurance Co. v. Colmenares*, [1967] S.C.R. 443 (S.C.C.), at 448, where Ritchie J. stated as follows:

56 the problem of determining the proper law of a contract is to be solved by considering the contract as a whole in light of all the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.

57 This approach was also approved in *Imperial Oil*, *supra*.

58 Turning to the reasons of the learned Trial Judge, he held that there was, in fact, an express choice of American law in clause 27 of the mortgage agreement. That clause reads:

59 27. Governing Law. To the extent not governed by the laws of Russia, the Mortgage shall in all respects be governed by and construed in accordance with the laws of the State of Washington. The Owner irrevocably submits to the nonexclusive jurisdiction of the state and federal courts situated in King County, Washington in any proceeding relating to this Mortgage and agree that any process or summons in any such action may be served by mailing to Owner a copy thereof. As used in this Section 27, "the laws of the State of Washington" include all laws of the State of Washington except the conflicts of laws principles, it being the intent that the substantive laws of Washington shall always apply. [emphasis added]

60 Dubé J. reached that conclusion on the basis that the supply of necessaries to the *Mys Chikhacheva* was carried out within a pre-existing commercial relationship arising from the Security Package. The question, then, is whether he properly considered the mortgage agreement at all.

61 In my analysis, Dubé J. properly considered the totality of the contractual relationship between Richardson and Starodubskoe. Upon my review of the Security Package, it is clear that none of the documents provide comprehensively for the supply of necessaries to the vessels. Instead, as Richardson suggests, the supply of necessaries by Richardson to Starodubskoe appears to be a key element in ensuring the attainment of the goal behind the entirety of the Security Package, that is, the marketing of and profit from processed fish products. The Marketing Contract provides only for the provision of Baader Technicians and for a set-off for "packaging, supplies and services," and makes no specific mention of fuel or other provisions.

62 The addendum to the Marketing Contract provides for security over the products created on the three vessels, and thus, in my view, links the Marketing Contract to the other components of the Security Package. The addendum, portions of which are handwritten, reads as follows:

63 It is understood that PRODUCER [Starodubskoe] is requesting RSM [Richardson] to finance and manage re-furbishing of the M/v "Yuzhnie Kurily.

64 RSM shall provide financing, technology and future vessel management based upon and contingent upon the PRODUCER assigning all production of sterkoder trawler class vessels "MYS SLEPIKOVSKOGO" and "CHIKHACHEVA" to RSM as collateral. This assignment may be in the form of either a marketing contract or full vessel management.

65 [Handwritten portion appears as follows:]

66 Payment terms on loan for converting M/V Yuzhnie Kurily are as follows:

67 Oct. 1996 - 10% of money owed

68 May, 1997 - 30%

69 Oct., 1997 - 20%

70 May, 1998 - 40%

71 Until such time as the loan is repaid RIL holds title to all products produced on board MYS SLEPIKOVSKOGO, MYS CHIKHACHEVA, and M/V Yuzhnie Kurily. Also, RIL will hold a mortgage on M/V Yuzhnie Kurily as collateral.

72 In my analysis, the addendum to the Marketing Contract grants a security in favour of Richardson over all production from the three vessels until the Refit Loan is fully repaid. This surely indicates that the parties understood and intended their relationship to be governed by a complex series of interrelated components, and not discrete, stand-alone contracts; a conclusion bolstered by recitals in the mortgage which incorporate by reference the promissory note and Refit Loan. As a result, I conclude that the Trial Judge was correct in having recourse to the full factual matrix behind the relationship between Richardson and Starodubskoe.

73 Even if the Marketing Contract were considered in isolation on the basis that it is the only contract governing the supply of necessaries, I would conclude that the proper law is that of the United States. The Marketing Contract contains no express choice of law and therefore it would be necessary to determine the system of law that has the closest and most substantial connection to the Marketing Contract: *Imperial Life Assurance Co. v. Colmenares*, *supra*.

74 In my analysis, the most compelling of all the factors in this case is the presence of the arbitration clause in the Marketing Contract. As Castel, *supra*, writes at 596:

75 If the parties agree that arbitration shall take place in a particular legal unit, the court will usually, although not always, conclude that the parties have impliedly chosen the law of the legal unit of arbitration as the proper law. Similarly, if the parties agree that the courts

of a particular legal unit shall have jurisdiction over the contract, there is a strong inference that the law of that legal unit is the proper law. [emphasis added]

76 In this case, the arbitration clause reads as follows:

77 Any dispute which might arise from or in relation to this contract, if not settled by negotiations, shall be settled by arbitration in accordance with UNCITRAL arbitration rules presently in force.

78 Place of arbitration shall be Seattle, Washington USA, the appointing authority shall be the President of Chamber of Commerce in Seattle. The number of arbitrators shall be three (3) and the language used for all documents and proceedings shall be English. Parties desire to execute the award of arbitration voluntarily. Court of arbitration shall base its award on the respective contract. [emphasis added]

79 In my view, this clause is indicative of the parties implied intention to have American law apply. Though not determinative, the arbitration clause is highly persuasive. In *Cie d'Armement Maritime S.A. v. Cie Tunisienne de Navigation S.A.* (1970), [1971] A.C. 572 (U.K. H.L.) both Lords Diplock and Wilberforce commented on the persuasive value of the arbitration clause in the absence of a contrary intention in the contract. Lord Diplock was of the view that

80 ...an arbitration clause is generally intended by the parties to operate as a choice of the proper law of the contract as well as the curial law and should be so construed unless there are compelling indications to the contrary in the other terms of the contract... [emphasis added]

81 No contrary intention appears on the face of the Marketing Contract. Further, Castel, *supra*, at 596 provides a list of possible factors which would indicate the applicability of American law in this case:

82 Other factors from which the courts have been prepared to infer the intentions of the parties as to the proper law are the legal terminology in which the contract is drafted, the form of the documents involved in the transaction, the currency in which payment is to be made, the use of a particular language, a connection with a preceding transaction, the nature and location of the subject matter of the contract, the residence (but rarely the nationality) of the parties, the head office of a corporation party to the contract, or the fact that one of the parties is a government. The proper law cannot be determined retrospectively by an event which at the time the contract was made was merely an uncertain event in the future. Nor can the contract float in an absence of law until the proper is determined, nor can it change from one legal unit to another on the happening of subsequent events. [emphasis added]

83 Certain of these factors are neutral. For example, the language of the Marketing Contract, the residence and head office of the parties, and the location of the subject matter do not point to either of the possible choices of law. However, the legal terminology and form of the document appears to favour American law, as the agreements in their original form were drafted by American lawyers; the currency is expressed to be in U.S. dollars; and, in terms of the Marketing Contract's connection to preceding transactions, the Marketing Contract incorporates by reference in the addendum the promissory note and mortgage, which grants security to ensure repayment of that loan. Undoubtedly, the mortgage and promissory note were executed to enable the parties to enter into the Marketing Contract. Even when one considers that the contract was executed in Russia, and performance was to occur, at least partly, in Russia, it is clear that the proper law is, by implication, American.

84 I take comfort from the reasons of Lord Morris of Borth-Y-Gest in *Tomkinson*, *supra*, at 1083-4. In that case, the parties had decided that the law of Cuba would apply to matters arising from the title to property, located in Cuba and held by an American creditor as security. Lord Morris held that references in the contract to Cuban law under such circumstances was not necessarily to be taken as an implied choice of Cuban law as the proper law of the contract. This was especially true where the circumstances, on balance, indicated the implied choice of American law.

85 I am also of the opinion that the Trial Judge erred in law by considering irrelevant parole evidence from Lynn Richardson regarding her intentions when executing the contract. While the Trial Judge couched the admission of this evidence in terms of gaining a fuller appreciation of "the factual matrix, the context, the environment within which the document was created...", it is also true that he found Mrs. Richardson's comments as to her intentions to be material. The general rule is that, except under limited circumstances, a party may not make representations or give evidence as to his or her subjective intention at the time the contract was made (see *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.)). In this case, there are no special circumstances allowing for its admission. However, in my analysis, his ultimate conclusion remains supportable even in the absence of the parole evidence, as such evidence is but one minor component among many that support his conclusion.

86 *Issue 2: Errors related to determination of whether Richardson had waived its right to a maritime lien over the Mys Chikhacheva*

87 Dubé J. also concluded that there had been no waiver of the maritime lien for necessaries on the part of Richardson. Bering had conceded at trial that waiver would be difficult to argue because of the strong position taken by U.S. courts against the concept, but, nevertheless, Bering argued that in this case there were two definite indicia of waiver on the record.

First, Bering pointed to the fact that Richardson did not require a mortgage against the *Mys Chikhacheva* or the *Mys Slepikovskogo*. However, as Russel R. Williams, the American expert, noted, the failure to take a mortgage over the *Mys Chikhacheva* does not defeat a maritime lien, unless the lien was expressly waived in the relevant contract. Paragraph 14 of the mortgage against the *Yuzhnie Kurily* (see paragraph [11], *supra*) specifically states that the maritime lien rights of Richardson are preserved, even against that mortgaged vessel; *a fortiori*, Richardson must not have waived the right to place liens over unmortgaged ships like the *Mys Chikhacheva*.

88 Bering also argues that the August 22, 1996 account submitted by Richardson shows that, with the total revenue from the *Mys Chikhacheva* as against all the charges upon the vessel, there was nothing owing with respect to the two trawlers. It follows that Richardson's claim was actually in respect of the unpaid balance of the debt incurred as a result of the refit of the factory processing vessel, *Yuzhnie Kurily*, rather than in respect of the *Mys Chikhacheva.* Dubé J. rejected the argument, reasoning that it did not show on the part of Richardson a clear and purposeful intention to forego the lien; a requirement specified by American law.

89 Bering now asserts that Richardson did, in fact, waive its rights to a maritime lien for necessaries and relies on the Security Package to submits that Richardson was "clearly satisfied" that its security would be sufficient to cover any debt incurred by Starodubskoe. Bering could not, however, point to any clear documentary or parole evidence which indicates an unequivocal waiver of lien rights.

90 In response, Richardson relies on the fact that no express waiver has ever been executed, and that clause 14 of the mortgage indicates an express intention on its part to preserve any lien rights which may be available. In light of these facts, in my view, the only possible conclusion is that the Trial Judge was correct in holding that no waiver had occurred. This is especially so given the strong presumption against such waiver under American law, a presumption found as a fact by the Trial Judge. In my view, Dubé J. correctly decided the issue of waiver in this case.

91 *Issue 3: Errors related to requirements in the Marketing Contract that the costs of supplies and services were to be set-off against the value of fish transhipments*

92 Bering relies on Part IV and clause VI.3 of the Marketing Contract, asserting that Richardson was under a contractual duty to deduct the cost of any supplies and services provided to Starodubskoe from the value of fish shipped from Starodubskoe to Richardson. Clause VI.3 provides for the deduction of the cost of "packaging, supplies and services" from the amount due to Starodubskoe. A similar set-off is in place for the provision of Baader Technicians in Part IV. Bering asserts that the Trial Judge erred, since, had the set-

off been recognized, Starodubskoe would have had a $550,000 credit balance as opposed to a $323,000 debt for provision of necessaries. Further, it is said that the Security Package does not authorize Richardson to apply the proceeds from Starodubskoe's shipments in any other manner. Bering also argues that the *contra proferentum* rule should apply, and the contract, in the face of ambiguity, be construed against Richardson, the drafter of the contract.

93 Bering also asserts that the Trial Judge erred in holding that the mortgage was inferior in priority to the lien rights. The lien rights would take priority under American law only, which presumes that, in the absence of a contrary intention, a creditor will allocate funds first to unsecured debt, and then to secured debt. Likewise, where there is more than one security, a creditor is presumed to apply funds first to the inferior security. Bering submits that the Trial Judge erred in applying this presumption in light of the Marketing Contract which, in the clearest of terms, indicates that a set-off shall occur whereby the cost of necessaries is deducted from the value of product provided by the three vessels. Hence, the value of the proceeds of the fish transhipments must be presumed to apply first to the cost of supplies and services, not to Starodubskoe's unsecured "global debt" to Richardson.

94 Richardson counters that the set-off is inapplicable to the necessaries supplied in this case, and, in any event, the set-off was not intended to become operative until the debt underlying the Refit Loan was extinguished by virtue of the addendum to the Marketing Contract. This addendum, reproduced *supra*, provides that "[Richardson] shall provide financing, technology, and future vessel management based upon and contingent upon [Starodubskoe] assigning all production of [the ships] to [Richardson] as collateral." The handwritten addition to the addendum indicates that Richardson would hold title to all production from the vessels until such time as the Refit Loan was repaid.

95 It would be unusual to have, on the one hand, a clear intention in the addendum that funds realized from fish transhipments would be applied to the Refit Loan, and on the other, an intention to set-off the cost of necessaries against those funds. The situation becomes increasingly more difficult when one considers that Richardson held the product as security for the Refit Loan. It would be curious indeed for Richardson, in the face of a clear agreement to apply funds to the Refit Loan, to then apply set-off provisions which would hinder the fulfilment of that agreement. It follows that, in my opinion, the set-off provisions cannot become operative until an amount was actually "due" to StarodubskoeCa situation which could not arise until it had met its obligations under the addendum, and repaid the entire loan amount. Hence, in my analysis, the set-off in the Marketing Contract does not operate in the manner urged by Bering. I am satisfied that the operation of the set-off clauses is subordinate to the language in the addendum to the Marketing Contract.

96 Further, if the Court can be satisfied that Richardson's lien for necessaries ranks ahead of the mortgage or loan debt in priority under American maritime law, then it would be

presumed that Richardson would first allocate those funds to the mortgage or loan, since they would be inferior. The Trial Judge made a specific finding of fact in this regard, noting at paragraph 54 that "[t]he existence of other contractual security or guarantee (such as a mortgage or promissory note) for repayment does not defeat a maritime lien unless such liens are expressly waived in the relevant contract" [see *Newport News Shipbuilding & Dry Dock Co. v. S.S. Independence*, 872 F. Supp. 262 (U.S. E.D. Va. 1994), at pp. 266-267.]. It follows that the lien for necessaries ranks first in priority, and the set-off provisions of the Marketing Contract do not operate to take priority over Richardson's lien in terms of allocation of funds as between debts. Since proof of foreign law is a question of fact, the Trial Judge's decision is entitled to considerable deference in this regard. In my view, given the addendum to the Marketing Contract and the Trial Judge's finding that American maritime law precludes the application of the set-off provisions, Bering's argument on the set-off issue must fail.

Issue 4: Errors related to the amount awarded by the Trial Judge

97 Rule 75 of the *Federal Court Rules, 1998* provides for applications to amend pleadings, if such amendments are on terms which "will protect the rights of all the parties." The test under Rule 75 is that set out by this Court in *Canderel Ltd. v. R.* (1993), [1994] 1 F.C. 3 (Fed. C.A.), where it was stated that an amendment should be allowed "at any stage of an action," subject to three provisos: the amendment must be made for the purpose of determining the real questions alive between the parties; amendment would not prejudice to the opposing party in a manner not compensable with costs; and the amendment must serve the interests of justice. Further, the nearer the end of the proceeding, the more difficult it becomes to prove an amendment does not work an injustice.

98 In this case, Richardson sought to amend its maritime lien claim at the last possible stage of the action, that is, just prior to its closing argument. It argued that it was unaware that port expenses (the "Korwell Invoices") could be claimed as necessaries until its own American legal expert explained that such expenses were, in fact, properly the basis of a maritime lien. The Korwell Invoices had been introduced in court and proven at trial as an exhibit, and Bering's counsel cross-examined on the documents without protest. Dubé J. allowed the amendment under subrule 75(1) as Bering was unable to demonstrate prejudice.

99 Bering now argues that the Trial Judge erred in allowing Richardson to amend its claim to include the Korwell Invoices at such a late stage in the trial. Bering alleges that it was unaware that the invoices were included in Richardson's claim until closing argument and further asserts that the amounts referred to in the invoices are not reflective of the heads of damage originally claimed in the statement of claim. As such, the amendment cannot be regarded as merely numerical, and, at the argument stage amounts to trial by ambush.

100 It is true that the application for leave to amend came at an extremely late stage in the trial, and it is unusual that Richardson would have learned of the Korwell Invoices' relevance from its own expert witness. However, the key element in the *Canderel* test is, in my view, "the interests of justice." I note that counsel for Bering did not apply for an adjournment or to reopen Bering's case when the amendment was sought. Mr. Richardson was present and could have been recalled for further cross-examination, but that was not done. Accordingly, in light of Bering's failure to demonstrate any prejudice, I fail to see how Dubé J. erred in granting the amendment.

101 Further, in light of Bering's failure to attack the Korwell Invoices on the basis that they were irrelevant, or were not necessaries, it is difficult to view the addition of the invoice as anything more than a numerical alteration to the sum total of the lien amount, a type of amendment which was expressly authorized by this Court in *Meyer v. Canada* (1985), 62 N.R. 70 (Fed. C.A.), on the basis that such amendments are in the interests of justice, and cannot act to prejudice the opposing party in a meaningful way. I might add that this is especially true where the invoices were disclosed in the discovery process and were entered as an exhibit at trial. Under these circumstances, I fail to see how the inclusion of these invoices amounts to trial by ambush. In any event, the Trial Judge's decision was discretionary in nature, and, in the absence of a clear error of law, is therefore entitled to significant deference. I am satisfied that Dubé J.'s decision gave sufficient weight to all the relevant circumstances, and should thus be shielded from appellate review (see*Reza v. Canada*, [1994] 2 S.C.R. 394 (S.C.C.)).

102 Bering also asserts that the Trial Judge erred in including the full value of an invoice from Skico Fuel Company of Hong Kong (the "Skico Invoice"), given that Richardson had been held responsible only for 13% as part of its bankruptcy in the United States. Bering urges that granting judgment for the full amount confers a windfall on Richardson, and contends that Richardson should not benefit from such windfall, especially since Skico can pursue its shortfall against Starodubskoe and the *Mys Chikhacheva*.

103 With regard to the Skico Invoice, Dubé J. concluded that, in equity, Bering should not be allowed to gain the benefit of a windfall resulting from a bankruptcy caused largely by Starodubskoe's breach of contract. He held that American maritime law provides that unpaid fuel costs, as necessaries, follow the *Mys Chikhacheva* under a maritime lien. The Trial Judge's decision is based on the application of American law, insofar as necessaries follow the vessel under a maritime lien. His finding as to the applicability of American law is one of fact, and therefore is entitled to substantial deference in the absence of a palpable and overriding error.

104 As Tetley, *supra* notes at 59-60, a maritime lien can be referred to as a "secret lien," in that it passes with the vessel even when it is sold to an unsuspecting new owner. As a

result, any claim for unpaid fuel costs would follow the *Mys Chikhacheva*, which received the benefit of the fuel without payment. For this reason, I am persuaded that the Trial Judge correctly weighed the equities before him. The ship gained a windfall in receiving fuel without payment, and to require the owner to bear the cost of that benefit is neither inequitable nor in contradiction of established principles under American maritime law. In my view, Richardson's bankruptcy does not disrupt this position, especially when one considers that Bering received the benefit of chartering the *Mys Chikhacheva* to Starodubskoe, whose conduct resulted in the present litigation.

105 I would dismiss the appeal with costs.

Appeal dismissed.

TAB 49

Date: 19971110
Docket: 24578
Registry: Kamloops

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ROYAL BANK OF CANADA

PLAINTIFF

AND:

BRAD CAMPBELL and BRAD MAKI

DEFENDANT

DECISION

OF

MASTER POWERS

Counsel for the Plaintiff: Murray Weeres

Counsel for the Defendant, Brad Campbell: Mervin L. Sadden (not appearing)

No one appearing for the Defendant, Brad Maki

Place and Date of Hearing: Kamloops, B.C. November 3, 1997

[1] The Plaintiff bank seeks judgment against the defendant Maki for the sum of $17,608.02 plus interest and costs, pursuant to Rule 17 and 18 of the Rules of Court.

[2] Mr. Maki was served with the writ of summons and statement of claim on March 18, 1997, and has not filed an appearance. The defendant Campbell has filed a statement of defence.

[3] The statement of claim alleges that Campbell agreed to purchase a truck from Maki for the sum of $18,000.00, payable $11,500.00 in cash and the balance being $6,500.00 by trade of a motorcycle.

[4] The plaintiff bank had a registered security interest over the motorcycle for a balance of $5,932.54.

[5] The bank agreed to finance the purchase in return for a security interest over the truck. Campbell signed a promissory note for $17,500.00 in favour of the bank and the bank advance the proceeds to Campbell.

[6] The statement of claim alleges that Maki:

> ....represented and warranted to the plaintiff or alternatively to the defendant, Brad Campbell, with the intention that it should be acted upon by the plaintiff as follows:
>
> (a) that the motor vehicle was free and clear of all encumbrances and;

(b) that alternatively, any proceeds received by the defendant, Brad Maki, would be utilized to pay and discharge any security interest that did charge the motor vehicle in full.

[7] The statement also says that it was in reliance on these representations by Maki that the plaintiff advanced funds to Campbell who in turn paid the cash purchase price to Maki and transferred the motorcycle. The security interest over the motorcycle had been discharged.

[8] The statement of claim alleges that the representations were made by Maki when he knew them to be false with the intention that they be acted upon by the bank and that as a result of acting on those representations the bank has suffered damages equal to the amount of the cash purchase price proceeds and value of the motorcycle security interest.

[9] The truck was subject to a security interest in favour of GMAC which was not discharged or paid and subsequently GMAC repossessed the truck.

[10] The plaintiff alleges that Maki received the monies and the motorcycle under false pretences and committed the tort of deceit against the bank.

[11] The bank seeks repayment of the monies from Campbell and judgment against Maki in the amount of $17,608.02 as of November 27, 1995 and interest and costs.

[12] The statement of defence filed by Campbell alleges that Campbell dealt with the plaintiff bank's loans officer, Jason Pearson. Campbell alleges in the statement of defence that Pearson advised Campbell of the necessity of a lien search and offered as representative of the bank to conduct the lien search. Campbell also alleges that he was advised by Pearson that "...everything was okay" and that there was no lien registered against the truck.

[13] Campbell alleges that he relied on this representation from the bank and therefore entered into the loan agreement, used a portion of the monies to pay off the debt relating to the motorcycle ($5,980.42) and transferred the motorcycle and paid the balance of the monies ($11,500.00) to Maki.

[14] Campbell alleges that his account at the plaintiff bank was debited $13.91, being the amount he agreed to pay for the lien search.

[15] Campbell alleges that he relied on the plaintiff bank and that they breached their contractual obligation to him or it's duty of care, in failing to properly conduct the search and

advise him of the lien. Campbell alleges that he relied on the plaintiff bank.

[16] The plaintiff bank argues that I should grant them judgment as requested because no appearance has been filed by Maki and on the basis of the affidavit of Mr. Gary Owen, Senior Collections Officer of Vancouver, British Columbia.

[17] The plaintiff relies on the following rule:

> 18(1)
> In an application in which an appearance has been entered or in an action referred to in Rule 17(9) or 25(12), the plaintiff, on the ground that there is no defence to the whole or part of the claim, or no defence except as to amount, may apply to the court for judgment in an affidavit setting out the facts verifying the claim or part of the claim and stating that the deponent knows of no fact which would constitute a defence to the claim or part of the claim except as to amount.

[18] The order sought is a final order and therefore the affidavit in support should be on personal knowledge not information and belief.

[19] These transactions took place in Fort St. John, British Columbia and Mr. Owen appears to reside in Vancouver, British Columbia. There is nothing in his affidavit to indicate what the basis of his personal knowledge is, nor is there any indication that the statements he makes are based on information and belief. In paragraph (1) he states that he has

personal knowledge of the facts except where stated to be upon information and belief but no where does he say that any of his statements are on information and belief.

[20] He alleges that the facts set out in the statement of claim are true but there is no indication that he ever spoke to Campbell or Maki directly in order to know what representations if any, were made. It is not clear whether he dealt with the defendants or made the decision as to the loan being advance or who did make the decision or what that person relied on in making that decision.

[21] The affidavit appears to be simply a pro forma affidavit in support of a rule 18 application but it does not set out the facts verifying the claim. In addition I question whether or not it is based on personal knowledge.

[22] In some cases the pro forma affidavit sworn by somebody who actually has personal knowledge may be sufficient. However in a case such as this where the claim by the plaintiff against the defendant and the connection to the defendant are so uncertain on the face of the pleadings I am not satisfied that there is sufficient information to justify exercising my discretion in favour of the plaintiff.

[23] In the present case the plaintiff has not proven the representations were made or that there was any reliance upon them and the application for summary judgment is dismissed.

[24] The plaintiff will have liberty to make the application again if they feel they can muster the appropriate evidence. Failing that they will simply have to proceed in the normal course.

"R. E. Powers"
R. E. POWERS
MASTER OF THE SUPREME COURT

TAB 50

1993 CarswellBC 262
British Columbia Supreme Court

Roynat Inc. v. Dunwoody & Co.

1993 CarswellBC 262, [1993] B.C.W.L.D. 2237, 20 C.P.C. (3d) 35, 42 A.C.W.S. (3d) 196, 83 B.C.L.R. (2d) 385

ROYNAT INC. v. DUNWOODY & COMPANY and CANADIAN IMPERIAL BANK OF COMMERCE

Master Bishop

Heard: August 4-5, 1993
Judgment: August 11, 1993
Docket: Doc. Vancouver C931813

Counsel: *Douglas I. Knowles*, for plaintiff.
Glenn A. Urquhart, for defendant Dunwoody & Company.

Subject: Civil Practice and Procedure

Application for order striking statement of defence, or alternatively for order requiring list of documents.

***Master Bishop*:**

1 The plaintiff, Roynat Inc., by way of Notice of Motion filed on the 13th day of July, 1993, seeks the following orders:

(a) an Order striking the Statement of Defence of the said Defendant Dunwoody & Company and for an Order that the proceeding shall continue as if no Appearance had been entered or Statement of Defence had been filed on behalf of the said Defendant Dunwoody & Company, pursuant to Rule 2(5);

(b) in the alternative to paragraph (a), an Order that the said Defendant Dunwoody & Company forthwith provide a list of documents in accordance with Rule 26 and that John Cronin and Eleanor Sleath attend and be examined for discovery pursuant to Rule 27 at a date and place to be arranged by counsel herein, and that no further application pursuant to Rule 18A be brought by the said Defendant Dunwoody & Company until the provision of a proper list of documents and the completion of the said examinations for discovery have occurred; and

(c) an Order for costs of this application.

2 When the application first came on for hearing in chambers on Wednesday, August 4th, 1993, Mr. Urquhart raised a preliminary objection suggesting that I should defer these matters to the justice who will be hearing the R. 18A application. That is so he argued, because of the provisions of R. 18A(7)(*h*) which reads as follows:

Directions

(7) Where the court is unable to grant judgment under subrule (5), and considers that the proceeding ought to be expedited by giving directions, the court may order the trial of a proceeding generally or on an issue and may order that

(*h*) an examination for discovery or a pre-trial examination of a witness be of limited duration.

3 The main submission was that I should exercise my discretion and defer the decision as to whether or not discovery of documents and persons should be given to the justice who will be hearing the R. 18A application as he or she is the proper person to determine the necessity for such discoveries.

4 At the conclusion of the submissions made by both counsel, I concluded that I wished to hear arguments on the merits of the applications.

5 Both counsel submitted their chambers briefs at the end of the first chambers hearing and I was able to review them prior to the re-commencement of the hearing on August 5th, 1993.

6 The facts and the history of the litigation herein upon which the applications on behalf of the plaintiff are founded are as follows.

7 This case involves a claim by the lender against the auditors of a small, publicly traded company. The plaintiff Roynat Inc. claims that it was misled by negligently prepared audited financial statements.

8 The plaintiff Roynat Inc. is the lender. Adagio Enterprises Ltd. is the borrower. Its parent company, Adagio Investments Inc., is a reporting company. Dunwoody is the firm of accountants who provided the au dited financial statements for that company. The Canadian Imperial Bank of Commerce was the banker for the Adagio companies at the time the plaintiff provided financing to them and the plaintiff claims against the Bank for misleading credit references.

9 The writ of summons and statement of claim were filed and served on the 30th day of March 1993. The defendant Dunwoody entered an appearance on the 1st day of April 1993.

10 On April 6th, 1993, Mr. Urquhart, solicitor for the defendant Dunwoody, telephoned to Mr. Knowles (the plaintiff's solicitor) to advise that he was intent upon setting down an application pursuant to R. 18A at the earliest possible opportunity. Mr. Knowles was absent but a tentative date of June 23rd, 1993 was arranged with his secretary. That conversation is confirmed by a faxed letter to Mr. Urquhart from Mr. Knowles's secretary dated April 7th, 1993. On April 14th, 1993, counsel for Dunwoody sent a letter to the plaintiff's counsel informing him of the defendant's intention to set the 18A application for June 23rd, 1993.

11 Mr. Knowles responded by letter dated April 21, 1993 stating that in his opinion the R. 18A application was premature as the statements of defence had yet to be filed and discovery procedures had yet to be commenced. Plaintiff's counsel recommended that the list of documents first be exchanged and examinations for discovery be scheduled and completed, after which time counsel for Dunwoody could proceed with its R. 18A application if he remained of the view that such an application was warranted. Plaintiff's counsel enclosed a demand for discovery of documents as well as a list of suggested discovery dates for Dunwoody's counsel to approve.

12 On that same day, counsel for Dunwoody forwarded the plaintiff's counsel a notice of motion seeking

> An order pursuant to Rule 18A that the claim of the plaintiff against the defendant Dunwoody & Company be dismissed on the grounds that the plaintiff has no cause of action against the defendant Dunwoody & Company

and an affidavit in support. In addition, a filed statement of defence and a demand for the discovery of documents was delivered.

13 On April 23rd, 1993, counsel for Dunwoody sent a letter to the plaintiff's counsel confirming Dunwoody's position that the plaintiff was not entitled to discovery of documents or any examinations for discovery on the basis that defendant Dunwoody owed no duty of care to the plaintiff and thus the plaintiff's cause of action could not be sustained. His position was that until the Court had determined whether the plaintiff indeed had a cause of action, Dunwoody need not incur the expense of such pretrial procedures.

14 C.I.B.C. filed its statement of defence on that same day.

15 On the 30th day of April 1993, plaintiff's counsel sent a letter to counsel for Dunwoody rejecting his position.

16 On May 12th, 1993, counsel for Dunwoody responded to the plaintiff's position and reiterated his position that the plaintiff was not entitled to discovery of documents or witnesses because, in his view, the purpose of an 18A application is to avoid increased legal costs and expense.

17 On May 14th, 1993, the plaintiff delivered its list of documents to counsel for Dunwoody.

18 One week later, plaintiff's counsel delivered a copy of an expert report to counsel for Dunwoody regarding Dunwoody's failure to observe the standard of careful and prudent auditing required of them in connection with the audit performed of the consolidated financial statements of Investments for the year ended June 30th, 1991.

19 On May 28th, 1993 plaintiff's counsel served notices of appointments to examine Eleanor Sleath and John Cronin on counsel for Dunwoody together with the appropriate conduct money. The discoveries were set for June 9th and 10th, 1993, respectively.

20 Counsel for Dunwoody returned the notices of the appointments together with the conduct money to plaintiff's counsel by letter dated May 31, 1993. Counsel for Dunwoody again reiterated his position that Cronin and Sleath would not comply with any requests for discoveries, and further stated that he would not consent to a cross-examination of John Cronin on his affidavit filed in support of the R. 18A application.

21 On June 16th, 1993, plaintiff's counsel filed a notice of motion seeking an order adjourning the R. 18A application of Dunwoody as well as an identical order to the one being sought in this application.

22 On that same day, counsel for Dunwoody advised plaintiff's counsel that it had been informed by the registry that the R. 18A application set for June 23rd, 1993 could not be heard prior to the Court's summer recess, and, due to the anticipated length of the application, it was re-scheduled for September 16th, 1993.

23 Those are the facts and the history of the litigation when the plaintiff's application was heard on August 4th and 5th, 1993.

24 The plaintiff's position is that it is entitled to pursue all pre-trial procedures including discovery of documents and an examination for discovery while awaiting the hearing on the R. 18A application filed by the defendant Dunwoody.

25 The defendant argues that the orders sought ought not to go as there is no provision in R. 18A for discovery of documents nor for an examination for discovery prior to the hearing of the application. Furthermore, Mr. Urquhart argues that if the R. 18A application is successful, then the plaintiff's case against the defendant will be at an end and his client ought not to bear the expense of complying with the demand for a list of documents or for examinations for discovery.

26 Mr. Knowles, in support of his client's contention that it is entitled to all pre-trial procedures available under the Rules, and more particularly to a list of documents and to conduct the examinations of discovery requested, argues that R. 18A does not act as a stay of proceedings with respect to pre-trial procedures. In support of his position he refers to two authorities.

27 The first decision he referred to is the decision of *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378 (C.A.).

28 In that case the plaintiff chartered a vessel under a time charter to ship lumber pursuant to a contract with M. Ltd. As a result of the defendant union's unlawful picketing of M. Ltd.'s loading facility due to a labour dispute with M.

Ltd., the plaintiff had to pay additional charter hire and related expenses. It sued the union for damages for wrongful interference with contractual relations. The plaintiff conducted examinations for discovery in June of 1986 and on the 9th of December it confirmed with the defendant that it had secured the date of the 6th of January, 1987 for a summary trial application. The application was subsequently adjourned to be heard on the 12th day of February, 1987, but on the 9th day of February, 1987 the defendant served the plaintiff with an appointment for an examination for discovery to be held on the 23rd of February.

29 When the application came on for hearing on February 12th, 1987, judgment was given for the plaintiff.

30 The defendant appealed and one of the issues on the appeal was whether or not the justice hearing the 18A application ought to have disposed of it without first allowing the defendants the right of conducting examinations for discovery.

31 Commencing at p. 381, Lambert J.A. states as follows:

> In my opinion, the summary trial procedure contemplated by R. 18A cannot be open to being frustrated by one of the parties delaying the pre-trial procedures until it is too late for the summary procedure to use them effectively.
>
> I am not suggesting that there was any intentional delay in this case. But it must be the case that if adequate notice is given to an opposing party that a summary trial application is going to be brought on, there then falls on that party an obligation to take every reasonable step to complete as much of the pre-trial procedures as is necessary to put him into the best mastery of the facts that is reasonably possible before the summary trial proceedings are heard. He cannot, by failing to take those pre-trial procedures, frustrate the benefits of the summary trial rule.

32 The second authority to which Mr. Knowles referred is *Wendeb Properties Inc. v. Elite Insurance Management Ltd.* (1991), 53 B.C.L.R. (2d) 246 (C.A.).

33 In that case, the plaintiff sued the defendant insurer for indemnity for a fire loss that occurred during the night of the 7th of June, 1989. The plaintiff based its claim upon an alleged policy of insurance evidenced by a cover note signed on behalf of the defendant insurance agent on the 8th of June 1989, but backdated to June 7th. The plaintiff alleged that the agent agreed to coverage before the expiry of the plaintiff's previous policy on May 31st. The plaintiff obtained judgment under R. 18A and the insurer appealed submitting in part that it was unjust for the chambers judge to award judgment on a summary basis and that the appellant should have been able to conduct an examination for discovery of the respondent.

34 At p. 250, Toy J.A. states:

> Between 20th October 1989, when the application was filed, and 12th December 1989, when the application was heard, counsel for Elite took no steps to exercise his client's rights to examine for discovery any representative of either the plaintiff building owner or the co-defendant Coastal against whom third party proceedings had been taken by Elite. Furthermore, no effort was made before or at the hearing to compel cross-examination on any of the affidavits that had been filed by the plaintiff's or the co-defendant Coastal's representatives.
>
> Under the circumstances I am of the view that the chambers judge properly exercised his discretion in determining that this case was an appropriate case to decide on a R. 18A application.

35 Following the *Anglo Canadian* case, the Court dismissed the appeal.

36 Mr. Knowles next referred to R. 26, 27 and 18A itself, both the old R. 18A and the Rule as it exists today.

37 He emphasized the mandatory nature of R. 26 in that a party "shall comply with the demand" (for discovery of documents) within 21 days of receipt of the demand (R. 26(1)).

38 With respect to R. 27, he emphasized that an examination for discovery may take place "at any time up to 14 days before the scheduled trial date" (R. 27(1)).

39 It is to be noted that there is no provision in either of those rules to suspend discovery pending the hearing of a R. 18A application; production of a list of documents is mandatory; and there is an element of discretion with respect to the timing of the examination for discovery.

40 He further submitted that there are no provisions within R. 18A itself that would operate to suspend the pre-trial procedures pending the outcome of an application under that rule.

41 Next, he referred to the provisions of R. 18A(3)(*c*), which reads as follows:

> **Evidence on application**
>
> (3) On an application under this rule, the applicant and each other party of record may adduce evidence by any or all of the following:
>
> (*c*) any part of the evidence taken upon an examination for discovery;
>
> and Rule 40(27)(*a*) and (*d*), (28), (29) and (31) to (33) applies to this subrule. [en. B.C. Reg. 10/92, s. 2, effective March 1, 1992.]

42 Finally, he referred to the judgment of The Honourable Mr. Justice Gow in the case of *Federal Deposit Insurance Corp. v. Vanstone* (1992), 63 B.C.L.R. (2d) 190 [[1992] 2 W.W.R. 407] (S.C.), where, commencing at p. 203, the learned Justice commented on the use of discovery evidence on a R. 18A application. Commencing at p. 203 the learned Justice states:

> In *Advanced Mobile Welding v. Quartz Ventures* (June 13, 1991), Vancouver Doc. A902108 [now reported (1991), 60 B.C.L.R. (2d) 235], Thackray J. in an oral decision held in an 18A application that the defendant could not adduce several answers given by the plaintiff in the course of her examination for discovery. Thereafter in *Laurentian Pacific Insurance Co. v. Halama* (October 31, 1991), Vancouver Doc. C908324 [now reported (1991), 60 B.C.L.R. (2d) 190], Drost J. in carefully considered reasons decided likewise. Thereafter in *Spooner v. Ridley Terminals Inc.* (December 2, 1991), Vancouver Doc. C913966 [now reported (1991), 62 B.C.L.R. (2d) 132, [1992] 2 W.W.R. 30], Macdonald J. considered the same issue. At p. 20 [p. 143 B.C.L.R.] he said:
>
> > *Re Hansard Spruce Mills*, supra, obliges me to reject the invitation to disagree with *Laurentian Pacific Insurance*. Subsequent decisions have not affected its validity. I am aware of no binding authority in case law or relevant statute which was not considered. It is a considered decision, rendered after full argument. The rules of stare decisis under which this court operates, for good and sufficient reasons, dictate that I am bound by the result in *Laurentian Pacific Insurance*. The question now rests in the good hands of the Court of Appeal (as and when it is called upon to decide the matter) and, perhaps, the Rules Committee which advises the Attorney General on these matters.
>
> On this matter my hands too are tied.
>
> But in *Laurentian* Drost J. also at pp. 14-15 [p. 198] held that discovery evidence may be used on a R. 18A application to the extent that it contains admissions falling within the scope of R. 31(6). That rule provides:
>
> (6) An application for judgment or any other application may be made to the court using as evidence
>
> (*a*) admissions of the truth of a fact ... made
>
> (ii) in an examination for discovery of a party or a person examined for discovery on behalf of a party ...

I agree.

43 Mr. Knowles submitted that these decisions were decided on the old R. 18A(3), which read:

Evidence on application

(3) On an application under this rule, the applicant and each other party of record may adduce evidence, which shall be by affidavit, and the court may adjourn the application and make an order provided for in Rule 52(8).

44 He emphasized that the new Rule would not appear to be limited to merely admissions as the wording of the Rule, as it now appears, allows the party to use "any part of the evidence taken upon an examination for discovery".

45 Subject to relevancy and the overriding discretion of the justice hearing the R. 18A application, I agree with his submission and that the evidence from a discovery which may be read in is no longer limited to admissions only.

46 Turning now to the arguments presented by Mr. Urquhart on behalf of the defendant Dunwoody, the argument is an argument of policy founded on sound economic principles.

47 He argues that the purpose of a R. 18A application is to promote the speedy and, as far as possible, inexpensive resolution of disputes. To that end he argues that his client ought not to be faced with the prospect of paying for the expense of giving discovery of documents or attending examinations for discovery which may serve no legitimate purpose, particularly if the application is successful.

48 There is little doubt that Mr. Urquhart, on behalf of his client, has attempted to resolve a major issue of the dispute in the most speedy and inexpensive manner.

49 He filed his R. 18A application and supporting materials within 21 days from the time that the writ of summons and statement of claim were served.

50 It is indeed an accepted proposition that a R. 18A application is designed to allow the justice hearing it to decide issues of fact and law in circumstances where it is unnecessary to put the parties to the expense of a trial. However, that is not to say that the Rule offers a stay of proceedings once such an application is filed. Indeed, R. 18(3)(*c*) specifically contemplates the conduct of discoveries prior to the R. 18A application.

51 I referred Mr. Urquhart to the decision of The Honourable Chief Justice Esson in *Hunt v. T & N plc* (1992), 72 B.C.L.R. (2d) 14 [[1993] 1 W.W.R. 354] (S.C.). One of the issues before the learned Chief Justice was whether or not a defendant should be permitted to pursue an application pursuant to R. 18A, having failed to comply with and deliver a list of documents pursuant to R. 26.

52 At p. 17 of his decision he states:

> In an unreported decision pronounced on June 1, 1990 Maczko J. held that it was not appropriate to allow a defendant to proceed with a R. 18A application pending the completion of discovery of documents by that defendant. The principal distinguishing feature between that and the present application is that, in the application before Maczko J., there was an outstanding order for the defendant to produce further documents. Counsel for the plaintiff submits that the same result should follow where a demand for discovery remains outstanding. I agree.

53 Mr. Urquhart suggested that that ratio ought not to apply in this instance as the only issue before the Justice will be whether or not the defendant owes the plaintiff a duty of care and that issue is one of law only. If no duty exists the plaintiff does not have a cause of action.

54 There is nothing in that case to indicate the limitation as urged by Mr. Urquhart and, in any event, there is no present agreement between the plaintiff and the defendant as to the exact knowledge of the partners at the time the audit was prepared.

55 Discovery of documents and examinations for dicovery may clear up the disputed facts. If that happens, the R. 18A application may no longer be necessary.

56 I find that a natural extension of the *Hunt* case based on the existing Rules today leads to the proposition that an application pursuant to R. 18A does not operate as a stay of proceedings insofar as any pre-trial proceedings are concerned and during the interval between the filing of the motion and supporting materials and the hearing of the summary trial, the parties to an action may avail themselves of all the pre-trial procedures available to them.

57 Returning to the issue of expense, it is the expense of a trial which is to be saved by the summary trial procedure.

58 Mr. Urquhart forcefully presented his backup argument, that is, the same argument presented in the first instance by way of preliminary objection. He argued that I ought not to exercise my discretion in ordering discoveries of documents or persons and that the better practice would be to defer it to the justice who will hear the application and, if Mr. Knowles wishes to pursue his request for discovery, he can do so on the hearing of the 18A application if he sees fit and the hearing would then be adjourned.

59 That was an approach followed by my brother, Master Tokarek in a decision given orally and subsequently reproduced in the case of *Ferguson v. Insurance Corp. of British Columbia*, (unreported) Vancouver Registry B921975, June 23rd, 1993.

60 In that case he dealt with an application to cross-examine a deponent on an affidavit pursuant to R. 52(28) prior to the hearing of a R. 18A application. At pp. 4-5 of his decision, as reproduced, he states in part:

> ... I would dismiss the application to have the constable cross-examined in advance of the R. 18A application. If I am wrong on my reading of or interpretation of the rules in question, I think that as a matter of practice it is preferable to allow the R. 18A judge to determine, on the basis of whatever affidavits and submissions are made, whether there is such a conflict of evidence on any fact in issue that would warrant ordering cross-examination. For example, it may be that if the argument made before me today was made before the 18A judge, he might wish to consider the amount of disagreement on the affidavit evidence in determining whether this is an appropriate case for a R. 18A matter. That kind of a consideration ought to be open and available to the judge hearing the 18A application and not be determined by me in advance. In saying this, I do not think it particularly matters whether it is a master or another chambers judge making that order. I think the concept of the Rule is to allow these matters to be disposed of by the judge hearing the R. 18A, so that he can deal with the entirety of the matter in a package, including determining whether there is any necessity for any cross-examination on any one or more of the affidavits. If I am wrong in the interpretation of the rules I think as a practical matter it would be a rare circumstance wherein an 18A application cross-examination would be ordered in advance even if there was the authority or jurisdiction under the Rules to do it.

61 While I agree with that general proposition, there are some important differences in the application before me and the application before him.

62 To begin with, the right of discovery of documents pursuant to R. 26 and to an examination for discovery pursuant to R. 27 are absolute. Indeed, as I stated earlier, the provisions in R. 26 with respect to discovery of documents are mandatory while there is a certain discretion as to the time for conducting the examinations for discovery. Those rights are not subject to first obtaining an order as is the case in obtaining the right to cross-examine on affidavit material.

63 Also, the defendant will not be entitled to a favourable ruling pursuant to R. 18A if it has not complied with the demand for a list of documents prior to the hearing of the application.

64 In the result, the application to strike the statement of defence is adjourned generally.

65 The application for production of a list of documents is allowed and that list shall be produced on or before 12 noon, August 26, 1993. Produced means prepared and served on the plaintiff's solicitor.

66 The application for an order that John Cronin and Eleanor Sleath attend and be examined for discovery pursuant to R. 27 at a date and place to be arranged by counsel herein, and that no further application pursuant to R. 18A be brought by the said defendant Dunwoody & Company until the provision of a proper list of documents and the completion of the said examinations for discovery have occurred, will be allowed in part.

67 Cronin and Sleath are each ordered to attend for an examination for discovery at dates, times and places to be arranged between counsel.

68 In my view, those discoveries, as is the case of the documents, should be held prior to September 16, 1993, but as neither dates nor times have been presently agreed upon, I will not make the balance of the order requested and will adjourn that aspect of the motion generally.

69 In the event that discoveries of documents and persons are not completed in a timely manner, counsel for the plaintiff may praecipe that part of the motion back on the chamber's list at any time or before this Master during the week of September 13, 1993, or pursue that application before the Justice at the hearing of the R. 18A application, as he deems fit.

70 The plaintiff shall have its costs as costs in the cause.

Order accordingly.

End of Document

TAB 51

1999 CarswellBC 1976

1999 CarswellBC 1976
British Columbia Supreme Court

R.W. Anderson Contracting Ltd. v. Stambulic Bros. Construction Ltd.

1999 CarswellBC 1976

R.W. Anderson Contracting Ltd., Plaintiff and Stambulic Bros. Construction Ltd. and Mocam Builders Ltd., Defendants and R. Griffith Land Surveying Inc., Third Party

Melnick J.

Judgment: August 25, 1999
Heard: July 22, 1999
Docket: Cranbrook 9474

Counsel: *T.G. Colgur*, for Plaintiff.
D.F. Collins, for Defendant.

Subject: Contracts

APPLICATION by plaintiff for summary judgment under Rule 18A for debt largely arising out of construction performed by plaintiff for defendants.

***Melnick J.*:**

1 This is an application for summary judgment under Rule 18A by R.W. Anderson Contracting Ltd. (Anderson) for debt largely arising out of construction performed by Anderson for Stambulic Bros. Construction Ltd. (Stambulic) and Mocam Builders Ltd. (Mocam). Stambulic and Mocam resist the claim on two bases: first, they admit that they owe to Anderson certain portions of the claim advanced but say they tendered full payment but payment was refused; second, they say that with respect to one of the claims the work performed was deficient and the extent of the deficiency has previously been conceded by Anderson.

I. Background

2 Anderson is in the business of excavation, land servicing and road building. From time to time it has performed services, and provided goods, to Stambulic and/or Mocam. Its claims largely relate to its relationship with Stambulic although with respect to certain work (including the installation of water, sewer and storm sewer services and hydrants as well as backfilling and compaction of sidewalks and roads) that work was performed for both Stambulic and Mocam in housing developments known as Park Royal Subdivision Phases II and III.

3 With respect to some of the work, namely the installation of certain water mains, Stambulic and Mocam claim that the work was done deficiently and that Anderson was given an opportunity to correct the deficiencies, but failed to do so. Thus, say Stambulic and Mocam, they had to engage the services of others to carry out the remedial work. They say that they have tendered to Anderson the difference between the amount of the holdback for that project and the cost of the repairs made necessary by Anderson's defective installation. For its part, Anderson says that its work was duly approved and the deficiencies, if any, were not its responsibility but the responsibility of others.

4 Included in the claim of Anderson is a claim for $2,000 allegedly advanced to Mr. Vince Stambulic by Mr. Ray

Anderson, principals of Stambulic and Anderson respectively. Anderson claims that it did not receive a credit against an account owing to Stambulic although the nature of that account is not particularized.

II. The Claims

5 It will be convenient if I deal with each of the separate claims detailed in the statement of claim individually.

A. Install a water main in Park Royal Subdivision Phase II ($7,247 plus $507.29 G.S.T.) Total $7,754.29

6 At the commencement of the trial, Mr. Colgur, on behalf of Anderson, withdrew this claim, conceding that it is properly owing by another party.

B. Provide 20 yards of bedding sand to Trickle Creek Golf Course at $10 per yard ($200 plus $14 G.S.T.) Total $214

7 Stambulic concedes that this sum is owing by it to Anderson. However, on December 22, 1998, this sum was paid in full by Stambulic to Anderson under cover of a letter from Mr. Collins, counsel for Stambulic to Mr. Colgur, counsel for Anderson. The covering letter specifically indicated that the payment was not part of a settlement offer and Anderson was free to accept payment and pursue the balance of its claims. For reasons that are not entirely clear to me, cheques representing this and other amounts were apparently held in Mr. Colgur's file although, from what was said by counsel during the course of the hearing, they may have now been returned to Mr. Collins (or Mr. Colgur may have indicated that he planned to return them).

8 Whatever the present status of the cheques, I am content that Stambulic acknowledged this debt and paid it to Anderson. If, for some reason, the cheque representing payment for this claim has been returned by Mr. Colgur to Mr. Collins, it should be resubmitted by Collins to Colgur forthwith so that the debt is finally paid. I find that it is no fault of Stambulic that Anderson did not accept payment of this account and Stambulic should not have a judgment against it in these circumstances.

C. Excavation for a house at Trickle Ridge Estates in Kimberley ($3,120 plus $218.40 G.S.T. plus $46.20 P.S.T.) Total $3,384.60

9 Again, Stambulic has acknowledged its debt to Anderson for this account, submitted payment in the manner aforesaid, with the same result. I repeat my comments above.

D. Balance remaining for excavation of Rick Johnson's house in Kimberley $2,000

10 Similarly, Stambulic has also acknowledged this debt and submitted payment as aforesaid. I again repeat the comments I made earlier.

E. Cash advance to Vince Stambulic $2,000

11 It is difficult to understand the rationale for the inclusion of this claim in this action. In his affidavit of April 16, 1999, Mr. Anderson describes it as a cash advance given to Vince Stambulic on an account owed to Stambulic. He says the $2,000 was provided to him by Anderson as a loan by Anderson to him as a shareholder of Anderson for the purpose of providing it to Vince Stambulic as part payment of an account owed to Stambulic. He said that the amount was to be credited against the account owed to Stambulic but that did not happen.

12 Apparently, Stambulic constructed a house for Mr. and Mrs. Anderson and that was the subject of a claim heard by me on September 20, 1998. I do not have available to me my reasons for judgment delivered orally on that date but I have a recollection of the $2,000 being claimed as an offset against what Mr. and Mrs. Anderson owed to Stambulic for the

construction of their home. Whether or not my recollection is accurate, however, does not matter because I am not convinced that the evidence establishes that the $2,000 advanced by Mr. Anderson to Mr. Stambulic constitutes a debt by Stambulic (the company) to Anderson (the company). This claim must fail.

F. Balance owing for construction and installation for services at Park Royal Subdivision as at March 17, 1997 $13,749

13 Stambulic and Mocam acknowledge that, after an interim payment made to Anderson, there remained a balance outstanding owing by it to Anderson for the installation of water mains, et cetera, in the Park Royal Subdivision Phases II and III of $13,749. However, Stambulic and Mocam, say that remedial work for deficiencies of $6,523.69 was required leaving a balance owing to Anderson of $7,225.31. This was paid by Stambulic and Mocam to Anderson at the time and in the manner described above with the same result (actually, an additional $45 was paid apparently in error). Anderson claims that any remedial work necessary was not due to any deficiency in its work but rather as a result of work carried out by others subsequently. Further, claims Anderson, Stambulic and Mocam have not proven that it was responsible for the deficiencies.

14 I have an initial problem with the position taken by Anderson. Firstly, a letter of April 22, 1998 from Mr. Colgur to Mr. Collins, when read together with an affidavit of Mr. Anderson dated September 23, 1998 filed in the action *Stambulic Bros. Construction Ltd. v. Anderson*, Cranbrook 8138 (B.C. S.C.), is tantamount to an admission by Mr. Anderson of the correctness of the claims for the deficiencies advanced by Stambulic and Mocam. Although that affidavit was filed in another action, Phipson on Evidence, 13 ed., Sweet & Maxwell, (London: 1982), states at para. 20-42 as follows:

> Affidavits and Depositions of Witnesses. So, generally, the depositions of viva voce testimony of a party's witnesses, even when printed in the appendix to a case on appeal to the House of Lords, are not receivable against such party in subsequent proceedings as admissions. But affidavits or documents which a party has expressly caused to be made or knowingly used as true, in a judicial proceeding, for the purpose of proving a particular fact, are evidence against him in subsequent proceedings to prove the same fact, even on behalf of strangers; and it is immaterial, in such a case, whether the documents are originals or copies.

15 On the basis of that authority, I accept that I am able to refer to Mr. Anderson's affidavit in the other action for the purpose of receiving, in this action, his statement against interest.

16 However, if I am incorrect in that conclusion, I nevertheless find that there is evidence before me upon which I conclude that, in fact, Anderson did not do its work in a good and workmanlike manner and remedial work in the amount claimed was necessary as a result thereof. I accept the evidence of Mr. Tony Ammaturo, one of the principals of Mocam, that the work performed by Anderson was not acceptable, was not finally passed by the City of Cranbrook inspector, and, specifically, a hydrant did not drain properly because the drainage vents had been blocked by concrete and there was gravel in the main feed line. I find this to have been the result of faulty workmanship by Anderson. I also conclude that road and side walk areas were not compacted to the level of compaction required by the specifications with resulting settlement of certain areas.

17 Therefore, I conclude that the following repairs were made necessary by Anderson failing to properly complete the work it contracted to do:

Phase 3	1)	remove and install offset catch basin lid		374.80
	2)	grout manholes & catch basins		256.80
	3)	Repair Fire Hydrant		2509.81
	4)	Engineering fee		480.00
Phase 2	1)	Sidewalk settlement repair		500.00
	2)	Asphalt settlement repair		1583.00
	3)	Engineering fee		392.00
			Subtotal	$6096.91
			G.S.T.	426.78
			Balance	$6523.69

18 Anderson was given the opportunity to complete this work, but failed or neglected to do so. Thus, the proper amount owing to Anderson by Stambulic and Mocam is the balance of $7,225.31, a debt they have acknowledged and, as indicated above, paid. This claim of Anderson is therefore dismissed.

III. Conclusion

19 For the reasons stated above, Anderson's claim is dismissed.

IV. Costs

20 Stambulic and Mocam seek special costs or increased costs in the circumstances of this case. That is, given that they acknowledged that which was properly owing by them and provided cheques, on a with prejudice basis, for all but the amount of their claim for offset of remedial work, this action either should not have been brought or should have been brought only for the amount represented by the remedial work. Further, given the acknowledgement of Mr. Anderson as to the correctness of the claim for the remedial work, the action should not have been brought at all. I have some sympathy for the position of Stambulic and Mocam. In the circumstances, I would exercise my discretion to award them special costs equivalent to 60% of their actual costs of defending this action.

V. Entry of Order

21 My dismissing this action has been predicated on the assumption that Stambulic and Mocam have tendered all that they were required to pay to Anderson. If the cheques representing these payments had been returned by Mr. Colgur on behalf of Anderson, the funds properly owing to Anderson should again be advanced by Stambulic and Mocam to Anderson. I would therefore require that certified cheques representing the amounts properly owing to Anderson by Stambulic and Stambulic and Mocam be provided by Mr. Collins to Mr. Colgur before entry of this order by Stambulic and Mocam.

Application dismissed.

End of Document

TAB 52

Citation: Sermeno v. Trejo
2000 BCSC 846

Date: 20000531
Docket: F992359
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ETELVA GUADALUPE VEGA SERMENO

PLAINTIFF

AND:

MARIANO ROBERTO VEGA TREJO

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR JUSTICE MACAULAY

(IN CHAMBERS)

Counsel for the Plaintiff: S.G. Wright

Counsel for the Defendant: G. Sherman

Date and Place of Hearing: April 13, 2000
Vancouver, BC

[1] The plaintiff invoked Rule 18A to seek a divorce and ancillary relief, including sole permanent custody and guardianship of the two children of the marriage. The parties consented at the time of the hearing to the decree nisi for divorce and most of the ancillary relief sought, although some claims were adjourned generally by consent. The only contested issue left for determination by summary trial related to whether guardianship should be sole or joint. At the conclusion of submissions, I concluded that it was inappropriate to determine this issue under Rule 18A due to the unsatisfactory procedures followed by the parties and, as a result, dismissed the application for summary judgement as it related to guardianship. These are my reasons.

[2] Rule 18A provides for a summary trial. It is not an interlocutory application. The parties failed to consider the differences relating to the admissibility of affidavit evidence under Rule 18A and interlocutory chambers applications. This failure lay at the heart of my dismissal of the application.

[3] Virtually all of the affidavit evidence was inadmissible on a summary trial application. The chambers brief included four affidavits sworn by the plaintiff on June 4, 1999, January 7, February 17 and March 8, 2000 respectively. The

first three were sworn on information and belief. The defendant swore an affidavit on December 30, 1999. A further affidavit apparently signed, but not properly sworn, by the defendant on February 3, 2000, was also included in the chambers brief. Both set out that they were sworn on information and belief. Three other individuals swore affidavits on February 3 on behalf of the defendant. These too were sworn on information and belief.

[4] All the affidavits, with the exception of the plaintiff's final affidavit, were prepared for the purpose of an earlier interlocutory application by the plaintiff to vary an existing interim order granting joint guardianship to the parties and sole custody of the children to the plaintiff. Master Horn heard and declined the plaintiff's application to vary on February 23, 2000. If the application respecting guardianship had succeeded, the plaintiff would have obtained the same relief sought on her Rule 18A application albeit on an interim basis.

[5] The plaintiff's final affidavit dealt with the guardianship issue in a single paragraph as follows:

> 13. The Defendant and I are joint guardians of the children under a Provincial Court Consent Order pronounced May 20, 1998. Given the history of the Defendant's psychiatric problems and his behaviour toward myself and the children since the Consent

> Order was made, as set out in my previous Affidavits herein, I would be very concerned if he became their sole guardian in the event of my death. I wish to have the power to choose a guardian to survive me by a Last Will and Testament.

This was the extent of the admissible evidence properly before the court on the issue of guardianship.

[6] The *Supreme Court Rules*, B.C. Reg. 221/90 as amended up to B.C. Reg. 149/99, set out the requirements for affidavits and the basis for their admissibility:

> 51(10) An affidavit may state only what a deponent would be permitted to state in evidence at trial, except that, if the source of the information is given, an affidavit may contain statements as to the deponents information and belief, if it is made
>
> (a) in respect of an application for an interlocutory order, or
>
> (b) by leave of the court under Rule 40(52)(a) or 52(8)(e).

Rule 51 applies to affidavits filed on all 18A applications. It specifically states that (1) any evidence tendered in an affidavit must meet the same admissibility tests as at a full trial; and (2) affidavits based on information and belief can only be relied upon if the source of the information is given, and if the affidavit is being used in an application for an interlocutory order, or with leave of the court under limited circumstances.

[7] Rule 40(52)(a) gives the court a broad power to permit evidence of a fact or document to be presented by a statement on oath of information and belief at or before a trial. Rule 52(8)(e) stipulates that in a chambers application, evidence is to be given according to the rules applicable to affidavits, except where the court permits another form of evidence to be adduced. Neither party applied to relax the rules of evidence in the present case nor can I discern any reason why they should have been.

[8] The courts have addressed the evidentiary requirements for summary trial applications on many occasions. A summary trial must be conducted with the same due regard to the rules of pleading and evidence as a full trial: *Cotton v. Wellsby* (1991), 59 B.C.L.R. (2d) 366 (C.A.), Southin J.A. Counsel must not “scoop-shovel” volumes of disjointed affidavits and exhibits upon a chambers judge and then expect him or her to make an informed decision: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, McEachern C.J.B.C.

[9] Like any other trial, the party who asserts the affirmative of an issue must prove the issue on a balance of probabilities: *Adia S.A. v. MacLean*, [1985] B.C.J. No. 2747 (QL); 6 C.P.C. (2d) 42 (B.C.S.C.) at para. 37. The ordinary

rules of evidence and pleadings must prevail. Of particular import is the recognition that the rule against hearsay is very much alive in Rule 18A applications: *Adia*, at para. 38.

[10] Hearsay evidence is only admissible on interlocutory applications or by leave of the court (under one of the exceptions to the hearsay rule). Double hearsay is never admissible. Where hearsay is permitted, the source of the information must be precisely set out. The name of the individual providing the information is to be included (*Meier v. C.B.C.* (1981), 28 B.C.L.R. 136).

[11] Evidence based on information and belief should not be tendered at a trial. Since an 18A application is a trial, the evidence presented in the affidavit material must be based on personal knowledge and not information and belief. If there are any circumstances in which Rules 51(10)(b) or 52(8)(e) permit the use of affidavit evidence based on information and belief, they must of necessity be few and exceptional: *American Pyramid Resources Inc. v. Royal Bank of Canada et al.* (1986), 2 B.C.L.R. (2d) 99 (B.C.S.C.), following *Adia*, *supra*, in *F.E. McCracken Ltd. v. Provident Properties Inc.*, [1989] B.C.J. No. 1953 (QL) (B.C.S.C.).

[12] In addition to the foregoing, the defendant’s unsworn February 3, 2000 affidavit was further flawed. The defendant

purported to rebut the plaintiff's reply affidavit of January 7, 2000. The limitations on the admissibility of rebuttal evidence on Rule 18A applications are the same as at trial: *Agrifoods International Corp. v. Beatrice Foods Inc.*, [1997] B.C.J. No. 393 (QL) (S.C.) at para. 9.

[13] Here, the defendant simply restated and bolstered his initial reply with his subsequent affidavit. This form of serial affidavit is inadmissible just as it would be if given *viva voce* at trial. It did not rebut any error, or new matter raised, by the plaintiff in her first reply affidavit (January 7, 2000). In addition, the affidavit was inflammatory and contained pejorative opinion, which did nothing to strengthen the defendant's position. The purpose of an affidavit is to present evidence to the court, not to argue a position or to formulate the judgment.

[14] The lack of properly admissible evidence rendered it impossible for me to determine the contested issue of joint or sole guardianship in the summary manner for which 18A was designed. I was therefore obligated to dismiss the application and send it to full trial.

"M.D. Macaulay, J."
The Honourable Mr. Justice M.D. Macaulay

TAB 53

1997 CarswellBC 185
British Columbia Court of Appeal

Strathloch Holdings Ltd. v. Christensen Bros. Foods Ltd.

1997 CarswellBC 185, [1997] B.C.J. No. 288, 142 W.A.C. 293, 29 B.C.L.R. (3d) 341, 68 A.C.W.S. (3d) 1042, 7 R.P.R. (3d) 293, 86 B.C.A.C. 293

Strathloch Holdings Ltd., Glenross Management Ltd., and John Alexander Reid (Plaintiffs / Appellants) and Christensen Bros. Foods Ltd. (Inc. No. 2196771); 453328 B.C. Ltd.; Donald Christensen; Versailles Development Inc.; Lois Nahirney, William M. Nahirney, and Tom Dielschneider (Defendants / Respondents)

Esson, Finch and Newbury JJ.A.

Heard: January 14, 1997
Judgment: February 6, 1997
Docket: Vancouver CA020083

Counsel: *J.D. Spears*, for appellants.
D.W. Donohoe, for respondents Versailles Development Inc., L. Nahirney, W.M. Nahirney, and T. Dielschneider.

Subject: Civil Practice and Procedure

Headnote

Practice --- Summary judgment — Availability of summary judgment — General

Practice — Summary judgment — Availability of summary judgment — Plaintiffs bringing action against defendants pursuant to agency agreement — Claim being dismissed by trial judge on motion for summary judgment — Trial judge noting that evidence regarding misrepresentation being contradictory — Trial judge accepting evidence most favourable to plaintiffs — Plaintiffs appealing — Conflicts in evidence not being fatal to application for summary trial — It being open to trial judge to determine issue under R. 18A of British Columbia Rules of Court — No error being established in trial judge's conclusions — Appeal dismissed — British Columbia, Rules of Court (1990), R. 18A.

The plaintiffs, JR and his companies S Ltd. and G Ltd., entered into an agency agreement with V Inc. In the agreement, V Inc. appointed S Ltd. as its agent to effect a binding contract for the purchase of land. Conditions restricting S Ltd.'s agency included an upset price for the land, and a closing date by which the land was to be purchased. V Inc. reserved the right to accept or reject any tenants for the proposed shopping centre. In return for S Ltd.'s services, V Inc. agreed to pay fees at specified times. JR and S Ltd. were prohibited from purporting to bind V Inc. in any way without its express written approval. Acting as an agent for V Inc., JR arranged a binding contract for the sale and purchase of the property. The deal failed to close, as V Inc. was unable to obtain the approvals required by the bank in time for the closing date. The plaintiffs brought an action against V Inc. and its principals for specific performance, fees, or damages for misrepresentation. On a motion for summary judgment, the claim was dismissed. The trial judge focused mainly on the misrepresentation issue, and noted that the evidence on that point was contradictory. He rejected the plaintiffs' claim, even after accepting the evidence most favourable to them. The trial judge did not expressly deal with the issue of entitlement to the fee. The plaintiffs appealed.

Held:

The appeal was dismissed.

It was not established that the plaintiffs had an enforceable right to the fee claimed at any time. In addition, the existence of conflicts in the evidence is not fatal to an application for summary trial. Although the plaintiffs objected at trial to having the misrepresentation issue determined under R. 18A, there was no indication that they were precluded from adducing any particular evidence by affidavit. The trial judge's decision on that issue was no different from the common sense determinations made by judges every day in assessing allegations and arguments. Accordingly, it was open to the trial judge, on the evidence before him, to determine the issue under R. 18A of the British Columbia *Rules of Court (1990)*, and there was no error established in the conclusions he reached.

APPEAL from judgment dismissing action.

The judgment of the court was delivered by *Newbury J.A.*:

1 Mr. Reid and his companies Strathloch Holdings Ltd. ("Strathloch") and Glenross Management Ltd. appeal from the dismissal of their action pursuant to R. 18A by the Court below. The action concerns an agency agreement between Mr. Reid (an experienced

developer), Strathloch and the defendant Versailles Development Inc. ("Versailles"), which agreement was signed in mid-January 1994 after negotiations between the solicitors for the parties.

2 The Agreement began by reciting that Strathloch had developed a plan for the acquisition of certain property near Vernon, B.C. which Versailles wished to acquire for the construction of a shopping centre. The property was owned by a Mr. Reimer. According to one of the recitals in the Agreement, Strathloch had "secured at least 70% of the prospective tenants for the Shopping Centre, as proposed to be built, in order to further induce Versailles to enter into this Agreement." In paragraph 1, Versailles appointed Strathloch as its agent to effect a binding contract for the purchase of the land from Mr. Reimer, and to "[e]ffect binding offers to lease with respect to the Shopping Centre tenants". Paragraph 2 set forth certain conditions that restricted Strathloch's agency — most importantly, an upset price for the land and a closing date by which it must be purchased were stipulated, and Versailles expressly reserved the right "to accept or reject any tenant brought forward by Strathloch, provided that such discretion is exercised reasonably".

3 In return for Strathloch's services, Versailles bound itself to pay certain fees — a sum (which was evidently paid) on execution of the contract for the purchase of the land, a further sum on closing, and $200,000 in accordance with paragraphs 3.3 and 3.4. Since the plaintiffs' claim turns largely on the meaning of these provisions, I set them out below:

> 3.3 Subject to the conditions set forth in Section 3.4, Versailles shall pay to Strathloch a maximum of $200,000.00 provided that Strathloch secures end delivers to Versailles binding offers to lease and provided that the tenants execute lease agreements for the total rentable area of the Shopping Centre.
>
> 3.4 The following conditions shall apply with respect to the payment provided in Section 3.3:
>
> > a. Strathloch shall only be paid for that proportion of the Shopping Centre to which it secures binding offers to lease and binding lease agreements have been entered into between landlord and tenant;
> >
> > b. Versailles shall pay to Strathloch $150,000.00 when it has delivered to Versailles binding offers to lease and lease agreements have been executed by the tenant with respect to no less than 70% of the area of the Shopping Centre which shall include, at a minimum, the "Areas Leased Out To Date" as set forth in Schedule "C" (or equivalent alternatives). Versailles shall not be required to make said payment before March 18, 1994; Strathloch will endeavour to find additional tenants prior to payment date.

c. Versailles shall pay to Strathloch up to an additional $50,000.00 provided that Strathloch leases the remaining area of the Shopping Centre as set out in Schedule "A" and provided the following conditions are met:

i Strathloch secures binding offers to lease;

ii The tenant and landlord enter in to lease agreements for the units leased; and

iii Strathloch obtains the first month of rent and a deposit equal to one month rent plus all applicable GST;

Said payments shall not be made prior to the third month after the Shopping Centre grand opening date and Strathloch shall only be paid for that proportion of the remaining 30% of the Shopping Centre area to which they secure said leases;

d. Should Versailles increase the number of units for rental Strathloch shall be compensated for any further request by Versailles that Strathloch lease the additional units;

e. If any of the tenants do not take possession of the lease premises and complete their leasehold improvements, the proportionate payment from Versailles to Strathloch with respect to said tenant shall be refunded to Versailles or, alternatively, Versailles shall be entitled to offset that payment with other funds due to Strathloch. If Strathloch finds suitable replacement tenants, the forfeited payments may be recaptured.

Paragraph 6 prohibited Reid and Strathloch from purporting to bind Versailles in any way without its express written approval. In paragraph 14, the parties acknowledged that the written document constituted the entire agreement between the parties and that the Agreement could "not be amended or modified except by an instrument in writing executed by all parties."

4 Acting as agent for Versailles, Mr. Reid duly arranged a binding contract between Versailles and Mr. Reimer for the sale and purchase of the property. The transaction was originally to close on March 8, 1994. Versailles and its principals (the defendants Mr. and Ms. Nahirney and Mr. Dielschneider) thereupon began seeking the necessary municipal approvals and permits for the construction of a shopping centre. They depose, however, that they were unable to obtain the approvals required by Versailles' banker in time for the (extended) closing date. As a result, the deal between Versailles and Reimer failed to close; Versailles forfeited its deposit of $40,000; and a Mr. Christensen (who in fact was one of the prospective tenants lined up by Mr. Reid) purchased the property thereafter through

a company controlled by him. The plaintiffs did join the ultimate purchaser in this action, but no appeal is taken before us from the dismissal of the action as against the so-called "Christensen Group".

5 The action against Versailles and its principals was framed as one for specific performance or alternatively, as one for judgment in the amount of $200,000 (the fee referred to in the Agreement), or in the further alternative, general damages for misrepresentation. The reasons for judgment of the summary trial judge focussed mainly on the third alternative, misrepresentation. The judge noted that since the evidence on that point was contradictory, he would accept that most favourable to the plaintiffs. Even so, he rejected the plaintiffs' claim that Versailles and its principals had, to use the vernacular, strung Reid along by giving him assurances during the lead-up to the closing date that "they had no problems in financing" and that they would "protect [Reid] and [Reid's] investment".

6 The summary trial judge dealt with these allegations as follows:

> To an experienced developer and businessman like Reid, an assurance that funds would be available cannot mean more than funds would be available after all zoning and permit and environmental requirements are satisfied and that the price of the land is negotiated. There is not even a suggestion that the money would not be available at that time in this case. Reid says Versailles could have and should have bought the property and did not do so, not giving any good reason. To suggest that Versailles did not complete for a valid reason, after investing around $150,000, is not credible.
>
> Reid says that he received assurances from Versailles that his fee would be paid. This is denied by Versailles. But assuming that such a statement was made, it is not something that is covered, but excluded, by the agreement of January the 20th, 1994. At the most, it was a promise with no consideration and not enforceable in law.

The Court therefore dismissed the plaintiffs' action as against Versailles and its principals, without dealing expressly with its entitlement to the $200,000 fee.

7 In this Court, Mr. Spears focussed on his clients' claim to $150,000 of the $200,000 fee referred to in paragraphs 3.3 and 3.4 of the Agreement quoted above. He argued that by some point in January 1994, his client delivered to Versailles offers to lease at least 70 per cent of the rentable area of the shopping centre, such that it became entitled to $150,000 of the fee under paragraph 3.4(b) and could have sued for specific performance of that term of the Agreement at that time. Thereafter, he says, Mr. Reid was persuaded not to sue by the representations made by Versailles and/or its principals. Mr. Reid's forbearance should not now preclude Strathloch's claim to the earned part of its agency fee.

8 I am not persuaded, however, that any of the plaintiffs proved their entitlement to the fee, or $150,000 thereof, on the evidence before the Court. First, Mr. Reid's affidavit evidence concerning what exactly he "delivered" to Versailles in the way of leases is very vague. Paragraph 11 of his first affidavit states that "When I had obtained 70 per cent signed leases and offers to lease, I was at that point able to invite interested parties to take over and build [the shopping centre]." Mr. Reid further deposed:

> Prior to Sept., 1993 I dealt with Don [the defendant Donald Christensen] with respect to a lease for a food supermarket, now shown and marked as Exhibit "C" are additional portions of Don's Ex. "A", his lease.

Exhibit "C" consists only of certain "SuperValu specifications" and does not appear to amount to a lease or an agreement to lease at all. Thus, it is far from clear whether in fact offers to lease, binding on prospective tenants, were "secured" as Mr. Reid suggests.

9 More importantly, it does not appear the $150,000 would have become payable under the terms of the Agreement even if it had been shown that Mr. Reid delivered binding offers (i.e., offers binding on the lessees) to lease 70 per cent of the shopping centre. Paragraph 3.3 was subject to the proviso that the tenants also execute "lease agreements" for space in the shopping centre. The term "lease agreements" is obviously intended to mean something different, and more, than "offers to lease", since both phrases appear in paragraph 3.3. Next, subparagraph (a) of paragraph 3.4 (to which paragraph 3.3 is made expressly subject) contemplated that "binding lease agreements" must have been entered into "between landlord and tenant". Subparagraph (b) again made the payment of the $150,000 conditional upon the delivery to Versailles of binding offers to lease *and* the execution of lease agreements by the tenant. There is no evidence that lease agreements (as opposed to offers to lease) were ever executed by tenants or by the would-be landlord, Versailles. (Reid did not have the authority to sign leases as Versailles's agent.)

10 If this is correct, I cannot see how it can be said Mr. Reid or his company had an enforceable right to this portion of the fee at any time. It would follow that any argument based on forbearance from suing on such a "right" would fail.

11 Mr. Spears also argued that the summary trial judge erred in deciding his clients' claim for damages for misrepresentation by way of summary trial. Whether Versailles' representations were negligent or otherwise, he says the judge rejected Strathloch's claim because the Court accepted "evidence" from *counsel* for the defendants as to the meaning of the alleged representations in a commercial context. No such *evidence* in the form of testimony or sworn statement was before the Court to support those submissions. Thus the summary trial judge erred, says Mr. Spears, in relying on such submissions to reach a conclusion on an important point of credibility.

12 It is of course well established that the existence of "conflicts in the evidence" is not fatal to an application for summary trial under R. 18A, and that when such an application is made, the respondent is expected to take every reasonable step he can to place all relevant evidence before the court, even though he may object to the procedure. (See *Anglo-Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378 (C.A.), at 382.) The plaintiffs might have been expected, for example, to adduce evidence of "commercial context" if they wished to urge on the Court a particular view of the Agreement. Although Mr. Spears objected at trial to having the matter determined under R. 18A, there is no indication that he was precluded from adducing any particular evidence of this kind by affidavit.

13 As for his contention that the summary trial judge based his decision on "evidence" given by counsel, I do not interpret the reasons for judgment in that way. In my view, the Court was merely making its own assessment of the likelihood that assurances from Versailles and its principals that they had their financing in order, would have been intended and understood as unconditional by experienced businesspersons in a commercial context. Such a judgment is no different from the common-sense determinations made by judges every day in assessing allegations and arguments. I do not see that it depended on "evidence" or that the Court erred in receiving counsels' submissions on the point.

14 I do wish to advert briefly, however, to the decision of this Court in *Fomo Products Inc. v. Solkan Enterprises Ltd./Enterprises Solkan Ltée (All Weather Products)* (1986), 4 B.C.L.R. (2d) 264, which was relied on by Mr. Donohoe as holding that in a hearing under R. 18A, it is open to the presiding judge to receive "evidence" in the form of statements by counsel. The issue in *Fomo* was whether a chambers judge had erred in considering certain statements of counsel in deciding whether the Court had jurisdiction to hear the action at all. The question of jurisdiction had not been raised in the pleadings. This Court held that he had not erred in considering "evidentiary matters" in relation to that preliminary question. Such matters might, as an example, relate to the question whether a party would be prejudiced by being unable to obtain affidavit evidence which could be obtained in an ordinary trial by subpoena. That should not be understood as a finding that, in the course of a summary trial, disputed facts can be established by statements of counsel.

15 I would dismiss the appeal on the basis that it was open to the Court below on the evidence before it to determine the issue under R. 18A, and on the basis that no error has been shown in the conclusions reached by the summary trial judge.

Appeal dismissed.

TAB 54

2000 CarswellNat 2087
Federal Court of Canada — Trial Division

Tajgardoon v. Canada (Minister of Citizenship & Immigration)

2000 CarswellNat 2087, 2000 CarswellNat 3408, [2000] F.C.J. No. 1450, [2001] 1 F.C. 591, 100 A.C.W.S. (3d) 322, 193 F.T.R. 230, 8 Imm. L.R. (3d) 310

Hossein Tajgardoon, Applicant and The Minister of Citizenship and Immigration, Respondent

Pelletier J.

Heard: July 5, 2000
Judgment: September 1, 2000
Docket: IMM-2063-99

Counsel: *Stephen Green*, for Applicant.
Susan Nucci, for Respondent.

Subject: Immigration

APPLICATION by applicant for judicial review of decision of visa officer refusing application for permanent residence.

***Pelletier J.*:**

1 Hossein Tajgardoon, the applicant, is an Iranian citizen who wishes to immigrate to Canada. The visa officer who processed his claim found that he lacked the personal characteristics which would permit him to establish himself economically in Canada. This would not distinguish him from many other would-be immigrants to Canada. What does distinguish him is that he is a graduate civil engineer, a former Iranian ambassador to the Netherlands from 1984 to 1987, the Chief of Protocol in the Iranian Ministry of Foreign Affairs from 1987 to 1990, the former Managing Director of Iran Khodro (Iran's largest car manufacturer) from 1991 to 1994 and since 1994, the Deputy Managing Director for Iranian Offshore Engineering and Construction Company. If this man lacks personal suitability, what hope is there for those of more modest accomplishments to satisfy our visa requirements?

2 Mr. Tajgardoon was interviewed by the visa officer at the Canadian Embassy in Damascus, Syria. His evidence is that the interview was conducted entirely in English with no interpreter. The visa officer had no difficulty understanding him and he was able to answer all questions put to him. In his affidavit, he describes his English as fluent. The visa officer's notes record that Mr. Tajgardoon was asked about his level of proficiency in English and after some discussion with the visa officer, it was agreed that he spoke, read and wrote English well. Notwithstanding this joint assessment, the visa officer then asked him to read a paragraph in English. The visa officer's assessment was that "His reading was not fluent and he [could] not accurately summarize the passage he read. Classification here of well is generous". On the strength of this assessment, the applicant was awarded six (6) out of a possible nine (9) points for English language proficiency.

3 The visa officer then assessed the applicant's personal suitability, noting that he was a former diplomat. He asked the applicant if he spoke any Dutch or German (the three years with Iranian Khodro were spent at the company's factory in Dusseldorf, Germany) and was told that he did not. When questioned why he had not learned the local languages during his foreign postings, the applicant replied that he was able to function in English. The visa officer recorded that this reflected upon the applicant's adaptability. The visa officer ascertained that the applicant had made no effort to contact prospective employers which he thought showed a lack of initiative. Upon being questioned about the effect of his age upon his employability, the applicant "raised somewhat arrogant response that he [would] not worry about this". Overall, the visa

officer did not find the applicant to be "a very congenial character" which he believed would negatively impact on his ability to sell himself in the labour market. The applicant was awarded five (5) out of ten (10) points for personal suitability which is an assessment of the likelihood that the applicant will be able to successfully establish himself in Canada.[1]

4 The applicant's rating in the assessment scheme prescribed under Schedule II of the *Immigration Regulations, 1978* was as follows:

Age	04
Occupation	05
Specific Vocation Preparation	17
Experience	08
Arranged Employment	00
Demographic Factor	08
Education	16
English	06
French	00
Relatives	00
Suitability	05
	--
Total	69

5 The applicant was one point short of the seventy (70) points prescribed by the Regulations. As a result, the shortfall in the English language and personal suitability categories is very significant. However, had the applicant been able to score the seventy (70) points, the visa officer indicated that he would have exercised the negative discretion given to him under the Regulations to refuse the applicant a visa on the ground that the total did not accurately reflect the applicant's chances of successfully establishing himself in Canada.

6 A preliminary point was raised by the applicant with respect to the absence of an affidavit by the visa officer and the weight to be given to the visa officer's notes, commonly known as the CAIPS ("Computer Assisted Immigration Processing System") notes. The argument is that the CAIPS notes, which are produced pursuant to Rule 317 of the *Federal Court Rules, 1998*, are not evidence of the truth of their contents since they are a classic example of hearsay, an out of court assertion tendered as proof of its contents. The applicant argues that unless the facts recited in the notes are proven by affidavit, they are not evidence before the Court and cannot be used by the respondent in support of its case. Underlying this argument is the related point that in the absence of an affidavit, there is no opportunity to cross-examine the visa officer with respect to the CAIPS notes. Since the applicant must run the risk of cross-examination to put his/her application before the Court, the respondent should be under the same obligation.

7 The respondent argues that the Tribunal Record, including the CAIPS notes, is evidence whose weight is to be assessed relative to the other evidence before the Court so that an assertion in the CAIPS notes is worthy of belief unless it is contradicted by other evidence. The trustworthiness of the notes arises from the fact that they are made contemporaneously with the events being recorded. The latter assertion may well be true, but the only evidence of it is the notes themselves.

8 The applicant relies on the decision of the Federal Court of Appeal in *Wang v. Canada (Minister of Employment & Immigration)* (1991), [1991] 2 F.C. 165, (1991), 121 N.R. 243 (Fed. C.A.), where the issue was the admissibility of a visa officer's memorandum of his recollection of events which was prepared sometime after the fact and was attached as an exhibit to the affidavit of an immigration officer. Mahoney J. for the Federal Court of Appeal held that there was no reason to depart from the usual rules of evidence since it was no more inconvenient for the visa officer to prepare an affidavit than it was for the applicant. To the extent that the applicant was required to swear an affidavit to get his version of events before the Court, thereby exposing himself to cross-examination, there was no rationale for allowing the respondent to put its version of events before the Court without assuming the same obligations. A series of cases have followed *Wang*, *supra*, including *Fung v. Canada (Minister of Employment & Immigration)* (1991), 121 N.R. 263 (Fed. C.A.); *Gaffney v. Canada (Minister of Employment & Immigration)* (1991), 12 Imm. L.R. (2d) 185, 121 N.R. 256 (Fed. C.A.); *Anglican Church Diocese of Montreal Canada v. Canada (Minister of Citizenship & Immigration)* (1997), 38 Imm. L.R. (2d) 276 (Fed. T.D.), to set out but a few.

9 The respondent relies on two recent cases where judges of the Federal Court, Trial Division have held that there is no obligation on the part of the respondent to file an affidavit. In *Awwad v. Canada (Minister of Citizenship & Immigration)* (1999), 162 F.T.R. 209 (Fed. T.D.), Teitelbaum J. refused to certify a question as to whether the CAIPS notes were admissible in the absence of an affidavit attesting to the truth of the contents. Teitelbaum J. held that it was the obligation of the parties to put their cases forward as they saw fit. It was for the respondent to decide if it wished to file an affidavit. This sidesteps the question of the evidentiary value of the CAIPS notes, in the absence of an affidavit in support of the truth of their contents.

10 In *Wang v. Canada (Minister of Citizenship & Immigration)* (1999), 166 F.T.R. 278 (Fed. T.D.), ("*Wang II*"), Blais J. held that there was no obligation on the part of the respondent to file an affidavit and that the record was evidence in support of the visa officer's decision. Blais J. relied upon *Awwad*, *supra*, in coming to the conclusion he did.

11 Finally, the matter was considered by Reed J. in *Chou v. Canada(Minister of Citizenship & Immigration)* (2000), 3 Imm. L.R. (3d) 212 (Fed. T.D.), in which my learned colleague reviewed the history of this issue since the decision of the Federal Court of Appeal in *Wang*, *supra*. She expressed her reluctance to follow the decisions in *Awwad*, *supra*, and *Wang II*, *supra*, in the absence of some indication that those decisions had been made in the knowledge of jurisprudence on the issue in the Federal Court of Appeal. She concluded that the CAIPS notes were not evidence of their contents in the absence of a supporting affidavit. However, she found that they were admissible as the reasons for the decision, following the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 243 N.R. 22 (S.C.C.), [1999] 2 S.C.R. 817 (S.C.C.).

12 Rule 307 dealing first with the obligation to provide an affidavit, provides that the respondent shall serve and file "any supporting affidavits and documentary exhibits" "les affidavits et les pièces documentaires qu'il entend utiliser à l'appui de sa position". While the English version of the Rule is ambiguous, the French version is clear that the respondent need only file those affidavits on which he/she proposes to rely.[2] If there are none, none need be filed. This is consistent with the position taken by Teitelbaum J. in *Awwad*, *supra*, to the effect that it is for the applicant to marshall the evidence in order to make his/her case.

13 The next question is the admissibility of the documents produced pursuant to Rule 317. The Rule specifies that:

> 317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.
>
> 317. (1) Une partie peut demander que des documents ou éléments matériels pertinents à la demande qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande lui soient transmis en signifiant à l'office fédéral et en déposant une demande de transmission de documents qui indique de façon précise les documents ou éléments matériels demandés.

14 The limited scope of the Rule is made clear by comparing it to Rule 17 of the *Federal Court Immigration Rules, 1993* which provides as follows:

> 17. Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:
>
> (a) the decision or order in respect of which the application is made and the written reasons given therefor,
>
> (b) all papers relevant to the matter that are in the possession or control of the tribunal,
>
> (c) any affidavits, or other documents filed during any such hearing, and

> (d) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application,
>
> and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.
>
> 17. Dès réception de l'ordonnance visée à la règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement:
>
> a) la décision, l'ordonnance ou la mesure visée par la demande, ainsi que les motifs écrits y afférents;
>
> b) tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif,
>
> c) les affidavits et autres documents déposés lors de l'audition,
>
> d) la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande,
>
> dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.

15 When one compares the two Rules, it is clear that Rule 17 provides for the production of a certified copy of the Tribunal Record, and Rule 317 simply provides a mechanism for a party to obtain documents not in its possession for the purpose of allowing the party to put the record before the Court. But even under Rule 17, the record is limited to the materials before the Tribunal for the purpose of making its decision and does not include draft reasons and supporting memoranda. See *Weerasinge v. Canada (Minister of Employment & Immigration)* (1993), 161 N.R. 200, [1994] 1 F.C. 330 (Fed. C.A.).

16 Rule 4 of the *Federal Court Immigration Rules, 1993* provides that except to the extent that they are inconsistent with the *Act*, various parts of the *Federal Court Rules, 1998* apply to challenges to decisions of visa officers. One of the parts which applies to such applications is Part 5, which deals with applications and includes Rule 317. There has been no suggestion of any inconsistency. As a result, the process for putting the record before the Court is different in a visa officer case than it is in a refugee case.

17 Furthermore, if draft reasons are not part of the record, it is unlikely that CAIPS notes are part of the record either. They are not part of the body of information before the visa officer when he/she makes his/her decision in the same sense as the applicant's record of education or employment is. The CAIPS notes are an internally generated document and are not a document put before the visa officer by the parties. As Reed J. pointed out in *Chou*, *supra*, the CAIPS notes are more in the nature of reasons for the decision, notwithstanding the fact that in visa cases, the applicant will have received a letter containing the reasons for the refusal of his/her application.

18 But to say that the CAIPS notes are reasons does not dispose of the question of admissibility. There is no general principle that reasons are admissible by their production. Admissibility is always a question of "For what purpose?". In the hands of the applicant, the contents of the CAIPS notes tend to be used to show that the visa officer has misconducted himself in some fashion. In the hands of the respondent, the same notes are used to bolster the respondent's submission that all relevant factors were considered. Using the traditional language of the law of evidence, one would say that the applicant relies upon admissions against interest found in the notes while the respondent seeks to use self-serving statements made in an out-of-court document whose author is not available for cross-examination. The conclusion flowing from a traditional analysis of the law is that the CAIPS notes would be admissible at the instance of the applicant as admissions against interest but would not be admissible in the hands of the respondent because they are self-serving hearsay statements.

19 There is a technical objection to this analysis which is that the respondent, the Minister of Citizenship and Immigration, is not the visa officer and admissions are only admissible against the party who made them.[3] The Minister is the

respondent in her capacity as the proponent of the decision, and not as one vicariously liable for the visa officer.[4] But this technical objection ought not to be allowed to obscure the reality of the situation. It is the visa officer's decision which is under attack. What the visa officer says about the decision or the circumstances leading up to it is surely relevant to the question of the lawfulness of the decision. The fact that the admissions originate with the visa officer raises the same arguments for admissibility as does an admission by a party.[5] As the proponent of the decision, the respondent has no interest in the litigation beyond protecting the integrity of the decision. This is not a case of attempting to treat one person's admission as another's. For all of these reasons, it is reasonable to look through the technical argument to the substance and to hold that the contents of the CAIPS notes are admissible against the respondent as admissions against interest by the visa officer whose decision the respondent seeks to uphold.

20 However, the respondent is not in a position to rely on the CAIPS notes as proof of their contents because this is classic hearsay. They are not admissible as business records in the absence of evidence which establishes that they satisfy the requirements of admissibility of business records. In order to make the CAIPS notes evidence of the facts to which they refer, they must be adopted as the evidence of the visa officer in an affidavit.

21 While the question was not argued before me, the result is the same when one considers the problem in the light of the trilogy of decisions of the Supreme Court of Canada dealing with hearsay evidence: *R. v. Khan* (1990), 113 N.R. 53, [1990] 2 S.C.R. 531 (S.C.C.); *R. v. Smith* (1992), 139 N.R. 323, [1992] 2 S.C.R. 915 (S.C.C.), and *R. v. B. (K.G.)* (1993), 148 N.R. 241, [1993] 1 S.C.R. 740 (S.C.C.). In each of these cases, the Supreme Court had to deal with a problem involving a traditional exception to the hearsay rule: a mother's evidence as to what her infant child told her about a sexual assault in *Khan*, *supra*, a statement by a murder victim to her mother as to her fear of the accused in *Smith*, *supra*, and prior inconsistent statements in *B. (K.G.)*, *supra*. In the course of dealing with these issues, the Supreme Court moved away from the reliance upon the traditional approach to hearsay evidence, i.e. it is inadmissible unless it can be characterized as falling into one of the recognized exceptions to hearsay, to a principled approach to the admissibility of hearsay evidence. Under the principled approach, hearsay is admissible if it can satisfy the tests of necessity and reliability. If the evidence is not available from the original maker of the out-of-court statement,and the circumstances of the making of the statement lead to the conclusion that the statement is likely to be true, then it is admissible whether or not it falls into one of the traditional exceptions.

22 Do the CAIPS notes satisfy the requirements of necessity and reliability so as to be admissible in proof of their contents at the instance of the respondent?[6] The first issue is the question of necessity. Presumably, the respondent would argue that the inconvenience associated with the preparation of affidavits by the visa officers around the world satisfies the requirement of necessity. This argument was raised and disposed of in *Wang*, *supra*. It is likely easier for the respondent to get an affidavit from its officer, than it is for the applicant who is also abroad to find someone to prepare and commission his affidavit. In the normal course of events, the requirement of necessity would not be satisfied. The requirement of some circumstantial guarantee of trustworthiness is more problematic. If the document is to be admissible upon its production, the facts necessary to show a circumstantial guarantee of trustworthiness must be found in the document itself. But this amounts to relying upon a document of unknown reliability to prove that the same document is reliable. It is a circular argument. On the face of it, such an argument ought not to succeed. The result is the same, no matter which approach is used.

23 Turning now to the merits of the application, the applicant argues that the assessment of his English language proficiency is deficient given that the entire interview was in English. Furthermore, he argues that his sworn statement that he is fluent in English is entitled to more credence than the unsworn comments of the visa officer in the visa officer's notes, should they be admissible. I am not disposed to interfere with the visa officer's assessment of the applicant's proficiency in English. He had the opportunity to hear the applicant and to speak to him. The applicant's affidavit evidence is, not to put too fine a point on it, self-serving. I am not prepared to interfere with this finding.

24 Schedule I of the *Immigration Regulations, 1978* defines the various items in the assessment scheme and identifies the points to be awarded to them. Personal suitability is defined as "the personal suitability of the person and his dependants to become successfully established in Canada based on the person's adaptability, motivation, initiative, resourcefulness and other similar qualities".[7] It is possible to consider some of the factors enumerated in Items 1 to 9 of Schedule I under this heading but only to the extent that they are relevant to the questions of adaptability, motivation, initiative etc.:

"Double-counting" on the part of the visa officer would be an error of law. In other words, specific factors such as

> education, language, occupational demand or any of the other five factors outlined in Schedule I already assessed separately cannot be "double-counted" when assessing an applicant's personal suitability[8]. Such factors may be considered under personal suitability only insofar as they elucidate the applicant's adaptability, motivation, initiative, resourcefulness and similar qualities. For example, an applicant who resides in an English-speaking country for several years without learning the language demonstrates less adaptability on his part. A visa officer makes no error in considering the separate factors from this perspective.

25 There was an evidentiary basis for a conclusion that the applicant had not displayed a great deal of initiative in seeking out potential employment in Canada. It is more doubtful that the applicant's failure to learn Dutch or German is indicative of adaptability since he was able to learn English and function in that language. In considering adaptability, a visa officer is not free to consider only one factor in isolation and to ignore the balance of an applicant's employment history. It seems somewhat ironic that a man who has been the ambassador of a major middle eastern nation to a European capital, managing director of a significant industrial concern and deputy managing director of a large construction and engineering firm is reproached for lack of adaptability. His linguistic failings, such as they are, seem trivial compared to the breadth of the applicant's experience in a number of diverse environments.

26 Furthermore, when the visa officer took age into account in assessing suitability, he was engaging in double counting of a sort which is not permitted. Age is not relevant to adaptability, motivation, initiative, ingenuity or other similar qualities. The labour market realities which confront older workers are already accounted for in the reduced points awarded to immigrants over the age of forty-four. This applicant lost six (6) points out of ten (10) as a result of exceeding forty-four (44) years of age. He ought not to lose more on the same score under the heading of suitability.
An order will be issued in 10 days setting aside the decision of the Visa Officer and remitting the matter to be determined by another Visa Officer.
The parties may in the interim propose a question for certification.

Application allowed.

Footnotes

1 *Amir v. Canada (Minister of Citizenship & Immigration)* (1996), 125 F.T.R. 158 (Fed. T.D.).

2 *Canada (Minister of Citizenship & Immigration) v. Lau* (1999), 164 F.T.R. 64 (Fed. T.D.).

3 Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (2nd Edition) Butterworths, Toronto, 1999 para 6.292.

4 Rule 5(2) of the *Federal Court Immigration Rules, 1993* provides that unless the Minister is the applicant, the Minister shall be a respondent in an application.

5 Sopinka, *supra* para 6.292.

6 The principled exception approach does not make inadmissible what would have previously been admissible. Therefore admissions against interest continue to be admissible at the instance of the party adverse to the party making the admission.

7 ...lui et ses personnes à charge sont en mesure de s'établir avec succès au Canada, d'après la faculté d'adaptation du requérant, sa motivation, son esprit d'initiative, son ingéniosité et d'autres qualités semblables.

8 *Ali v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1080.

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TAB 55

COURT FILE NO.: 02-CL-4528
DATE: 20050120

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

RE: IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

AND IN THE MATTER OF a Plan of Compromise or Arrangement of TELEGLOBE INC. and the other Applicants listed on Schedule "A"

Applicants

BEFORE: FARLEY J.

COUNSEL: *David Hager*, for ABN AMRO Bank N.V.

Peter J. Osborne, for the Interim Administrator

Geoffrey B. Morawetz, for the Banking Syndicate

Kevin Zych, for the *Ad Hoc* Committee of Debenture Holders

Harvey Chaiton, for the Interim Receiver

Steven Graff, for SkyOnLine

HEARD: January 14, 2005

E N D O R S E M E N T

[1] With the effluxion of time the issuance of the Superintendent of Corporations (Colombia) ("Super") and reflection, the characterization of this motion changed. As argued, the moving party ABN AMRO Bank N.V. ("ABN") requested an order that Teleglobe Inc. (TCan") pay Teleglobe Colombia S.A. ("TCol") $608,853 US which it is understood TCan received from its then subsidiary TCol in 2002 after TCan had obtained CCAA relief and before TCol obtained similar insolvency relief pursuant to Law 550 (Colombia). Apparently the purchaser of TCol was content to allow ABN to lead the charge in this legal battle regarding the money in question. ABM is no longer pursuing a constructive trust claim.

[2] While the Super's decision ordered TCan to repay not only the $608,853 US in question but an additional approximately $700,000 US for a total of $1.3 million US, the Super determined that TCan had provided full value to TCol for such amount. However it is a provision of Law 550 that a related party such as TCan cannot be favoured in the 18 months prior

to the Colombian insolvency declaration and thus it was inappropriate for TCan to receive these funds while there were non-related party debts (which were also unsecured) outstanding. Pursuant to Colombian law, TCan would not be allowed to participate in the TCol estate distributions until all unrelated creditors had been paid.

[3] I would note that TCan has supported TCol so as to maximize the Colombian estate and further that TCol is indebted to TCan for some $3 million US.

[4] Ernst & Young Inc. ("E&Y") as Interim Administrator of TCan has confirmed that it will accept without further proof the claim of TCol as an unsecured creditor in the estate of TCan for the amount of the award of the Super, namely approximately $1.3 million US (inclusive of the monies sought to be returned to TCol by this motion by ABN). I take it that this would be subject to any potential setoff aspect re the $3 million US.

[5] ABN has a particular interest in TCol's situation: not only is ABN a creditor in the Colombian estate, but it also has a guarantee of the TCol debt to ABN from TCan. ABN has filed a proof of claim in the TCan CCAA proceedings. ABN will have to work out with E&Y the amount of this claim keeping in mind that it is claiming for the same amount in both the Colombian and the Canadian estates, so that the problem of double proof will have to be dealt with.

[6] The Super's decision (an order for revocation) is on its face a personal *in personam* judgment in Colombia; it is not an order requiring that TCan return a specific or earmarked fund (or from TCol's perspective that that decision granted TCol or any creditor of TCol (including ABN) any specific proprietary interest in a specific fund. The essence of this is that the Super's award was an unsecured money judgment in favour in TCol against TCan.

[7] E&Y cited *Lax* v. *Lax*, [2004] O.J. No. 5146 (C.A.) as authority for the proposition that a foreign judgment must be domesticated prior to being enforced in Canada – and that to do so would require a Canadian action being commenced to recognize the foreign judgment. E&Y also observed that there has been no request to have the stay lifted against TCan for this purpose.

[8] Assuming for the sake of argument that ABN is permitted to bring this motion pursuant to s. 18.6(4) of the CCAA as an "interested person", it does not seem to me that it would be appropriate to stretch the doctrine of comity or the principles of *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077 or *Beals* v. *Saldanha*, [2003] S.C.C. 72 in such a way that the claim of TCol is leapfrogged over the queue of the other unsecured creditors of TCan. What has to be appreciated is that TCan is also in insolvency and given the protection of the CCAA order for the benefit of its estate. This is not a situation where there is only a foreign insolvency – namely TCol – which would be a completely different situation – but there is also a Canadian insolvency – namely TCan. The Canadian insolvency court must protect the rights of all creditors, foreign or domestic; however, it would be contrary to the doctrine of equal treatment of creditors to prefer – or advance – the interest of foreign creditors over the interests of domestic creditors.

[9] Indeed, it may well be that if this Court were to order the payment of the monies in question ($680,853 US) from TCan to TCol that TCol as a foreign creditor would have its interests inappropriately preferred over all other creditors of TCan – domestic or foreign. In addition, it would seem to me that it would be illogical to do that when TCol owes TCan some $3 million US. Further, as I understand it, notwithstanding that TCan had provided TCol with fair value, it would have to go to the back of the queue before it could expect a dividend from the Colombian estate, as contrasted with Canadian insolvency law which would not invoke this type of penalty. It would seem to me that if I were to accede to the request of ABN, that such would be working an unfairness against the (unsecured) creditors of the TCan Canadian estate.

[10] ABN's motion is dismissed.

J.M. Farley

DATE: January 20, 2005

TAB 56

1960 CarswellBC 57
British Columbia Supreme Court

Tipping v. Hornby (Tipping)

1960 CarswellBC 57, 32 W.W.R. 287

Tipping v. Hornby (falsely called Tipping)

Lord, J.

Judgment: May 16, 1960

Counsel: *M. Mussallem*, for petitioner.
F. H. Low-Beer, for respondent.

Subject: Family

***Lord, J.*:**

1 On this petition for a decree of nullity I reserved judgment on the question raised by the defence that there was no proof that the first marriage was subsisting at the time of the second marriage. Within a few days I received notice that the petitioner would apply to reopen the proceedings to submit further evidence on this point.

2 The respondent did not give evidence at the hearing and what the petitioner now wishes to put in evidence are certain questions and answers of the respondent when she was examined on oath before the registrar on a petition for alimony pending the hearing of the petition for nullity. On the examination the respondent swore that her first husband died on January 8, 1955, and she identified a death certificate regarding his death. As the petitioner and respondent were married on May 10, 1936, it is obvious that her first husband was still alive when she married the petitioner.

3 The application to reopen was opposed on the ground that such evidence was available at the time of the trial and it was not in the interests of justice that the trial be reopened for further evidence. I fully appreciate the principles involved as stated in *Larsen v. Hassard*, [1934] 3 W.W.R. 224, but inasmuch as I was advised about this application within a short time after the close of the hearing and as no judgment had been rendered, I feel that my discretion should be exercised in favour of reopening, and, with respect, I agree with the observation of Lamont, J.A. in *Bank of Montreal v. Campbell*, [1925] 3 W.W.R. 166, at 169, 20 Sask. L.R. 170, when he said

> generally speaking a party is not to be deprived of a right which he has through the omission of his counsel ... to prove at the trial some fact material to his case.

4 It is also contended that the evidence is not admissible. It is said that the petitioner is treating the examination of the respondent as an examination for discovery but discovery is not allowed under our practice in divorce and matrimonial causes. But I think the evidence is receivable as an admission made by one of the parties to a proceeding, and in this case it is made under oath and in a collateral issue to the main proceeding. In *Ex parte Hall; Re Cooper* (1882) 19 Ch D 580, at 583, 51 LJ Ch 556, Jessel, M.R. put it very succinctly when he said:

> Any statement made by a man on oath may be used against him as an admission.

5 The statement is admitted, and I hold it to be sufficient proof that the respondent's first husband was alive at the time of her marriage to the petitioner. This then shifts the onus to the respondent to show other circumstances which may preclude the granting of the decree asked for: *Middlemiss v. Middlemiss* (1955) 15 W.W.R. 641; otherwise the decree of nullity is granted. The respondent is entitled to the costs of the proceedings.

End of Document

TAB 57

Insurance Corporation of British Columbia *Appellant*

v.

Unifund Assurance Company *Respondent*

Indexed as: Unifund Assurance Co. *v.* Insurance Corp. of British Columbia

Neutral citation: 2003 SCC 40.

File No.: 28745.

2002: December 12; 2003: July 17.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Extraterritorial limitation on provincial legislation — Applicability of reimbursement provisions of Ontario regulatory scheme to out-of-province insurer.

Insurance — Motor vehicles — Interprovincial motor vehicle liability insurance — Arbitrator — Jurisdiction — Ontario residents injured while travelling in British Columbia — Ontario residents receiving statutory accident benefits under Ontario policy from Ontario insurer — British Columbia law permitting insurer in that province to deduct from damages payable amount of benefits received by insured under automobile insurance "wherever" issued — Ontario Insurance Act not permitting deduction but providing for indemnification of no-fault insurer by tortfeasors' insurer for benefits paid — Jurisdiction of arbitrator appointed under Ontario Insurance Act to decide issues of jurisdiction simpliciter, forum conveniens and choice of law — Insurance Act, R.S.O. 1990, c. I.8, s. 275.

Mr. and Mrs. B, Ontario residents, were injured when their rented car was struck by a tractor-trailer in British Columbia. All the vehicles involved in the accident were registered in British Columbia and insured by the

Insurance Corporation of British Columbia *Appelante*

c.

Unifund Assurance Company *Intimée*

Répertorié : Unifund Assurance Co. *c.* Insurance Corp. of British Columbia

Référence neutre : 2003 CSC 40.

N° du greffe : 28745.

2002 : 12 décembre; 2003 : 17 juillet.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Limites de la portée extraterritoriale d'une loi provinciale — Applicabilité à un assureur de l'extérieur de la province des dispositions en matière d'indemnisation entre assureurs prévues par le régime de réglementation ontarien.

Assurance — Véhicules automobiles — Assurance-responsabilité automobile interprovinciale — Arbitre — Compétence — Résidents de l'Ontario victimes d'un accident de la route en Colombie-Britannique — Indemnités d'accident légales versées à ces résidents de l'Ontario en vertu d'une police émise en Ontario par un assureur de cette province — Loi de la Colombie-Britannique permettant aux assureurs dans cette province de déduire des dommages-intérêts les indemnités reçues par les assurés en vertu d'une police d'assurance automobile « peu importe » où elle a été émise — Déduction en question non permise par la Loi sur les assurances de l'Ontario qui pourvoit toutefois à l'indemnisation par l'assureur de l'auteur du délit civil de l'assureur ayant versé les indemnités hors-faute — Pouvoir de l'arbitre nommé en vertu de la Loi sur les assurances de l'Ontario de statuer sur les questions de la simple reconnaissance de compétence, du forum conveniens et du choix du droit applicable — Loi sur les assurances, L.R.O. 1990, ch. I.8, art. 275.

M. et M^me^ B, des résidents de l'Ontario, ont été blessés au cours d'un voyage en Colombie-Britannique lorsque leur voiture de location a été heurtée par un camion gros porteur. Tous les véhicules en cause dans l'accident

appellant. After their return to Ontario, both Mr. and Mrs. B received substantial statutory accident benefits (SABs) under their Ontario policy from their Ontario insurer, the respondent. Subsequently they were awarded substantial damages in an action brought in British Columbia against the negligent truck owner, truck driver and truck repair shop, all of whom were insured by the appellant. Pursuant to s. 25 of the British Columbia *Insurance (Motor Vehicle) Act*, the appellant deducted the no-fault benefits paid to the Bs from the award of damages in British Columbia.

Both the Ontario insurer and the British Columbia insurer were parties to a Power of Attorney and Undertaking (the "PAU") exchanged by motor vehicle insurers to denote compliance with minimum coverage requirements and to facilitate acceptance of service. The PAU is part of a reciprocal scheme for the enforcement of motor vehicle insurance claims in Canada.

Under s. 275 of the Ontario *Insurance Act*, the payor of the SABs is entitled to seek indemnification from the insurer of any heavy commercial vehicle involved in the accident. The respondent applied to the Ontario Superior Court of Justice for the appointment of an arbitrator to determine the question of indemnification. The appellant made a cross-motion for a stay of proceedings on the basis, *inter alia*, that the Ontario insurance regulatory scheme could not constitutionally apply to it on the facts of this case, or, in the alternative, on the basis that British Columbia was the more convenient forum. The motions court, applying *forum non conveniens* principles, granted the appellant's cross-motion to stay the proceedings. The Court of Appeal reversed that decision, finding that the motions judge should have declined to hear the motion for a stay and proceeded with the appointment of an arbitrator who could then deal with any issues of jurisdiction and law, including the constitutional issue.

Held (Major, Bastarache and Deschamps JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Iacobucci, Binnie and LeBel JJ.: The principal issue is the constitutional applicability of the Ontario *Insurance Act* to the appellant on the facts of this particular case, and the motions court ought to have addressed it. If the Ontario insurance scheme is wholly inapplicable to the appellant on the facts here, an arbitrator appointed under the Act is without any

étaient immatriculés en Colombie-Britannique et assurés par l'appelante. Après leur retour en Ontario, M. et M^me^ B ont reçu de l'intimée, leur assureur dans cette province, des indemnités d'accident légales substantielles (IAL). Par la suite, ils ont reçu une somme considérable au titre des dommages-intérêts au terme d'une action intentée en Colombie-Britannique contre le propriétaire du camion, le camionneur et l'atelier qui avait réparé le camion, qui étaient tous assurés par l'appelante. Conformément à l'art. 25 de la loi de la Colombie-Britannique intitulée *Insurance (Motor Vehicle) Act*, l'appelante a soustrait de la somme accordée au titre de dommages-intérêts en Colombie Britannique les indemnités hors-faute versées à M. et M^me^ B.

Tant l'assureur ontarien que celui de la Colombie-Britannique étaient signataires du document appelé Procuration et engagements (le « formulaire P&E »), que s'échangent les assureurs automobiles et qui atteste le respect des exigences minimales en matière de garantie d'assurance et facilite l'acceptation de documents en cas de signification. Le formulaire P&E fait partie d'un régime de réciprocité visant l'exécution des demandes d'indemnités présentées au Canada.

La société qui verse des IAL a droit, en vertu de l'art. 275 de la *Loi sur les assurances* de l'Ontario, d'être indemnisée par l'assureur de tout véhicule commercial lourd impliqué dans l'accident. L'intimée a demandé à la Cour supérieure de justice de l'Ontario de nommer un arbitre pour trancher la question de l'indemnisation. L'appelante a présenté une motion sollicitant la suspension de l'instance, pour le motif, notamment, que le régime ontarien de réglementation du secteur des assurances est constitutionnellement inapplicable eu égard aux faits de l'espèce ou que la Colombie-Britannique est le ressort le plus approprié. Appliquant les principes relatifs au *forum non conveniens*, le tribunal des motions a accueilli la motion incidente de l'appelante sollicitant la suspension de l'instance. La Cour d'appel a infirmé la décision du juge des motions au motif que celui-ci aurait dû refuser d'entendre la requête en suspension de l'instance et nommer l'arbitre, lequel aurait alors examiné toutes les questions de compétence et de droit, y compris la question constitutionnelle.

Arrêt (les juges Major, Bastarache et Deschamps sont dissidents) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Iacobucci, Binnie et LeBel : La principale question litigieuse est l'applicabilité constitutionnelle de la *Loi sur les assurances* de l'Ontario à l'appelante compte tenu des faits de l'espèce, et le juge des requêtes aurait dû se prononcer sur cette question. Si le régime d'assurance ontarien est entièrement inapplicable à l'appelante eu égard aux faits

statutory or other authority to decide anything in this case.

There is no doubt that an arbitrator or administrative tribunal can be vested with jurisdiction to determine questions of law, even questions of constitutional law going to its own jurisdiction, provided that the legislature has made plain that intention. Assuming that the Ontario legislature intended s. 17(1) of the *Arbitration Act, 1991* to be such a grant of jurisdiction, however, there is nothing in the Act to suggest that this jurisdiction was intended in all circumstances to be exclusive. When the authority of a court is invoked to appoint an arbitrator under a statute which one of the parties contends cannot constitutionally apply to it, the court should deal with the challenge.

Section 275 of the Ontario *Insurance Act* is constitutionally inapplicable to the appellant because its application in the circumstances of this case would not respect territorial limits on provincial jurisdiction. This territorial restriction is fundamental to our system of federalism in which each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres, and expects the same respect in return.

The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it. Different degrees of connection to the enacting province may be required according to the subject matter. A "real and substantial connection" sufficient to permit the court of a province to take jurisdiction over a dispute may nevertheless not be sufficient for the law of that province to regulate the outcome. What constitutes a "sufficient" connection depends on the relationships among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it. The applicability of an otherwise competent provincial regulatory scheme to an out-of-province defendant is conditioned by the requirements of order and fairness that underlie our federal arrangements.

Under ordinary constitutional principles the Ontario *Insurance Act* is inapplicable to the out-of-province appellant in this case. Not only is the appellant not authorized to sell insurance in Ontario, it does not in fact do so. Its insured vehicles in this case did not venture into Ontario. The accident did not take place in Ontario, and the appellant did not benefit from the deduction of the

de l'espèce, l'arbitre nommé en vertu de la Loi ontarienne ne dispose d'aucun pouvoir — d'origine législative ou autre — pour statuer sur quelque question que ce soit dans la présente affaire.

Il est certain qu'un arbitre ou un tribunal administratif peut se voir accorder le pouvoir de trancher des questions de droit — même des questions de droit constitutionnel touchant à sa propre compétence —, pourvu que le législateur ait clairement indiqué que telle était son intention. À supposer toutefois que la province d'Ontario entendait que le par. 17(1) ait pour effet de conférer une telle compétence, rien dans la *Loi de 1991 sur l'arbitrage* n'indique que cette compétence était censée être exclusive dans tous les cas. Lorsqu'on invoque la compétence d'un tribunal de nommer un arbitre en vertu d'une loi qui, selon la prétention d'une des parties, ne peut constitutionnellement s'appliquer à elle, le tribunal judiciaire devrait trancher la contestation.

L'article 275 de la *Loi sur les assurances* de l'Ontario est constitutionnellement inapplicable à l'appelante pour le motif que, dans les circonstances de la présente affaire, son application ne respecterait pas les limites territoriales de la compétence provinciale. Cette restriction de la portée territoriale est fondamentale dans notre régime fédéral, où chaque province est tenue de respecter la souveraineté législative des autres provinces dans leurs champs de compétence respectifs et s'attend au même respect en retour.

Les limites territoriales du pouvoir de légiférer des provinces empêchent les lois d'une province de s'appliquer aux affaires qui ne présentent pas de lien suffisant avec cette dernière. Différents degrés de rattachement à la province ayant légiféré peuvent être requis selon l'objet du différend. Un « lien réel et substantiel » qui serait par ailleurs suffisant pour permettre aux tribunaux d'une province de se déclarer compétents à l'égard d'un litige peut néanmoins ne pas être suffisant pour que les lois de cette province décident de l'issue de ce litige. Le caractère « suffisant » du lien dépend du rapport qui existe entre le ressort ayant légiféré, l'objet du texte de loi et l'individu ou l'entité qu'on cherche à assujettir à celui-ci. L'applicabilité d'un régime provincial de réglementation par ailleurs valide à un défendeur de l'extérieur de la province concernée est fonction des exigences d'ordre et d'équité qui sous-tendent nos structures fédérales.

Suivant les principes ordinaires du droit constitutionnel, la *Loi sur les assurances* de l'Ontario est inapplicable en l'espèce à l'appelante de l'extérieur de la province. Non seulement l'appelante n'est-elle pas autorisée à vendre de l'assurance en Ontario, mais, dans les faits, elle n'en vend pas. Aucun des véhicules assurés par l'appelante en l'espèce ne s'est rendu en Ontario.

SABs by virtue of Ontario law but by the law of British Columbia. If the respondent were correct, Ontario could attach whatever benefits it liked to an out-of-province accident and require the appellant to come to Ontario to reimburse the Ontario insurer irrespective of whether or not British Columbia law permitted any deduction in that respect from the judgment award.

The PAU signed by the appellant has no application to the facts of this case. Its operation is explicitly limited to a proceeding "arising out of a motor-vehicle accident in any of the respective Provinces or Territories". The "respective Provinces or Territories" are those thereafter listed, namely (in this instance) provinces and territories other than British Columbia, whose name was crossed out on the standard form. The interpretation that the PAU is directed to out-of-province accidents is confirmed by the wording of the undertakings set out in the PAU itself. Moreover, even if the PAU could be interpreted to require the appellant's appearance to defend the respondent insurer's claim in Ontario, the appellant would not thereby be precluded from contesting the application of the Ontario *Insurance Act* to impose a civil obligation on an out-of-province insurer in respect of an out-of-province motor vehicle accident.

The PAU should not be interpreted as a general attornment by the appellant to Ontario insurance law in respect of a motor vehicle accident that occurred in British Columbia. The fact that the appellant has on occasion attorned to Ontario in defending British Columbia motorists involved in accidents in Ontario does not constitute a general attornment to Ontario in respect of all accidents wherever they take place and any consequent proceedings.

Since the Ontario regulatory scheme does not apply to the out-of-province appellant on the facts of this case, the issue of *forum non conveniens* is moot. There is no statutory cause of action available to the respondent to sue upon in Ontario or in British Columbia.

Per Major, Bastarache and Deschamps JJ. (dissenting): A superior court judge must decide the issues of

L'accident n'a pas eu lieu dans cette province et l'appelante a pu bénéficier de la déduction en vertu non pas des lois de l'Ontario mais de celles de la Colombie-Britannique. Si l'intimée a raison, l'Ontario pouvait, à son gré, accorder n'importe quelle sorte d'indemnité à l'égard d'un accident survenu dans une autre province et obliger l'appelante à venir en Ontario rembourser l'assureur ontarien, peu importe si les lois de la Colombie-Britannique permettaient de déduire de la somme accordée par le jugement quelque partie que ce soit de cette indemnité.

Le formulaire P&E signé par l'appelante ne s'applique pas aux faits de l'espèce. Son application est expressément limitée aux procédures intentées [TRADUCTION] « par suite d'un accident d'automobile survenu dans quelque province ou territoire concerné ». L'expression « province ou territoire concerné » s'entend des ressorts énumérés, à savoir (dans la présente affaire) les provinces et territoires autres que la Colombie-Britannique, province dont le nom a été biffé sur le formulaire type. Le libellé des engagements énoncés dans le formulaire P&E lui-même confirme l'interprétation selon laquelle le formulaire P&E vise les accidents d'automobile survenant à l'extérieur de la province. En outre, même s'il était possible de considérer que le formulaire P&E oblige l'appelante à comparaître, en défense, à l'action intentée en Ontario par la société d'assurance intimée, l'appelante ne serait pas de ce fait empêchée de contester la prétention selon laquelle la *Loi sur les assurances* de l'Ontario s'applique et a pour effet d'imposer à un assureur d'une autre province une obligation civile à l'égard d'un accident d'automobile survenu dans une autre province.

La signature du formulaire P&E ne saurait être considérée comme un acquiescement général par l'appelant à l'application du droit ontarien des assurances à l'égard de l'accident d'automobile survenu en Colombie-Britannique. Le fait que l'appelante ait, à l'occasion, acquiescé à la compétence des tribunaux de l'Ontario en présentant une défense au nom d'automobilistes de la Colombie-Britannique ayant eu des accidents en Ontario ne constitue pas un acquiescement général à la compétence des tribunaux ontariens relativement à tout accident — peu importe le lieu où il se produit — et aux procédures qui en découlent.

Étant donné que, eu égard aux faits de l'espèce, le régime ontarien ne s'applique pas à l'appelante de l'extérieur de la province, la question du *forum non conveniens* est devenue théorique. L'intimée ne dispose d'aucune cause d'action prévue par la loi la fondant à intenter des poursuites en Ontario ou en Colombie-Britannique.

Les juges Major, Bastarache et Deschamps (dissidents) : Il appartient aux juges des cours supérieures

jurisdiction *simpliciter* and *forum conveniens*. Even though it may be difficult to isolate these two issues of jurisdiction perfectly, the Court of Appeal could not decide to submit the whole matter to an arbitrator without inferentially deciding that the Ontario *Insurance Act* applied, since the appointment of the arbitrator depends on the application of s. 275 of that Act.

A link with the subject matter of the claim is sufficient to establish the jurisdiction *simpliciter* of a forum given the flexible approach that has been endorsed by this Court. On the facts of this case, the appellant has accepted the jurisdiction of Ontario in this matter by signing a PAU, which constitutes a sound foundation for the application of the Ontario *Insurance Act* to the parties in this case. The insurers, by signing the PAU, have recognized the interrelationship of insurance regimes across Canada and accepted that insurers in one province will sometimes be sued in other provinces. It is therefore reasonably foreseeable that the appellant will sometimes have to appear in Ontario to defend an action brought in that jurisdiction as a result of an accident having occurred in British Columbia. The appellant is, at least notionally, an insurer in Ontario, or one carrying out business in that province. It is not unfair that insurers involved in the interprovincial scheme underlying this appeal, and having accepted the risk of harm to extraprovincial parties to the agreement, be considered to have attorned to the jurisdiction of Ontario's courts. All of the reasons justifying a widened jurisdiction in *Morguard* apply in this case. Most importantly, the demands of Canadian federalism strongly favour this result. It is unreasonable, when deciding the issue of jurisdiction *simpliciter*, to enter into a piecemeal interpretation of the regime providing for the integration of insurance protection across Canada and to establish distinctions between benefits payable to the insured, on the one hand, and the indemnification of their insurers, on the other hand. There are a number of considerations which, taken together with the general language of the PAU, indicate that the appellant is subject to Ontario's jurisdiction. The benefits paid by the respondent to an Ontario resident that were later deducted by the appellant, the general undertaking to appear by the appellant, and its limited undertaking not to present certain defences in Ontario actions all militate in favour of a finding that jurisdiction *simpliciter* is made out.

de trancher les questions de la simple reconnaissance de compétence et du *forum conveniens*. Bien qu'il puisse être difficile de dissocier complètement ces deux questions de compétence, la Cour d'appel ne pouvait décider que toute l'affaire relevait de l'arbitre sans implicitement conclure à l'application de la *Loi sur les assurances* de l'Ontario, puisque la nomination de l'arbitre dépend de l'application de l'art. 275 de cette loi.

L'existence d'un lien avec l'objet de l'action suffit pour établir la simple reconnaissance de compétence d'un tribunal, vu la démarche souple à laquelle a souscrit notre Cour. Il ressort des faits en l'espèce que l'appelante a acquiescé à la compétence des tribunaux ontariens à l'égard de l'objet de l'action en signant le formulaire P&E, document qui constitue une assise solide pour justifier en l'espèce l'application aux parties de la *Loi sur les assurances* de l'Ontario. En signant le formulaire P&E, les assureurs ont reconnu la connexité entre les régimes d'assurance au Canada et le fait que les assureurs exerçant leurs activités dans une province puissent, à l'occasion, être poursuivis dans une autre. Il est donc raisonnablement prévisible que l'appelante sera parfois tenue de comparaître en Ontario afin de se défendre contre une action intentée dans cette province à la suite d'un accident survenu en Colombie-Britannique. L'appelante est, en principe à tout le moins, un assureur en Ontario ou un assureur exerçant des activités dans cette province. Comme les assureurs qui participent au régime interprovincial à l'origine du présent pourvoi ont accepté le risque que des parties à l'accord venant d'autres provinces subissent un préjudice, il n'est pas injuste de considérer qu'ils ont acquiescé à la compétence des tribunaux ontariens. Toutes les raisons ayant justifié la reconnaissance d'une compétence élargie dans l'arrêt *Morguard* s'appliquent dans la présente affaire. Qui plus est, les exigences du fédéralisme canadien militent fortement en faveur de ce résultat. Lorsqu'il s'agit de trancher la question de la simple reconnaissance de compétence, il n'est pas raisonnable de s'engager dans une interprétation élément par élément d'un régime pourvoyant à l'intégration des garanties d'assurance en vigueur dans l'ensemble du Canada, et d'établir des distinctions entre les indemnités payables à l'assuré, d'une part, et l'indemnisation de leurs assureurs, d'autre part. Il existe un certain nombre de facteurs qui, conjugués aux termes généraux du formulaire P&E, indiquent que l'appelante est assujetti aux lois et tribunaux de l'Ontario. Tous les éléments suivants incitent à conclure à la simple reconnaissance de compétence: les indemnités que l'intimé a versées à un résident de l'Ontario et que l'appelante a ensuite déduites, la promesse générale de comparaître faite par l'appelante et son engagement limité de ne pas présenter certains moyens de défense dans les actions intentées en Ontario.

The same arguments that justify having a court of justice, not an arbitrator, decide the issue of jurisdiction *simpliciter* in this case apply to the issue of whether the former or the latter should determine whether there exists a more convenient forum. The *forum non conveniens* inquiry is a preliminary one that must be raised at the earliest opportunity and its determination is necessary before the jurisdiction of an arbitrator can be effective in a case such as this. The proper test is to ask whether the existence of a more appropriate forum has been clearly established to displace the forum selected by the plaintiff. If neither forum is clearly more appropriate, the domestic forum wins by default. The application of the balance of convenience by the motions judge constituted an error of law since a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. In staying the proceedings in part because he was not satisfied that there would result a loss of a juridical advantage to the respondent, the motions judge established an unduly high threshold. Given the respondent's real and substantial connection to Ontario, it has a legitimate claim to take advantage of the interinsurer indemnification scheme which Ontario provides. There is a fair possibility that the respondent will gain an advantage by prosecuting the action in Ontario. The appellant did not provide any evidence that British Columbia was clearly the more appropriate forum. This action is altogether independent of the one before the British Columbia court; it was started in Ontario on the basis of payments made under an insurance policy contracted in Ontario. Many factors link the parties to Ontario. Furthermore, the possibility of interinsurer indemnification is the product of an Ontario statutory regime.

Valid provincial laws can affect matters which are sufficiently connected to the province. The respondent has shown that the subject matter which the *Insurance Act* covers, interinsurer indemnification, falls within provincial jurisdiction and is sufficiently connected to Ontario so as to render the statute applicable to the appellant.

Cases Cited

By Binnie J.

Distinguished: *Jevco Insurance Co. v. Continental Insurance Co. of Canada* (2000), 132 O.A.C. 379, aff'g [1999] O.J. No. 2267 (QL); *Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.)* (1936-1937), 56 C.L.R. 337; *R. v. Thomas Equipment Ltd.*, [1979] 2 S.C.R.

Les arguments justifiant qu'un tribunal judiciaire, et non un arbitre, statue sur la question de la simple reconnaissance de compétence dans la présente affaire s'appliquent également à la question de savoir si le tribunal ou l'arbitre doit décider s'il existe un autre tribunal plus approprié en l'espèce. La question du *forum non conveniens* est une question préliminaire qui doit être soulevée à la première occasion et tranchée avant que l'arbitre puisse avoir effectivement compétence dans une affaire comme celle dont nous sommes saisis. Le critère applicable consiste à se demander si on a clairement établi l'existence d'un tribunal plus approprié que celui choisi par le demandeur à l'action. Lorsqu'aucun des tribunaux n'est clairement le plus approprié, le tribunal interne l'emporte *ipso facto*. Le juge des motions a commis une erreur de droit en appliquant le critère de la prépondérance des inconvénients, puisque la partie dont la demande a un lien réel et substantiel avec un ressort peut légitimement faire valoir les avantages qu'elle peut tirer du fait d'ester en justice dans ce ressort. Le juge des motions a appliqué un critère excessivement exigeant lorsqu'il a sursis à l'instance, en partie parce qu'il n'était pas convaincu que l'intimée perdrait un avantage juridique. En raison du lien réel et substantiel que l'intimée possède avec l'Ontario, elle peut légitimement faire valoir les avantages qu'elle peut tirer du régime d'indemnisation entre assureurs de l'Ontario. L'intimée a de bonnes chances d'obtenir un avantage en estant en justice en Ontario. L'appelante n'a présenté aucune preuve établissant que la Colombie-Britannique était clairement le forum le plus approprié. La présente action est tout à fait indépendante de celle dont est saisi le tribunal de la Colombie-Britannique; elle a été introduite en Ontario, sur la base des paiements effectués en vertu d'une police d'assurance souscrite en Ontario. Bon nombre de facteurs rattachent les parties à l'Ontario. De plus, la possibilité qu'il y ait indemnisation entre assureurs découle d'un régime législatif ontarien.

Une loi provinciale valide peut produire des effets sur des « matières » qui présentent un lien suffisant avec la province. L'intimée a établi que la question traitée dans la *Loi sur les assurances* de l'Ontario, soit l'indemnisation entre assureurs, est un sujet de compétence provinciale qui présente avec l'Ontario un lien suffisant pour que la loi en question s'applique à l'appelante.

Jurisprudence

Citée par le juge Binnie

Distinction d'avec les arrêts : *Jevco Insurance Co. c. Continental Insurance Co. of Canada* (2000), 132 O.A.C. 379, conf. [1999] O.J. No. 2267 (QL); *Broken Hill South Ltd. c. Commissioner of Taxation (N.S.W.)* (1936-1937), 56 C.L.R. 337; *R. c. Thomas Equipment*

529; *Union Steamship Co. of Australia Proprietary Ltd. v. King* (1988), 166 C.L.R. 1; *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981); **referred to:** *Brennan v. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294; *Ruckheim v. Robinson* (1995), 1 B.C.L.R. (3d) 46; *Potts v. Gluckstein* (1992), 8 O.R. (3d) 556; *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733; *Royal Bank of Canada v. The King*, [1913] A.C. 283; *Gray v. Kerslake*, [1958] S.C.R. 3; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78; *R. v. Jameson*, [1896] 2 Q.B. 425; *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Attorney General for Ontario v. Scott*, [1956] S.C.R. 137; *Interprovincial Co-Operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477; *Credit Foncier Franco-Canadien v. Ross*, [1937] 3 D.L.R. 365; *Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission of Ontario*, [1937] O.R. 796; *Kalenczuk v. Kalenczuk* (1920), 52 D.L.R. 406; *The Queen in Right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Ladore v. Bennett*, [1939] A.C. 468; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; *Insurance Corp. of British Columbia v. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705; *MacDonald v. Proctor* (1977), 86 D.L.R. (3d) 455, aff'd [1979] 2 S.C.R. 153; *Healy v. Interboro Mutual Indemnity Insurance Co.* (1999), 44 O.R. (3d) 404, leave to appeal refused, [2000] 1 S.C.R. xiii; *Corbett v. Co-operative Fire & Casualty Co.* (1984), 14 D.L.R. (4th) 531.

Ltd., [1979] 2 R.C.S. 529; *Union Steamship Co. of Australia Proprietary Ltd. c. King* (1988), 166 C.L.R. 1; *International Shoe Co. c. State of Washington*, 326 U.S. 310 (1945); *Allstate Insurance Co. c. Hague*, 449 U.S. 302 (1981); **arrêts mentionnés :** *Brennan c. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294; *Ruckheim c. Robinson* (1995), 1 B.C.L.R. (3d) 46; *Potts c. Gluckstein* (1992), 8 O.R. (3d) 556; *Citizens Insurance Co. of Canada c. Parsons* (1881), 7 App. Cas. 96; *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5; *Cooper c. Canada (Commission des droits de la personne)*, [1996] 3 R.C.S. 854; *St. Anne Nackawic Pulp & Paper Co. c. Section locale 219 du Syndicat canadien des travailleurs du papier*, [1986] 1 R.C.S. 704; *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929; *Regina Police Assn. Inc. c. Regina (Ville) Board of Police Commissioners*, [2000] 1 R.C.S. 360, 2000 CSC 14; *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307; *Northern Telecom Canada Ltée c. Syndicat des travailleurs en communication du Canada*, [1983] 1 R.C.S. 733; *Royal Bank of Canada c. The King*, [1913] A.C. 283; *Gray c. Kerslake*, [1958] R.C.S. 3; *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077; *Hunt c. T&N plc*, [1993] 4 R.C.S. 289; *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90; *Spar Aerospace Ltée v. American Mobile Satellite Corp.*, [2002] 4 R.C.S. 205, 2002 CSC 78; *R. c. Jameson*, [1896] 2 Q.B. 425; *Pennoyer c. Neff*, 95 U.S. 714 (1877); *Attorney General for Ontario c. Scott*, [1956] R.C.S. 137; *Interprovincial Co-Operatives Ltd. c. La Reine*, [1976] 1 R.C.S. 477; *Credit Foncier Franco-Canadien c. Ross*, [1937] 3 D.L.R. 365; *Beauharnois Light, Heat and Power Co. c. Hydro-Electric Power Commission of Ontario*, [1937] O.R. 796; *Kalenczuk c. Kalenczuk* (1920), 52 D.L.R. 406; *La Reine du chef du Manitoba c. Air Canada*, [1980] 2 R.C.S. 303; *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393; *Ladore c. Bennett*, [1939] A.C. 468; *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297; *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21; *Ratych c. Bloomer*, [1990] 1 R.C.S. 940; *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359; *Insurance Corp. of British Columbia c. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705; *MacDonald c. Proctor* (1977), 86 D.L.R. (3d) 455, conf. par [1979] 2 R.C.S. 153; *Healy c. Interboro Mutual Indemnity Insurance Co.* (1999), 44 O.R. (3d) 404, autorisation de pourvoi refusée, [2000] 1 R.C.S. xiii; *Corbett c. Co-operative Fire & Casualty Co.* (1984), 14 D.L.R. (4th) 531.

By Bastarache J. (dissenting)

Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78; *Brennan v. Singh*, [1999] B.C.J. No. 520 (QL); *Brennan v. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294, aff'g (1999), 70 B.C.L.R. (3d) 342; *Brennan v. Singh* (2001), 15 C.P.C. (5th) 17, 2001 BCSC 1812; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; *Long v. Citi Club*, [1995] O.J. No. 1411 (QL); *Brookville Transport Ltd. v. Maine* (1997), 189 N.B.R. (2d) 142; *Negrych v. Campbell's Cabins (1987) Ltd.*, [1997] 8 W.W.R. 270; *McNichol Estate v. Woldnik* (2001), 150 O.A.C. 68; *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679; *O'Brien v. Canada (Attorney General)* (2002), 210 D.L.R. (4th) 668; *Pacific International Securities Inc. v. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716; *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213; *Insurance Corp. of British Columbia v. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705; *Berg (Litigation guardian of) v. Farm Bureau Mutual Insurance Co.* (2000), 50 O.R. (3d) 109; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; *Avenue Properties Ltd. v. First City Development Corp.* (1986), 32 D.L.R. (4th) 40; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

Statutes and Regulations Cited

Arbitration Act, 1991, S.O. 1991, c. 17, ss. 7(1), (2), (3), 8(2), (3), 10, 17, 48(1)(c).

Automobile Insurance Regulations, R.R.O. 1990, Reg. 664, s. 9.

Constitution Act, 1867, s. 92.

Insurance Act, R.S.O. 1990, c. I.8, ss. 267.1(8)2(i) [ad. 1993, c. 10, s. 25], 268(1) [rep. & sub. *idem*, s. 26], (2), 275 [am. *idem*, ss. 1, 31].

Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231, ss. 18, 25.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 17.06.

United States Constitution, art. IV, Fourteenth Amendment.

Authors Cited

Black, Vaughan. "Interprovincial Inter-Insurer Interactions: *Unifund v. ICBC*" (2002), 36 *Can. Bus. L.J.* 436.

Citée par le juge Bastarache (dissident)

Morguard Investments Ltd. c. De Savoye, [1990] 3 R.C.S. 1077; *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, [2002] 4 R.C.S. 205, 2002 CSC 78; *Brennan c. Singh*, [1999] B.C.J. No. 520 (QL); *Brennan c. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 94, conf. (1999), 70 B.C.L.R. (3d) 342; *Brennan c. Singh* (2001), 15 C.P.C. (5th) 17, 2001 BCSC 1812; *Hunt c. T&N plc*, [1993] 4 R.C.S. 289; *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022; *Conseil canadien des relations du travail c. Paul L'Anglais Inc.*, [1983] 1 R.C.S. 147; *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393; *Muscutt c. Courcelles* (2002), 60 O.R. (3d) 20; *Long c. Citi Club*, [1995] O.J. No. 1411 (QL); *Brookville Transport Ltd. c. Maine* (1997), 189 R.N.-B. (2e) 142; *Negrych c. Campbell's Cabins (1987) Ltd.*, [1997] 8 W.W.R. 270; *McNichol Estate c. Woldnik* (2001), 150 O.A.C. 68; *Oakley c. Barry* (1998), 158 D.L.R. (4th) 679; *O'Brien c. Canada (Attorney General)* (2002), 210 D.L.R. (4th) 668; *Pacific International Securities Inc. c. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716; *Cook c. Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213; *Insurance Corp. of British Columbia c. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705; *Berg (Litigation guardian of) c. Farm Bureau Mutual Insurance Co.* (2000), 50 O.R. (3d) 109; *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90; *Avenue Properties Ltd. c. First City Development Corp.* (1986), 32 D.L.R. (4th) 40; *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297.

Lois et règlements cités

Automobile Insurance Regulations, R.R.O. 1990, Règl. 664, art. 9.

Constitution des États-Unis d'Amérique, art. IV, Quatorzième amendement.

Insurance (Motor Vehicle) Act, R.S.B.C. 1996, ch. 231, art. 18, 25.

Loi constitutionnelle de 1867, art. 92.

Loi de 1991 sur l'arbitrage, L.O. 1991, ch. 17, art. 7(1), (2), (3), 8(2), (3), 10, 17, 48(1)c).

Loi sur les assurances, L.R.O. 1990, ch. I.8, art. 267.1(8)2(i) [aj. 1993, ch. 10, art. 25], 268(1) [abr. & rempl. *idem*, art. 26], (2), 275 [mod. *idem*, art. 1, 31].

Règles de procédure civile, R.R.O. 1990, Règl. 194, r. 17.06.

Doctrine citée

Black, Vaughan. « Interprovincial Inter-Insurer Interactions : *Unifund v. ICBC* » (2002), 36 *Rev. can. dr. comm.* 436.

Castel, Jean-Gabriel, and Janet Walker. *Canadian Conflict of Laws*, 5th ed. Markham, Ont.: Butterworths, 2002 (loose-leaf updated December 2002, Issue 3).
Fortier, L. Yves. "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, My Lord, of Jealousy'" (2001), 80 *Can. Bar Rev.* 143.
Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, loose-leaf ed. Scarborough, Ont.: Carswell, 1997 (updated 2002, release 1).
Sullivan, Ruth E. "Interpreting the Territorial Limitations on the Provinces" (1985), 7 *Supreme Court L.R.* 511.
Tribe, Laurence H. *American Constitutional Law*, vol. 1, 3rd ed. New York: Foundation Press, 2000.
United Nations. Commission on International Trade Law. *UNCITRAL Model Law on International Commercial Arbitration*, U.N. GAOR, 40th Sess., Supp. No. 17, U.N. Doc. A/40/17 (1985), Annex I, arts. 8(1), 16.
Watson, Garry D., and Frank Au. "Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*" (2000), 23 *Advocates' Q.* 167.

APPEAL from a judgment of the Ontario Court of Appeal (2001), 204 D.L.R. (4th) 732, 146 O.A.C. 162, 28 C.C.L.I. (3d) 38, [2001] O.J. No. 1885 (QL), reversing a decision of the Superior Court of Justice (2000), 23 C.C.L.I. (3d) 96, [2000] O.J. No. 3212 (QL). Appeal allowed, Major, Bastarache and Deschamps JJ. dissenting.

Avon M. Mersey, *Alan L. W. D'Silva*, *Michael Sobkin* and *Sophie Vlahakis*, for the appellant.

Leah Price and *Gerald George*, for the respondent.

The judgment of McLachlin C.J. and Iacobucci, Binnie and LeBel JJ. was delivered by

BINNIE J. —

I. Introduction

This appeal raises important questions regarding an alleged extraterritorial application of a provincial regulatory statute. The respondent insurer seeks to recover in Ontario from the appellant British Columbian insurer about $750,000 under certain statutory provisions of Ontario insurance law.

Castel, Jean-Gabriel, and Janet Walker. *Canadian Conflict of Laws*, 5th ed. Markham, Ont. : Butterworths, 2002 (loose-leaf updated December 2002, Issue 3).
Fortier, L. Yves. « Delimiting the Spheres of Judicial and Arbitral Power : "Beware, My Lord, of Jealousy" » (2001), 80 *R. du B. can.* 143.
Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, loose-leaf ed. Scarborough, Ont. : Carswell, 1997 (updated 2002, release 1).
Nations Unies. Commission des Nations Unies pour le droit commercial international. *Loi type de la CNUDCI sur l'arbitrage commercial international*, N.U. AGRO, 40e sess., suppl. no 17, Doc. N.U. (A/40/17) (1985), ann. I, art. 8(1), 16.
Sullivan, Ruth E. « Interpreting the Territorial Limitations on the Provinces » (1985), 7 *Supreme Court L.R.* 511.
Tribe, Laurence H. *American Constitutional Law*, vol. 1, 3rd ed. New York : Foundation Press, 2000.
Watson, Garry D., and Frank Au. « Constitutional Limits on Service *Ex Juris* : Unanswered Questions from *Morguard* » (2000), 23 *Advocates' Q.* 167.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (2001), 204 D.L.R. (4th) 732, 146 O.A.C. 162, 28 C.C.L.I. (3d) 38, [2001] O.J. No. 1885 (QL), qui a infirmé une décision de la Cour supérieure de justice (2000), 23 C.C.L.I. (3d) 96, [2000] O.J. No. 3212 (QL). Pourvoi accueilli, les juges Major, Bastarache et Deschamps sont dissidents.

Avon M. Mersey, *Alan L. W. D'Silva*, *Michael Sobkin* et *Sophie Vlahakis*, pour l'appelante.

Leah Price et *Gerald George*, pour l'intimée.

Version française du jugement de la juge en chef McLachlin et des juges Iacobucci, Binnie et LeBel rendu par

LE JUGE BINNIE —

I. Introduction

1 Le présent pourvoi soulève d'importantes questions touchant à la prétendue application extraterritoriale d'une loi provinciale de nature réglementaire. La société d'assurance intimée tente, en vertu de certaines dispositions législatives ontariennes concernant le droit des assurances, de recouvrer en Ontario la somme d'environ 750 000 $ de la société d'assurance appelante de la Colombie-Britannique.

2 The dispute between these insurance companies stems from a serious motor vehicle accident in British Columbia. The appellant, a British Columbia insurer, responded there on behalf of the defendants. The injured plaintiffs returned to Ontario and collected statutory no-fault benefits from the respondent, an Ontario insurer, which now seeks reimbursement by subjecting the appellant to the loss transfer provisions of the Ontario scheme.

3 The appellant says it does not have any real and substantial connection with Ontario and therefore Ontario insurance law cannot impose on it a civil obligation arising out of a British Columbia accident. I agree that the respondent seeks to give the Ontario statute impermissible extraterritorial effect. In my view, the appeal should be allowed.

II. The Facts

4 Marcia and Ronald Brennan, who made their home in Cambridge, Ontario, flew to Vancouver in August 1995 for the wedding of one of their sons. While in British Columbia, they rented a car. Driving along the Upper Levels Highway in North Vancouver, the Brennans' rental car was struck from behind by a tractor trailer driven by Baljinder Singh, the impact of which catapulted their car across the centre line concrete barrier into the path of oncoming traffic. In a collision the trial judge described as "horrendous", the Brennans, particularly Mrs. Brennan, suffered terrible injuries. After their return to Ontario, the Brennans' home needed to be extensively renovated, a modified vehicle was purchased, and 24-hour attendant care was provided to Mrs. Brennan, who eventually died from her injuries in March 2001. The amount paid as statutory accident benefits ("SABs") has yet to be finally quantified but is about $750,000.

Le litige entre ces sociétés d'assurance découle d'un grave accident automobile survenu en Colombie-Britannique. L'appelante, société d'assurance de Colombie-Britannique, a comparu dans cette province au nom des défendeurs. Les demandeurs blessés sont retournés en Ontario, où ils ont touché des indemnités d'assurance sans égard à la responsabilité versées par l'intimée, la société d'assurance faisant affaire en Ontario, laquelle sollicite maintenant le remboursement de ces indemnités en tentant d'assujettir l'appelante aux dispositions relatives à l'indemnisation des pertes entre assureurs prévues par le régime ontarien.

L'appelante dit n'avoir aucun lien réel et substantiel avec l'Ontario et que, en conséquence, le droit ontarien des assurances ne peut lui imposer d'obligation civile découlant d'un accident survenu en Colombie-Britannique. Je souscris à l'argument selon lequel l'intimée cherche à donner à la loi ontarienne des effets extraterritoriaux qu'elle ne saurait avoir. À mon avis, le pourvoi devrait être accueilli.

II. Les faits

En août 1995, Marcia et Ronald Brennan, qui vivent à Cambridge en Ontario, se sont rendus en avion à Vancouver pour assister au mariage d'un de leurs fils. Pendant leur séjour en Colombie-Britannique, ils ont loué une automobile. Alors qu'ils circulaient sur l'autoroute Upper Levels, dans la ville de North Vancouver, leur voiture de location a été heurtée à l'arrière par un camion gros porteur conduit par monsieur Baljinder Singh. Sous l'effet de la collision, l'automobile a été catapultée de l'autre côté du muret central, dans la voie réservée aux véhicules circulant en sens inverse. Les Brennan, M^{me} Brennan surtout, ont été grièvement blessés dans la collision, que le juge de première instance a qualifiée d'« horrible ». Une fois revenus en Ontario, les Brennan ont dû apporter des modifications majeures à leur résidence, ils ont fait l'achat d'un véhicule adapté et des soins auxiliaires ont été fournis 24 heures par jour à M^{me} Brennan, qui est décédée en mars 2001 des suites de ses blessures. La somme payable à titre d'indemnités d'accident légales (« IAL ») n'a pas encore été déterminée exactement, mais elle s'élève à environ 750 000 $.

Meanwhile, the Brennans brought an action for damages in the Supreme Court of British Columbia and, on March 4, 1999, were awarded approximately $2.5 million.

The respondent, Unifund Assurance Company ("Unifund"), had issued a motor vehicle insurance policy to the Brennans in Ontario. The policy included the mandatory, no-fault coverage (or SAB) payments, for which the Brennans paid a premium. The Ontario *Insurance Act*, R.S.O. 1990, c. I.8 (also referred to as the "Ontario Act"), provides that SABs are payable under an Ontario policy when insured persons are injured in motor vehicle accidents occurring anywhere in North America. Unifund, a Newfoundland company, was licensed to carry on business in Ontario, but not, at the time of the accident, in British Columbia.

The appellant Insurance Corporation of British Columbia ("ICBC") insured the negligent truck owner, truck driver, and truck repair shop in British Columbia. It is on the hook for the $2.5 million award of damages, but, under the law of that province, it is entitled to deduct any no-fault payments paid to the Brennans, even though it actually paid no part of that amount.

Unifund understandably feels aggrieved that the appellant, having contributed nothing to the payment of the no-fault benefits, is nevertheless taking a $750,000 deduction created at Unifund's expense. Unifund contends that the appellant should pay it the $750,000.

III. The Statutory Cause of Action

Unifund's problem is to find a cause of action. In this appeal, we are dealing only with Unifund's quite separate and distinct claim under s. 275 of the Ontario Act, which provides a statutory mechanism for transferring losses between Ontario

Dans l'intervalle, les Brennan ont intenté une action en dommages-intérêts en Cour suprême de la Colombie-Britannique et se sont vus accorder, le 4 mars 1999, la somme d'environ 2,5 millions de dollars. 5

L'intimée, Unifund Assurance Company (« Unifund »), avait établi au nom des Brennan une police d'assurance automobile en Ontario. La police incluait la garantie obligatoire d'assurance pourvoyant au paiement d'indemnités sans égard à la faute (ou IAL) pour laquelle les Brennan avaient versé une prime. La *Loi sur les assurances* de l'Ontario, L.R.O. 1990, ch. I.8 (aussi appelée la « Loi ontarienne ») dispose que des IAL sont payables en vertu d'une police contractée en Ontario lorsque les assurés sont blessés dans un accident d'automobile survenant n'importe où en Amérique du Nord. Au moment de l'accident, Unifund, une société terre-neuvienne, était autorisée à exercer ses activités en Ontario, mais non en Colombie-Britannique. 6

L'appelante, Insurance Corporation of British Columbia (« ICBC »), est l'assureur en Colombie-Britannique des parties ayant été jugées négligentes, à savoir le propriétaire du camion, le camionneur et l'atelier qui a réparé le camion. L'appelante est tenue au paiement de la somme de 2,5 millions de dollars accordée au titre des dommages-intérêts. Toutefois, en vertu du droit de cette province, elle peut déduire tout paiement hors-faute fait aux Brennan, et ce même si, dans les faits, elle n'a versé aucune partie de cette somme. 7

Naturellement, Unifund s'estime lésée du fait que l'appelante, qui n'a pas contribué aux indemnités hors-faute, se prévale, à ses dépens, d'une déduction de 750 000 $. Unifund prétend que l'appelante devrait lui payer les 750 000 $. 8

III. La cause d'action légale

Le problème que doit surmonter Unifund consiste à établir l'existence d'une cause d'action. Dans le présent pourvoi, nous n'examinons que la demande très précise de Unifund fondée sur l'art. 275 de la Loi ontarienne, disposition établissant un mécanisme 9

insurance companies arising out of the payment of SABs under the Ontario Act.

10 It is important to emphasize that Unifund asserts no common law or equitable cause of action against the appellant, ICBC, in these proceedings. In the case before us, Unifund either has a statutory cause of action against the British Columbia insurer under the Ontario Act or it has no cause of action at all.

11 The deduction of about $750,000 claimed by the appellant, ICBC, is also a creature of statute. Under s. 25(5) of the British Columbia *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, the British Columbia court is directed to deduct from a damages award "benefits" which include "accident insurance benefits similar" to British Columbia's no-fault benefits "provided under a contract . . . of automobile insurance wherever issued . . ." (s. 25(1) (emphasis added)). The British Columbia Court of Appeal ordered the $750,000 to be deducted from the $2.5 million awarded to the Brennans, even though the appellant contributed nothing to the payment, because, in its view, the legislative purpose of s. 25(5) is to "prevent double recovery by allowing parties to deduct the 'benefits' that a claimant receives, or to which a claimant is entitled, from the award of damages": *Brennan v. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294, at para. 4; see also *Ruckheim v. Robinson* (1995), 1 B.C.L.R. (3d) 46 (C.A.), at paras. 50-54. The deductibility approach was perhaps adopted in British Columbia because the appellant, ICBC, as the sole provider of motor vehicle insurance in the province, is generally the payor of both the no-fault benefits and the final award. For the same reason, the British Columbia legislation does not contain a loss transfer provision similar to s. 275 of the Ontario Act to redistribute the cost of no-fault benefits amongst insurance companies.

de contribution des sociétés d'assurance de l'Ontario au paiement des IAL prévues par cette loi.

Il est important de souligner que Unifund n'invoque en l'espèce aucune cause d'action en common law ou en equity contre l'appelante, ICBC. Dans la présente affaire, ou bien Unifund dispose d'une cause d'action contre la société d'assurance de la Colombie-Britannique en vertu de la Loi ontarienne, ou bien elle n'en a pas du tout.

La déduction d'environ 750 000 $ réclamée par l'appelante, ICBC, est également un droit d'origine législative. Suivant le par. 25(5) de la loi de la Colombie-Britannique intitulée *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, ch. 231, les tribunaux de cette province sont tenus de soustraire de la somme accordée au titre de dommages-intérêts les diverses [TRADUCTION] « indemnités », y compris les [TRADUCTION] « prestations d'assurance accidents similaires » aux indemnités d'assurance sans égard à la responsabilité de la Colombie-Britannique [TRADUCTION] « versées en application d'un contrat [. . .] d'assurance automobile établi [. . .] en quelque lieu que ce soit . . . » (par. 25(1) (je souligne)). La Cour d'appel de la Colombie-Britannique a ordonné que les 750 000 $ soient déduits des 2,5 millions de dollars accordés aux Brennan, et ce même si l'appelante n'a pas contribué au paiement des IAL, parce qu'elle estime que le par. 25(5) a pour objet [TRADUCTION] « d'éviter la double indemnisation en permettant aux parties de déduire des dommages-intérêts accordés au demandeur les "indemnités" qui lui sont versées — ou auxquelles il a droit — » : *Brennan c. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294, par. 4; voir aussi *Ruckheim c. Robinson* (1995), 1 B.C.L.R. (3d) 46 (C.A.), par. 50-54. Il est possible que la Colombie-Britannique ait adopté la déductibilité en raison du fait que, en tant que seul assureur automobile de la province, l'appelante, ICBC, est en général celle qui verse à la fois les indemnités d'assurance sans égard à la responsabilité et la somme accordée par le jugement définitif. Pour cette même raison, les lois de la Colombie-Britannique ne comportent pas de disposition analogue à l'art. 275 de la Loi ontarienne, qui autorise l'indemnisation, entre sociétés d'assurance, du coût des indemnités sans égard à la responsabilité.

The Ontario insurance scheme, on the other hand, which regulates numerous competing motor vehicle insurers, adopts a different approach. The non-pecuniary damages are calculated "without regard to" SABs (s. 267.1(8)2(i)). However, the payor of the SABs (usually the victim's insurer) is entitled by statute to indemnification from the insurer of any "heavy commercial vehicle" (*Automobile Insurance Regulations*, R.R.O. 1990, Reg. 664, s. 9) involved in the motor vehicle accident in question, "according to the respective degree of fault of each insurer's insured as determined under the fault determination rules" (s. 275(2)), i.e., allocated not by general principles of tort but by the rules set out in Ontario regulations. Section 275(4) of the Ontario Act provides that disputes about indemnification are to be resolved by arbitration, pursuant to the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17. There is no doubt that if the appellant were an Ontario insurer, it would be required to arbitrate Unifund's claim.

12 Pour ce qui est du régime d'assurance ontarien, qui réglemente de nombreuses sociétés d'assurance automobile concurrentes, un modèle différent a été adopté. Les dommages-intérêts pour pertes non pécuniaires sont calculés « sans égard » aux IAL (sous-disposition 267.1(8)2(i)). Toutefois, la société qui verse de telles indemnités (habituellement l'assureur de la victime) a droit, en vertu de la Loi, d'être indemnisée par l'assureur de tout [TRADUCTION] « véhicule commercial lourd » (*Automobile Insurance Regulations*, R.R.O. 1990, Règl. 664, art. 9) impliqué dans l'accident d'automobile en question, « en fonction du degré de responsabilité de l'assuré de chaque assureur tel qu'il est établi selon les règles de détermination de la responsabilité » (par. 275(2)), c'est-à-dire non pas selon les principes généraux de la responsabilité délictuelle mais selon les règles énoncées par règlement. Le paragraphe 275(4) de la Loi ontarienne dispose que les différends à l'égard de l'indemnisation doivent être réglés par voie d'arbitrage, conformément à la *Loi de 1991 sur l'arbitrage* de l'Ontario, L.O. 1991, ch. 17. Il ne fait aucun doute que si l'appelante était un assureur ontarien, elle serait tenue de faire trancher par arbitrage la demande de Unifund.

It is perhaps important to emphasize that if the Ontario Act applies, the respondent would be entitled to recover even if the appellant were *not* permitted to deduct the $750,000 from the Brennans' award. This is because the two provincial regulatory schemes function independently of one another, and deductibility by one insurer is not a condition precedent to recovery by the other insurer under s. 275 of the Ontario Act.

13 Il importe de souligner que si la Loi ontarienne s'applique l'intimée aurait droit de recouvrer les indemnités versées, et ce même si l'appelante *n'était pas* autorisée à déduire cette somme des dommages-intérêts accordés aux Brennan. Ce serait le cas parce que les deux régimes provinciaux de réglementation fonctionnent indépendamment l'un de l'autre et que la déductibilité d'une somme donnée par un assureur n'est pas un préalable au recouvrement de celle-ci par l'autre assureur en application de l'art. 275 de la Loi ontarienne.

We are told that there is no legislation in British Columbia under which Unifund could pursue a statutory claim for reimbursement against the appellant in that province. The constitutional question of whether the Ontario *Insurance Act* applies to provide Unifund with a statutory cause of action is therefore dispositive of the respondent's claim.

14 On nous dit qu'il n'existe en Colombie-Britannique aucune loi qui permettrait à Unifund d'intenter dans cette province une action en remboursement contre l'appelante. La réponse à la question constitutionnelle consistant à décider si la *Loi sur les assurances* de l'Ontario s'applique et fournit à Unifund une cause d'action légale est par conséquent décisive en ce qui concerne la demande de l'intimée.

IV. The Statutory Arbitration

15 Unifund applied to the Ontario Superior Court of Justice for the appointment of an arbitrator pursuant to s. 275(4) of the Ontario Act. The appellant, ICBC, responded with a motion for an order "staying or dismissing" the application on the basis, *inter alia*, that "Ontario law, specifically the Ontario *Insurance Act*, and any procedure under it is not applicable in this matter and does not define the relationship between the parties". In effect, the appellant's motion alleged that Unifund's application disclosed no cause of action against the out-of-province insurer on the facts of this case.

16 The Ontario Court of Appeal directed the appellant to make its objection before an arbitrator appointed pursuant to the Ontario Act. The appellant says that it ought not to be ordered to appear before an arbitrator appointed pursuant to the Ontario Act unless and until it is first determined that the appellant is subject to the Ontario Act with respect to the matters in dispute.

17 I think the appellant is correct on this procedural question as well as in objecting to the substantive application of the Ontario statute to this dispute. If the Ontario insurance scheme is wholly inapplicable to the appellant on the facts here, an arbitrator appointed under the Ontario Act is without any statutory or other authority to decide anything in this case. Practicality as well as principle required the constitutional issue raised by the appellant to be resolved by the superior court to which it was addressed, and it should have been answered, in my view, in the appellant's favour.

V. The Power of Attorney and Undertaking

18 In order to assist motorists who travel outside their province or state of residence, all Canadian insurers of motor vehicles, and many insurers in the United States, have exchanged what is called a "Power of Attorney and Undertaking" ("PAU") which denotes "compliance with minimum coverage requirements and facilitat[es] acceptance of

IV. L'arbitrage prévu par la loi

Unifund a demandé à la Cour supérieure de justice de l'Ontario de nommer un arbitre en vertu du par. 275(4) de la Loi ontarienne. L'appelante, ICBC, a répondu par une motion sollicitant une ordonnance portant [TRADUCTION] « suspension ou rejet » de la demande, invoquant notamment que « le droit ontarien, en particulier la *Loi sur les assurances*, et toute procédure fondée sur ces règles de droit, ne s'applique pas en l'espèce et ne régit pas les relations entre les parties ». Concrètement, l'appelante a plaidé dans sa requête que les faits invoqués dans la demande de Unifund ne révèlent aucune cause d'action contre l'assureur de l'autre province.

La Cour d'appel de l'Ontario a ordonné à l'appelante de faire valoir son objection devant un arbitre nommé en vertu de la Loi ontarienne. L'appelante affirme qu'on ne devrait pas lui ordonner de se présenter devant un arbitre nommé en vertu de la Loi ontarienne tant et aussi longtemps qu'il n'aura pas d'abord été jugé qu'elle est assujettie à cette loi en ce qui concerne les questions en litige.

J'estime que l'appelante a raison à l'égard de cette question d'ordre procédural, en plus d'être fondée à contester l'application de la Loi ontarienne au présent différend. Si le régime d'assurance ontarien est entièrement inapplicable à l'appelante eu égard aux faits de l'espèce, l'arbitre nommé en vertu de la Loi ontarienne ne dispose d'aucun pouvoir — d'origine législative ou autre — pour statuer sur quelque question que ce soit dans la présente affaire. Des considérations d'ordre pratique et de politique générale commandaient que la question constitutionnelle soulevée par l'appelante soit décidée par la cour supérieure qui en était saisie et, à mon avis, la cour aurait dû la trancher en faveur de l'appelante.

V. Le formulaire Procuration et engagements

Afin d'aider les automobilistes qui se déplacent à l'extérieur de la province ou de l'État où ils résident, tous les assureurs automobiles du Canada et bon nombre d'assureurs américains ont convenu d'utiliser un document appelé Procuration et engagements (le « formulaire P&E »), qui atteste [TRADUCTION] « le respect des exigences minimales en matière

service". The PAU is part of a "reciprocal scheme for the enforcement of motor vehicle liability insurance policies in Canadian provinces and territories": *Potts v. Gluckstein* (1992), 8 O.R. (3d) 556 (C.A.), at p. 557. As the terms of the PAU are important to the respondent's position, I set out its relevant terms hereunder:

POWER OF ATTORNEY AND UNDERTAKING

(Denoting compliance with minimum coverage requirements and facilitating acceptance of service)

INSURANCE CORPORATION OF BRITISH COLUMBIA

the head office of which is in the City of North Vancouver

in the . . . Province of British Columbia

In . . . Canada, hereby, with respect to an action or proceeding against it or its insured, or its insured and another or others, arising out of a motor-vehicle accident in any of the respective Provinces or Territories, appoints severally the Superintendents of Insurance of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Quebec, and Yukon Territory and the Northwest Territories, to do and execute all or any of the following acts, deeds, and things, that is to say: To accept service of notice or process on its behalf.

. . .

Insurance Corporation of British Columbia aforesaid hereby undertakes:–

A. To appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge:

B. That upon receipt from any of the officials aforesaid of such notice or process in respect of its insured, or in respect of its insured and another or others, it will forthwith cause the notice or process to be personally served upon the insured:

de garantie d'assurance et facilite l'acceptation de documents en cas de signification ». Le formulaire P&E fait partie d'un [TRADUCTION] « régime de réciprocité visant la mise en œuvre des polices d'assurance-responsabilité automobile dans les provinces et territoires du Canada » : *Potts c. Gluckstein* (1992), 8 O.R. (3d) 556 (C.A.), p. 557. Vu l'importance du texte de ce document pour la thèse de l'intimée, j'en reproduis les passages pertinents :

[TRADUCTION]

PROCURATION ET ENGAGEMENTS

(Le présent document atteste le respect des exigences minimales en matière de garantie d'assurance et facilite l'acceptation de documents en cas de signification.)

INSURANCE CORPORATION OF BRITISH COLUMBIA

dont le siège social est situé dans la ville de North Vancouver

dans la [. . .] province de la Colombie-Britannique

au [. . .] Canada, confie par les présentes au surintendant des assurances de la Colombie-Britannique, de l'Alberta, de la Saskatchewan, du Manitoba, de l'Ontario, du Nouveau-Brunswick, de la Nouvelle-Écosse, de l'Île-du-Prince-Édouard, de Terre-Neuve, du Québec, du territoire du Yukon et des territoires du Nord-Ouest, la charge d'accomplir tout ce qui est prévu par les présentes, à savoir : recevoir en son nom signification de tout avis ou acte de procédure relativement aux actions ou autres procédures intentées contre elle ou contre son assuré, ou contre son assuré et d'autres, par suite d'un accident d'automobile survenu dans quelque province ou territoire concerné » .

. . .

Par les présentes, Insurance Corporation of British Columbia s'engage : –

A. À comparaître à toute action ou autre procédure qui est intentée contre elle ou contre son assuré dans quelque province ou territoire et dont elle a connaissance :

B. Dès réception de la part de l'un quelconque des fonctionnaires susmentionnés, d'un avis ou acte de procédure qui lui est signifié à l'égard de l'assuré, ou à l'égard de son assuré et d'autres, à faire immédiatement signifier à l'assuré cet avis ou acte de procédure :

C. Not to set up any defence to any claim, action, or proceeding, under a motor-vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the laws relating to motor-vehicle liability insurance contracts or plan of automobile insurance of the Province or Territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgement rendered against it or its insured by a Court in such Province or Territory, in the claim, action or proceeding, in respect of any kind or class of coverage provided under the contract or plan and in respect of any kind or class of coverage required by law to be provided under a plan or contracts of automobile insurance entered into in such Province or Territory of Canada up to the greater of

(a) the amounts and limits for that kind or class of coverage or coverages provided in the contract or plan, or

(b) the minimum for that kind or class of coverage or coverages required by law to be provided under the plan or contracts of automobile insurance entered into in such Province or Territory of Canada, exclusive of interest and costs and subject to any priorities as to bodily injury or property damage with respect to such minimum amounts and limits as may be required by the laws of the Province or Territory. [Emphasis added.]

(Note that the words "British Columbia" in the lead paragraph are crossed out in the original PAU.)

VI. Judicial History

A. *Ontario Superior Court of Justice* (2000), 23 C.C.L.I. (3d) 96

19 Campbell J. had before him the respondent's motion to appoint an arbitrator and the appellant's cross-motion to stay the proceedings for want of jurisdiction, or, in the alternative, for *forum non conveniens*. In his view the purpose of the arbitration under the Ontario Act "is to deal with matters that are clearly in issue within the rules applicable in Ontario" (para. 43). It is not, he concluded, designed to resolve legal issues that may arise because of conflict in the legislation in two different provinces. However, he did not dismiss the

C. À n'invoquer, à l'égard de toute demande, action ou autre procédure, aucun moyen de défense fondé sur le contrat d'assurance-responsabilité automobile qu'elle a conclu et qui ne pourrait être invoqué si ce contrat était intervenu dans la province ou le territoire canadien où cette action ou autre procédure est intentée et avait été conclu conformément aux lois y régissant les contrats d'assurance-responsabilité automobile ou le régime d'assurance automobile, et à exécuter tout jugement définitif prononcé contre elle ou son assuré par un tribunal de la province ou du territoire à l'égard de la demande, de l'action ou de la procédure, relativement à toute garantie prévue par le contrat ou régime applicable ou qui doit, selon la loi, être prévue par le régime ou les contrats d'assurance automobile dans cette province ou ce territoire du Canada, jusqu'à concurrence de la plus élevée des sommes suivantes :

a) la somme maximale prévue par le contrat ou le régime pour ce genre ou cette catégorie de garanties ;

b) la somme minimale qui doit, selon la loi, être prévue par un régime ou contrat d'assurance automobile conclu dans cette province ou ce territoire au Canada pour ce genre ou cette catégorie de garanties, à l'exclusion de l'intérêt et des frais, et sous réserve des priorités applicables en vertu des lois de la province ou du territoire en matière de préjudice corporel ou matériel, à l'égard de ces sommes minimales. [Je souligne.]

(Signalons que le mot « Colombie-Britannique » figurant dans le paragraphe liminaire est biffé dans le formulaire P&E.)

VI. Historique des procédures judiciaires

A. *Cour supérieure de justice de l'Ontario* (2000), 23 C.C.L.I. (3d) 96

Le juge Campbell était saisi de la motion de l'intimée sollicitant la nomination d'un arbitre et de la motion incidente de l'appelante demandant la suspension de l'instance pour cause d'absence de compétence ou de *forum non conveniens*. Selon lui, l'arbitrage prévu par la Loi ontarienne a pour objet [TRADUCTION] « de trancher les questions qui sont clairement litigieuses eu égard aux règles applicables en Ontario » (par. 43). Il n'est pas conçu, a-t-il conclu, pour régler des questions de droit susceptibles de se soulever en raison d'un

Ontario action. He applied *forum non conveniens* principles and ruled that "the balance favours the stay of the Ontario arbitration" (para. 43). While he did not specifically make a finding with respect to jurisdiction *simpliciter*, he stayed Unifund's action rather than dismissing it. This disposition presupposed that, while the Ontario court had jurisdiction, it would not be appropriate in all the circumstances to exercise it.

conflit de lois dans deux provinces différentes. Toutefois, il n'a pas rejeté l'instance introduite en Ontario. Il a appliqué les principes relatifs au *forum non conveniens* et jugé que [TRADUCTION] « la balance penche en faveur de la suspension de l'arbitrage en Ontario » (par. 43). Quoiqu'il n'ait pas tiré de conclusion précise sur la question de la simple reconnaissance de compétence, il a suspendu l'instance introduite par Unifund au lieu de la rejeter. Cette décision présupposait que, bien que le tribunal ontarien était compétent, l'exercice de cette compétence pourrait ne pas être approprié eu égard à toutes les circonstances.

B. *Ontario Court of Appeal* (2001), 204 D.L.R. (4th) 732

The Ontario Court of Appeal reversed the motions judge on the basis that "he should have declined to hear the motion [for a stay] and proceeded with the appointment of the arbitrator who could then deal with any issues of jurisdiction and law" (para. 3). Feldman J.A. approached the appeal as one relating to procedure. It was within the jurisdiction of the arbitrator appointed under the Ontario Act to make the initial determination of jurisdiction. In her view, the appellant's execution of the PAU obliged it to participate in the Ontario arbitration. Further, an arbitrator appointed under the Ontario legislation is empowered to decide issues of *forum non conveniens*. The appeal was allowed on those procedural grounds.

B. *Cour d'appel de l'Ontario* (2001), 204 D.L.R. (4th) 732

20 La Cour d'appel de l'Ontario a infirmé la décision du juge des motions au motif que [TRADUCTION] « celui-ci aurait dû refuser d'entendre la motion [sollicitant la suspension de l'instance] et nommer l'arbitre, lequel aurait alors examiné toutes les questions de compétence et de droit » (par. 3). La juge Feldman a examiné l'appel sous l'angle de la procédure. La décision initiale touchant la compétence était du ressort de l'arbitre nommé en vertu de la Loi ontarienne. Selon la juge, ayant signé le formulaire P&E, l'appelante avait l'obligation de prendre part à l'arbitrage en Ontario. De plus, l'arbitre nommé en vertu des lois de l'Ontario est habilité à trancher les questions concernant le *forum non conveniens*. L'appel a été accueilli pour ces motifs d'ordre procédural.

VII. Relevant Statutory Provisions

The relevant provisions of the *Insurance Act*, R.S.O. 1990, c. I.8, and the *Arbitration Act, 1991*, S.O. 1991, c. 17, are set out in the Appendix.

VII. Les dispositions législatives pertinentes

21 Les dispositions pertinentes de la *Loi sur les assurances*, L.R.O. 1990, ch. I.8, et de la *Loi de 1991 sur l'arbitrage*, L.O. 1991, ch. 17, sont reproduites à l'annexe.

VIII. Constitutional Question

On August 27, 2002, the Chief Justice stated the following constitutional question:

Is s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, constitutionally inapplicable to the appellant because its application in the circumstances of this case

VIII. La question constitutionnelle

22 Le 27 août 2002, la Juge en chef a formulé la question constitutionnelle suivante :

L'article 275 de la *Loi sur les assurances*, L.R.O. 1990, ch. I.8, et ses modifications, est-il constitutionnellement inapplicable à l'appelante pour le motif que, dans les

would not accord with territorial limits on provincial jurisdiction?

IX. Analysis

23 It is well established that motor vehicle insurance within a province is a matter within provincial legislative competence: *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.). Since 1881, of course, the mobility of Canadians has increased exponentially. Tractor-trailer trucks rumble across the country. Holiday makers are enticed to take their holidays in distant provinces and many travel by car. Other Canadians, like the Brennans, fly to their destination and rent a car upon arrival. Still others regularly drive south to Florida or Arizona for some respite from winter.

24 People assume that their insurance follows them and their car wherever they go, and so it does. If the Brennans had taken their car instead of an airplane to British Columbia, and become involved in the same accident, the PAU scheme would have ensured that their Ontario insurer, Unifund, could have been served with a British Columbia Statement of Claim through the Superintendent of Insurance, and could not have raised in the resulting British Columbia proceedings a defence not open to a British Columbia insurer in the same circumstances.

25 Similarly, if Baljinder Singh had driven the tractor-trailer east to Ontario and collided with the Brennans on Highway 401 near their home in Cambridge, the PAU would have permitted the appellant, ICBC, to be served through the Superintendent of Insurance. In that case, the appellant could not have raised any defence not open to an Ontario insurer under comparable coverage. Moreover, Ontario law would apply as the law of the place where the accident happened: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. The PAU would have facilitated service on, and the holding responsible

circonstances de la présente affaire, son application ne serait pas conforme aux limites territoriales de la compétence provinciale?

IX. Analyse

Il est bien établi que le pouvoir de légiférer sur l'assurance automobile relève des provinces : *Citizens Insurance Co. of Canada c. Parsons* (1881), 7 App. Cas. 96 (C.P.). Depuis 1881, évidemment, les déplacements des Canadiens se sont multipliés de façon exponentielle. Les camions gros porteurs font entendre leur vrombissement d'un bout à l'autre du pays. Invités à visiter des provinces éloignées, les vacanciers sont nombreux à s'y rendre en automobile. Certains Canadiens, comme les Brennan, prennent l'avion jusqu'à leur destination et louent une voiture à leur arrivée. Pour fuir l'hiver, d'autres prennent régulièrement la route du Sud et conduisent jusqu'en Floride ou en Arizona.

Les gens tiennent pour acquis qu'ils continuent d'être assurés, où qu'ils se déplacent avec leur automobile, et c'est effectivement le cas. Si les Brennan s'étaient rendus en automobile en Colombie-Britannique, au lieu de prendre l'avion, et qu'ils y avaient eu le même accident, leur assureur situé en Ontario, Unifund, aurait pu, conformément au régime prévu par le formulaire P&E, se voir signifier, par l'intermédiaire du surintendant des assurances, une déclaration introduite en Colombie-Britannique, auquel cas il n'aurait pu, dans le cadre de l'instance intentée en Colombie-Britannique, faire valoir une défense qu'un assureur de cette province n'aurait pu invoquer dans les mêmes circonstances.

De même, si M. Baljinder Singh avait fait route vers l'est jusqu'en Ontario et que son camion était entré en collision avec la voiture des Brennan sur l'autoroute 401, à proximité de la résidence de ceux-ci à Cambridge, l'appelante, ICBC, aurait pu, en application du même régime, recevoir signification d'une action par l'intermédiaire du surintendant des assurances. Dans un tel cas, elle n'aurait pu faire valoir aucune défense que n'aurait pu invoquer un assureur de l'Ontario tenu à une garantie comparable. En outre, le droit ontarien s'appliquerait en tant que droit du lieu où l'accident s'est produit :

of, the out-of-province tortfeasors and their out-of-province insurer.

Tolofson c. Jensen, [1994] 3 R.C.S. 1022. Le formulaire P&E aurait facilité la signification des actes de procédures et autres documents aux auteurs du délit civil de l'autre province et à leur assureur, ainsi que la poursuite de l'action en responsabilité contre eux.

In this case, the accident and all the lawsuits arising directly from the accident took place in British Columbia. It is only the quite separate statutory procedure initiated by Unifund against the appellant that is brought in Ontario.

26 En l'espèce, l'accident et toutes les poursuites en découlant directement ont eu lieu en Colombie-Britannique. Seule la procédure distincte prévue par la Loi ontarienne qu'a intentée Unifund contre l'appelante est présentée en Ontario.

The constitutional question stated by the Chief Justice identifies the dispositive issue:

27 La question constitutionnelle qu'a formulée la Juge en chef résume bien l'aspect décisif du litige :

Is s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, constitutionally inapplicable to the appellant because its application in the circumstances of this case would not accord with territorial limits on provincial jurisdiction?

L'article 275 de la *Loi sur les assurances*, L.R.O. 1990, ch. I.8, et ses modifications, est-il constitutionnellement inapplicable à l'appelante pour le motif que, dans les circonstances de la présente affaire, son application ne serait pas conforme aux limites territoriales de la compétence provinciale?

While at one level, the argument is about which court has jurisdiction over the dispute (and if more than one court qualifies, then whether Ontario is the convenient forum for its resolution), the underlying issue is whether, in light of the territorial limitation on provincial legislation, the respondent, Unifund, has a viable cause of action at all against the out-of-province appellant. If it is concluded, as the constitutional question asks, that s. 275 of the Ontario Act is "constitutionally inapplicable to the appellant . . . [because of] territorial limits on provincial jurisdiction", then Unifund's action under the Ontario Act should be stopped irrespective of where it is brought.

Bien que, d'une part, il s'agisse simplement de décider quel tribunal a compétence sur le différend (et, si plus d'un tribunal est compétent, de décider si le tribunal ontarien est le forum approprié pour trancher ce différend), la véritable question en litige consiste à se demander si, compte tenu des limites territoriales de l'application des lois provinciales, l'intimée, Unifund, dispose d'une quelconque cause d'action valable contre l'appelante de l'extérieur de la province. S'il est jugé, selon le texte de la question constitutionnelle, que l'art. 275 de la Loi ontarienne est « constitutionnellement inapplicable à l'appelante [. . .] [à cause des] limites territoriales de la compétence provinciale », il conviendrait alors de faire cesser l'action intentée par Unifund en vertu de la Loi ontarienne, indépendamment de l'endroit où elle est intentée.

The general policy objectives of order and fairness that underlie territorial limits were discussed by La Forest J. in *Tolofson*, *supra*, at pp. 1050-51, as follows:

28 Le juge La Forest a commenté ainsi, aux p. 1050-1051 de l'arrêt *Tolofson*, précité, les objectifs généraux d'ordre et d'équité sur lesquels reposent les limites territoriales restreignant l'application des lois :

Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that

Les gens s'attendent habituellement à ce que leurs activités soient régies par la loi du lieu où ils se trouvent et à ce que les avantages et les responsabilités juridiques s'y rattachant soient définis en conséquence. Le gouverne-

place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. [Emphasis added.]

ment de ce lieu est le seul habilité à régir ces activités. Les autres États et les étrangers partagent normalement les mêmes attentes. Si d'autres États appliquaient systématiquement leurs lois à des activités qui se déroulent ailleurs, il y aurait confusion. Étant donné la facilité de voyager dans le monde moderne et l'émergence d'un ordre économique mondial, la situation deviendrait souvent chaotique si le principe de la compétence territoriale n'était pas respecté, du moins de façon générale. [Je souligne.]

29 The respondent, as stated, asserts only an Ontario statutory cause of action. Its request for the appointment of an arbitrator could only be granted if the loss transfer scheme of the Ontario Act applies. Section 275(4), to repeat for convenience, provides that "[i]f the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*" (emphasis added).

Comme je l'ai indiqué précédemment, l'intimée invoque uniquement une cause d'action fondée sur une loi ontarienne. Sa demande sollicitant la nomination d'un arbitre ne saurait être accueillie que si le régime d'indemnisation prévu entre assureurs par la Loi ontarienne s'applique. Le paragraphe 275(4), que je reproduis pour des raisons de commodité, dispose que « [s]i les assureurs n'arrivent pas à s'entendre à l'égard de l'indemnisation visée au présent article, le différent est réglé par voie d'arbitrage aux termes de la *Loi sur l'arbitrage* » (je souligne).

30 Under our federal structure, different provinces are quite free to adopt different statutory schemes for their respective motor vehicle insurance industries. British Columbia decided to confer a monopoly on the appellant to sell motor vehicle insurance in that province. British Columbia does not provide for claims for indemnification amongst rival motor vehicle insurance companies in the province because there are none. Of course, the appellant is not thereby immunized from common law causes of action arising elsewhere, as in the hypothetical case mentioned above of one of its insureds taking his or her motor vehicle to Ontario and getting into an accident: *Potts*, *supra*, at p. 560. The appellant remains contractually bound to its insured and the PAU is designed to facilitate its appearance and the discharge of its contractual responsibilities in the province where the accident occurred.

Dans notre régime fédéral, chaque province est entièrement libre d'adopter son propre régime législatif pour régir son secteur de l'assurance automobile. La Colombie-Britannique a décidé d'accorder à l'appelante le monopole de la vente d'assurance automobile dans cette province. La Colombie-Britannique n'autorise pas la présentation de demande d'indemnisation entre sociétés d'assurance rivales dans la province, et ce tout simplement parce que l'appelante n'a pas de rivale. Évidemment, l'appelante n'est pas à l'abri des causes d'action fondées sur la common law et prenant naissance dans d'autres provinces, comme l'illustre la situation hypothétique mentionnée précédemment, où un de ses assurés se rendrait en automobile en Ontario et y aurait un accident de la route : *Potts*, précité, p. 560. L'appelante continue d'être liée contractuellement à son assuré et le formulaire P&E vise à lui faciliter la tâche de comparaître et de s'acquitter de ses responsabilités contractuelles dans la province où l'accident s'est produit.

31 The respondent has identified two potential grounds on which Ontario law might apply to its claim for reimbursement: firstly, that the appellant does business in Ontario, and is therefore in general subject to the law of the Ontario insurance

L'intimée a relevé deux motifs susceptibles de justifier l'application du droit ontarien à sa demande de remboursement : premièrement, le fait que l'appelante exerce des activités en Ontario et est donc généralement assujettie au droit qui régit le marché

market place, and, secondly, that under the terms of the PAU, the appellant has in any event undertaken by reciprocal agreement to be bound by Ontario's insurance scheme, including the loss transfer provisions applicable to competing Ontario insurance companies.

Neither of these issues was resolved by the Ontario Court of Appeal because, in its view, their determination should be left, in the first instance, to the arbitrator.

Accordingly, the following are the principal legal issues:

(i) Was the Ontario Court of Appeal correct that an arbitrator appointed under the Ontario Act was the appropriate forum for the determination as to whether the Ontario Act did or did not apply to the appellant in the circumstances of this case ("the arbitration issue")?

(ii) If not, should the motions judge have determined that s. 275 of the Ontario Act was constitutionally applicable to the appellant having regard to the alleged "real and substantial connection" between the appellant and Ontario on the facts of this case, and/or the terms of the Power of Attorney and Undertaking (PAU) ("the constitutional issue")?

(iii) If so, should the motions judge have dealt with the further issue of *forum non conveniens*, or, having found jurisdiction *simpliciter*, should the issue of *forum non conveniens* have been referred to the arbitrator, as held by the Court of Appeal ("the *forum non conveniens* issue")?

I propose to deal with each of these issues in turn.

(i) *Was the Ontario Court of Appeal Correct that an Arbitrator Appointed Under the Ontario Act Was the Appropriate Forum for the Determination as to Whether the Ontario Act Did or Did Not Apply to the Appellant in the Circumstances of This Case ("the Arbitration Issue")?*

de l'assurance en Ontario; deuxièmement, le fait que, suivant les modalités du formulaire P&E, l'appelante a de toute façon accepté, dans le cadre d'un accord de réciprocité, d'être liée par le régime d'assurance ontarien, y compris par les dispositions relatives à l'indemnisation entre assureurs applicable aux sociétés rivales du secteur de l'assurance en Ontario.

32 La Cour d'appel de l'Ontario n'a tranché aucune de ces questions, puisque, à son avis, elles devaient l'être en première instance par un arbitre.

33 En conséquence, voici les principales questions de droit en litige :

(i) La Cour d'appel de l'Ontario a-t-elle eu raison de conclure qu'un arbitre nommé en vertu de la Loi ontarienne constitue le forum approprié pour décider si cette loi s'applique ou non à l'appelante dans les circonstances de l'espèce (« la question de l'arbitrage »)?

(ii) Dans la négative, le juge des motions aurait-il dû conclure que l'art. 275 de la Loi ontarienne est constitutionnellement applicable à l'appelante compte tenu du « lien réel et substantiel » qui existerait entre cette dernière et l'Ontario, eu égard aux faits de l'espèce, et/ou des termes du formulaire P&E (« la question constitutionnelle »)?

(iii) Dans l'affirmative, le juge des motions aurait-il dû examiner la question additionnelle du *forum non conveniens*, ou, puisqu'il a conclu affirmativement à la question de la simple reconnaissance de compétence, la question du *forum non conveniens* aurait-elle dû être renvoyée à un arbitre, conclusion à laquelle est arrivée la Cour d'appel? (« la question du *forum non conveniens* »)?

34 Je me propose d'examiner chacune de ces questions à tour de rôle.

(i) *La Cour d'appel de l'Ontario a-t-elle eu raison de conclure qu'un arbitre nommé en vertu de la Loi ontarienne constitue le forum approprié pour décider si cette loi s'applique ou non à l'appelante dans les circonstances de l'espèce (« la question de l'arbitrage »)?*

35 The Court of Appeal concluded that "the scheme of the *Arbitration Act, 1991*" is that "it is the role of the arbitrator and not of the court, at least initially, to decide questions of jurisdiction, applicable law and questions of law including whether a party is an 'insurer' for the purposes of s. 275" (para. 19 (emphasis added)). The court thus dispatched all the jurisdictional and related legal issues to the arbitrator on the basis of s. 17(1) of the *Arbitration Act, 1991* (which applies by virtue of s. 275 of the Ontario Act) and which reads as follows:

17.—(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

36 Section 17 is based on art. 16 of the UNCITRAL model law which reflects the principle of "Kompetenz - Kompetenz", i.e., that an arbitral tribunal ought to be competent to rule on its own competence. The concept is said to be "fundamental": L. Y. Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, My Lord, of Jealousy'" (2001), 80 *Can. Bar Rev.* 143, at p. 145.

37 There is no doubt that an arbitrator or administrative tribunal can be vested with jurisdiction to determine questions of law, even questions of constitutional law going to its own jurisdiction, provided that the legislature has made plain that intention: see, e.g., *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 61.

38 Assuming in the respondent's favour that the Ontario legislature intended s. 17(1) to be such a grant of jurisdiction, I do not think there is anything in the *Arbitration Act, 1991* to suggest that this

La Cour d'appel a estimé qu'il ressort de [TRADUCTION] « l'économie de la *Loi de 1991 sur l'arbitrage* » que « c'est à l'arbitre, et non au tribunal, qu'il appartient de trancher, en première instance à tout le moins, la question de la compétence, celle du droit applicable et les questions de droit, y compris celle de savoir si une partie est un "assureur" pour l'application de l'art. 275 » (par. 19 (je souligne)). La Cour d'appel a en conséquence renvoyé à l'arbitre la question de la compétence et toutes les questions de droit connexes, se fondant sur le par. 17(1) de la *Loi de 1991 sur l'arbitrage* (qui s'applique par l'effet de l'art. 275 de la Loi ontarienne) et qui est ainsi rédigé :

17 (1) Le tribunal arbitral peut statuer sur sa propre compétence en matière de conduite de l'arbitrage et peut, à cet égard, statuer sur les objections relatives à l'existence ou à la validité de la convention d'arbitrage.

L'article 17 est basé sur l'art. 16 de la Loi type de la CNUDCI, lequel s'inspire du principe de la « Kompetenz - Kompetenz », selon lequel un tribunal arbitral doit être compétent pour statuer sur sa propre compétence. Il s'agit d'une notion qu'on qualifie de « fondamentale » : L. Y. Fortier, « Delimiting the Spheres of Judicial and Arbitral Power : "Beware, My Lord, of Jealousy" » (2001), 80 *R. du B. Can.* 143, p. 145.

Il est certain qu'un arbitre ou un tribunal administratif peut se voir accorder le pouvoir de trancher des questions de droit — même des questions de droit constitutionnel touchant à sa propre compétence —, pourvu que le législateur ait clairement indiqué que telle était son intention : voir, par exemple, *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5, et *Cooper c. Canada (Commission des droits de la personne)*, [1996] 3 R.C.S. 854, par. 61.

À supposer, comme le veut la thèse de l'intimée, que la province d'Ontario entendait que le par. 17(1) ait pour effet de conférer une telle compétence, j'estime que rien dans la *Loi de 1991 sur*

jurisdiction was intended in all circumstances to be exclusive. Here, we are dealing with a constitutional challenge before the arbitrator has been appointed. The challenge is raised as a preliminary objection in front of the very court that is asked to make the appointment.

The respondent's argument that the arbitrator's jurisdiction should be regarded as exclusive in the first instance rests largely on a series of labour relations cases where this Court held that courts should defer to labour arbitrators in disputes which, in their essential character, arise out of a collective agreement: *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14, at para. 24.

Those cases, however, are based on the Court's interpretation of the legislative intent expressed in labour relations legislation in favour of exclusivity (see *St. Anne*, *supra*, at pp. 718-19, and *Weber*, *supra*, at para. 41). The Court was not being asked to defer to the very arbitrator whose constitutional root of authority was being challenged.

There is nothing in the *Insurance Act* of Ontario, which was the Court of Appeal's springboard into the *Arbitration Act, 1991*, to suggest that the legislature intended an arbitrator appointed under that Act, usually an insurance specialist, to have *exclusive* jurisdiction (even in the first instance) to determine the constitutional applicability of that Act under the division of legislative powers in the Canadian Constitution.

The respondent also relies on *Jevco Insurance Co. v. Continental Insurance Co. of Canada* (2000), 132 O.A.C. 379 (C.A.), aff'g [1999] O.J. No. 2267 (QL) (S.C.J.), but that case turns on a different point. There, the issue sought to be raised before the

l'arbitrage n'indique que cette compétence était censée être exclusive dans tous les cas. En l'espèce, nous sommes en présence d'une contestation de nature constitutionnelle précédant la nomination de l'arbitre. Cette contestation a été soulevée, à titre d'objection préliminaire, devant le tribunal même à qui l'on demande de nommer l'arbitre.

39 L'argument de l'intimée selon lequel la compétence de l'arbitre devrait être considérée comme exclusive en première instance repose dans une large mesure sur une série d'arrêts en matière de relations du travail dans lesquels notre Cour a jugé que les tribunaux devaient s'en remettre aux arbitres du travail dans les litiges qui, dans leur essence, résultent d'une convention collective : *St. Anne Nackawic Pulp & Paper Co. c. Section locale 219 du Syndicat canadien des travailleurs du papier*, [1986] 1 R.C.S. 704; *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929; *Regina Police Assn. Inc. c. Regina (Ville) Board of Police Commissioners*, [2000] 1 R.C.S. 360, 2000 CSC 14, par. 24.

40 Toutefois, ces arrêts reposent sur l'interprétation de notre Cour en ce qui concerne les lois sur les relations du travail dans lesquelles le législateur s'est exprimé en faveur de l'exclusivité (voir les arrêts *St. Anne*, précité, p. 718-719, et *Weber*, précité, par. 41). Dans ces affaires, on ne demandait pas à notre Cour de s'en remettre à l'arbitre même dont la compétence était contestée du point de vue constitutionnel.

41 Rien dans la *Loi sur les assurances* de l'Ontario, qui a amené la Cour d'appel à examiner la *Loi de 1991 sur l'arbitrage*, ne tend à indiquer que le législateur entendait accorder à l'arbitre nommé en vertu de la première loi — habituellement un spécialiste du domaine des assurances — compétence *exclusive* (même en première instance) pour décider si cette loi est constitutionnellement applicable dans le cadre du partage des pouvoirs législatifs prévu par la Constitution canadienne.

42 L'intimée invoque également l'arrêt *Jevco Insurance Co. c. Continental Insurance Co. of Canada* (2000), 132 O.A.C. 379 (C.A.), conf. [1999] O.J. No. 2267 (QL) (C.S.J.), mais cette affaire a été décidée sur un point différent. Dans

arbitrator was whether the Workers' Compensation legislation relieves an insurer of responsibility for statutory no-fault benefits. All of the parties were in Ontario and subject to the laws of that province. It was open to the Ontario legislature to confer on an arbitrator the determination in the first instance of that legal point, and the Ontario Court of Appeal held that the legislature had done so. Here, by contrast, the issue is whether the laws passed by the Ontario legislature have any application at all to this dispute.

43 Legislative attempts to distance the provincial superior courts from issues of constitutional *applicability* as well as *validity* have generally proven to be unsuccessful. See, e.g., *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at pp. 328-29. In my view, when the authority of a court is invoked to appoint an arbitrator under a statute which one of the parties contends cannot constitutionally apply to it, the court should deal with the challenge. As observed by Estey J. in *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733, at p. 741, the courts are "the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their statutory boundaries".

44 The jurisdiction of the courts in Ontario to appoint the arbitrator was itself dependent on the application of s. 275 of the Ontario *Insurance Act*. If the Act could not constitutionally apply to this dispute, then an appointment of an arbitrator pursuant to the Act would be ineffective.

45 Section 48(1)(c) of the *Arbitration Act, 1991* provides that the court may set aside an arbitral award on the basis that "the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law". I can think of no practical

Jevco, la question qu'on voulait soumettre à l'arbitre était de savoir si les lois relatives aux accidents du travail dégagent l'assureur de toute responsabilité à l'égard des indemnités d'assurance hors-faute. Toutes les parties étaient de l'Ontario et étaient assujetties aux lois de cette province. Le législateur ontarien avait la capacité d'investir un arbitre du pouvoir de se prononcer en première instance sur ce point de droit et la Cour d'appel de l'Ontario a conclu qu'il l'avait fait. En l'espèce, par contre, il s'agit de décider si les dispositions législatives adoptées par le législateur ontarien s'appliquent de quelque façon au présent litige.

Les législateurs qui ont tenté de soustraire à la compétence des cours supérieures des provinces des questions d'*applicabilité* et de *validité* constitutionnelles ont généralement échoué dans leur tentative : voir, par exemple, *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, p. 328-329. À mon avis, lorsqu'on invoque la compétence d'un tribunal de nommer un arbitre en vertu d'une loi qui, selon la prétention d'une des parties, ne peut constitutionnellement s'appliquer à elle, le tribunal devrait statuer sur la contestation. Comme l'a fait remarquer le juge Estey dans l'arrêt *Northern Telecom Canada Ltée c. Syndicat des travailleurs en communication du Canada*, [1983] 1 R.C.S. 733, p. 741, les tribunaux sont, « dans la société, l'autorité qui contrôle les bornes de la souveraineté propre des deux gouvernements pléniers et celle qui surveille les organismes à l'intérieur de ces sphères pour vérifier que leurs activités demeurent dans les limites de la loi ».

Le pouvoir des tribunaux ontariens de nommer l'arbitre était lui-même tributaire de l'application de l'art. 275 de la *Loi sur les assurances* de l'Ontario. Si cette Loi n'était pas constitutionnellement applicable au litige, la nomination d'un arbitre en vertu de celle-ci serait sans effet.

L'alinéa 48(1)c) de la *Loi de 1991 sur l'arbitrage* dispose que le tribunal peut annuler la sentence arbitrale au motif que « l'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario ». Je ne vois aucune raison pratique de

reason to compel the parties to go through a doomed arbitration, where the very issue is the constitutional availability of the statutory cause of action being invoked, rather than having the court determine the issue in the first instance.

If, as the appellant contends, an arbitration would be unconstitutional, then issues of cost, delay and inconvenience all argue for judicial euthanasia at the outset.

I note, as well, that s. 8(2) of the *Arbitration Act, 1991* speaks of the arbitrator's jurisdiction to decide "any question of law that arises during the arbitration" (emphasis added). If the appellant is correct, there is no constitutional basis for the arbitration to come into existence in the first place.

The Ontario courts had jurisdiction to determine the constitutional applicability of the Ontario *Insurance Act* in this case. It involved a claim to reimbursement of a payment made in Ontario to an Ontario insured by an Ontario insurance company. By notice of motion dated July 28, 2000, under Rule 17.06 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the appellant sought various rulings all of which related to the constitutional applicability of the Ontario *Insurance Act*. There was no objection taken to the Ontario court dealing with the constitutional question. On the contrary, it was of the essence of the appellant's notice of motion.

I conclude, therefore, that the motions court ought to have addressed the issue of the constitutional applicability of the Ontario Act raised by the appellant.

(ii) *Is the Ontario Act Constitutionally Applicable to the Appellant on the Facts of This Case Having Regard to the Alleged "Real and Substantial Connection" Between the Appellant and Ontario and/or the Obligations Undertaken in the Power of Attorney and Undertaking ("PAU") ("the Constitutional Issue")?*

contraindre les parties à entreprendre un arbitrage inutile, dans les cas où la question fondamentale est l'applicabilité, du point de vue constitutionnel, de la cause d'action d'origine législative qui est invoquée, au lieu de demander au tribunal de se prononcer sur cette question en première instance.

46 Si, comme le prétend l'appelante, l'arbitrage est une mesure inconstitutionnelle, les coûts, les délais et les inconvénients d'une telle procédure sont autant d'arguments incitant à l'écarter d'entrée de jeu par euthanasie judiciaire.

47 Je tiens également à souligner que, aux termes du par. 8(2) de la *Loi de 1991 sur l'arbitrage*, l'arbitre peut statuer sur « toute question de droit qui est soulevée au cours de l'arbitrage » (je souligne). Si l'appelante a raison, la tenue même de l'arbitrage n'a aucune assise constitutionnelle.

48 Les tribunaux ontariens avaient compétence pour statuer sur l'applicabilité constitutionnelle de la *Loi sur les assurances* de l'Ontario à la présente affaire, qui concerne le remboursement d'une somme versée en Ontario à un assuré ontarien par une société d'assurance de cette province. Au moyen d'un avis de motion daté du 28 juillet 2000 et présenté en vertu de la règle 17.06 des *Règles de procédure civile* de l'Ontario, R.R.O. 1990, Règl. 194, l'appelante a sollicité diverses décisions touchant l'applicabilité constitutionnelle de la *Loi sur les assurances* de l'Ontario. Personne ne s'est opposé à ce que le tribunal ontarien connaisse de la question d'ordre constitutionnelle. Au contraire, l'avis de motion de l'appelante demandait au tribunal de trancher cette question.

49 J'arrive en conséquence à la conclusion que le juge des motions aurait dû se prononcer sur la question de l'applicabilité constitutionnelle de la Loi ontarienne soulevée par l'appelante.

(ii) *Eu égard aux faits de l'espèce, la Loi ontarienne est-elle constitutionnellement applicable à l'appelante compte tenu du « lien réel et substantiel » qui existerait entre cette dernière et l'Ontario, et/ou des obligations contractées aux termes du formulaire P&E (« la question constitutionnelle »)?*

50 It is well established that a province has no legislative competence to legislate extraterritorially. If the Ontario Act purported to regulate civil rights in British Columbia arising out of an accident in that province, this would be an impermissible extraterritorial application of provincial legislation: *Royal Bank of Canada v. The King*, [1913] A.C. 283 (P.C.); *Gray v. Kerslake*, [1958] S.C.R. 3; P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at pp. 13-4 to 13-25; R. E. Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1985), 7 *Supreme Court L.R.* 511, at p. 531.

51 This territorial restriction is fundamental to our system of federalism in which each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres, and expects the same respect in return. It flows from the opening words of s. 92 of the *Constitution Act, 1867*, which limit the territorial reach of provincial legislation: "In each Province the Legislature may exclusively make Laws in relation to" the enumerated heads of power (emphasis added). The authority to legislate in respect of insurance is founded in s. 92(13), which confers on each legislature the power to make laws in relation to "Property and Civil Rights in the Province" (emphasis added).

52 Unifund does not take issue with these basic propositions. Its contention is that it seeks only to enforce its Ontario civil rights in Ontario, namely the right to indemnification created by s. 275 of the Ontario Act. It says it is entitled to do so under ordinary constitutional law principles because there is "a real and substantial connection" between the appellant and Ontario, or, alternatively, under the PAU.

53 I therefore turn to the first of the two grounds on which the respondent alleges the Ontario statutory scheme applies.

Il est bien établi qu'une province n'a pas le pouvoir d'édicter des lois ayant une portée extraterritoriale. Si la Loi ontarienne visait à régir, en Colombie-Britannique, les droits civils résultant d'un accident survenu dans cette province, il s'agirait d'une application extraterritoriale non permise d'une loi provinciale : *Royal Bank of Canada c. The King*, [1913] A.C. 283 (C.P.); *Gray c. Kerslake*, [1958] R.C.S. 3; P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 1, p. 13-4 à 13-25; R. E. Sullivan, « Interpreting the Territorial Limitations on the Provinces » (1985), 7 *Supreme Court L.R.* 511, p. 531.

Cette restriction de la portée territoriale est fondamentale dans notre régime fédéral où chaque province est tenue de respecter la souveraineté législative des autres provinces dans leurs champs de compétence respectifs, et où elle s'attend au même respect en retour. Cette restriction ressort du passage liminaire de l'art. 92 de la *Loi constitutionnelle de 1867*, qui limite la portée territoriale des lois provinciales : « Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant » sous les chefs de compétence qui y sont énumérés (je souligne). Le pouvoir de légiférer en matière d'assurance découle du par. 92(13), lequel confère à chaque province le pouvoir de faire des lois relatives à la « propriété et [aux] droits civils dans la province » (je souligne).

Unifund ne conteste pas ces propositions fondamentales, mais dit chercher simplement à exercer, en Ontario, les droits civils qui lui sont reconnus dans cette province, à savoir le droit à indemnisation créé par l'art. 275 de la Loi ontarienne. Elle affirme avoir droit de le faire soit en vertu des principes ordinaires de droit constitutionnel, du fait de l'existence d'un « lien réel et substantiel » entre l'appelante et l'Ontario, soit en vertu du formulaire P&E.

Je vais donc examiner les deux moyens invoqués par l'intimée pour établir l'application du régime législatif ontarien.

(a) The respondent says that there is a "*real and substantial connection*" between the appellant and Ontario that makes it appropriate for Ontario law to regulate the outcome of their dispute.

The "real and substantial connection" test has been adopted and developed by this Court in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1103 and 1109; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at p. 328; and *Tolofson*, *supra*, at p. 1049; followed and applied more recently in cases such as *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, at para. 71, and *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78.

In this case, however, we are asked to apply the "real and substantial connection test" in the different context of the *applicability* of a provincial regulatory scheme to an out-of-province defendant. The issue is not just the competence of the Ontario court to entertain the appointment of an arbitrator (as in the choice of forum cases) but, as the constitutional question asks, whether the "connection" between Ontario and the respondent is sufficient to support the application to the appellant of Ontario's regulatory regime.

Consideration of constitutional *applicability* can conveniently be organized around the following propositions:

1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;

2. What constitutes a "sufficient" connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;

a) L'intimée affirme qu'il existe, entre l'appelante et l'Ontario, un « *lien réel et substantiel* » et que, de ce fait, il convient que les lois de l'Ontario décident de l'issue du litige l'opposant à l'appelante.

54 Notre Cour a adopté et explicité le critère du « lien réel et substantiel » dans les arrêts *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077, p. 1103 et 1109; *Hunt c. T&N plc*, [1993] 4 R.C.S. 289, p. 328; et *Tolofson*, précité, p. 1049; elle l'a suivi et appliqué plus récemment dans des affaires telles que *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90, par. 71, et *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, [2002] 4 R.C.S. 205, 2002 CSC 78.

55 En l'espèce, toutefois, nous sommes appelés à appliquer le « critère du lien réel et substantiel » dans le contexte différent de l'applicabilité d'un régime de réglementation établi par une province donnée, à un défendeur de l'extérieur de cette province. Il ne s'agit pas seulement de décider si le tribunal judiciaire ontarien a compétence pour connaître de la demande de nomination de l'arbitre (comme dans les affaires de choix du forum), mais, comme le précise la question constitutionnelle, si le « lien » entre l'Ontario et l'intimée est suffisant pour justifier l'application à l'appelante du régime de réglementation ontarien.

56 L'examen de l'*applicabilité* du point de vue constitutionnel peut s'articuler autour des propositions suivantes :

1. La limitation territoriale de la portée du pouvoir de légiférer des provinces empêche les lois d'une province de s'appliquer aux affaires qui ne présentent pas de lien suffisant avec cette dernière.

2. Le caractère « suffisant » du lien dépend du rapport qui existe entre le ressort ayant légiféré, l'objet du texte de loi et l'individu ou l'entité qu'on cherche à assujettir à celui-ci.

3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;

4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.

57 I propose to address each of these elements to the extent necessary to resolve this aspect of the appeal.

1. *The Sufficient Connection*

58 The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it: J.-G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf)), at p. 2.1. As will be seen, a "real and substantial connection" sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome.

59 In *Tolofson*, La Forest J. observed: "It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country . . . it would lead to unfair and unjust results if it did. The same considerations apply as between the Canadian provinces" (p. 1052).

60 Territorial limits is an ancient doctrine developed in the context not of provinces but of sovereign states, as discussed by Lord Russell of Killowen C. J. in *R. v. Jameson*, [1896] 2 Q.B. 425, at p. 430:

One other general canon of construction is this — that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts

3. L'applicabilité d'une loi provinciale par ailleurs valide à un défendeur de l'extérieur de la province concernée est fonction des exigences d'ordre et d'équité qui sous-tendent nos structures fédérales.

4. Comme ils visent une finalité, les principes d'ordre et d'équité sont appliqués d'une manière souple, en fonction de l'objet de la loi.

Je me propose d'examiner ces éléments dans la mesure nécessaire pour régler cet aspect du pourvoi.

1. *L'existence d'un lien suffisant*

Les limites territoriales du pouvoir de légiférer des provinces ont pour effet d'empêcher l'application des lois d'une province aux affaires qui ne présentent pas de lien suffisant avec cette dernière : J.-G. Castel et J. Walker, *Canadian Conflict of Laws* (5e éd. (feuilles mobiles)), p. 2.1. Comme nous le verrons, un « lien réel et substantiel » qui serait par ailleurs suffisant pour permettre aux tribunaux d'une province de se déclarer compétents à l'égard d'un litige peut toutefois ne pas être suffisant pour que les lois de cette province décident de l'issue de ce litige.

Dans l'arrêt *Tolofson*, p. 1052, le juge La Forest a fait l'observation suivante : « Il me semble aller de soi, par exemple, qu'il n'appartient pas à l'État A de définir les droits et obligations des citoyens de l'État B à l'égard d'actes accomplis dans leur propre pays, [. . .] car il s'ensuivrait des résultats inéquitables et injustes si c'était le cas. Les mêmes considérations s'appliquent en ce qui concerne les provinces canadiennes. »

Les limites territoriales du pouvoir législatif constituent une vieille doctrine qui a été élaborée dans le contexte d'affaires concernant non pas des provinces mais des États souverains, comme l'indiquent les explications suivantes de Lord Russell of Killowen dans *R. c. Jameson*, [1896] 2 Q.B. 425, p. 430 :

[TRADUCTION] Selon un autre principe général d'interprétation, si une loi se prête à une interprétation différente, on ne saurait considérer qu'elle s'applique

done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.

aux étrangers à l'égard des actes qu'ils accomplissent à l'extérieur du territoire de la puissance souveraine qui a édicté la loi en question. Il s'agit d'une règle fondée sur le droit international en vertu de laquelle chaque puissance souveraine est tenue de respecter les sujets et les droits des autres puissances souveraines à l'extérieur de son propre territoire.

A similar concern for state comity, or reciprocal respect, was internalized within the federal structure of the United States as early as *Pennoyer v. Neff*, 95 U.S. 714 (1877), at p. 722:

61 Un souci analogue à l'égard de la courtoisie internationale — ou respect mutuel — est depuis longtemps intégré à la structure fédérale des États-Unis comme en témoigne l'arrêt *Pennoyer c. Neff*, 95 U.S. 714 (1877), p. 722 :

. . . no State can exercise direct jurisdiction and authority over persons or property without its territory. . . . The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others.

[TRADUCTION] [A]ucun État ne peut exercer directement quelque compétence et autorité sur les personnes ou les biens à l'extérieur de son territoire. [. . .] Les divers États jouissent d'une dignité et d'une autorité équivalentes, et l'indépendance d'un de ces États implique exclusion du pouvoir de tous les autres.

These early formulations conceive of the territorial limitation in very physical terms, as was still the case in 1913 in *Royal Bank of Canada*, *supra*, where the court struck down an Alberta statute which purported to direct monies raised for a failed railway project to be paid over to provincial government coffers instead of having the monies returned to the lenders, most of whom resided in the United Kingdom. Viscount Haldane L.C. considered it notable that "[n]o money in specie was sent to the branch office" in Alberta (p. 294). He concluded that the debts were recoverable by the bondholders at the Bank's head office in Montréal. Accordingly, the right of the foreign bondholders to receive back their money

62 Ces vieux énoncés expriment une conception très physique de la limitation territoriale, toujours présente en 1913 dans l'arrêt *Royal Bank of Canada*, précité, où notre Cour a invalidé une loi de l'Alberta qui prévoyait que des sommes recueillies pour un projet ferroviaire qui avait avorté seraient versées dans les coffres du gouvernement provincial au lieu d'être remboursées aux prêteurs, dont la plupart résidaient au Royaume-Uni. Le vicomte Haldane, lord chancelier, a considéré notable le fait qu'[TRADUCTION] « [a]ucune somme n'avait été envoyée en espèces à la succursale » en Alberta (p. 294). Il a conclu que les obligataires pouvaient se faire payer leur créance au siège social de la banque à Montréal. Par conséquent, le droit des créanciers obligataires étrangers de recouvrer leur argent

was a civil right which had arisen, and remained enforceable outside the province. The statute was on this ground beyond the powers of the Legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it. [p. 298]

[TRADUCTION] était un droit civil qui avait pris naissance en dehors de la province et dont on pouvait encore demander le respect à l'extérieur de celle-ci. Pour cette raison, la loi excédait les pouvoirs de l'assemblée législative albertaine, dans la mesure où les dispositions qu'on entendait édicter ne se limitaient pas à la propriété et aux droits civils dans la province, et ne se rapportaient pas uniquement aux questions de nature purement locale ou privée dans la province. [p. 298]

See also *Attorney General for Ontario v. Scott*, [1956] S.C.R. 137, at p. 141; *Interprovincial Co-Operatives Ltd. v. The Queen*, [1976] 1 S.C.R.

Voir également *Attorney General for Ontario c. Scott*, [1956] R.C.S. 137, p. 141; *Interprovincial Co-Operatives Ltd. c. La Reine*, [1976] 1 R.C.S.

477, at p. 521; *Credit Foncier Franco-Canadien v. Ross*, [1937] 3 D.L.R. 365 (Alta. S.C.A.D.); and *Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission of Ontario*, [1937] O.R. 796 (C.A.).

2. *What Constitutes a "Sufficient Connection" Depends on the Relationship Among the Enacting Jurisdiction, the Subject Matter of the Law, and the Persons Sought To Be Regulated By It.*

63 Later formulations of the extraterritoriality rule put the focus less on the idea of actual physical presence and more on the relationships among the enacting territory, the subject matter of the law, and the person sought to be subjected to its regulation. The potential application of provincial law to relationships with out-of-province defendants became more nuanced. The evolution of the rule was perhaps inevitable given the reality, as La Forest J. commented in *Morguard*, that modern states "cannot live in splendid isolation" (p. 1095). The focus on the relationship, as something that did not necessarily require actual physical presence within the jurisdiction, was identified by Dixon J., speaking for the High Court of Australia in *Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.)* (1936-1937), 56 C.L.R. 337, at p. 375, who said it was

> also within the competence of the [state] legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connections.

64 Viewed in this way, the problem in *Royal Bank of Canada*, *supra*, was not physical presence as such but that there was insufficient *connection* between the province of Alberta, on the one hand, and the out-of-province bondholders and their money on deposit with the bank's head office in Quebec, on the other hand, to justify the regulation of the debt by Alberta.

477, p. 521; *Credit Foncier Franco-Canadien c. Ross*, [1937] 3 D.L.R. 365 (C.S. Alb., div. app.); et *Beauharnois Light, Heat and Power Co. c. Hydro-Electric Power Commission of Ontario*, [1937] O.R. 796 (C.A.).

2. *L'existence d'un « lien suffisant » dépend du rapport qui existe entre le ressort ayant légiféré, l'objet du texte de loi en cause et les personnes qu'on entend assujettir à celui-ci.*

Dans des énoncés ultérieurs de la règle de l'extraterritorialité, on a moins insisté sur la notion de présence physique proprement dite, s'attachant davantage au lien entre le territoire ayant légiféré, l'objet du texte de loi en cause et la personne qu'on entendait assujettir à celui-ci. L'application potentielle des lois d'une province aux rapports mettant en cause des défendeurs se trouvant à l'extérieur de celle-ci est devenue une question plus nuancée. L'évolution de la règle était peut-être inévitable compte tenu du fait que, comme l'a souligné le juge La Forest dans l'arrêt *Morguard*, les États modernes « ne peuvent [. . .] pas vivre dans l'isolement le plus complet » (p. 1095). Cette insistance sur l'existence d'un lien ne requérant pas nécessairement une présence physique proprement dite dans le ressort a été énoncée par le juge Dixon, qui s'exprimait au nom de la Haute Cour d'Australie, dans l'arrêt *Broken Hill South Ltd. c. Commissioner of Taxation (N.S.W.)* (1936-1937), 56 C.L.R. 337, p. 375 :

> [TRADUCTION] . . . l'assemblée législative [d'un État] a également le pouvoir de fonder la responsabilité uniquement sur le lien qu'a une personne avec le territoire. Ce lien peut être la présence dans le territoire, la résidence, le domicile, l'exercice d'activités commerciales à cet endroit ou même un rapport plus ténu.

Considéré sous cet angle, le problème dans l'affaire *Royal Bank of Canada*, précitée, n'était pas la présence physique comme telle, mais le fait qu'il existait, entre la province d'Alberta, d'une part, et les créanciers obligataires de l'extérieur de la province et leur argent déposé au siège social de la banque dans la province de Québec, d'autre part, un *lien* insuffisant pour justifier la réglementation de ces sommes par l'Alberta.

It appears from the case law that different degrees of connection to the enacting province may be required according to the subject matter of the dispute. *Broken Hill* was a tax case. In divorce matters, mere residence of the parties in the jurisdiction was regarded, at common law, as an *insufficient* "relationship". Actual domicile was required, e.g., *Kalenczuk v. Kalenczuk* (1920), 52 D.L.R. 406 (Sask. C.A.). In another context, "[m]erely going through the air space over Manitoba" was an insufficient "relation" or connection with the province to support imposition of a provincial tax "within the Province": *The Queen in Right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303, at p. 316, *per* Laskin C.J. Yet in a products liability case, the presence of the defendant manufacturer in the jurisdiction is considered unnecessary. The relationship created by the knowing dispatch of goods into the enacting jurisdiction in the reasonable expectation that they will be used there is regarded as sufficient: *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, at p. 409. In yet another context, in *R. v. Thomas Equipment Ltd.*, [1979] 2 S.C.R. 529, the "relation" requirement was satisfied for regulatory purposes where the accused, a non-resident, not only sold its products (which were *not* defective) in the enacting jurisdiction, but had hired a local agent to promote their sale. In each case, the court assessed the relationship between the enacting jurisdiction and the out-of-province individual or entity sought to be regulated by it in light of the subject matter of the legislation to determine if the relation was "sufficient" to support the validity or applicability of the legislation in question.

65 Il ressort de la jurisprudence que différents degrés de rattachement à la province ayant légiféré peuvent être requis selon l'objet du différend. L'arrêt *Broken Hill* était une affaire fiscale. En matière de divorce, le simple fait pour les parties d'avoir une résidence dans un ressort était considéré, en common law, comme un « lien » *insuffisant*. On exigeait qu'elles y aient leur domicile réel : voir, par exemple, *Kalenczuk c. Kalenczuk* (1920), 52 D.L.R. 406 (C.A. Sask.). Dans un autre contexte, « [l]e seul fait de traverser l'espace aérien au-dessus du Manitoba » ne constituait pas un « lien » suffisant avec la province pour justifier l'imposition d'une taxe provinciale « dans les limites de la Province » : *La Reine du chef du Manitoba c. Air Canada*, [1980] 2 R.C.S. 303, p. 316, le juge en chef Laskin. Pourtant, dans les affaires de responsabilité du fabricant, la présence du fabricant défendeur dans le ressort n'est pas considérée nécessaire. Est considéré comme suffisant le lien que constitue le fait pour l'intéressé d'expédier sciemment des marchandises dans le ressort ayant légiféré tout en s'attendant raisonnablement qu'on les y utilisera : *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393, p. 409. Dans un autre contexte, celui de l'affaire *R. c. Thomas Equipment Ltd.*, [1979] 2 R.C.S. 529, l'exigence requérant l'existence d'un « lien » aux fins d'assujettissement au régime de réglementation a été satisfaite lorsque l'entreprise accusée, qui résidait dans une autre province, a non seulement vendu ses produits (lesquels *n'*étaient *pas* défectueux) dans le ressort ayant légiféré, mais a également embauché un représentant local pour les y promouvoir. Dans chacun de ces arrêts, la Cour a évalué, à la lumière de l'objet du texte de loi en cause, le lien entre le ressort ayant légiféré et l'individu ou l'entité de l'extérieur de la province qu'on entendait réglementer afin de déterminer si le lien était « suffisant » pour étayer la validité ou l'applicabilité de la loi en question.

In *Ladore v. Bennett*, [1939] A.C. 468 (P.C.), Ontario legislation that reduced the rate of interest on out-of-province bondholders was upheld. Purchasers, wherever situated, of Ontario municipal bonds had created a relationship between themselves and Ontario which was sufficient to ground

66 Dans l'affaire *Ladore c. Bennett*, [1939] A.C. 468 (C.P.), la validité d'une loi ontarienne réduisant le taux d'intérêt accordé aux créanciers obligataires de l'extérieur de la province, a été confirmée. Les acheteurs — où qu'ils se trouvaient — d'obligations municipales émises en Ontario avaient créé

jurisdiction in respect of the particular subject matter of the legislation. On the facts, *Ladore* is difficult to distinguish from *Royal Bank of Canada*. The different result can only be explained, from the perspective of the out-of-province parties, by an evolving sophistication in respect of the true scope of the territorial limitation. *Ladore* was expressly approved by this Court in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

67 A further complication arises when the issue is not the *validity* of provincial legislation, but its *applicability* to out-of-province entities. In this case, the appellant does not at all challenge the validity of the Ontario *Insurance Act* which on its face regulates an aspect of "Property and Civil Rights in the Province" (emphasis added) (*Constitution Act, 1867*, s. 92(13)). The appellant says only that the Ontario Act must be confined to its proper constitutional sphere, and its reach cannot validly be extended to an out-of-province insurer to govern the outcome of the present dispute.

3. *The Applicability of an Otherwise Competent Provincial Legislation to Out-of-Province Defendants is Conditioned by the Requirements of Order and Fairness that Underlie Our Federal Arrangements.*

68 The more flexible view of extraterritorial application evident in the later cases will, at least to some extent, increase the potential among the provinces for conflict. In *Hunt*, *supra*, an organizing principle of the federation was found in the requirements of order and fairness, described by the Court as "constitutional imperatives" (p. 324). Within the Canadian federation, comity requires adherence to "principles of order and fairness, principles that ensure security of transactions with justice" (*Morguard*, *supra*, at p. 1097). As La Forest J. explained in *Tolofson*, *supra*, at p. 1051:

entre eux et l'Ontario un lien suffisant pour asseoir la compétence du législateur relativement à l'objet précis de la loi. Au regard des faits, il est difficile de distinguer les affaires *Ladore* et *Royal Bank of Canada*. Pour ce qui est des parties de l'extérieur de la province, la différence de résultat ne peut s'expliquer que par le raffinement de la doctrine relativement à la portée réelle de la limitation territoriale de la compétence législative provinciale. Notre Cour a expressément approuvé l'arrêt *Ladore* dans le *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297.

La situation se complique davantage lorsque la question à trancher n'est pas la *validité* de la loi provinciale mais plutôt son *applicabilité* à certaines entités à l'extérieur de la province. En l'espèce, l'appelante ne conteste absolument pas la validité de la *Loi sur les assurances* de l'Ontario, qui à première vue réglemente un aspect visé par « la propriété et les droits civils dans la province » (je souligne) (*Loi constitutionnelle de 1867*, par 92(13)). L'appelante affirme seulement que la portée de la Loi ontarienne doit respecter les limites imposées par la Constitution et que son application ne peut validement être élargie à un assureur de l'extérieur de la province et décider de l'issue du présent litige.

3. *L'applicabilité d'une loi provinciale par ailleurs valide à un défendeur de l'extérieur de la province concernée est fonction des exigences d'ordre et d'équité qui sous-tendent nos structures fédérales.*

L'interprétation plus souple de l'application extraterritoriale qui ressort clairement des arrêts plus récents accroîtra, dans une certaine mesure à tout le moins, le risque de conflit entre les provinces. Dans l'arrêt *Hunt*, précité, les exigences en matière d'ordre et d'équité ont été considérées comme un principe directeur de la fédération et qualifiées par notre Cour d'« impératifs constitutionnels » (p. 324). Au sein de la fédération canadienne, la courtoisie commande qu'on adhère aux « principes d'ordre et d'équité, des principes qui assurent à la fois la justice et la sûreté des opérations » (*Morguard*, précité, p. 1097). Comme l'a expliqué le juge La Forest dans l'arrêt *Tolofson*, précité, p. 1051 :

Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.

To similar effect is the concern expressed by La Forest J. in *Tolofson*, *supra*, at p. 1066:

. . . it is arguable that it is not constitutionally permissible for both the province where certain activities took place and the province of the residence of the parties to deal with civil liability arising out of the same activities. Assuming both provinces have legislative power in such circumstances, this would open the possibility of conflicting rules in respect of the same incident.

The issue in *Hunt* was whether a Quebec statute, which purported to prohibit the removal from Quebec of business records required by judicial process outside the province, excused compliance in a British Columbia court with documentary production. Noting (at p. 330) that this approach would effectively immunize the business concerns located in Quebec from ever having to produce documents sought for the purposes of litigation in other provinces, La Forest J. held that the Quebec "blocking statute" was "constitutionally inapplicable [in British Columbia] because it offends against the principles enunciated in *Morguard*" (p. 331).

Similarly, in my view, order in the federation would be undermined if every provincial jurisdiction took it upon itself to regulate aspects of the financial impact of the British Columbia car crash in relation to its own residents at the expense of the British Columbia insurer. The Brennans' accident, for example, might have occasioned a multi-vehicle pile-up on the Upper Levels highway. On the respondent's theory, each of the injured parties and their insurers could have imposed the varying insurance arrangements of their home jurisdictions on the appellant, ICBC. The problem is not at all fanciful. All it would take is a collision involving Mr. Singh's truck and one 58-passenger tourist bus filled with out-of-province skiers heading along the Upper Levels Highway towards Whistler. Such "competing exercises" of regulatory regimes "must

Bien des activités qui se déroulent à l'intérieur d'un État ont nécessairement une incidence dans un autre État, mais il faut éviter une multiplicité d'exercices concurrents du pouvoir étatique à leur égard.

69 Dans le même ordre d'idées, le juge La Forest a fait la remarque suivante, à la p. 1066 de l'arrêt *Tolofson*, précité :

On peut [. . .] prétendre qu'il n'est pas constitutionnellement permis que les deux provinces, celle où certaines activités ont eu lieu et celle dans laquelle résident les parties, connaissent de la responsabilité civile résultant des mêmes activités. À supposer que les deux provinces aient compétence législative en pareilles circonstances, il pourrait y avoir conflit de règles à l'égard du même incident.

70 Dans l'affaire *Hunt*, la question était de savoir si une loi québécoise, qui interdisait de transporter hors du Québec des documents commerciaux requis par voie judiciaire à l'extérieur de la province, permettait de refuser de produire de tels documents à un tribunal de la Colombie-Britannique. Soulignant que si la validité de cette loi était confirmée, les entreprises situées au Québec n'auraient jamais à produire des documents demandés pour les besoins de litiges dans d'autres provinces (p. 330), le juge La Forest a conclu que la « loi prohibitive » du Québec était « constitutionnellement inapplicable [en Colombie-Britannique] parce qu'elle [était] contraire aux principes énoncés dans l'arrêt *Morguard* » (p. 331).

71 De même, je suis d'avis que l'ordre qui règne dans la fédération serait perturbé si chaque province prenait sur elle de réglementer, en ce qui concerne ses propres résidents, certains aspects des répercussions financières de l'accident d'automobile survenu en Colombie-Britannique, et ce au détriment de l'assureur de cette province. Par exemple, l'accident dont les Brennan ont été victimes aurait pu provoquer un carambolage sur l'autoroute Upper Levels. Suivant la thèse de l'intimée, chacune des parties lésées et son assureur auraient pu imposer à l'appelante, ICBC, le régime d'assurance particulier du ressort où ils résident. Le problème est loin d'être théorique. Il aurait en effet suffi d'une collision entre le camion de M. Singh et un autobus de 58 places rempli de skieurs de l'extérieur de la province se rendant à Whistler sur l'autoroute Upper Levels.

be avoided". The cost of such regulatory uncertainties undermines economic efficiency.

72 Fairness to the out-of-province defendant is also an important factor in the federation. Here, if the respondent is correct, the appellant would be obliged to respond to insurance regimes in each province or state claiming some sort of insured interest in the financial fall-out from the British Columbia accident arising out of whatever financial obligations those other provincial or state legislatures have seen fit for whatever reason to impose on their own insurance companies.

73 Adoption of the principles of order and fairness as a mechanism to regulate extraterritoriality concerns differentiates Canada somewhat from Australia (where s. 2 of the Constitution specifically confers extraterritorial jurisdiction on the several states, which, in some circumstances, can include the off-shore: *Union Steamship Co. of Australia Proprietary Ltd. v. King* (1988), 166 C.L.R. 1 (Aust. H.C.), at p. 12) and the United States, where the jurisprudence is governed by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV of the Constitution.

74 In *Broken Hill*, for example, Dixon J. went on to say, "If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers" (p. 375). We would say, after *Morguard*, *Hunt* and *Tolofson*, that, within our federal structure, it is not only the view of the enacting legislature that must be considered, but the collective interest of the federation as a whole in order and fairness. The same *caveat* should be placed at the door of the United States' "minimum contacts" doctrine, endorsed by its Supreme Court in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). In that country, as well, state laws are given generous application to disputes with limited connections to the enacting jurisdiction (see, e.g., *Allstate Insurance Co. v. Hague*,

« [I]l faut éviter » de tels « exercices concurrents » d'établissement de régimes de réglementation. Ces incertitudes en matière de réglementation nuisent à l'efficience économique.

L'équité envers les défendeurs de l'extérieur de la province est également un facteur important à considérer au sein de la fédération. En l'espèce, si l'intimée a raison, l'appelante serait tenue de se soumettre aux régimes d'assurance de chaque province ou État revendiquant quelque intérêt assuré à l'égard des répercussions économiques de l'accident en Colombie-Britannique, par suite d'obligations financières que les législateurs de ces ressorts auraient jugé bon, pour une raison ou une autre, d'imposer à leurs propres sociétés d'assurance.

L'adoption des principes d'ordre et d'équité, comme mécanisme servant à régir les problèmes d'extraterritorialité, différencie dans une certaine mesure le Canada de l'Australie (où l'art. 2 de la Constitution de ce pays confère expressément aux États une compétence extraterritoriale qui peut, dans certaines circonstances, s'étendre à la région extracôtière : *Union Steamship Co. of Australia Proprietary Ltd. c. King* (1988), 166 C.L.R. 1 (H.C. Aust.), p. 12) et des États-Unis, où la jurisprudence est influencée par la clause d'application régulière de la loi du Quatorzième amendement et la clause de reconnaissance totale prévue à l'article IV de la Constitution.

Dans l'arrêt *Broken Hill*, par exemple, le juge Dixon a ajouté ceci : [TRADUCTION] « S'il existe un lien, il appartient à l'assemblée législative de décider jusqu'où elle entend aller dans l'exercice de ses pouvoirs » (p. 375). Depuis les arrêts *Morguard*, *Hunt* et *Tolofson*, on peut affirmer que, dans notre structure fédérale, il ne faut pas considérer uniquement le point de vue du ressort ayant légiféré, mais aussi les intérêts collectifs de l'ensemble de la fédération en matière d'ordre et d'équité. La même réserve doit également assortir la doctrine américaine des [TRADUCTION] « liens minimaux », à laquelle a souscrit la Cour suprême des États-Unis dans l'arrêt *International Shoe Co. c. State of Washington*, 326 U.S. 310 (1945). Dans ce pays également, on applique largement les lois

449 U.S. 302 (1981)) to the point where Professor Laurence Tribe has commented:

> There is much to be said for the view that the current state of the Supreme Court's personal jurisdiction and choice-of-law doctrines is precisely backwards. It is easy for a state to apply its law (which is by definition outcome-determinative) to a case, but relatively difficult for it to obtain jurisdiction over a dispute, even though jurisdiction is never directly outcome-determinative. Jurisdictional issues are unpredictable and endlessly litigated; choice-of-law matters are largely unregulated.

(L. H. Tribe, *American Constitutional Law* (3rd ed. 2000), vol. 1, at p. 1292)

Cases dealing with extraterritorial application from the courts of Australia and the United States should therefore be read with an eye to the differences in our constitutional arrangements.

Returning to the Canadian jurisprudence, a striking illustration of the applicable principles of extraterritoriality is found in *Thomas Equipment*, *supra*. In that case, a New Brunswick manufacturer of farm machinery (Thomas Equipment), which had contracted with an Alberta dealer to sell and promote its machinery in Alberta, was held to have committed an offence under the Alberta *Farm Implement Act*, R.S.A. 1970, c. 136. That statute, which regulated aspects of the farm equipment business in Alberta, provided that, on termination of a dealership, the supplier was required to repurchase unsold equipment and parts. There was no such obligation written into the dealership contract, which was expressly stated to be governed by the law of New Brunswick. The manufactured goods were not defective. Thomas Equipment refused to make the repurchase and was prosecuted in Alberta under *The Farm Implement Act* for this refusal. A majority of this Court, *per* Martland J.,

des États à des différends qui présentent des liens limités avec le ressort ayant légiféré (voir, par exemple, *Allstate Insurance Co. c. Hague*, 449 U.S. 302 (1981)), et ce à un point tel que la situation a amené le professeur Laurence Tribe à faire les commentaires suivants:

> [TRADUCTION] Ne manque pas de pertinence l'opinion selon laquelle les positions de la Cour Suprême sur la compétence à l'égard de la personne et sur le conflit de lois sont précisément à l'effet contraire. Il est facile pour un État d'appliquer ses lois (qui, par définition, ont pour effet de décider du résultat) à une affaire, mais il lui est relativement difficile d'obtenir compétence sur un différend, même si le fait d'avoir compétence ne décide jamais directement de l'issue de l'affaire. Les questions de compétence font l'objet de débats interminables et leur issue est imprévisible; les questions de conflit de lois ne sont, dans une large mesure, pas encadrées.

(L. H. Tribe, *American Constitutional Law* (3e éd. 2000), vol. 1, p. 1292)

75 La jurisprudence américaine et australienne sur l'application extraterritoriale des lois doit par conséquent être examinée en tenant compte des différences qui caractérisent nos arrangements constitutionnels et ceux de ces pays.

76 Si l'on revient à la jurisprudence canadienne, l'arrêt *Thomas Equipment*, précité, constitue un exemple frappant des principes d'extraterritorialité applicables. Dans cette affaire, on a statué qu'un fabricant néo-brunswickois de matériel agricole (Thomas Equipment), qui avait conclu avec un commerçant albertain un contrat de vente et promotion de son matériel en Alberta, avait commis une infraction à la loi de l'Alberta intitulée *The Farm Implement Act*, R.S.A. 1970, ch. 136. Cette loi, qui régissait les divers aspects du secteur du matériel agricole en Alberta, précisait qu'en cas de résiliation d'un tel contrat le fournisseur devait racheter le matériel et les pièces non vendus. Le contrat de concession ne comportait aucune obligation du genre et stipulait expressément qu'il était régi par les lois du Nouveau-Brunswick. Les produits manufacturés n'étaient pas défectueux. La société Thomas Equipment a refusé de racheter le matériel et a été poursuivie sur ce fondement en Alberta en vertu

approved, at p. 544, a *dictum* from one of the Alberta judges:

> If a manufacturer wants to have his farm implements sold here he must comply with the rules of the game, as it were, established by the legislature of Alberta. One of these rules clearly covers the manufacturer's responsibility when his agreement with a dealer is terminated.

77 Martland J. considered it important that Thomas Equipment had done more than make a "simple contract for the sale of goods" (p. 542) for resale in Alberta. It had hired a local dealer to promote its products and goodwill within the province. Its "relationship" with Alberta was more than just that of an out-of-province vendor. In that sense, Thomas Equipment had itself (in addition to its machinery) entered the Alberta marketplace.

78 Even so, Martland J. was careful to point out, at p. 545, that no constitutional question had been raised by the accused, Thomas Equipment. The majority decision was therefore based solely and expressly on "the proper construction of the [Alberta] statute in respect of the facts of the case".

79 Laskin C.J., dissenting, squarely addressed the constitutional issue. He stated that the prosecution was "to me an attempt to give Alberta law an extra-provincial application" (p. 533). He referred in particular to *Gray*, *supra*, where Ontario law was held incompetent to direct a New York insurer to pay the benefits of an annuity, after the annuitant's death, to his lawful widow (pursuant to Ontario law) instead of to his former common law wife (as required by New York law). As Laskin C.J. explained, "Ontario could not change the terms of the [New York annuity] contract because it would be purporting to deal with civil rights outside the province" (p. 535). Similarly, in *Thomas Equipment* itself, the relationship between the New Brunswick manufacturer and the province of Alberta did not, in the view of Laskin C.J., properly expose Thomas Equipment to

de la loi albertaine susmentionnée. S'exprimant au nom de la majorité des juges de notre Cour, le juge Martland a souscrit, à la p. 544, à la remarque incidente suivante, formulée par un des juges albertains :

> [TRADUCTION] Si un fabricant veut vendre son matériel agricole ici, il doit respecter les règles du jeu, telles qu'établies par la législature de l'Alberta. Une de ces règles porte précisément sur la responsabilité d'un fabricant lorsque son contrat avec le commerçant prend fin.

Le juge Martland a considéré important le fait que la société Thomas Equipment avait conclu plus qu'un « simple contrat de vente de marchandises » (p. 542) destinées à être revendues en Alberta. L'entreprise avait engagé un commerçant de l'Alberta pour promouvoir ses produits et créer un achalandage dans cette province. Son « lien » avec l'Alberta n'était pas uniquement à titre de vendeur de l'extérieur de la province. En ce sens, la société Thomas Equipment elle-même (en plus de son matériel) avait accédé au marché albertain.

Malgré cela, le juge Martland a pris soin de souligner, à la p. 545, que l'entreprise accusée, Thomas Equipment, n'avait soulevé aucune question d'ordre constitutionnel. La décision majoritaire était donc uniquement et expressément fondée sur « l'interprétation exacte de la loi [albertaine] par rapport aux faits ».

Dans une opinion dissidente, le juge en chef Laskin a examiné directement la question constitutionnelle, disant ceci, au sujet de la poursuite : « [à] mon avis, [. . .] [elle] revient à donner une portée extra-territoriale à la loi albertaine » (p. 533). Il s'est référé en particulier à l'arrêt *Gray*, précité, dans lequel il a été jugé qu'une loi ontarienne ne pouvait, après le décès du rentier, obliger un assureur de l'État de New York à verser une rente viagère à sa conjointe légitime (en vertu des lois ontariennes) plutôt qu'à son ancienne conjointe de fait (comme l'exigeaient les lois de l'État de New York). Comme l'a expliqué le juge en chef Laskin, « l'Ontario ne pouvait modifier les termes du contrat [de rente conclu à New York] parce qu'elle porterait alors atteinte à des droits civils à l'extérieur de la province » (p. 535). De façon similaire, dans l'arrêt *Thomas Equipment*

Alberta's regulatory regime. Although he did not, of course, apply the *Morguard* analysis as such, Laskin C.J. clearly considered Alberta's assertion of jurisdiction to be disruptive of good order among the provinces, and unfair to the New Brunswick manufacturer having regard to the choix of law provision in its dealer contract.

4. *The Principles of "Order and Fairness", Being Purposive, Are Applied Flexibly.*

The required strength of the relationship varies with the type of jurisdiction being asserted. A relationship that is inadequate to support the application of regulatory legislation may nevertheless provide a sufficient "real and substantial connection" to permit the courts of the forum to take jurisdiction over a dispute. This happens regularly. The courts, having taken jurisdiction, then apply the law of the other province applying rules of conflict resolution governing choice of law issues. Thus, in *Tolofson* itself, there was a sufficient relationship between British Columbia and the parties for the British Columbia courts to hear the case, but it was determined that Saskatchewan law should apply to determine the outcome of the dispute.

It would be unwise in this case to embark on a general discussion of "order and fairness". The question before us is quite specific: Does the respondent have a statutory cause of action against the appellant given the constitutional limitations on the reach of the Ontario *Insurance Act*?

5. *Application of These Principles to the Facts of This Case*

The respondent, Unifund, points to the fact that the payments for which reimbursement is claimed were paid in Ontario by an Ontario insurer to an

lui-même, le juge en chef Laskin était d'avis que le lien entre le fabricant néo-brunswickois et la province d'Alberta n'avait pas pour effet de soumettre adéquatement la société Thomas Equipment au régime de réglementation de l'Alberta. Bien qu'il n'ait évidemment pas appliqué l'analyse de l'arrêt *Morguard* comme telle, le juge en chef Laskin estimait manifestement que la compétence dont se réclamait l'Alberta perturbait l'ordre établi entre les provinces et créait une injustice envers le fabricant néo-brunswickois, compte tenu du choix de la loi applicable stipulé dans le contrat de concession.

4. *Comme ils visent une finalité, les principes d'ordre et d'équité sont appliqués d'une manière souple.*

80 Le lien requis doit présenter un caractère plus ou moins étroit selon la sorte de compétence invoquée. Un lien insuffisant pour soutenir l'application d'une loi de nature réglementaire peut néanmoins constituer un « lien réel et substantiel » permettant aux tribunaux de la province de se déclarer compétents dans un litige donné. Cela se produit régulièrement. S'étant d'abord déclarés compétents, les tribunaux appliquent ensuite le droit de l'autre province en recourant aux principes de règlement des différends régissant les problèmes de conflit de lois. Ainsi, dans l'affaire *Tolofson*, il existait un lien suffisant entre la Colombie-Britannique et les parties pour que les tribunaux de cette province puissent connaître de l'affaire, mais il a été jugé que le droit de la Saskatchewan devait s'appliquer pour déterminer l'issue du litige.

81 Il ne serait pas sage de se lancer dans une analyse générale des notions d'« ordre et d'équité ». La question à laquelle nous devons répondre est très précise : l'intimée dispose-t-elle d'une cause d'action prévue par la loi contre l'appelante, compte tenu des limites d'ordre constitutionnel restreignant la portée de la *Loi sur les assurances* de l'Ontario?

5. *Application de ces principes aux faits de l'espèce*

82 L'intimée, Unifund, insiste sur le fait que les paiements dont on demande le remboursement ont été faits en Ontario, par un assureur ontarien, à un

Ontario resident. This is true, but it leaves out of consideration the relationship between Ontario and the party sought to be made to pay, the out-of-province appellant. Not only is the appellant not authorized to sell insurance in Ontario, it does not in fact do so. Its insured vehicles in this case did not venture into Ontario. The accident did not take place in Ontario, and the appellant did not benefit from the $750,000 deduction by virtue of Ontario law but by the law of British Columbia.

83 The most that can be said for the respondent in this case is that the fact of a motor vehicle accident in British Columbia triggered certain payments in Ontario under Ontario law. However, the fact the Ontario legislature has chosen to attach legal consequences in Ontario to an event (the motor vehicle accident) taking place elsewhere does not extend its legislative reach to a resident of "elsewhere". It can also be said that these payments in Ontario, in turn, triggered a deduction of an equivalent amount under the laws of British Columbia. Again, however, the decision of the British Columbia legislature to attach legal consequences (the deduction) in that province to an event that occurred in Ontario (the SAB payments) does not bring the appellant (beneficiary under the British Columbia legislation) into the orbit of the Ontario legislature for the purpose of taking away the British Columbia benefit in favour of an Ontario insurance company.

84 Here, unlike *Thomas Equipment*, *supra*, the appellant had not hired anyone in Ontario to promote its products. It was not in the Ontario marketplace and, in my view, it was not required to "comply with the rules of the [Ontario] game". The decision of the Ontario legislature to impose no-fault benefits on Unifund could not be bootstrapped into legislative jurisdiction to impose a corresponding debt on the appellant, which (leaving aside the

résident de l'Ontario. Tout cela est exact, mais fait abstraction du lien qui existe entre l'Ontario et la partie visée par la demande de paiement, en l'occurrence l'appelante de l'extérieur de la province. Non seulement cette dernière n'est-elle pas autorisée à vendre de l'assurance en Ontario, mais, dans les faits, elle n'en vend pas. Aucun des véhicules assurés par l'appelante en l'espèce ne s'est rendu en Ontario. L'accident n'a pas eu lieu dans cette province et l'appelante a pu bénéficier de la déduction de 750 000 $ en vertu non pas des lois de l'Ontario mais de celles de la Colombie-Britannique.

Le seul élément qui peut être invoqué en faveur de l'intimée, en l'espèce, est le fait qu'un accident d'automobile survenu en Colombie-Britannique a donné lieu au paiement de certaines sommes en Ontario, sous le régime des lois de cette province. Toutefois, la décision du législateur ontarien d'assortir de conséquences juridiques en Ontario un fait (l'accident d'automobile) survenant ailleurs que dans cette province n'a pas pour effet d'étendre l'application de cette mesure législative aux résidents « de l'extérieur de la province ». Il est également possible d'affirmer que les paiements effectués en Ontario ont, à leur tour, entraîné la déduction d'une somme équivalente en vertu des lois de la Colombie-Britannique. Ici aussi, cependant, la décision du législateur de la Colombie-Britannique d'assortir de conséquences juridiques (la déduction), dans sa province, un événement survenu en Ontario (le versement des IAL) n'a pas pour effet d'assujettir l'appelante (bénéficiaire sous le régime des lois de la Colombie-Britannique) à la compétence du législateur ontarien et de retirer à cette dernière, au profit d'une société d'assurance ontarienne, l'avantage que lui accorde la Colombie-Britannique.

En l'espèce, contrairement à la situation dans l'affaire *Thomas Equipment*, précitée, l'appelante n'a engagé personne en Ontario pour promouvoir ses produits. Elle n'était pas un acteur sur le marché ontarien et, à mon avis, elle n'était pas tenue de « respecter les règles du jeu [ontariennes] ». On ne peut invoquer la décision du législateur de l'Ontario d'imposer à Unifund le paiement d'indemnités sans égard à la faute pour fonder quelque pouvoir

PAU argument) was beyond the territorial jurisdiction of the province.

More recently, in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, the Court upheld a legislative scheme that permitted the British Columbia securities regulator to exchange information with out-of-province securities regulators. The decision was based squarely on the proposition that statutory authorization of voluntary cooperation with foreign securities regulators "does not attempt to extend the reach of provincial legislation outside its borders" (para. 38). That decision is of no help to the respondent.

There are two other matters urged by the respondent that require brief comment.

Firstly, Unifund contends that in deducting a no-fault benefit from the court award to the Brennans, the appellant obtained the benefit of the Ontario legislation. Arguing that the appellant, ICBC, cannot be permitted to accept the benefit while avoiding the burden of the Ontario legislation, the respondent puts its position as follows (at para. 12 of its factum):

> By claiming the deduction under section 25 of the BC *Act* in the litigation with the Brennans, ICBC sought and obtained the benefit of the Ontario legislation. In its argument in this litigation, ICBC is seeking to avoid the burden of the Ontario legislation, and to thereby obtain a massive windfall.

I do not think this analysis is correct. Private insurance is normally a collateral benefit that is not ordinarily deductible by a defendant from the damages it must pay a successful plaintiff: see *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, at pp. 945 and 974; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359. The Brennans had paid for their Unifund policy, including the SABs, and would not ordinarily be deprived

législatif permettant d'imposer une obligation correspondante à l'appelante, qui (indépendamment de l'argument relatif au formulaire P&E) échappait à la compétence territoriale du législateur ontarien.

85 Plus récemment, dans l'arrêt *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21, notre Cour a confirmé la validité d'un régime législatif autorisant les organismes de réglementation du marché des valeurs mobilières de la Colombie-Britannique et d'ailleurs de s'échanger des renseignements. La décision était clairement fondée sur la thèse selon laquelle la coopération volontaire, prévue par la loi, entre organismes étrangers de réglementation du marché des valeurs mobilières « ne tente pas d'étendre la portée de la mesure législative provinciale au-delà des frontières de la province » (par. 38). Cette décision n'est d'aucun secours à l'intimée.

86 L'intimée a soulevé deux autres arguments qui nécessitent de brefs commentaires.

87 Premièrement, Unifund prétend que, en déduisant l'indemnité sans égard à la faute de la somme que le tribunal a accordée aux Brennan, l'appelante s'est trouvée à profiter de cet avantage offert par les lois ontariennes. L'intimée plaide qu'on ne saurait permettre à ICBC de recevoir cet avantage tout en évitant les obligations de la Loi ontarienne. Voici comment l'intimée a exposé cet argument (au par. 12 de son mémoire) :

> [TRADUCTION] En réclamant la déduction prévue à l'article 25 de la *Loi* de la C.-B. dans le cadre du litige qui l'oppose aux Brennan, ICBC a demandé et obtenu l'avantage accordé par la Loi ontarienne. Par l'argument qu'elle expose en l'espèce, ICBC tente d'éviter les obligations de la Loi ontarienne et en même temps d'obtenir une rentrée d'argent exceptionnelle.

88 Je ne crois pas que cette analyse soit juste. L'assurance privée est normalement une prestation parallèle que le défendeur ne peut généralement pas déduire des dommages-intérêts qu'il est condamné à payer au demandeur : voir les arrêts *Ratych c. Bloomer*, [1990] 1 R.C.S. 940, p. 945 et 974, et *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359. Les Brennan ont payé les sommes prévues à l'égard de

of the benefit for which they contracted. The deductibility benefit to the appellant was not conferred by the Ontario Act but by s. 25 of the British Columbia *Insurance (Motor Vehicle) Act*.

89 Secondly, Unifund points out that on other occasions, the appellant has itself applied (successfully) for an order that it is entitled under s. 268(2) of the Ontario Act to claim indemnity from an Ontario insurer under s. 275: *Insurance Corp. of British Columbia v. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705 (C.A.). That, however, was a case of a motor vehicle accident in Ontario where Ontario law applied.

90 It is true that the appellant has participated in litigation in Ontario from time to time, and on some occasions has "benefited" from the Ontario Act. However, the appellant's sporadic entries into Ontario were the result of motor vehicle accidents in Ontario involving motor vehicle policies issued in British Columbia, and were case-specific. Nothing in the appellant's activities in those cases gave rise to the obligation sought to be imposed in this case.

91 I therefore conclude that under ordinary constitutional principles, the Ontario Act is inapplicable to the out-of-province appellant in this case. I turn, then, to the second string of the respondent's bow, the appellant's alleged "attornment" to Ontario law under the terms of the PAU.

(b) Under the Power of Attorney and Undertaking

92 The PAU system is an interprovincial (and interstate) web of interlocking arrangements for substitutional service and undertakings designed to ensure that travelling motorists are financially responsible for their actions in other provinces and participating

la police émise par Unifund, y compris à l'égard des IAL, et ne seraient normalement pas privés du bénéfice que leur assurait le contrat. Ce n'est pas la Loi ontarienne qui a conféré le bénéfice de déductibilité à l'appelante, mais l'art. 25 de la loi de la Colombie-Britannique intitulée *Insurance (Motor Vehicle) Act*.

Deuxièmement, Unifund souligne que, à d'autres occasions, l'appelante a elle-même demandé (et obtenu) une ordonnance reconnaissant que le par. 268(2) de la Loi ontarienne lui donne le droit de réclamer une indemnité d'un assureur de l'Ontario en vertu de l'art. 275 : *Insurance Corp. of British Columbia c. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705 (C.A.). Il s'agissait toutefois, dans cette affaire, d'un accident d'automobile survenu en Ontario et auquel les lois ontariennes s'appliquaient.

Il est vrai que l'appelante a été partie à des litiges en Ontario et qu'elle a, à l'occasion, « profité » de la Loi ontarienne. Cependant, ces incursions sporadiques de l'appelante en Ontario découlaient d'accidents d'automobile survenus dans cette province et couverts par des polices d'assurance automobile émises en Colombie-Britannique, et chaque cas constituait un cas d'espèce. Rien dans les activités de l'appelante dans ces affaires n'a fait naître l'obligation qu'on cherche à lui imposer dans le présent pourvoi.

Par conséquent, j'arrive à la conclusion que, suivant les principes ordinaires du droit constitutionnel, la Loi ontarienne est inapplicable en l'espèce à l'appelante de l'extérieur de la province. Je vais maintenant examiner le deuxième volet de l'argumentation de l'intimée, le prétendu « acquiescement » de l'appelante aux lois ontariennes par l'effet des modalités mêmes du formulaire P&E.

b) Le moyen fondé sur le formulaire P&E

Le formulaire P&E est un mécanisme constitué d'un ensemble d'arrangements entre provinces (et États) comportant des mesures de signification indirecte et des engagements qui permettent de faire en sorte que les automobilistes assument

states, by confirming that their insurers will respond to claims in respect of an accident which occurs outside of the insured's home jurisdiction. It tracks the ordinary law. An out-of-province motorist can be required to defend an action in the jurisdiction where the accident occurred, and an insurer is contractually bound to the defendant to provide a defence in that place, whether there is a PAU in place or not.

la responsabilité financière de leurs actes dans les autres provinces et États participants, en confirmant que les assureurs donneront suite aux réclamations présentées à l'égard des accidents survenus à l'extérieur du ressort d'origine des assurés. Ces mesures correspondent aux règles de droit ordinaires en la matière. Un automobiliste d'une autre province peut avoir à se défendre contre une action intentée dans la province où l'accident a eu lieu, et son assureur est contractuellement tenu de représenter le défendeur à cet endroit, peu importe si le formulaire P&E s'applique ou non.

Under the terms of the PAU, which the appellant executed on September 22, 1988, the appellant agreed to appoint the Superintendent of Insurance in other provinces to accept service on its behalf "with respect to an action or proceeding against it or its insured . . . arising out of a motor-vehicle accident in any of the respective Provinces or Territories" (emphasis added).

93 Aux termes du formulaire P&E qu'elle a signé le 22 septembre 1988, l'appelante a convenu de charger le surintendant des assurances des autres provinces de recevoir en son nom signification des [TRADUCTION] « actions ou autres procédures intentées contre elle ou contre son assuré [. . .] par suite d'un accident d'automobile survenu dans quelque province ou territoire concerné » (je souligne).

The PAU in this case does not extend to all provinces and territories. I interpret the phrase "respective Provinces or Territories" to be those thereafter listed, namely provinces and territories other than British Columbia, whose name was crossed out on the standard form.

94 En l'espèce, le formulaire P&E ne s'applique pas à l'ensemble des provinces et territoires. À mon avis, l'expression [TRADUCTION] « province ou territoire concerné » s'entend des ressorts y énumérés, à savoir les provinces et territoires autres que la Colombie-Britannique, province dont le nom a été biffé sur le formulaire type.

The appointment is followed by three undertakings:

95 La désignation est suivie des trois engagements suivants pris par les signataires :

firstly, the signatory undertakes "[t]o appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge";

premièrement, [TRADUCTION] « [. . .] comparaître à toute action ou autre procédure qui est intentée contre elle ou contre son assuré dans quelque province ou territoire et dont elle a connaissance »;

secondly, to "forthwith cause the notice or process to be personally served upon the insured"; and,

deuxièmement, [TRADUCTION] « faire immédiatement signifier à l'assuré cet avis ou acte de procédure »;

thirdly, not to set up any defence "under a motor-vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with, the laws relating to motor vehicle liability insurance contracts or plan of automobile insurance of the Province or Territory of Canada in which such action or proceeding may be instituted".

troisièmement, n'invoquer aucun moyen de défense [TRADUCTION] « fondé sur le contrat d'assurance-responsabilité automobile qu'elle a conclu et qui ne pourrait être invoqué si ce contrat était intervenu dans la province ou le territoire canadien où cette action ou autre procédure est intentée et avait été conclu conformément aux lois y régissant les contrats d'assurance-responsabilité automobile ou le régime d'assurance automobile ».

96 It is my view that the PAU has no application to the facts of this case.

97 Moreover, even if the PAU could be interpreted to require the appellant's appearance to defend the claim in Ontario, I do not think the appellant would be precluded by the PAU in general or its third undertaking in particular from contesting the application of the Ontario *Insurance Act* to impose a civil obligation on an out-of-province insurer in respect of an out-of-province motor vehicle accident. Such a defence does not arise under its "motor vehicle liability insurance contract".

98 In *MacDonald v. Proctor* (1977), 86 D.L.R. (3d) 455 (Ont. C.A.), a Manitoba driver was involved in an accident in Ontario. An Ontario action ensued, in which the Manitoba insurer, pursuant to the terms of a PAU, appeared. Under Manitoba law, the Manitoba insurer was obliged to pay statutory benefits. The Ontario tortfeasor attempted to deduct the SABs from the Ontario award of damages as allowed by the Ontario Act, but the deduction was disallowed. In the Ontario Court of Appeal, Zuber J.A. observed that the issue in dispute there (as here) was "the applicability of the Ontario *Insurance Act*" (p. 456). In his view, notwithstanding the PAU, the deductibility provisions of the Ontario Act did not apply. He noted that, where the insurers wished to incorporate Ontario statutory provisions in the PAU (as in the case of policy limits), they did so expressly (at pp. 457-58):

> I am unable to read the undertaking as an agreement to incorporate into extraprovincial policies all those items that the *Ontario Insurance Act* obliges an Ontario policy to include. . . .
>
> Although we have not been provided with the details of the Manitoba policy, it appears that it must contain

J'estime que le formulaire P&E ne s'applique pas aux faits de l'espèce.

En outre, même s'il était possible de considérer que le formulaire P&E oblige l'appelante à comparaître, en défense, à l'action intentée en Ontario, je ne crois pas que ce document en général, ou son troisième engagement en particulier, empêche l'appelante de contester la prétention selon laquelle la *Loi sur les assurances* de l'Ontario s'applique et a pour effet d'imposer à un assureur d'une autre province une obligation civile à l'égard d'un accident d'automobile survenu dans une autre province. Un tel moyen de défense n'est pas fondé sur le « contrat d'assurance-responsabilité automobile » de l'appelante.

Dans l'affaire *MacDonald c. Proctor* (1977), 86 D.L.R. (3d) 455 (C.A. Ont.), un automobiliste manitobain a eu un accident en Ontario. Par la suite, on a introduit en Ontario une action à laquelle l'assureur manitobain a comparu conformément aux modalités du formulaire P&E. En vertu du droit manitobain, l'assureur du Manitoba avait l'obligation de verser des indemnités prévues par la loi. L'auteur du délit civil en Ontario a tenté de déduire les IAL des dommages-intérêts accordés en Ontario, comme l'y autorise la Loi ontarienne, mais la déduction lui a été refusée. Le juge Zuber de la Cour d'appel de l'Ontario a fait observer que la question en litige dans cette affaire (comme dans celle qui nous occupe) portait sur [TRADUCTION] « l'applicabilité de la *Loi sur les assurances* de l'Ontario » (p. 456). Selon le juge Zuber, malgré l'existence du formulaire P&E, les dispositions de la Loi ontarienne relatives à la déductibilité ne s'appliquaient pas. Il a souligné que, lorsque les assureurs désirent intégrer des dispositions législatives ontariennes dans le formulaire P&E (par exemple les limites de couverture stipulées dans les polices d'assurance), ils le font de manière expresse (aux p. 457-458) :

> [TRADUCTION] Je ne puis considérer l'engagement comme un accord intégrant dans les polices émanant d'autres provinces tous les éléments dont la *Loi sur les assurances de l'Ontario* exige l'inclusion dans les polices d'assurance ontariennes. . .
>
> Bien qu'on ne nous ait pas fourni le détail de la police d'assurance du Manitoba, elle comporte sans doute des

benefits very similar to (or perhaps the same as) those set out in Sch. E. However, the coverage providing those benefits is included in the policy by the Manitoba Public Insurance Corporation in the fulfilment of its own responsibilities; not because those benefits have been impressed into the policy by Ontario legislation.

. . . an undertaking by the Manitoba Public Insurance Corporation to, in effect, observe Ontario rules to a certain extent, where its insured is involved in Ontario proceedings, does not render the Manitoba policy one that is "made in Ontario". [Emphasis added.]

MacDonald looked at the present problem through the opposite end of the telescope, i.e., from the perspective of the court of the forum where the accident occurred and where the litigation took place. However, the principled limitation on extraterritoriality is the same. As Laskin C.J. stated in affirming this judgment from the bench ([1979] 2 S.C.R. 153, at pp. 153-54):

The main point argued by counsel for the appellant concerned the right of his client to have the advantage, as a deduction from his liability for damages, of disability benefits to which the plaintiff was entitled under her Manitoba contract with the Manitoba Public Insurance Corporation, as if s. 237(2) of the Ontario *Insurance Act* applied. Neither the undertaking filed by the Manitoba insurer, taken alone or in association with s. 25 of the Ontario *Insurance Act*, avails the appellant on this point. We do not agree that the disability benefits are deductible from the damages assessed against the appellant.

The Court thus recognized the limited effect of the PAU, and did not accept as correct the theory of interprovincial integration urged in this case by the respondent. The importance of the PAU in this respect is as stated in *Healy v. Interboro Mutual Indemnity Insurance Co.* (1999), 44 O.R. (3d) 404 (C.A.), *per* Goudge J.A., at p. 409:

[The PAU] assures the same statutory guarantees to someone injured in an automobile accident in Ontario whether the relevant automobile insurance contract was made in Ontario or another participating jurisdiction.

The PAU is about enforcement of insurance policies, not about helping insurance companies, which

indemnités sensiblement similaires (voire identiques) à celles prévues à l'annexe E. Toutefois, la garantie accordant ces indemnités figure dans la police parce que la Société d'assurance publique du Manitoba l'y a insérée dans l'exécution de ses propres obligations, et non parce que la Loi ontarienne a incité à l'inclusion de ces indemnités dans la police.

. . . l'engagement de la Société d'assurance publique du Manitoba de respecter dans les faits les règles ontariennes jusqu'à un certain point, dans les cas où son assuré est partie à des procédures en Ontario, ne fait pas de la police d'assurance manitobaine une police « faite en Ontario ». [Je souligne.]

Dans l'arrêt *MacDonald*, le problème qui nous occupe a été examiné à partir de l'autre bout de la lorgnette, soit du point de vue du tribunal du ressort où l'accident a eu lieu et où le litige s'est déroulé. Toutefois, la restriction raisonnée à l'extraterritorialité est la même. Comme a dit le juge en chef Laskin en confirmant ce jugement séance tenante ([1979] 2 R.C.S. 153, p. 153-54) :

La plaidoirie de l'avocat de l'appelant a surtout porté sur le droit de son client de pouvoir faire déduire des dommages-intérêts dont il est tenu, les prestations d'invalidité auxquelles la demanderesse avait droit aux termes de son contrat manitobain conclu avec The Manitoba Public Insurance Corporation, comme si le par. 237(2) de *The Ontario Insurance Act* s'appliquait. L'engagement déposé par l'assureur manitobain, seul ou associé à l'art. 25 de *The Ontario Insurance Act*, n'est d'aucun secours à l'appelant sur ce point. Nous ne sommes pas d'avis que les prestations d'invalidité sont déductibles des dommages-intérêts dus par l'appelant.

99 Notre Cour a donc reconnu l'effet limité du formulaire P&E, et elle a rejeté la thèse de l'intégration interprovinciale qu'invoque en l'espèce l'intimée. L'importance du formulaire P&E à cet égard a été exposée par le juge Goudge de la Cour d'appel de l'Ontario, à la p. 409 de l'arrêt *Healy c. Interboro Mutual Indemnity Insurance Co.* (1999), 44 O.R. (3d) 404 :

[TRADUCTION] [Le formulaire P&E] accorde les mêmes garanties légales à toute personne blessée dans un accident d'automobile survenu en Ontario, peu importe si le contrat d'assurance automobile en cause a été conclu en Ontario ou dans un autre ressort participant.

100 Le formulaire P&E vise à faciliter l'application des polices d'assurance, et non à aider les

have been paid a premium for the no-fault coverage, to seek to recover in their home jurisdictions their losses from other insurance companies located in a different jurisdiction when the accident took place in that other jurisdiction, and where the claims arising out of the accident were litigated there. The appellant referred us to the observation of Professor Black:

> The reciprocal system, of which the PAU is a key part, thus has what might loosely be described as a pro-compensation, consumer-protection function.

(V. Black, "Interprovincial Inter-Insurer Interactions: *Unifund v. ICBC*" (2002), 36 *Can. Bus. L.J.* 436, at p. 444)

101 I agree. I am reinforced in that conclusion by several considerations:

Firstly, as stated, the opening language of the PAU, which sets the framework for the rest of the document, talks about a proceeding "arising out of a motor-vehicle accident in any of the respective Provinces" which, in this PAU, excluded British Columbia where this accident took place.

Secondly, s. 275 of the Ontario Act is an indemnity provision that does not arise out of the motor vehicle policy itself. SABs, as their name suggests, are "statutory accident benefits" required by the Ontario legislation. If the respondent is correct, Ontario could attach whatever benefits it liked to an out-of-province accident and require the appellant to come to Ontario to reimburse the Ontario insurer irrespective of whether or not British Columbia law permitted any deduction in that respect from the judgment award. As the Court pointed out in *Hunt*, *supra*, at p. 327, "[a] province undoubtedly has an interest in protecting the property of its residents within the province, but it cannot do so by unconstitutional means."

compagnies d'assurance — qui ont par ailleurs touché des primes pour la garantie d'assurance sans égard à la faute — à se faire indemniser de leurs pertes, dans leur ressort d'origine, par d'autres assureurs situés dans la province où l'accident a eu lieu et où les réclamations découlant de l'accident ont été débattues devant les tribunaux. L'appelante nous a cité cette observation du professeur Black :

> [TRADUCTION] Le régime de réciprocité, dont le formulaire P&E est un élément fondamental, joue un rôle que l'on pourrait décrire assez librement comme tendant à l'indemnisation et à la protection du consommateur.

(V. Black, « Interprovincial Inter-Insurer Interactions : *Unifund v. ICBC* » (2002), 36 *Rev. can. dr. comm.* 436, p. 444)

Je suis d'accord avec cette observation. Plusieurs considérations viennent étayer cette conclusion :

Premièrement, comme il a été indiqué précédemment, la disposition liminaire du formulaire P&E, qui fixe le cadre applicable à l'ensemble du document, fait état des procédures intentées [TRADUCTION] « par suite d'un accident d'automobile survenu dans leur province [. . .] respecti[ve] », ce qui excluait, dans ce formulaire, la Colombie-Britannique, province où l'accident s'est produit.

Deuxièmement, l'art. 275 de la Loi ontarienne est une disposition en matière d'indemnisation qui ne prend pas sa source dans la police d'assurance automobile elle-même. Comme leur nom l'indique, les IAL ou « indemnités d'accident légales » sont des indemnités prévues par la Loi ontarienne. Si l'intimée a raison, l'Ontario pouvait, à son gré, accorder n'importe quelle sorte d'indemnité à l'égard d'un accident survenu dans une autre province et obliger l'appelante à venir en Ontario rembourser l'assureur ontarien, peu importe si les lois de la Colombie-Britannique permettaient de déduire quelque partie que ce soit de cette indemnité de la somme accordée par le jugement. Comme l'a souligné notre Cour à la p. 327 de l'arrêt *Hunt*, précité, « [u]ne province a sans doute intérêt à protéger les biens de ses résidents sur son territoire, mais elle ne peut pas le faire par des moyens inconstitutionnels. »

Thirdly, the fact the PAU is aimed at litigation arising directly out of the motor vehicle accident itself is confirmed by the nature of the three undertakings:

> (1) The first undertaking (to appear) is triggered by proper substituted service on the Superintendent. If the accident had occurred in Ontario, the travelling tortfeasors from British Columbia could (quite apart from the PAU) have been served under the rules *ex juris* and the appellant would have been contractually bound to provide a defence. In that sense, the PAU merely facilitates the inevitable.
>
> (2) The second undertaking requires the insurer to effect personal service on the insured. The insured is not, of course, named as a party to the proposed arbitration. This is because this proceeding does not affect the Brennans. As stated, it is an attempt by Unifund to access an Ontario statutory scheme to reimburse itself for the payments it had paid pursuant to its Ontario policy, and in respect of which it had received a premium. The irrelevance of this undertaking to Unifund's action reinforces the conclusion that this dispute is not one contemplated by the PAU.
>
> (3) The third undertaking is not to raise a defence "under a motor-vehicle liability insurance contract entered into by it". The reference to "insurance contract" must necessarily be to the British Columbia policies issued to the truck, trucker and repair shop. This makes perfect sense in seeking to harmonize an out-of-province motor vehicle policy with the laws of the jurisdiction where the accident took place. The Ontario Court of Appeal has itself held that the defences which an insurance company may raise "are dictated by the laws

Troisièmement, la nature des trois engagements confirme le fait que le formulaire P&E vise les poursuites découlant directement des accidents d'automobile :

> (1) Le premier engagement (celui de comparaître) prend effet avec la signification indirecte régulièrement effectuée au surintendant des assurances concerné. Si l'accident s'était produit en Ontario et que les auteurs du délit civil avaient été des visiteurs de la Colombie-Britannique, ils auraient pu recevoir signification (indépendamment du formulaire P&E) en vertu des règles relatives à la signification *ex juris* et l'appelante aurait été tenue par contrat de les défendre. En ce sens, le formulaire P&E ne fait que faciliter ce qui aurait été inévitable.
>
> (2) Le deuxième engagement oblige l'assureur à faire signifier à personne à l'assuré les documents pertinents. En l'espèce, les assurés ne sont évidemment pas désignés comme partie à l'arbitrage proposé, tout simplement parce que les Brennan ne sont pas touchés par cette procédure. Comme je l'ai indiqué plus tôt, Unifund tente en l'espèce de tirer profit du régime établi par la Loi ontarienne et de se faire rembourser ainsi les sommes qu'elle a versées en vertu de la police d'assurance qu'elle a émise en Ontario, et à l'égard desquelles elle a reçu une prime. La non-pertinence de cet engagement en ce qui concerne l'instance introduite par Unifund renforce la conclusion que le présent litige n'est pas visé par le formulaire P&E.
>
> (3) Le troisième engagement consiste à s'abstenir d'invoquer un moyen de défense [TRADUCTION] « fondé sur le contrat d'assurance-responsabilité automobile qu'elle a conclu ». Les mots « contrat d'assurance » s'entendent nécessairement des polices d'assurance émises en Colombie-Britannique à l'égard du camion, du camionneur et de l'atelier de réparation. Cette interprétation est parfaitement logique lorsqu'on tente d'harmoniser une police d'assurance automobile émanant d'une

of the province in which the motor vehicle accident occurred" (emphasis added): *Potts*, *supra*, at p. 562, citing *Corbett v. Co-operative Fire & Casualty Co.* (1984), 14 D.L.R. (4th) 531 (Alta. Q.B.), at p. 535. In the cases relied upon by the respondent, Unifund, the motor vehicle accident had occurred within the territorial jurisdiction of the court which "harmonized" the out-of-province policy with the local rules pursuant to the term of the PAU: see *Royal Insurance*, *supra*, and *Healy*, *supra*, leave to appeal to this Court denied, [2000] 1 S.C.R. xiii. All of this, however, has little relevance to an action between insurance companies commenced in a province where the accident did not occur.

autre province avec les lois de la province où s'est produit l'accident. La Cour d'appel de l'Ontario elle-même a jugé que les moyens de défense qu'une société d'assurance pouvait soulever [TRADUCTION] « sont dictés par les lois de la province où l'accident a eu lieu » (je souligne) : *Potts*, précité, p. 562, citant *Corbett c. Co-operative Fire & Casualty Co.* (1984), 14 D.L.R. (4th) 531 (B.R. Alb.), p. 535. Dans les décisions invoquées par l'intimée, Unifund, l'accident d'automobile s'était produit dans le ressort du tribunal qui avait « harmonisé » la police d'assurance émise dans une autre province avec les règles locales conformément aux modalités du formulaire P&E : voir *Royal Insurance*, précité, et *Healy*, précité, autorisation de pourvoi refusée, [2000] 1 R.C.S. xiii. Tous ces éléments sont toutefois peu pertinents dans une instance entre sociétés d'assurance introduite dans une province où l'accident n'est pas survenu.

(4) The third undertaking goes on to require the signatory to satisfy any final judgment rendered against it "in the claim, action or proceeding, in respect of any kind or class of coverage provided under the contract or plan and in respect of any kind or class of coverage required by law to be provided under a plan or contracts of automobile insurance entered into in such Province" up to certain limits. In other words, actions contemplated by the PAU involve the dollar amounts and "kind or classes of coverage" contained in the original motor vehicle policy itself. This has nothing to do with the interinsurer indemnification procedure under s. 275 of the *Insurance Act* of Ontario.

(4) Le troisième engagement oblige en outre le signataire a exécuter, jusqu'à concurrence des limites prévues, tout jugement définitif prononcé contre lui [TRADUCTION] « à l'égard de la demande, de l'action ou de la procédure, relativement à toute garantie prévue par le contrat ou régime applicable ou qui doit, selon la loi, être prévue par le régime ou les contrats d'assurance automobile dans cette province ». Autrement dit, les actions visées par le formulaire P&E portent sur les sommes et les « garanties » prévues par la police d'assurance automobile source. Tout cela n'a cependant rien à voir avec la procédure d'indemnisation réciproque prévue par l'art. 275 de la *Loi sur les assurances* de l'Ontario.

Fourthly, the appellant, on December 16, 1997, filed a further undertaking with the Ontario Insurance Commission (called the "Protected Defendant Undertaking") which provides in part:

Quatrièmement, le 16 décembre 1997, l'appelante a déposé, auprès de la Commission des assurances de l'Ontario, un engagement supplémentaire (intitulé [TRADUCTION] « Engagement à l'égard des défendeurs exclus »), lequel comporte notamment les stipulations suivantes :

THE INSURER UNDERTAKES AND AGREES that motor vehicle liability policies issued by the Insurer will include at least the Ontario Coverages, as set out above,

[TRADUCTION] L'ASSUREUR S'ENGAGE à insérer, dans les polices d'assurance-responsabilité automobile qu'il émet, à tout le moins les garanties prévues en

when automobiles insured by the Insurer are operated in Ontario. . . .

. . .

THE INSURER ALSO AGREES to appear and to be bound by the laws of Ontario in defending any claim under its motor vehicle liability policy. [Emphasis added.]

Ontario, qui sont énoncées précédemment, lorsque les automobiles qu'il assure sont utilisées en Ontario. . .

. . .

L'ASSUREUR ACCEPTE ÉGALEMENT d'être assujetti aux lois de l'Ontario et de comparaître en défense à l'égard de toute réclamation fondée sur les polices d'assurance-responsabilité automobile qu'il émet. [Je souligne.]

While the Protected Defendant Undertaking operates in addition to the PAU, which remains in full force and effect, its terms seem to me to reinforce the nature of the arrangements between the appellant and Ontario, which have to do with defending claims under the appellant's insurance policies, not defending a claim under the Ontario Act to reallocate the cost of payments required by the Ontario Act amongst insurance companies subject to the Ontario Act.

Bien que l'engagement à l'égard des défendeurs exclus s'applique en sus du formulaire P&E, qui demeure toujours en vigueur, j'estime que ses modalités confirment la nature des engagements intervenus entre l'appelante et l'Ontario, c'est-à-dire la présentation de défenses en cas de réclamations fondées sur les polices d'assurance émises par l'appelante, et non la présentation de défenses en cas de réclamations fondées sur la Loi ontarienne et sollicitant la répartition du coût des paiements que requiert cette loi entre les compagnies d'assurance assujetties à celle-ci.

As stated earlier, the fact that the appellant, ICBC, has on occasion attorned to Ontario in defending British Columbia motorists involved in accidents in that province does not constitute a general attornment to Ontario in respect of all accidents wherever they take place and any consequent proceedings.

102 Comme je l'ai indiqué plus tôt, le fait que l'appelante, ICBC, ait à l'occasion acquiescé à la compétence des tribunaux de l'Ontario en présentant une défense au nom d'automobilistes de la Colombie-Britannique ayant eu des accidents en Ontario, ne constitue pas un acquiescement général à la compétence des tribunaux ontariens relativement à tout accident — peu importe le lieu où il se produit — et aux procédures qui en découlent.

The courts should strive to give full effect to voluntary, interprovincial arrangements that seek to overcome some of the practical difficulties inherent in our federal structure. The danger, however, is that if the courts overstate the effect of these voluntary arrangements, and thereby impose on the parties obligations that were never in their contemplation, cooperation may no longer be forthcoming. In my view, the respondent's argument attempts to push the PAU beyond its intended scope. Acceptance of its argument would undermine rather than enhance voluntary interprovincial cooperation in the field of motor vehicle insurance. If the insurers wish to expand their voluntary

103 Les tribunaux devraient s'efforcer de donner plein effet aux arrangements interprovinciaux volontaires conclus en vue de surmonter certaines des difficultés d'ordre pratique inhérentes à notre structure fédérale. Cela n'est toutefois pas sans risque, car si les tribunaux exagèrent les effets de ces arrangements volontaires et imposent en conséquence aux parties des obligations qu'elles n'avaient jamais envisagées, celles-ci pourraient ne plus être disposées à coopérer. À mon avis, l'intimée cherche par son argument à donner au formulaire P&E une portée plus large que celle qu'il est censé avoir. Retenir cet argument aurait pour effet non pas de renforcer, mais plutôt d'affaiblir la

cooperation, the PAU can be amended to achieve this purpose.

104 If, as I concluded earlier, the appellant is not otherwise within the legislative jurisdiction of Ontario, the PAU does not put it there by agreement.

105 In any event, as noted earlier, even if the PAU were interpreted (wrongly, in my view) to require the appellant to litigate Unifund's claim in Ontario, there is nothing in the PAU that would prevent the appellant from contesting the purported extraterritorial assertion of s. 275 of the Ontario *Insurance Act*. For the reasons already discussed, such an objection would succeed. However one looks at this case, the respondent's claim should be dismissed.

(iii) *Should the Judge Have Dealt with the Issue of Forum Non Conveniens, or, Having Found the Ontario Act Constitutionally Applicable, Should the Issue of Forum Non Conveniens Have Been Referred to the Arbitrator ("the Forum Non Conveniens Issue")?*

106 Having concluded, in response to the constitutional question, that the Ontario regulatory scheme does not apply to the out-of-province appellant on the facts of this case, the issue of *forum non conveniens* is moot. There is no statutory cause of action available to the respondent to sue upon in Ontario *or* in British Columbia. Unifund's application rests on a faulty constitutional basis and must be dismissed.

X. Conclusion

107 I would allow the appeal with costs throughout and dismiss the respondent's application.

108 The constitutional question should be answered as follows:

coopération interprovinciale volontaire dans le domaine de l'assurance automobile. Si les assureurs souhaitent accroître cette coopération volontaire, le formulaire P&E peut être modifié pour réaliser cet objectif.

Si, conformément à la conclusion à laquelle je suis arrivé plus tôt, l'appelante ne relève pas de quelque autre façon de la compétence législative de l'Ontario, le formulaire P&E n'a pas pour effet de l'y assujettir par consentement.

Quoi qu'il en soit, comme je l'ai souligné précédemment, même si on considérait (à tort selon moi) que le formulaire P&E oblige l'appelante à contester la demande présentée par Unifund en Ontario, rien dans le formulaire P&E n'empêche l'appelante de contester la portée extraterritoriale qu'aurait, prétend-on, l'art. 275 de la *Loi sur les assurances* de l'Ontario. Pour les motifs exposés plus tôt, un tel moyen de contestation serait accueilli. Peu importe l'angle sous lequel on considère la présente affaire, la demande de l'intimée doit être rejetée.

(iii) *Le juge aurait-il dû examiner la question du forum non conveniens, ou, ayant conclu que la Loi ontarienne était constitutionnellement applicable, aurait-il dû renvoyer cette question à l'arbitre (« la question du forum non conveniens »)?*

Puisque j'ai conclu, en réponse à la question constitutionnelle, que le régime ontarien ne s'applique pas à l'appelante de l'extérieur de la province eu égard aux faits de l'espèce, la question du *forum non conveniens* est devenue théorique. L'intimée ne dispose d'aucune cause d'action prévue par la loi la fondant à intenter des poursuites en Ontario *ou* en Colombie-Britannique. La demande de Unifund est constitutionnellement défectueuse et doit être rejetée.

X. Conclusion

Je suis d'avis d'accueillir le pourvoi, avec dépens dans toutes les cours, et de rejeter la demande de l'intimée.

La question constitutionnelle devrait recevoir la réponse suivante :

Q. Is s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, constitutionally inapplicable to the appellant because its application in the circumstances of this case would not accord with territorial limits on provincial jurisdiction?

A. Yes.

The reasons of Major, Bastarache and Deschamps JJ. were delivered by

Bastarache J. (dissenting) —

I. Introduction

This appeal involves two insurers which are parties to a reciprocal scheme for the enforcement of motor vehicle claims. They disagree on the effect of that scheme and on the extraterritorial application of the Ontario *Insurance Act*, R.S.O. 1990, c. I.8, notably s. 275, which provides for the indemnification of a no-fault insurer, here Unifund Assurance Company ("Unifund"), by a tortfeasors' insurer, here the Insurance Corporation of British Columbia ("ICBC"), for benefits paid over $2,000. Also at issue in this appeal is the jurisdiction of an arbitrator to be appointed pursuant to s. 275(4) of the Ontario *Insurance Act* to decide the issues of jurisdiction *simpliciter*, *forum conveniens* and choice of law.

For the reasons that follow, I am of the view that a superior court judge must decide the issues of jurisdiction *simpliciter* and *forum conveniens*. I am also of the view that, on the facts of this case, ICBC has accepted the jurisdiction of Ontario in this matter by signing a "Power of Attorney and Undertaking" ("PAU"). That instrument, interpreted in light of the principles of private international law set out in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, recently affirmed in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78, constitutes a sound

Q. L'article 275 de la *Loi sur les assurances*, L.R.O. 1990, ch. I.8 et ses modifications, est-il constitutionnellement inapplicable à l'appelante pour le motif que, dans les circonstances de la présente affaire, son application ne serait pas conforme aux limites territoriales de la compétence provinciale?

R. Oui.

Version française des motifs des juges Major, Bastarache et Deschamps rendus par

Le juge Bastarache (dissident) —

I. Introduction

109 Le présent pourvoi concerne deux assureurs qui sont parties à un régime de réciprocité visant l'exécution des demandes d'indemnités présentées par les victimes d'accidents d'automobile. Les parties ne s'entendent ni sur les effets du régime ni sur l'application extraterritoriale de la *Loi sur les assurances* de l'Ontario, L.R.O. 1990, ch. I.8, plus particulièrement l'art. 275 de cette loi, qui précise que l'assureur d'un assuré non responsable de l'accident, en l'occurrence Unifund Assurance Company (« Unifund »), a droit d'être indemnisé par l'assureur de l'auteur du délit civil, en l'occurrence Insurance Corporation of British Columbia (« ICBC »), lorsque les indemnités à verser dépassent 2 000 $. Est également en litige le pouvoir de l'arbitre visé au par. 275(4) de la *Loi sur les assurances* de l'Ontario de trancher les questions de la simple reconnaissance de compétence, du *forum conveniens* et du choix du droit applicable.

110 Pour les motifs qui suivent, j'estime qu'il appartient aux juges des cours supérieures de trancher les questions de la simple reconnaissance de compétence et du *forum conveniens*. Eu égard aux faits en l'espèce, je suis également d'avis que, en signant le document intitulé [TRADUCTION] « Procuration et engagements » (le « formulaire P&E »), ICBC a accepté que les lois ontariennes régissant la question s'appliquent à la présente affaire. Ce document, interprété à la lumière des principes de droit international privé qui ont été énoncés dans l'arrêt *Morguard Investments Ltd. c. De Savoye*, [1990] 3

foundation for the application of the Ontario *Insurance Act* to the parties in this case. By virtue of the fact of attornment through the PAU, amongst other factors, I conclude that the subject matter which the *Insurance Act* covers is sufficiently connected to Ontario so as to render the Act applicable to ICBC.

II. Factual Background

111 Mr. and Mrs. Brennan, Ontario residents, were injured while visiting British Columbia in 1995. They were struck by a tractor-trailer while travelling in a car rented in British Columbia and Mrs. Brennan was rendered quadriplegic. Following the accident, the Brennans returned to Ontario. All of the vehicles involved in the accident were registered in British Columbia and insured by the appellant, ICBC, which provides mandatory insurance in that province. Both Mr. and Mrs. Brennan received substantial statutory accident benefits (SABs) from their insurer, the respondent, Unifund.

112 The Brennans were awarded substantial damages as a result of an action brought in British Columbia against the owner and driver of the tractor-trailer, and against the garage that had repaired the said tractor-trailer. The trial judge only dealt with the quantum of damages as all three defendants, insured by the appellant, admitted joint liability: *Brennan v. Singh*, [1999] B.C.J. No. 520 (QL) (S.C.). The three defendant tortfeasors, in accordance with s. 25 of the British Columbia *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, sought to deduct from the damages the amount of money that the Brennans had received from the respondent in the form of SABs. The British Columbia Court of Appeal confirmed that the ICBC policy which insured the garage was automobile insurance within the meaning of the British Columbia *Insurance (Motor Vehicle) Act* and that the tortfeasors were entitled to deduct the benefits received from the respondent pursuant to its s. 25: *Brennan v. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294, aff'g (1999), 70 B.C.L.R. (3d) 342

R.C.S. 1077, et confirmés récemment dans l'arrêt *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, [2002] 4 R.C.S. 205, 2002 CSC 78, constitue une assise solide pour justifier l'application aux parties de la *Loi sur les assurances* de l'Ontario. En raison notamment de l'acquiescement à la compétence des tribunaux ontariens, j'estime que la question visée a un lien suffisant avec cette province pour rendre la loi applicable à ICBC en l'espèce.

II. Les faits

M. et M^me^ Brennan, des résidents de l'Ontario, ont été blessés au cours d'un voyage en Colombie-Britannique en 1995. Un camion gros porteur a heurté la voiture qu'ils avaient louée sur place, et l'accident a laissé M^me^ Brennan quadriplégique. Par la suite, les Brennan sont retournés en Ontario. Tous les véhicules en cause dans l'accident étaient immatriculés en Colombie-Britannique et assurés par l'appelante, ICBC, laquelle vend l'assurance obligatoire dans cette province. M. et M^me^ Brennan ont reçu de leur assureur, l'intimée, Unifund, des indemnités d'accident légales substantielles.

Les Brennan ont obtenu des dommages-intérêts élevés à l'issue d'une action intentée en Colombie-Britannique contre le propriétaire et conducteur du camion gros porteur, et contre le garage qui avait réparé ce véhicule. Le juge de première instance n'a examiné que la question du montant des dommages-intérêts, étant donné que les trois défendeurs, assurés par l'appelante, ont reconnu leur responsabilité conjointe : *Brennan c. Singh*, [1999] B.C.J. No. 520 (QL) (C.S.). Conformément à l'art. 25 de la loi de la Colombie-Britannique intitulée *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, ch. 231, les trois codéfendeurs et auteurs du délit civil ont demandé que soit déduite des dommages-intérêts la somme obtenue par les Brennan de l'intimée à titre d'indemnités d'accident légales. La Cour d'appel de la Colombie-Britannique a confirmé que la police émise par ICBC à l'égard du garage constituait une assurance automobile au sens de l'*Insurance (Motor Vehicle) Act* de la Colombie-Britannique et que les auteurs du délit avaient droit, en vertu de l'art. 25, à la déduction

(S.C.). An action is continuing in the Supreme Court of British Columbia to determine the amount of the benefits that will be ordered to be deducted from the damage award: *Brennan v. Singh* (2001), 15 C.P.C. (5th) 17, 2001 BCSC 1812.

The parties were unable to agree with respect to indemnification under s. 275 of the Ontario *Insurance Act*, the appellant, ICBC, taking the position that the Act did not apply. Consequently, the respondent, Unifund, brought an application before the Ontario Superior Court for the appointment of an arbitrator pursuant to s. 10 of the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17. The appellant took two steps in response. First, it brought an application in the British Columbia Supreme Court for a declaratory order that the law of British Columbia (and not that of Ontario) applies to the rights of the two insurers, and that the respondent has no right of subrogation under British Columbia law. Second, it brought an application returnable before a judge in Ontario for an order staying the arbitration.

The "Power of Attorney and Undertaking" ("PAU"), titled "Canada Non-Resident Inter-Province Motor Vehicle Liability Insurance Card", provides that when an insured is sued in another province or territory, the Superintendent of Insurance of that province will accept service on behalf of the insurer or its insured, and that the insurer undertakes to appear in the action. As a signatory to the PAU, the insurer further undertakes not to set up any defence in respect of any action under a motor vehicle liability contract which might not be set up in the province in which the action is instituted, and to satisfy judgment up to the greater of the amounts and limits of coverage provided for in the contract, or the minimum for that kind or class of coverage provided for by the laws of the province or territory in which the action is filed. This reciprocal scheme provides a uniform basis for the enforcement of motor

des indemnités reçues de l'intimée : *Brennan c. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294, conf. (1999), 70 B.C.L.R. (3d) 342 (C.S.). Une action est en instance devant la Cour suprême de la Colombie-Britannique afin de déterminer l'indemnité dont le tribunal ordonnera la soustraction du montant des dommages-intérêts : *Brennan c. Singh* (2001), 15 C.P.C. (5th) 17, 2001 BCSC 1812.

113 Les parties ont été incapables de s'entendre sur l'indemnisation visée à l'art. 275 de la *Loi sur les assurances* de l'Ontario, l'appelante, ICBC, plaidant l'inapplication de cette loi. En conséquence, l'intimée, Unifund, a demandé à la Cour supérieure de l'Ontario la nomination d'un arbitre suivant l'article 10 de la loi ontarienne intitulée *Loi de 1991 sur l'arbitrage*, L.O. 1991, ch. 17. En réponse à cette demande, l'appelante a effectué deux démarches. Premièrement, elle a sollicité de la Cour suprême de la Colombie-Britannique une ordonnance déclarant, d'une part, que ce sont les lois de la Colombie-Britannique (et non celles de l'Ontario) qui s'appliquent à l'égard des droits des deux assureurs, et, d'autre part, que l'intimée n'a aucun droit de subrogation en vertu des lois de la Colombie-Britannique. Deuxièmement, elle a demandé à un juge de l'Ontario d'ordonner la suspension de l'arbitrage.

114 Selon le formulaire P&E, document dont le titre est [TRADUCTION] « Carte d'assurance-responsabilité automobile interprovinciale pour non-résidents du Canada », lorsqu'un assuré est poursuivi dans une autre province ou un autre territoire, le surintendant des assurances de cet endroit accepte de recevoir signification d'actes de procédure ou d'avis au nom de l'assureur ou de son assuré, et l'assureur s'engage à comparaître à l'action. À titre de signataire du formulaire P&E, l'assureur s'engage également à ne pas présenter, à l'égard de toute action découlant d'un contrat de responsabilité automobile, de moyen de défense qui ne pourrait être invoqué dans la province où l'action a été intentée, et à exécuter le jugement jusqu'à concurrence de la plus élevée des sommes suivantes : la garantie maximale prévue par le contrat ou la somme minimale prévue pour ce genre ou cette catégorie de garantie par les lois en vigueur dans la

vehicle insurance claims in Canada and, to a lesser extent, in North America.

province ou le territoire où l'action a été intentée. Ce régime de réciprocité assure l'exécution uniforme des réclamations d'assurance automobile au Canada et, dans une moindre mesure, en Amérique du Nord.

III. Relevant Statutory Provisions

III. Les dispositions législatives pertinentes

115 *Insurance Act*, R.S.O. 1990, c. I.8

275.—(1) The insurer responsible under subsection 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.

(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.

(3) No indemnity is available under subsection (2) in respect of the first $2,000 of statutory accident benefits paid in respect of a person described in that subsection.

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.

(5) No arbitration hearing shall be held with respect to indemnification under this section if, in respect of the incident for which indemnification is sought, any of the insurers and an insured are parties to a mediation under section 280, an arbitration under section 282, an appeal under section 283 or a proceeding in a court in respect of statutory accident benefits.

Loi sur les assurances, L.R.O. 1990, ch. I.8

275 (1) L'assureur tenu de payer, aux termes du paragraphe 268(2), des indemnités d'accident légales à des catégories de personnes qui peuvent être nommées dans les règlements a droit, sous réserve des conditions, dispositions, exclusions et restrictions qui peuvent être prescrites, à une indemnisation, en ce qui concerne les indemnités qu'il a payées, de la part des assureurs d'une catégorie ou des catégories d'automobiles qui peuvent être nommées dans les règlements et qui étaient impliquées dans l'incident dont découle l'obligation de payer des indemnités d'accident légales.

(2) L'indemnisation visée au paragraphe (1) est effectuée en fonction du degré de responsabilité de l'assuré de chaque assureur tel qu'il est établi selon les règles de détermination de la responsabilité.

(3) Aucune indemnité n'est offerte aux termes du paragraphe (2) relativement à la première tranche de 2 000 $ d'indemnités d'accident légales payées à l'égard d'une personne mentionnée dans ce paragraphe.

(4) Si les assureurs n'arrivent pas à s'entendre à l'égard de l'indemnisation visée au présent article, le différend est réglé par voie d'arbitrage aux termes de la *Loi sur l'arbitrage*.

(5) Aucune audience d'arbitrage n'est tenue à l'égard de l'indemnisation visée au présent article si, en ce qui concerne l'incident qui a entraîné la demande d'indemnisation, un des assureurs et un assuré sont parties à une procédure de médiation entamée en vertu de l'article 280, à un arbitrage effectué aux termes de l'article 282, à un appel interjeté en vertu de l'article 283 ou à une instance judiciaire à l'égard d'indemnités d'accident légales.

IV. Judicial History

IV. L'historique des procédures judiciaires

A. *Ontario Superior Court of Justice* (2000), 23 C.C.L.I. (3d) 96

A. *Cour supérieure de justice de l'Ontario* (2000), 23 C.C.L.I. (3d) 96

116 Campbell J. determined that the case dealt with the narrow issue of the indemnification between two insurers pursuant to the Ontario *Insurance Act*.

Le juge Campbell a décidé que l'affaire portait uniquement sur la question de l'indemnisation entre deux assureurs en application de la *Loi sur les*

He decided that his task was not to determine with finality the applicable law with respect to the resolution of the dispute but rather to consider the balance of convenience with regard to a motion for a stay on the basis of *forum non conveniens*. The question of jurisdiction *simpliciter* was not explicitly considered by the applications judge.

In the circumstances, the applications judge was not satisfied that there would be a loss of a juridical advantage, as feared by the respondent, Unifund, were a stay to be granted. The reciprocal nature of the scheme and the need for consideration by a court in one province of the applicability of the rules in another province led him to conclude that it was not simply a matter for a court in Ontario to apply Ontario law, or a court in British Columbia to apply British Columbia law. Rather, it was for each court to consider the nature of the reciprocal scheme as effected by the legislation in both provinces. The applications judge found the factors for granting a stay of proceedings in this case to be: (1) an absence of evidence of any serious or substantial prejudice to the plaintiff if a stay were granted; (2) the need to provide an opportunity for an expeditious determination of the issues raised by the plaintiff; and, (3) a serious prospect for inconsistent findings if both proceedings moved forward concurrently. The applications judge concluded that the balance favoured the stay of the Ontario arbitration as he was of the view that the arbitration procedure instituted under s. 275 of the Ontario *Insurance Act* was not enacted to resolve legal issues that arise as a result of the operation of an interprovincial scheme which poses problems of conflicting provincial laws. Because everything that gave rise to the dispute between the insurers commenced with an accident and an action in British Columbia, that province's courts were deemed to be the appropriate forum for the resolution of the dispute.

assurances de l'Ontario. Il a conclu que son rôle ne consistait pas à décider de façon définitive du droit applicable au règlement du différend, mais plutôt à examiner la prépondérance des inconvénients dans le cadre d'une motion sollicitant le sursis de l'instance pour cause de *forum non conveniens*. Le juge des motions n'a pas examiné explicitement la question de la simple reconnaissance de la compétence.

117 Vu les circonstances, le juge des motions n'était pas convaincu qu'il y aurait, comme le craignait l'intimée, Unifund, perte d'un avantage juridique s'il ordonnait le sursis à l'arbitrage. Le caractère réciproque du régime et la nécessité qu'un tribunal d'une province donnée s'interroge sur l'applicabilité des règles dans une autre province ont amené le juge à conclure qu'il ne s'agissait pas simplement d'une affaire requérant d'un tribunal ontarien qu'il applique les lois de l'Ontario ou d'un tribunal de la Colombie-Britannique qu'il applique les lois de cette province. L'un ou l'autre de ces tribunaux devra plutôt examiner la nature du régime de réciprocité au regard de la législation applicable dans les deux provinces. Le juge des motions a estimé que les facteurs pertinents justifiant de surseoir à l'arbitrage dans cette affaire étaient les suivants : (1) l'absence de preuve de quelque préjudice grave ou important pouvant être causé au demandeur s'il ordonnait le sursis à l'arbitrage; (2) la nécessité de favoriser le règlement expéditif des questions soulevées par le demandeur; (3) le risque important de jugements contradictoires si les deux instances devaient se poursuivre parallèlement. Le juge des motions a conclu que la balance penchait en faveur de la suspension de l'arbitrage en Ontario puisque, à son avis, la procédure d'arbitrage prévue par l'art. 275 de la *Loi sur les assurances* de l'Ontario n'a pas été instituée pour régler des questions de droit découlant de l'application d'un régime interprovincial créant des problèmes d'incompatibilité entre lois provinciales. Comme tous les éléments à l'origine du différend entre les assureurs ont pour point de départ un accident et une action en Colombie-Britannique, les tribunaux de cette province ont été réputés être le forum approprié pour connaître du litige.

B. *Court of Appeal for Ontario* (2001), 204 D.L.R. (4th) 732

118 Feldman J.A., for a unanimous court, held that when a statute provides that a matter is to be decided by arbitration under the Ontario *Arbitration Act, 1991*, it is for the arbitrator to decide questions of jurisdiction, applicable law and questions of law, subject to the right to appeal that decision to a court of justice. The Court of Appeal considered the issue of *forum non conveniens* and found that the applications judge was in error when he stated that an arbitrator appointed to determine issues under s. 275 of the Ontario *Insurance Act* could only decide "intra-Ontario" issues. First, the applications judge's conclusion was found to be inconsistent with s. 275 when read in conjunction with the PAU to which British Columbia and Ontario are signatories. Paragraph A of the PAU states that the signatory company undertakes "[t]o appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge". The Court of Appeal held that, in part because of the presence of the PAU, there is no basis to conclude that s. 275(4) of the Ontario *Insurance Act* is to operate fully only in those circumstances where all parties and issues are confined to Ontario. Second, the applications judge's conclusion was held to be contrary to the scheme of the Ontario *Arbitration Act, 1991* and the powers accorded to an arbitral tribunal under this same Act, namely to initially decide all questions of law and jurisdiction, unless the arbitrator or the parties consent to a referral to a court of justice.

V. Analysis

A. *The Procedural Issues*

119 The law of interprovincial jurisdiction and enforcement was changed drastically in *Morguard*, *supra*, where the Court held that the principles of

B. *Cour d'appel de l'Ontario* (2001), 204 D.L.R. (4th) 732

Rédigeant la décision unanime de la Cour d'appel, le juge Feldman a conclu que, lorsqu'une loi prévoit qu'une affaire doit être soumise à l'arbitrage en application de la *Loi de 1991 sur l'arbitrage* de l'Ontario, il appartient à l'arbitre de se prononcer sur les questions de compétence, sur les lois applicables et sur les questions de droit, sous réserve du droit des parties d'interjeter appel de sa décision à un tribunal judiciaire. Après avoir examiné la question du *forum non conveniens*, la Cour d'appel a estimé que le juge des motions avait commis une erreur en disant qu'un arbitre chargé de statuer sur les questions visées à l'art. 275 de la *Loi sur les assurances* de l'Ontario ne pouvait se prononcer que sur des questions [TRADUCTION] « régies par les lois de l'Ontario ». Premièrement, la Cour d'appel a décidé que la conclusion du juge des motions était incompatible avec l'art. 275, lorsque celui-ci est lu en corrélation avec le texte du formulaire P&E auquel la Colombie-Britannique et l'Ontario ont adhéré. Le paragraphe A de ce formulaire indique que la société signataire s'engage [TRADUCTION] « [à] comparaître à toute action ou autre procédure qui est intentée contre elle ou contre son assuré dans quelque province ou territoire et dont elle a connaissance ». La Cour d'appel a jugé, partiellement en raison de l'existence du formulaire P&E, que rien ne permettait de conclure que le par. 275(4) de la *Loi sur les assurances* de l'Ontario ne doit recevoir plein effet que dans les cas où les parties se trouvent en Ontario et les questions en litige y ont leur origine. Deuxièmement, selon la Cour d'appel, la conclusion du juge des motions était contraire à l'objet de la *Loi de 1991 sur l'arbitrage* de l'Ontario et aux pouvoirs conférés par cette loi au tribunal arbitral, à savoir celui de trancher en première instance toute question de droit et de compétence, sauf lorsque l'arbitre ou les parties acceptent de déférer la question à un tribunal judiciaire.

V. Analyse

A. *Les questions d'ordre procédural*

L'arrêt *Morguard*, précité, a modifié de façon radicale le droit en matière de saisine extraprovinciale et d'application extraterritoriale de lois

order and fairness require limits on the reach of provincial legislation facilitating the enforcement of an extraprovincial judgment, but that extraprovincial jurisdiction can nevertheless be asserted on the basis of a real and substantial connection. The territoriality issue arose again in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; in that case, the Court considered whether a provincial statute preventing documents relating to any business concerns in Quebec from being sent out of the province was *ultra vires* the province as being in relation to a matter outside the province, or constitutionally inapplicable to judicial proceedings in other provinces. In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, this Court dealt with the question of which law should govern in cases involving the interests of more than one jurisdiction, specifically as it concerns automobile accidents involving residents of different provinces. However, the principles developed in *Hunt* and *Tolofson* are of little help in the case at bar as it concerns consent-based jurisdiction in the context of a conflict between insurers. The difficulty with this appeal is that there is a disagreement between the parties about the effect of the PAU and whether signing it constituted attornment by the parties to Ontario's jurisdiction. The preliminary question, however, is whether these issues should be decided by a superior court judge or by an arbitrator, as held by the Court of Appeal for Ontario.

In its reasons, the Court of Appeal relied on paragraph A of the PAU, the undertaking to appear, and on the fact that the determination of *forum non conveniens* by the applications judge would be inconsistent with the provisions of the Ontario *Insurance Act*. The appellant, ICBC, submits that if there is any doubt about the application of the Ontario *Insurance Act* or the appropriateness of Ontario as a forum, that doubt should not be resolved by an arbitrator appointed under the very legislation whose

provinciales. Dans cette affaire, la Cour a conclu que les principes d'ordre et d'équité requièrent que soient assorties de limites la portée des lois provinciales visant à faciliter l'exécution des jugements émanant de l'extérieur de la province concernée, mais que les tribunaux d'une autre province peuvent néanmoins se saisir d'une affaire sur la base d'un lien réel et substantiel. La question de la territorialité s'est présentée à nouveau dans l'arrêt *Hunt c. T&N plc*, [1993] 4 R.C.S. 289, où notre Cour s'est demandée si une loi québécoise interdisant la communication à l'extérieur de la province de tout document relatif à une entreprise commerciale située au Québec était *ultra vires* parce qu'elle portait sur une matière de nature extraprovinciale ou qu'elle était constitutionnellement inapplicable aux procédures judiciaires se déroulant dans une autre province. Dans l'arrêt *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022, notre Cour a examiné la question de savoir quel droit doit régir les affaires dans lesquelles des intérêts situés dans plusieurs ressorts sont en jeu, en particulier lorsqu'il s'agit d'accidents d'automobile touchant des résidents de provinces différentes. Les principes élaborés dans les arrêts *Hunt* et *Tolofson* ne sont pas toutefois d'un grand secours dans le présent pourvoi, puisque nous sommes en présence d'une affaire d'acquiescement à la compétence des tribunaux, dans le contexte d'un conflit entre assureurs. En l'espèce, le problème tient au fait que les parties ne s'entendent ni sur les effets à donner au formulaire P&E ni sur la question de savoir si la signature de ce document constitue un acquiescement à la compétence des tribunaux et des lois de l'Ontario. Préalablement, toutefois, il faut se demander si ces diverses questions doivent être tranchées par un juge d'une cour supérieure ou, comme l'a décidé la Cour d'appel de l'Ontario, par un arbitre.

120 Dans ses motifs, la Cour d'appel a invoqué le paragraphe A du formulaire P&E, soit l'engagement à comparaître, et le fait que la conclusion du juge des motions selon laquelle l'Ontario est un *forum non conveniens* serait incompatible avec les dispositions de la *Loi sur les assurances* de cette province. L'appelante, ICBC, prétend que s'il existe quelque doute quant à l'application de la *Loi sur les assurances* de l'Ontario ou au choix de l'Ontario en tant que forum approprié, il n'appartient pas à l'arbitre

application is questioned. The appellant submits that Ontario's *Arbitration Act, 1991* does not confer exclusive jurisdiction on an arbitrator to construe legislation to determine its constitutional applicability. It argues that a party should not be required to submit to a tribunal whose fundamental existence, authority and jurisdiction are challenged, but should be able to first ask a court of justice to rule on this important threshold question.

121 The respondent, Unifund, agrees with the Court of Appeal that the determination of the preliminary question of whether an insurer is an insurer within the meaning of s. 275 of the Ontario *Insurance Act* should be made in the first instance by an arbitrator. It argues that the characterization of this issue by the appellant as jurisdictional and constitutional does not transform the nature of the inquiry or remove from the arbitrator the power to make such a decision. The respondent submits that the mandatory arbitration clause in s. 275(4) of the Act confers exclusive jurisdiction on an arbitrator to deal with all the issues raised by the appellant, in the first instance.

122 I think that the first issue presented to the applications judge was that of jurisdiction *simpliciter*, and that in any event he was required to deal with it before addressing the question of *forum conveniens*. Even though it may be difficult to perfectly isolate these two issues of jurisdiction, I am of the view that the Court of Appeal could not decide to submit the whole matter to an arbitrator without inferentially deciding that the Ontario *Insurance Act* applied. The reason for this is that the appointment of the arbitrator depends on the application of s. 275 of the Ontario *Insurance Act*. With respect, I find the decision of the Court of Appeal inconsistent as it orders the appointment of an arbitrator while remitting to this same arbitrator the question of whether or not his or her jurisdiction is constitutional.

nommé en vertu de la loi même dont l'application est contestée de dissiper ce doute. L'appelante affirme que la *Loi de 1991 sur l'arbitrage* de l'Ontario ne donne pas à l'arbitre compétence exclusive pour interpréter les lois en vue de statuer sur leur applicabilité au regard de la Constitution. L'appelante plaide qu'une partie ne devrait pas être tenue de s'en remettre à un tribunal administratif dont on conteste l'existence, l'autorité et la compétence fondamentales, sans d'abord pouvoir demander à un tribunal judiciaire de se prononcer sur cette importante question préliminaire.

L'intimée, Unifund, fait sienne l'opinion de la Cour d'appel selon laquelle il appartient à l'arbitre de se prononcer en première instance sur la question préliminaire de savoir si l'assureur est un assureur au sens de l'art. 275 de la *Loi sur les assurances* de l'Ontario. L'intimée, Unifund, prétend que le fait pour l'appelante de qualifier cette question préliminaire de question de compétence et de constitutionnalité n'a pas pour effet de transformer la nature de l'examen et d'enlever à l'arbitre le pouvoir de prendre une telle décision. Elle soutient que la clause d'arbitrage obligatoire prévue au par. 275(4) de la Loi confère à l'arbitre compétence exclusive pour statuer, en première instance, sur toutes les questions soulevées par l'appelante.

J'estime que la première question présentée au juge des motions était celle de la simple reconnaissance de compétence et que, quoi qu'il en soit, il n'avait d'autre choix que de l'examiner avant d'aborder celle du *forum conveniens*. Bien qu'il puisse être difficile de dissocier complètement ces deux questions de compétence, je suis d'avis que la Cour d'appel ne pouvait décider que toute l'affaire relevait de l'arbitre sans implicitement conclure à l'application de la *Loi sur les assurances* de l'Ontario. Cette opinion repose sur le fait que la nomination de l'arbitre dépend de l'application de l'art. 275 de cette loi. En toute déférence, la décision de la Cour d'appel est, selon moi, illogique, puisqu'elle ordonne la nomination d'un arbitre tout en laissant à celui-ci le soin de statuer sur la constitutionnalité de sa compétence.

123

The argument that an arbitrator is mandated to decide questions of law and therefore must do so before these questions are to be decided by a court of justice is not persuasive in this case because of the very nature of the appellant's claim, namely that the Ontario legislation imposing arbitration is constitutionally inapplicable. I fail to see how an arbitrator can have any jurisdiction if the procedure under which he or she is empowered to decide questions of law is *ultra vires* the legislature. This reasoning is consistent with the principles that govern the *Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law in 1985, on which the Ontario *Arbitration Act, 1991* is based. The former's Article 8(1) reads:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

The territorial application of the Ontario *Insurance Act* is an issue that is distinct from those considered in cases dealing with the power of administrative tribunals to determine their own jurisdiction. This is, in my opinion, consistent with the opinion of La Forest J. in *Morguard*, *supra*, at pp. 1099-1100:

> The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges — who also have superintending control over other provincial courts and tribunals — are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments.

The same point is made forcefully in *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, at pp. 162-63.

L'argument voulant que comme l'arbitre a le mandat de trancher les questions de droit et qu'il doit en conséquence se prononcer sur celles-ci avant qu'un tribunal judiciaire puisse le faire n'est pas convaincant en l'espèce, vu la nature même de la prétention de l'appelante, savoir que la loi ontarienne imposant l'arbitrage est constitutionnellement inapplicable. Je ne vois pas comment l'arbitre peut disposer de quelque compétence que ce soit si la procédure l'autorisant à trancher des questions de droit excède les pouvoirs de la législature. Ce raisonnement est compatible avec les principes qui régissent la *Loi type sur l'arbitrage commercial international* adoptée en 1985 par la Commission des Nations Unies pour le droit commercial international, dont est inspirée la *Loi de 1991 sur l'arbitrage* de l'Ontario. Le paragraphe 8(1) de la *Loi type* est rédigé ainsi :

> Le tribunal saisi d'un différend sur une question faisant l'objet d'une convention d'arbitrage renverra les parties à l'arbitrage si l'une d'entre elles le demande au plus tard lorsqu'elle soumet ses premières conclusions quant au fond du différend, à moins qu'il ne constate que ladite convention est caduque, inopérante ou non susceptible d'être exécutée.

L'application territoriale de la *Loi sur les assurances* de l'Ontario est une question distincte de celles examinées dans les affaires portant sur le pouvoir de tribunaux administratifs de statuer sur leur propre compétence. À mon avis, ce point de vue concorde avec l'opinion exprimée par le juge La Forest dans l'arrêt *Morguard*, précité, p. 1099-1100 :

> Le système judiciaire canadien est organisé de telle manière que toute crainte de différence de qualité de justice d'une province à l'autre ne saurait être vraiment fondée. Tous les juges de cour supérieure — qui ont également un pouvoir de contrôle sur d'autres tribunaux judiciaires et administratifs provinciaux — sont nommés et rémunérés par les autorités fédérales. De plus, toutes les cours de justice sont sujettes à l'examen en dernier ressort de leurs décisions par la Cour suprême du Canada qui peut décider si les cours d'une province ont à bon droit exercé leur compétence dans une action et dans des circonstances où les cours d'une autre province devraient reconnaître ces jugements.

Cette même idée est énoncée de façon convaincante dans l'arrêt *Conseil canadien des relations du travail c. Paul L'Anglais Inc.*, [1983] 1 R.C.S. 147, p. 162-163.

B. *Jurisdiction Simpliciter*

124 The first issue to be decided is therefore that of jurisdiction *simpliciter*. *Morguard* determined that, given considerations of comity, the exercise of extraterritorial jurisdiction depends on the existence of a real and substantial connection to the forum that assumed jurisdiction and gave judgment. In *Hunt*, *supra*, at pp. 324-28, the Court gave these considerations the force of constitutional principles, acknowledging that their meaning and limits had not been fully defined. In *Spar Aerospace*, *supra*, at para. 52, LeBel J., for a unanimous Court, insisted that a flexible approach is to be adopted when the "real and substantial connection" criterion is applied, finding support in La Forest J.'s discussion in *Morguard*, at p. 1106 (thereby agreeing with Dickson J.'s approach in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, at pp. 408-9) of the requisite "inherently reasonable" character of any finding of jurisdiction. Later, at para. 56 of *Spar Aerospace*, LeBel J. is of the opinion that each ground listed at art. 3148(3) of the *Civil Code of Quebec*, namely fault, injurious act, damage and contract, taken on its own, is an example of a real and substantial connection between a province and an action for the purposes of jurisdiction *simpliciter*. Approving a number of cases where damage suffered in a province was judged sufficient to establish a real and substantial connection (in the majority of cases, enabling the plaintiff's chosen forum to assume jurisdiction), he concludes that a broad basis for jurisdiction, based on a less stringent real and substantial connection, is all the more favourable where inappropriate exercises of jurisdiction can be moderated by way of the application of the doctrine of *forum non conveniens*: *Spar Aerospace*, at paras. 58-61.

125 Obviously, jurisdiction *simpliciter* and *forum non conveniens* are related and the factors determining

B. *La simple reconnaissance de compétence*

La première question à trancher est donc celle de la simple reconnaissance de compétence. Dans l'arrêt *Morguard*, il a été jugé que, pour des raisons de courtoisie judiciaire, l'exercice d'une compétence extraterritoriale dépend de l'existence d'un lien réel et substantiel avec le tribunal qui s'est déclaré compétent et qui a rendu jugement. Aux pages 324 à 328 de l'arrêt *Hunt*, précité, notre Cour a donné à ces considérations une valeur de principe constitutionnel, tout en reconnaissant qu'elle n'avait pas entièrement fixé leur sens et leurs limites. Exprimant l'opinion unanime de notre Cour dans l'arrêt *Spar Aerospace*, précité, le juge LeBel a souligné, au par. 52, qu'il fallait faire montre de souplesse dans l'application du critère du « lien réel et substantiel ». Le juge LeBel a invoqué à cet égard les propos tenus par le juge La Forest à la p. 1106 de l'arrêt *Morguard* (et souscrit par le fait même à la démarche retenue par le juge Dickson (plus tard Juge en chef) dans l'arrêt *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393, p. 408-409), relativement à la condition exigeant que toute décision concluant à la compétence soit « intrinsèquement raisonnable ». Plus loin, au par. 56 de l'arrêt *Spar Aeorspace*, le juge LeBel estime que les divers éléments énumérés au par. 3148(3) du *Code civil du Québec* — faute, fait dommageable, préjudice et contrat — sont autant d'exemples de lien réel et substantiel entre une province et une action pour l'application du critère de la simple reconnaissance de compétence. Approuvant un certain nombre de décisions dans lesquelles les tribunaux ont jugé que le préjudice subi dans une province était suffisant pour établir l'existence d'un lien réel et substantiel (ce qui, dans la majorité des cas, a permis au tribunal choisi par le demandeur de se déclarer compétent), le juge LeBel conclut que la reconnaissance d'une large assise juridictionnelle, découlant d'une application moins stricte du critère du lien réel et substantiel, est d'autant plus avantageuse lorsqu'il est possible de réduire les acceptations inappropriées de compétence par l'application de la doctrine du *forum non conveniens* : *Spar Aerospace*, par. 58-61.

Il existe manifestement un lien entre les notions de simple reconnaissance de compétence et de

the latter inquiry will overlap with those applicable in the former. Nevertheless, the jurisdictional issue is a legal rule, not a discretionary one, as pointed out by Sharpe J.A. for a unanimous Court of Appeal for Ontario in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, at para. 43. The first jurisdictional inquiry consists in establishing whether there exists a sufficient connection between the forum and the action, not whether the said connection is stronger than those existing between the action and other forums. The jurisdiction *simpliciter* inquiry is one based on order, fairness and efficiency in the context of the needs of modern federalism.

In *Muscutt*, Sharpe J.A. held at para. 53 that Ontario's Rule 17.02(h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which permits service outside Ontario, is a procedural device that is constitutionally valid and does not interfere with the ability of the party served to move to set aside the service or stay the proceeding. The Court of Appeal held that personal subjection is not a necessary component to establish jurisdiction *simpliciter*, but that a substantial connection to the subject matter of the litigation will suffice. This, I believe, is consistent with this Court's reasons in *Spar Aerospace*. I note, however, that several trial level decisions, perhaps finding inspiration in the American "minimum contacts" doctrine, have made of contact between the defendant and the forum a *de facto* prerequisite for the assumption of jurisdiction *simpliciter*: *Muscutt*, at paras. 59-62; see for instance: *Long v. Citi Club*, [1995] O.J. No. 1411 (QL) (Gen. Div.), at para. 7, *Brookville Transport Ltd. v. Maine* (1997), 189 N.B.R. (2d) 142 (Q.B.), at para. 23; *Negrych v. Campbell's Cabins (1987) Ltd.*, [1997] 8 W.W.R. 270 (Man. Q.B.), at para. 6. I do not endorse this reasoning. Indeed, it was rejected by more than one court of appeal, including that of Ontario (*Muscutt*, at para. 74; *McNichol Estate v. Woldnik* (2001), 150 O.A.C. 68, at paras. 12-16), of Nova Scotia (*Oakley v. Barry* (1998), 158 D.L.R. (4th) 679, at pp. 691-92 and 698-99; *O'Brien v. Canada (Attorney General)* (2002), 210

forum non conveniens, et les facteurs déterminants dans le deuxième cas recoupent ceux applicables dans le premier. Néanmoins, la détermination de la compétence commande l'application d'une règle de droit impérative, et non d'une règle discrétionnaire, comme l'a fait remarquer, au par. 43 de l'arrêt *Muscutt c. Courcelles*, (2002), 60 O.R. (3d) 20, le juge Sharpe, qui exprimait alors la décision unanime de la Cour d'appel de l'Ontario. Le premier volet de cette détermination consiste à se demander s'il existe un lien suffisant entre le tribunal et l'action, et non si ce lien est plus solide que ceux qui existent entre l'action et d'autres forums. L'examen de la simple reconnaissance de compétence repose sur des considérations relatives à l'ordre, à l'équité et l'efficacité, dans le contexte des besoins du fédéralisme moderne.

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Au paragraphe 53 de l'arrêt *Muscutt*, le juge Sharpe a conclu que l'al. 17.02h) des *Règles de procédure civile* de l'Ontario, R.R.O. 1990, Règl. 194, lequel autorise la signification à l'extérieur de l'Ontario, est un mécanisme procédural constitutionnellement valide, qui n'empêche pas la partie qui reçoit signification de présenter une motion pour faire annuler la signification ou suspendre l'instance. La Cour d'appel a jugé que l'assujettissement personnel n'est pas un élément requis pour établir la simple reconnaissance de compétence, et qu'un lien substantiel avec l'objet du litige suffit. Ce raisonnement est, à mon avis, compatible avec les motifs exposés par notre Cour dans l'arrêt *Spar Aerospace*. Je tiens toutefois à signaler que plusieurs décisions de première instance, s'inspirant peut-être de la doctrine américaine des [TRADUCTION] « liens minimaux », ont fait du lien entre le défendeur et le tribunal un préalable à la simple reconnaissance de compétence : *Muscutt*, par. 59-62; voir, par exemple : *Long c. Citi Club*, [1995] O.J. No. 1411 (QL) (Div. gén.), par. 7; *Brookville Transport Ltd. c. Maine* (1997), 189 R.N.-B. (2e) 142 (B.R.), par. 23; *Negrych c. Campbell's Cabins (1987) Ltd.*, [1997] 8 W.W.R. 270 (B.R. Man.), par. 6. Je ne peux souscrire à ce raisonnement. De fait, plusieurs cours d'appel l'ont rejeté, dont celle de l'Ontario (*Muscutt*, par. 74; *McNichol Estate c. Woldnik* (2001), 150 O.A.C. 68, par. 12-16), de la Nouvelle-Écosse (*Oakley c. Barry* (1998), 158 D.L.R. (4th) 679, p. 691-692 et

D.L.R. (4th) 668, at paras. 20-21), and of British Columbia (*Pacific International Securities Inc. v. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716, at paras. 15-17; *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213, at para. 20). In any event, I agree with Sharpe J.A.'s conclusion on the preferability of an approach broader than personal subjection and his approval of G. D. Watson and F. Au's position in "Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*" (2000), 23 *Advocates' Q.* 167, as explained at para. 73 of his reasons in *Muscutt*:

> On the basis of these objections, Watson and Au conclude that the real and substantial connection test should be interpreted as requiring a connection either between the forum and the defendant or between the forum and the subject matter of the action. In their view, the defendant's connection with the forum should not determine the choice of forum. Rather, the defendant's connection should simply be a relevant factor to be weighed together with other factors.

127 The present appeal does not revolve around the question of attornment by simple admission of service; it is based on the meaning of the PAU with regard to the interconnectedness of the various provincial motor vehicle insurance regimes. This does not diminish the relevance to the determination of this appeal of the previous discussion of the requirement of a personal connection in establishing jurisdiction *simpliciter*, which is not required in the post-*Morguard* case law.

128 The appellant, ICBC, submits that as a matter of statutory interpretation, the Ontario *Insurance Act* does not apply to this case. The arbitration model endorsed by that Act is not engaged, it argues, because the appellant is not an "insurer" within the meaning of the Act as it is not licensed to, and does not in fact, carry on business in Ontario. Nothing in the Ontario *Insurance Act*, the appellant submits, can be construed as extending the Ontario loss-allocation scheme to non-resident insurers who do not insure Ontario residents and whose obligations

698-699; *O'Brien c. Canada (Attorney General)* (2002), 210 D.L.R. (4th) 668, par. 20-21) et de la Colombie-Britannique (*Pacific International Securities Inc. c. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716, par. 15-17; *Cook c. Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213, par. 20). Quoi qu'il en soit, à l'instar du juge Sharpe, j'estime qu'il faut préférer une théorie plus large que celle de l'assujettissement personnel et j'approuve la thèse défendue par G. D. Watson et F. Au dans « Constitutional Limits on Service *Ex Juris* : Unanswered Questions from *Morguard* » (2000), 23 *Advocates' Q.* 167, thèse qu'il explique en ces termes au par. 73 de l'arrêt *Muscutt* :

> [TRADUCTION] Se fondant sur ces objections, Watson et Au concluent qu'il faut considérer que le critère du lien réel et substantiel requiert l'existence d'un lien entre le tribunal et le défendeur, ou entre le tribunal et l'objet de l'action. À leur avis, le lien qui existe entre le défendeur et le ressort ne devrait pas déterminer le choix du tribunal, il ne constitue qu'un facteur pertinent qui doit être soupesé avec d'autres.

Le présent pourvoi ne porte pas sur une question d'acquiescement à compétence par simple acceptation de la signification, mais plutôt sur la portée du formulaire P&E eu égard à l'interrelation des différents régimes provinciaux d'assurance automobile. Ce fait n'enlève rien à la pertinence, pour trancher le présent pourvoi, de l'analyse faite plus tôt relativement à la condition exigeant l'existence d'un lien personnel pour l'établissement de la simple reconnaissance de compétence, condition que ne requiert pas la jurisprudence postérieure à l'arrêt *Morguard*.

L'appelante, ICBC, soutient que, selon les règles d'interprétation législative, la *Loi sur les assurances* de l'Ontario ne s'applique pas en l'espèce. Le modèle d'arbitrage retenu dans cette loi ne s'applique pas à elle, affirme l'appelante, parce qu'elle n'est pas un « assureur » au sens de la Loi, du fait qu'elle n'est pas autorisée à exercer ses activités en Ontario et qu'elle ne le fait d'ailleurs pas. Elle prétend que la *Loi sur les assurances* de l'Ontario n'a pas pour effet d'étendre l'application du régime provincial de répartition des pertes aux

arise from accidents outside Ontario. According to the appellant, the PAU does not alter the conclusion that Ontario law does not apply to the facts of this case. It submits that the object of the reciprocal scheme to which insurers in North America have subscribed is to protect insureds and those entitled to recover damages from them. The appellant therefore takes the position that the respondent's attempt to impose Ontario's loss allocation regime in a case arising out of an accident in British Columbia has nothing to do with the object of the PAU or of the reciprocal scheme. The appellant submits that the PAU does not include a general or comprehensive submission to the law of Ontario for all purposes and in all circumstances.

assureurs de l'extérieur de la province qui n'assurent pas les résidents ontariens et dont les obligations résultent d'accidents survenus à l'extérieur de l'Ontario. Selon l'appelante, le formulaire P&E ne change rien à la conclusion que les lois ontariennes ne s'appliquent pas aux faits de l'espèce. Elle fait valoir que le régime de réciprocité auquel les assureurs souscrivent en Amérique du Nord vise la protection des assurés et des personnes ayant le droit d'être indemnisées par ceux-ci. L'appelante estime en conséquence que le désir de l'intimée d'imposer un régime de répartition des pertes dans une affaire résultant d'un accident survenu en Colombie-Britannique n'a rien à voir avec l'objet du formulaire P&E ou du régime de réciprocité. Elle plaide que le formulaire P&E n'emporte pas assujettissement général ou total aux lois de l'Ontario à toutes fins et dans tous les cas.

In the present case, the underlying tort claim is not a relevant factor in determining whether Ontario has jurisdiction *simpliciter*. What is relevant is the fact that the insurers, by signing the PAU, have recognized the interrelationship of insurance regimes across Canada and accepted that insurers in one province will sometimes be sued in other provinces. In my opinion it is therefore reasonably foreseeable that the appellant will sometimes have to appear in Ontario to defend an action brought in that jurisdiction as a result of an accident having occurred in British Columbia. The appellant is, at least notionally, an insurer in Ontario, or one carrying out business in that province. In fact, the appellant has facilitated service and agreed, in limited circumstances, not to raise certain defences in Ontario courts. I do not find it unfair that insurers involved in the interprovincial scheme underlying this appeal, and having accepted the risk of harm to extraprovincial parties to the agreement, be considered to have attorned to the jurisdiction of Ontario's courts. I think that all of the reasons justifying a widened jurisdiction in *Morguard* apply in this case. Most importantly, the demands of Canadian federalism strongly favour this result. I wish to clarify at this juncture that my conclusion does not interfere with the right of the appellant in this case to argue that Ontario is *forum*

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En l'espèce, l'action principale en responsabilité délictuelle n'est pas un facteur pertinent pour simplement reconnaître compétence à l'Ontario. Sont pertinents, d'une part le fait que, en signant le formulaire P&E, les assureurs ont reconnu la connexité entre les régimes d'assurance au Canada, et d'autre part le fait qu'ils aient accepté que les assureurs d'une province puissent à l'occasion être poursuivis dans une autre. À mon avis, il est donc raisonnablement prévisible que l'appelante sera parfois tenue de comparaître en Ontario afin de se défendre contre une action intentée dans cette province à la suite d'un accident survenu en Colombie-Britannique. L'appelante est, en principe à tout le moins, assureur en Ontario ou un assureur exerçant des activités dans cette province. En fait, l'appelante a facilité la signification et a accepté, dans des cas limités, de ne pas plaider certains moyens de défense devant les tribunaux ontariens. Comme les assureurs qui participent au régime interprovincial à l'origine du présent pourvoi ont accepté le risque que des parties à l'accord venant d'autres provinces subissent un préjudice, il n'est pas injuste de considérer qu'ils ont acquiescé à la compétence des tribunaux ontariens. Je crois que toutes les raisons ayant justifié la reconnaissance d'une compétence élargie dans l'arrêt *Morguard* s'appliquent dans la présente affaire. Qui plus est, les exigences du fédéralisme canadien

non conveniens, or that the law of Ontario should not apply.

militent fortement en faveur de ce résultat. J'aimerais toutefois préciser, à ce stade-ci de l'analyse, que ma conclusion ne porte pas atteinte au droit qu'a l'appelante, en l'espèce, de soutenir que l'Ontario est un *forum non conveniens*, ou que les lois ontariennes ne devraient pas s'appliquer.

130 With respect, I cannot agree with the interpretation of Binnie J. that the phrase "respective Provinces or Territories" in the first paragraph of the PAU operates in a way that excludes the province of British Columbia from its reach. British Columbia is one of the respective provinces participating in the PAU interprovincial system. Given that, as indicated at the very top of the PAU, the appellant's head office is in the city of North Vancouver in the province of British Columbia, it need not appoint the superintendent of insurance of that province to accept service of notice or process on its behalf. The province of British Columbia was crossed out in the PAU only with regard to the fact that the appellant is bound by the ordinary rules of service to respond to claims against it in British Columbia.

En toute déférence, je ne peux souscrire à l'interprétation du juge Binnie, selon laquelle les mots [TRADUCTION] « province ou territoire concerné » figurant dans le premier paragraphe du formulaire P&E ont pour effet d'exclure la Colombie-Britannique du champ d'application de ce document. La Colombie-Britannique est l'une des diverses provinces qui participent au régime interprovincial. Compte tenu du fait que, comme il est indiqué au tout début du formulaire P&E, le siège de l'appelante est situé dans la ville de North Vancouver dans la province de Colombie-Britannique, l'appelante n'a pas besoin de désigner le surintendant des assurances de la Colombie-Britannique pour qu'il reçoive signification des avis ou actes de procédure. La seule raison pour laquelle le nom de la Colombie-Britannique a été biffé dans le formulaire P&E est le fait que l'appelante est liée par les règles ordinaires en matière de signification pour ce qui est des actions intentées contre elle en Colombie-Britannique.

131 The appellant submits that the PAU is designed only to protect the insured and those entitled to recover damages from those insured, and does not constitute a general submission to jurisdiction by it. Submission to jurisdiction with regard to motor vehicle accidents entered into by its insured, the appellant argues, has nothing to do with the indemnification of insurers between themselves. Faced with a PAU whose wording, notably in paragraph A, is general, the appellant refers to s. 18 of the British Columbia *Insurance (Motor Vehicle) Act*, which speaks of its ability to execute such undertakings, in order to limit their scope. The appellant also alleges that the undertaking to appear in an action refers to an action properly instituted, and that its appearance is not to be interpreted as restricting its right to raise issues of jurisdiction. The respondent submits that a real and substantial link between Ontario and the action is established by the fact that it has paid SABs

L'appelante soutient que le formulaire P&E vise uniquement à protéger les assurés et les personnes ayant droit d'être indemnisées par ceux-ci, et qu'il n'emporte pas acquiescement général à la compétence des tribunaux des autres ressorts signataires. L'appelante prétend que l'acquiescement à compétence auquel a consenti son assuré en matière d'accidents d'automobile n'a aucun rapport avec l'indemnisation entre assureurs. Relativement à l'interprétation du formulaire P&E, document rédigé en termes généraux, particulièrement le paragraphe A, l'appelante se réfère à l'art. 18 de la loi intitulée *Insurance (Motor Vehicle) Act* de la Colombie-Britannique, qui précise sa capacité de prendre de tels engagements, afin de limiter la portée de ceux-ci. En outre, elle prétend que la promesse de comparaître vise les actions intentées de façon régulière, et que sa comparution ne doit pas être considérée comme ayant pour effet

to its insured pursuant to the Ontario *Insurance Act*, and that those payments will be deducted by the appellant from payments it owes to the respondent's insured. The respondent argues that the appellant is in fact carrying out business in Ontario, though it does not sell insurance products there, by the very fact that it has responsibilities with regard to insured persons there as a result of the PAU. It submits that the terms of the PAU are sufficiently broad to establish jurisdiction *simpliciter* because in signing this document the appellant appointed the Superintendent of Insurance of Ontario to accept service of notice or process on its behalf "with respect to an action or proceeding against it or its insured, or its insured and another or others, arising out of a motor-vehicle accident in any of the respective Provinces or Territories" (emphasis added). The respondent further submits that the appellant undertook "[t]o appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge" (emphasis added).

de restreindre son droit de soulever des questions de compétence. L'intimée affirme que l'existence d'un lien réel et substantiel entre l'Ontario et l'action est établie du fait qu'elle a versé des indemnités d'accident légales à son assuré conformément à la *Loi sur les assurances* de l'Ontario, et que l'appelante déduira ces sommes de celles qu'elle doit verser à l'assuré de l'intimée. Cette dernière soutient que, en réalité, l'appelante exerce des activités en Ontario, même si elle n'y vend pas de produits d'assurance, justement à cause des obligations qui lui incombent dans cette province, par l'effet du formulaire P&E, à l'égard des personnes assurées. Elle soutient que les termes du formulaire P&E sont suffisamment larges pour conclure à la simple reconnaissance de compétence parce qu'en signant ce document l'appelante a chargé le surintendant des assurances de l'Ontario d'accepter en son nom la signification d'avis ou d'actes de procédure [TRADUCTION] « relativement aux actions ou autres procédures intentées contre elle ou contre son assuré, ou contre son assuré et d'autres, par suite d'un accident d'automobile survenu dans quelque province ou territoire concerné » (je souligne). L'intimée prétend également que l'appelante s'est engagée « [à] comparaître à toute action ou autre procédure qui est intentée contre elle ou contre son assuré dans quelque province ou territoire et dont elle a connaissance » (je souligne).

I accept that s. 275 of the Ontario *Insurance Act*, the indemnification provision at issue in this appeal, is not directly related to the protection of the insured and those injured by them, or to facilitating the mobility of persons in Canada. That said, I do not think that it is reasonable, when deciding the issue of jurisdiction *simpliciter*, to enter into a piecemeal interpretation of the regime providing for the integration of insurance protection across Canada and to establish distinctions between benefits payable to the insured, on the one hand, and the indemnification of their insurers, on the other hand. I think it is interesting, when dealing with some claims coming under the PAU and others not, to note the similar holistic approach taken by Goudge J.A. in his analysis of jurisdiction *simpliciter* in *McNichol Estate*, *supra*, at paras. 11-13. There is no valid reason to

132 Je reconnais que l'art. 275 de la *Loi sur les assurances* de l'Ontario, la disposition relative à l'indemnisation en litige dans le présent pourvoi, ne vise pas directement à protéger les assurés et les personnes à qui ceux-ci causent préjudice, ni à faciliter la libre circulation des personnes au Canada. Cela dit, lorsqu'il s'agit de trancher la question de la simple reconnaissance de compétence, je ne crois pas qu'il soit raisonnable de s'engager dans une interprétation élément par élément d'un régime pourvoyant à l'intégration des garanties d'assurance en vigueur dans l'ensemble du Canada, et d'établir des distinctions entre les indemnités payables à l'assuré, d'une part, et l'indemnisation de leurs assureurs, d'autre part. Lorsqu'on examine des réclamations, dont certaines relèvent du formulaire P&E et d'autres non, il est intéressant, selon moi, de

give the PAU a restrictive interpretation at this point in order to overcome the principled approach developed in *Morguard.*

souligner la démarche globale similaire qu'a adoptée le juge Goudge de la Cour d'appel de l'Ontario dans son analyse de la simple reconnaissance de compétence, aux par. 11 à 13 de l'arrêt *McNichol Estate*, précité. À ce stade-ci, il n'existe aucune raison valable d'interpréter restrictivement le formulaire P&E afin de surmonter l'approche fondée sur des principes élaborée dans l'arrêt *Morguard.*

133 In light of the foregoing, wherein I accept that a link with the subject matter of the claim is sufficient to establish the jurisdiction *simpliciter* of a forum given the flexible approach that has been endorsed by this Court, I think that it is fair to say that there are a number of considerations which, taken together with the general language of the PAU, indicate that the appellant is subject to Ontario's jurisdiction. I accept the position of the respondent that the benefits it paid to an Ontario resident which were later deducted by the appellant, the general undertaking to appear by the appellant, and its limited undertaking not to present certain defences in Ontario actions, all militate in favour of a finding that jurisdiction *simpliciter* is made out. I also find the reasoning of Goudge J.A., for a unanimous Court of Appeal for Ontario in *Insurance Corp. of British Columbia v. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705, to be applicable here. In that case, the trial judge had concluded at trial that the entitlement to indemnification found at s. 275(1) of the Ontario *Insurance Act* only applied to insurers responsible under s. 268(2) of the Act for the payment of SABs. The trial judge was of the opinion that s. 268 of the Act could only apply to contracts made in Ontario. The Court of Appeal disagreed and held at p. 5759 "that an extra-provincial insurer that has chosen to participate in the reciprocal scheme is obliged to pay those SABs mandated by s. 268(1) of the *Insurance Act* as if its policy were a valid Ontario motor vehicle liability policy. By filing the PAU, that insurer [in that case, ICBC] has undertaken to comply with the no-fault coverage required by s. 268(1) and (2)." The issue before us is not, at this stage, whether a different result was justified in *Royal Insurance* on the basis of the choice of law; it is that the integration of the provincial regimes is real and substantially made out by the obligation to pay SABs in another province under the PAU. As

À la lumière des paragraphes qui précèdent, dans lesquels j'admets que l'existence d'un lien avec l'objet de l'action suffit pour établir la simple reconnaissance de compétence d'un tribunal vu la démarche souple à laquelle a souscrit notre Cour, je pense qu'on peut légitimement dire qu'il existe un certain nombre de facteurs qui, conjugués aux termes généraux du formulaire P&E, indiquent que l'appelante est assujettie aux lois et tribunaux de l'Ontario. J'accepte la thèse de l'intimée selon laquelle tous les éléments suivants incitent à conclure à la simple reconnaissance de compétence : les indemnités que l'intimé a versées à un résident de l'Ontario et que l'appelante a ensuite déduites, la promesse générale de comparaître faite par l'appelante et son engagement limité de ne pas présenter certains moyens de défense dans les actions intentées en Ontario. En outre, j'estime que s'applique en l'espèce le raisonnement suivi par le juge Goudge, qui exprimait alors l'opinion unanime de la Cour d'appel de l'Ontario dans l'arrêt *Insurance Corp. of British Columbia c. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705. Dans cette affaire, le juge de première instance avait conclu que le droit à l'indemnisation prévu au par. 275(1) de la *Loi sur les assurances* de l'Ontario ne s'appliquait qu'aux assureurs tenus de verser les indemnités d'accident légales en vertu du par. 268(2) de la Loi. Il était d'avis que l'art. 268 de la Loi ne pouvait s'appliquer qu'aux contrats conclus en Ontario. Ne partageant pas cet avis, la Cour d'appel a exprimé son désaccord et a conclu, à la p. 5759, [TRADUCTION] « qu'un assureur de l'extérieur de la province qui a choisi d'adhérer au régime de réciprocité est tenu de verser les indemnités d'accident légales prévues par le par. 268(1) de la *Loi sur les assurances*, au même titre que si sa police était une police ontarienne de responsabilité automobile valide. En déposant le formulaire P&E, cet assureur [ICBC dans cette affaire] s'est engagé à respecter la

mentioned earlier, the determination of jurisdiction *simpliciter* is a preliminary issue, distinct from the issues of *forum non conveniens* and choice of law. I reject the idea that the latter inquiries into *forum conveniens* and choice of law should have any influence over the determination of jurisdiction *simpliciter*. This is consistent with the approach taken by a unanimous Court of Appeal for Ontario in *Berg (Litigation guardian of) v. Farm Bureau Mutual Insurance Co.* (2000), 50 O.R. (3d) 109, and I think that it is the appropriate one.

Having found that jurisdiction *simpliciter* is established, I must decide whether the question of *forum non conveniens* should be decided by the court or remitted to an arbitrator, as ordered by the Court of Appeal. In my view, the same arguments that justify that a court of justice, not an arbitrator, decide the issue of jurisdiction *simpliciter* in this case apply to that of whether the former or the latter should determine whether there exists a more convenient forum in this case. The *forum non conveniens* inquiry is a preliminary one that must be raised at the earliest opportunity and its determination is necessary before the jurisdiction of an arbitrator can be effective in a case such as this.

C. *Review of the Decision on Forum Conveniens*

The Court of Appeal did not deal with this issue, holding that an arbitrator should first decide whether there was a clearly more appropriate forum for the action. The applications judge had decided to grant a stay on the basis that he was not satisfied that there

garantie d'assurance sans égard à la faute prescrite par les par. 268(1) et (2). » La question que nous devons trancher à ce stade-ci n'est pas de savoir si le choix du droit applicable aurait justifié un résultat différent dans l'arrêt *Royal Insurance*, mais de savoir si l'intégration des régimes provinciaux est réalisée de façon réelle et substantielle par l'obligation, prévue par le formulaire P&E, de verser les indemnités d'accident légales dans une autre province. Comme je l'ai mentionné plus tôt, la simple reconnaissance de compétence est une question préliminaire, distincte des questions touchant le *forum non conveniens* et le choix du droit applicable. Je rejette l'idée que les analyses concernant ces questions devraient influer d'une manière ou d'une autre sur la décision relative à la simple reconnaissance de compétence. Cette conclusion est conforme à la démarche adoptée par la Cour d'appel de l'Ontario dans l'arrêt unanime *Berg (Litigation guardian of) c. Farm Bureau Mutual Insurance Co.* (2000), 50 O.R. (3d) 109, démarche qui est à mon avis celle qu'il convient d'appliquer.

134 Ayant conclu à la simple reconnaissance de compétence, je dois maintenant décider si la question du *forum non conveniens* doit être tranchée par un tribunal judiciaire ou être renvoyée à un arbitre conformément à l'ordonnance de la Cour d'appel. À mon sens, les arguments justifiant qu'un tribunal judiciaire, et non un arbitre, statue sur la question de la simple reconnaissance de compétence dans la présente affaire s'appliquent également à la question de savoir si le tribunal ou l'arbitre doit décider s'il existe un autre tribunal plus approprié en l'espèce. La question du *forum non conveniens* est une question préliminaire qui doit être soulevée à la première occasion et tranchée avant que l'arbitre puisse avoir effectivement compétence dans une affaire comme celle dont nous sommes saisis.

C. *Contrôle de la décision relative au forum conveniens*

135 La Cour d'appel ne s'est pas penchée sur cette question, estimant plutôt qu'un arbitre devait d'abord décider s'il existait un autre tribunal nettement plus approprié pour connaître de l'action. Quant au juge des motions, il avait décidé de

would result a loss of a juridical advantage to the respondent, that s. 275 of the Ontario *Insurance Act* was not meant to deal with issues arising in the context of an interprovincial scheme, and that the underlying dispute between the parties was a civil action in British Columbia concerning an automobile accident that occurred in that province.

136 The appellant submits that British Columbia has clearly been established as the "natural forum" for the determination of the respondent's indemnification claim because all of the facts giving rise to the claim, and all legal proceedings resulting from those facts, occurred in British Columbia. It adds that British Columbia courts are quite capable of deciding which law applies and of applying the law of another province, should it be necessary to do so. The respondent replies that the applications judge incorrectly applied the onus of proof by not requiring that the appellant show that British Columbia is clearly the more appropriate forum, and by only requiring that the respondent prove that it would suffer the loss of a juridical advantage if the action were stayed. The other factors that should have been considered, the respondent submits, are the fact that its insureds, the Brennans, are residents of Ontario, the fact that the SABs were paid in Ontario under the terms of a contract concluded in that province, that the right of indemnification arises in Ontario under Ontario law, that the key documents and witnesses required to determine the claimed right to indemnification are in Ontario, that the right of indemnification is unconnected to the tort action in British Columbia, that the appellant, in signing the PAU, appointed the Superintendent of Insurance of Ontario as agent of service and undertook to appear in any action or proceeding against it, and that the respondent is not a licensed insurer in British Columbia.

surseoir à l'instance en Ontario pour les motifs suivants : il n'était pas convaincu que cette décision ferait perdre à l'intimée un avantage juridique; l'art. 275 de la *Loi sur les assurances* de l'Ontario n'a pas pour objet de régler des questions se soulevant dans le cadre d'un régime interprovincial; le fond du différend entre les parties est une action civile intentée en Colombie-Britannique par suite d'un accident d'automobile survenu dans cette province.

L'appelante prétend qu'il a clairement été établi que la Colombie-Britannique est le « ressort naturel » pour connaître de la demande d'indemnisation de l'intimée, étant donné que tous les faits à l'origine de la réclamation sont survenus dans cette province et que toutes les procédures judiciaires en découlant y ont été intentées. Elle ajoute que les tribunaux de la Colombie-Britannique sont parfaitement capables de déterminer quel est le droit applicable et, au besoin, d'appliquer celui d'une autre province. L'intimée répond que le juge des motions a mal appliqué le fardeau de la preuve, du fait qu'il n'a pas obligé l'appelante à démontrer que la Colombie-Britannique était clairement le ressort le plus approprié, mais s'est plutôt contenté d'exiger que l'intimée prouve qu'elle perdrait un avantage juridique s'il ordonnait la suspension de l'instance. Selon l'intimée, les autres facteurs dont il aurait fallu tenir compte sont les suivants : Les Brennan, ses assurés, sont des résidents de l'Ontario; les indemnités d'accident légales ont été versées en Ontario en vertu d'un contrat conclu dans cette province; le droit à l'indemnisation prend sa source en Ontario en vertu des lois de cette province; les documents et les témoins importants nécessaires pour décider du droit à l'indemnisation revendiqué se trouvent en Ontario; le droit à l'indemnisation n'a aucun lien avec l'action en responsabilité délictuelle intentée en Colombie-Britannique; en signant le formulaire P&E, l'appelante a confié au surintendant des assurances de l'Ontario la responsabilité de recevoir signification des actes de procédure et autres documents et elle s'est engagée à comparaître à toute action ou autre procédure intentée contre elle; l'intimée n'est pas un assureur autorisé à exercer ses activités en Colombie-Britannique.

I agree with the respondent that the proper test to a *forum non conveniens* inquiry is to ask whether the existence of a more appropriate forum has been clearly established to displace the forum selected by the plaintiff: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at pp. 920-21; affirmed by the Court in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, at para. 89. If neither forum is clearly more appropriate, the domestic forum wins by default: *Amchem*, at p. 931. The application of the balance of convenience by the applications judge constituted an error of law since "a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides": *Amchem*, at p. 920.

With regard to the loss of a juridical advantage, I am of the view that, in staying the proceedings in part because he was not satisfied that there would result a loss of a juridical advantage to the respondent, the applications judge established an unduly high threshold. As the Court explained in *Amchem*, at p. 920:

> The weight to be given to juridical advantage is very much a function of the parties' connexion to the particular jurisdiction in question . . . [A] party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available. [Emphasis added.]

Put another way, all that a party has to show is "a fair possibility of gaining an advantage by prosecuting the action in the desired jurisdiction": *Avenue Properties Ltd. v. First City Development Corp.* (1986), 32 D.L.R (4th) 40 (B.C.C.A.), at pp. 46-47. Given the respondent's real and substantial connection to Ontario, I am of the view that it has a legitimate claim to, and it is reasonable to expect that it will, take advantage of the interinsurer indemnification scheme which Ontario provides. There is a fair possibility that the respondent will gain an advantage by prosecuting the action in Ontario. Other

137 À l'instar de l'intimée, j'estime que le critère applicable pour décider si le tribunal choisi par le demandeur à l'action est un *forum non conveniens* consiste à se demander si on a clairement établi l'existence d'un tribunal plus approprié : *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897, p. 920-921; opinion confirmée par notre Cour dans l'arrêt *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90, par. 89. Lorsqu'aucun des tribunaux n'est clairement le plus approprié, le tribunal interne l'emporte *ipso facto* : *Amchem*, p. 931. Le juge des motions a commis une erreur de droit en appliquant le critère de la prépondérance des inconvénients, puisque « la partie dont la demande a un lien réel et important avec un ressort peut légitimement faire valoir les avantages qu'elle peut en retirer » : *Amchem*, p. 920.

138 Pour ce qui est de la perte d'un avantage juridique, j'estime que le juge des motions a appliqué un critère excessivement exigeant lorsqu'il a sursis à l'instance, en partie parce qu'il n'était pas convaincu que l'intimée perdrait un avantage juridique. Comme l'a expliqué notre Cour dans l'arrêt *Amchem*, p. 920 :

> Le poids à accorder à un avantage juridique dépend grandement du lien des parties avec le ressort en question. [. . .] [L]a partie dont la demande a un lien réel et important avec un ressort peut légitimement faire valoir les avantages qu'elle peut en retirer. La légitimité de sa demande repose sur l'attente raisonnable qu'en cas de litige découlant de l'opération en cause, elle pourra se prévaloir de ces avantages. [Je souligne.]

En d'autres termes, la partie n'a qu'à démontrer qu'elle possède de [TRADUCTION] « bonnes chances d'obtenir un avantage en poursuivant l'action dans le ressort désiré » : *Avenue Properties Ltd. c. First City Development Corp.* (1986), 32 D.L.R (4th) 40 (C.A.C.-B.), p. 46-47. En raison du lien réel et substantiel que l'intimée possède avec l'Ontario, je suis d'avis qu'elle peut légitimement faire valoir les avantages qu'elle peut tirer du régime d'indemnisation réciproque de l'Ontario, et qu'il est raisonnable de s'attendre à ce qu'elle les fasse valoir. L'intimée a de bonnes chances d'obtenir un avantage en

factors also matter: consideration must be given to matters of public policy, where relevant, the places where the parties carry on their business, the convenience and expense of litigating in one place or the other, the discouragement of forum shopping (*Holt Cargo Systems*, at para. 91), as well as other relevant factors that may appear.

139 In my view, ICBC did not provide any evidence that British Columbia was clearly the more appropriate forum. It is totally irrelevant that the underlying action was launched in British Columbia, given the issues in the case at bar. This action is altogether independent of the one before the British Columbia court; it was started in Ontario on the basis of payments made under an insurance policy contracted in Ontario. Many factors previously mentioned link the parties to Ontario. Furthermore, the possibility of interinsurer indemnification is the product of an Ontario statutory regime. I would think that it is obvious that there is a juridical disadvantage to the respondent in having this action proceed in British Columbia. Obviously, both parties are concerned that the choice of the forum will have an impact on the choice of law. The question of the choice of law, in my view, is a separate issue and should be dealt with, in the first instance, by an arbitrator appointed pursuant to s. 275(4) of the Ontario *Insurance Act*, his or her decision being subject to appeal in the normal course of things.

D. *The Constitutional Issue*

140 I do not propose to deal at any length with the question of the permissible reach of Ontario's *Insurance Act*. In *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, the Court opined that valid provincial legislation can affect extra-provincial rights in an "incidental" manner. I am of the view that valid provincial laws can affect "matters" which are "sufficiently connected" to the province. See J.-G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf)), at p. 2.1. In my view, the respondent has

intentant l'action en Ontario. D'autres facteurs sont également importants : il faut tenir compte des considérations de politique générale pertinentes, de l'endroit où les parties exploitent leur entreprise, des aspects pratiques et financiers de la tenue du litige dans un endroit ou dans l'autre, de la nécessité de dissuader les parties de s'adonner à la recherche d'un tribunal favorable (*Holt Cargo Systems*, par. 91) et de tous les autres facteurs pertinents qui peuvent se présenter.

À mon avis, ICBC n'a présenté aucune preuve établissant que la Colombie-Britannique était clairement le forum le plus approprié. Le fait que l'action principale ait été intentée dans cette province n'a aucune pertinence, vu les questions qui se soulèvent en l'espèce. La présente action est tout à fait indépendante de celle dont est saisi le tribunal de la Colombie-Britannique; elle a été introduite en Ontario, sur la base des paiements effectués en vertu d'une police d'assurance souscrite en Ontario. Bon nombre des facteurs mentionnés précédemment rattachent les parties à l'Ontario. De plus, la possibilité qu'il y ait indemnisation entre assureurs découle d'un régime législatif ontarien. Il est selon moi évident que l'intimée subira un désavantage juridique si l'action est entendue en Colombie-Britannique. Il est clair que les deux parties craignent que le choix du tribunal ait une incidence sur le choix du droit applicable. Cette question est à mon avis une question distincte, qui doit être tranchée en première instance par un arbitre nommé conformément au par. 275(4) de la *Loi sur les assurances* de l'Ontario, décision normalement susceptible d'appel.

D. *La question constitutionnelle*

Je n'entends pas examiner en profondeur la question de la portée que l'on peut donner à la *Loi sur les assurances* de l'Ontario. Dans l'arrêt *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297, la Cour a émis l'opinion qu'une loi provinciale valide peut porter atteinte de façon « accessoire » à des droits extraprovinciaux. Je suis d'avis qu'une loi provinciale valide peut produire des effets sur des « matières » qui présentent un « lien suffisant » avec la province. Voir J.-G. Castel et J. Walker, *Canadian Conflict of Laws* (5e

shown that the subject matter which the *Insurance Act* covers, interinsurer indemnification, falls within provincial jurisdiction and is sufficiently connected to Ontario so as to render the statute applicable to the ICBC.

VI. Disposition

I would dismiss the appeal, with costs, and affirm the decision of the Court of Appeal to refer the matter back to the applications judge to appoint an arbitrator under s. 10 of the *Arbitration Act, 1991*, to deal with the question of the choice of law and consider the substantive issues raised by the parties. The constitutional question should be answered in the negative.

APPENDIX

Insurance Act, R.S.O. 1990, c. I.8 (prior to amendment by S.O. 1996, c. 21)

Statutory accident benefits

268.—(1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*.

. . .

Indemnification in certain cases

275.—(1) The insurer responsible under subsection 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.

Idem

(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each

éd. 2002 (feuilles mobiles)), p. 2.1. Selon moi, l'intimée a établi que la question traitée dans la *Loi sur les assurances* de l'Ontario, soit l'indemnisation entre assureurs, est un sujet de compétence provinciale qui présente un lien suffisant avec l'Ontario pour que la loi en question s'applique à ICBC.

VI. Dispositif

Je rejetterais le pourvoi, avec dépens, et je confirmerais la décision de la Cour d'appel renvoyant l'affaire au juge des motions pour qu'il nomme, en vertu de l'art. 10 de la *Loi de 1991 sur l'arbitrage*, un arbitre chargé de trancher la question du choix du droit applicable et d'examiner les questions de fond soulevées par les parties. La question constitutionnelle devrait recevoir une réponse négative. 141

ANNEXE

Loi sur les assurances, L.R.O. 1990, ch. I.8 (avant sa modification par L.O. 1996, ch. 21)

Indemnités d'accident légales

268 (1) Chaque contrat constaté par une police de responsabilité automobile, y compris chaque contrat en vigueur au moment où est prise ou modifiée l'*Annexe sur les indemnités d'accident légales*, est réputé prévoir les indemnités d'accident légales énoncées à l'*Annexe* et dans les modifications apportées à celle-ci, sous réserve des conditions, dispositions, exclusions et restrictions énoncées à cette *Annexe*.

. . .

Indemnisation dans certains cas

275 (1) L'assureur tenu de payer, aux termes du paragraphe 268(2), des indemnités d'accident légales à des catégories de personnes qui peuvent être nommées dans les règlements a droit, sous réserve des conditions, dispositions, exclusions et restrictions qui peuvent être prescrites, à une indemnisation, en ce qui concerne les indemnités qu'il a payées, de la part des assureurs d'une catégorie ou des catégories d'automobiles qui peuvent être nommées dans les règlements et qui étaient impliquées dans l'incident dont découle l'obligation de payer des indemnités d'accident légales.

Idem

(2) L'indemnisation visée au paragraphe (1) est effectuée en fonction du degré de responsabilité de l'assuré

insurer's insured as determined under the fault determination rules.

. . .

Arbitration

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.

Arbitration Act, 1991, S.O. 1991, c. 17

Stay

7.—(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

. . .

3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

8. . . .

Questions of law

(2) The arbitral tribunal may determine any question of law that arises during the arbitration; the court may do so on the application of the arbitral tribunal, or on a party's application if the other parties or the arbitral tribunal consent.

Appeal

(3) The court's determination of a question of law may be appealed to the Court of Appeal, with leave.

. . .

Appointment of arbitral tribunal

10.—(1) The court may appoint the arbitral tribunal, on a party's application, if,

. . .

de chaque assureur tel qu'il est établi selon les règles de détermination de la responsabilité.

. . .

Arbitrage

(4) Si les assureurs n'arrivent pas à s'entendre à l'égard de l'indemnisation visée au présent article, le différend est réglé par voie d'arbitrage aux termes de la *Loi sur l'arbitrage*.

Loi de 1991 sur l'arbitrage, L.O. 1991, ch. 17

Sursis

7 (1) Si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question que la convention oblige à soumettre à l'arbitrage, le tribunal judiciaire devant lequel l'instance est introduite doit, sur la motion d'une autre partie à la convention d'arbitrage, surseoir à l'instance.

Exceptions

(2) Cependant, le tribunal judiciaire peut refuser de surseoir à l'instance dans l'un ou l'autre des cas suivants :

. . .

3. L'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario.

8 . . .

Questions de droit

(2) Le tribunal arbitral peut statuer sur toute question de droit qui est soulevée au cours de l'arbitrage. Le tribunal judiciaire peut également le faire à la requête du tribunal arbitral, ou à la requête d'une partie, si les autres parties ou le tribunal arbitral y consentent.

Appel

(3) La décision du tribunal judiciaire sur une question de droit peut faire l'objet d'un appel devant la Cour d'appel, sur autorisation de celle-ci.

. . .

Désignation du tribunal arbitral

10 (1) Le tribunal judiciaire peut désigner le tribunal arbitral, à la requête d'une partie, dans les cas suivants :

. . .

(b) a person with power to appoint the arbitral tribunal has not done so after a party has given the person seven days notice to do so.

No appeal

(2) There is no appeal from the court's appointment of the arbitral tribunal.

. . .

Arbitral tribunal may rule on own jurisdiction

17.—(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

. . .

Declaration of invalidity of arbitration

48.—(1) At any stage during or after an arbitration, on the application of a party who has not participated in the arbitration, the court may grant a declaration that the arbitration is invalid because,

. . .

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law. . . .

Appeal allowed with costs, MAJOR, BASTARACHE *and* DESCHAMPS JJ. *dissenting*.

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the respondent: Fogler, Rubinoff, Toronto; Samis & Company, Toronto.

b) une personne investie du pouvoir de désigner le tribunal arbitral n'a pas procédé à sa désignation après la remise par une partie d'un préavis de sept jours à cette fin.

Désignation sans appel

(2) La désignation du tribunal arbitral par le tribunal judiciaire n'est pas susceptible d'appel.

. . .

Possibilité pour le tribunal arbitral de statuer sur sa propre compétence

17 (1) Le tribunal arbitral peut statuer sur sa propre compétence en matière de conduite de l'arbitrage et peut, à cet égard, statuer sur les objections relatives à l'existence ou à la validité de la convention d'arbitrage.

. . .

Déclaration de nullité de l'arbitrage

48 (1) À quelque étape que ce soit durant ou après un arbitrage, à la requête d'une partie qui n'a pas participé à l'arbitrage, le tribunal judiciaire peut, par jugement déclaratoire, déclarer nul l'arbitrage pour l'un des motifs suivants :

. . .

c) l'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario. . .

Pourvoi accueilli avec dépens, les juges MAJOR, BASTARACHE *et* DESCHAMPS *sont dissidents*.

Procureurs de l'appelante : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intimée : Fogler, Rubinoff, Toronto; Samis & Company, Toronto.

TAB 58

farm licence. Hence, to accept the petitioners' interpretation would, for all intents and purposes, defeat the purpose of Part 3 of the *Forest Act*, which deals with the disposition of timber by the Crown and authorizes the Minister to enter into tree farm licences, a result which could not, in my view, have been intended by the legislature.

VI
CONCLUSION

[22] In my opinion, the correct interpretation of s. 28 of the Act is that the legislature could not have intended, by using the word "encumbered" in s. 28(1)(*b*)(i), to include aboriginal rights. In the result, the answer to the preliminary issue of law is that aboriginal title, including ownership, title and other aboriginal rights over all of Haida Gwaii (the Queen Charlotte Islands), including the land, water, flora and fauna and resources thereof, is *not* capable of constituting an encumbrance within the meaning of s. 28 of the Act.

Answer accordingly.

United States of America v. Ivey et al.

[Indexed as: United States of America v. Ivey]

Court File No. 94-CQ-52877

Ontario Court (General Division), Sharpe J. November 24, 1995.

Conflict of laws — Foreign judgments — Defences — Waste managers operating disposal site in foreign country — Foreign government cleaning up site in accordance with legislation — Obtaining judgment for cost of clean-up in foreign court — Seeking to enforce judgment — Real and substantial connection test applying — Legislation not penal, tax or revenue in nature — Not within public law exception to enforcement — No defence to enforcement.

Waste management operators used a disposal site in a foreign country. The government of that country brought an action against the waste managers for reimbursement of the cost of remedial measures undertaken by the Environmental Protection Agency in relation to a waste disposal site. The measure of recovery was prescribed in the legislation and was directly tied to the cost of the required environmental clean-up. The amounts sought to be recovered were actually expended in response to an environmental threat and were incurred in accordance with the prescribed methods which included notification to the owners who were given an opportunity to respond. The owners did not defend the actions which were brought in the foreign jurisdiction.

The foreign government then brought an action and moved for summary judgment to enforce the judgment it had obtained. The waste managers argued

that the courts of a foreign jurisdiction did not have jurisdiction over them and that enforcement should be refused.

Held, the motion should be granted.

The real and substantial connection test is applicable in determining whether the foreign court had jurisdiction. The law would be deficient and at odds with the reality of modern commercial life if it were possible for a domestic resident to engage actively in a business in a foreign country for a period of several years but shelter behind domestic borders to avoid the claim for harm caused by that activity.

The real and substantial connection test was met. While the nature of liability might be unexpected, it was restitutionary in nature and not imposed with a view to the punishment of the party responsible.

A claim for reimbursement of costs incurred as a result of actionable conduct cannot be viewed as a tax. Nor was the legislation penal in nature.

There was no attempt by the foreign country to assert extraterritorial sovereignty. The legislation represented the judgment of that country's legislature as to an appropriate regime of civil liability for environmentally hazardous substances in certain circumstances.

The foreign court had jurisdiction to render the judgment and none of the defences to enforcement was sustainable.

Morguard Investments Ltd. v. De Savoye (1990), 76 D.L.R. (4th) 256, [1990] 3 S.C.R. 1077, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, 122 N.R. 81, 24 A.C.W.S. (3d) 478, **apld**

Evans Dodd v. Gambin Associates (1994), 26 C.P.C. (3d) 189, 17 O.R. (3d) 803, 46 A.C.W.S. (3d) 853; *Attorney-General of New Zealand v. Ortiz*, [1984] 1 A.C. 1; *Attorney General for the United Kingdom v. Heinemann Publishers Australia Pty. Ltd.* (1988), 165 C.L.R. 30, **consd**

Other cases referred to

Amchem Products Inc. v. British Columbia (Workers' Compensation Board) (1993), 102 D.L.R. (4th) 96, [1993] 1 S.C.R. 897, 14 C.P.C. (3d) 1, 39 W.A.C. 1, [1993] 3 W.W.R. 441, 77 B.C.L.R. (2d) 62, 150 N.R. 321, 39 A.C.W.S. (3d) 600; *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 29 C.P.C. (3d) 65, 17 O.R. (3d) 407, 43 A.C.W.S. (3d) 1082; *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654, 19 C.P.C. (3d) 219, 57 W.A.C. 146, [1994] 1 W.W.R. 112, 83 B.C.L.R. (2d) 177, 43 A.C.W.S. (3d) 46; leave to appeal to S.C.C. refused 109 D.L.R. (4th) vii, 23 C.P.C. (3d) 294*n*, 78 W.A.C. 239*n*, 172 N.R. 157*n*; *Fabrelle Wallcoverings & Textiles Ltd. v. North American Decorative Products Inc.* (1992), 6 C.P.C. (3d) 170, 33 A.C.W.S. (3d) 392; *McMickle v. Van Straaten* (1992), 93 D.L.R. (4th) 74, 33 A.C.W.S. (3d) 864; *Stoddard v. Accurpress Manufacturing Ltd.*, [1994] 1 W.W.R. 677, 84 B.C.L.R. (2d) 194, 41 A.C.W.S. (3d) 1130; *Clancy v. Beach*, [1994] 7 W.W.R. 332, 92 B.C.L.R. (2d) 82, 45 A.C.W.S. (3d) 846; *Allen v. Lynch* (1993), 21 C.P.C. (3d) 99, 111 Nfld. & P.E.I.R. 43, 41 A.C.W.S. (3d) 959; *Huntington v. Attrill*, [1893] A.C. 150; *U.S. v. Monsanto*, 878 F.2d 160 (1988); *Re State of Norway's Application*, [1990] 1 A.C. 723; *United States of America v. Inkley*, [1989] 1 Q.B. 255; *Attorney-General for the United Kingdom v. Wellington Newspapers Ltd.*, [1988] 1 N.Z.L.R. 129; *Secretary of State of Canada v. Alien Property Custodian for United States*, [1931] 1 D.L.R. 890, [1931] S.C.R. 169; *Union of India v. Bumper Development Corp.* (1995), 36 C.P.C. (3d) 249, [1995] 7 W.W.R. 80, 29 Alta. L.R. (3d) 194, 171 A.R. 166, 54 A.C.W.S. (3d) 1111; *Laane and Baltser v. Estonian State Cargo & Passenger SS. Line*, [1949] 2 D.L.R. 641, [1949] S.C.R.

530; *Tolofson v. Jensen* (1994), 120 D.L.R. (4th) 289, [1994] 3 S.C.R. 1022, 26 C.C.L.I. (2d) 1, 22 C.C.L.T. (2d) 173, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202, 77 O.A.C. 81, 84 W.A.C. 241, [1995] 1 W.W.R. 609, 100 B.C.L.R. (2d) 1, 175 N.R. 161, 52 A.C.W.S. (3d) 40; *Boardwalk Regency Corp. v. Maalouf* (1992), 88 D.L.R. (4th) 612, 6 O.R. (3d) 737, 51 O.A.C. 64, 31 A.C.W.S. (3d) 591 [supplementary reasons 88 D.L.R. (4th) 632, 6 O.R. (3d) 758, 51 O.A.C. 277, 32 A.C.W.S. (3d) 470]; *Re: Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (1992); *J.V. Peters & Co. v. EPA*, 767 F.2d 263 (1985)

Statutes referred to

Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C., §107(a), 9607(a) (1980)
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 121
Environmental Protection Act, R.S.O. 1990, c. E.19

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20

ACTION to enforce foreign judgment; MOTION for summary judgment.

Malcolm N. Ruby, for plaintiff.

John S. McKeown, *John P. McGowan* and *Catherine C. Grant*, for defendants.

SHARPE J.:—

INTRODUCTION

The plaintiff United States of America brings this motion for summary judgment in an action to enforce two judgments it has obtained against the defendants in the United States District Court for the Eastern District of Michigan ("District Court"). The defendants, by way of a cross-motion, ask that the action be dismissed. The District Court judgments were obtained pursuant to the *Comprehensive Environmental Response, Compensation and Liability Act*, 42 U.S.C. §9607(a) (1980) ("CERCLA"). The plaintiff sued for reimbursement of the cost of remedial measures undertaken by the Environmental Protection Agency ("EPA") in relation to a waste disposal site owned and operated by the defendants. The defendants did not defend the District Court actions and resist enforcement of the judgments by this court on a number of grounds summarized in the four issues which follow.

ISSUES

(1) Did the District Court have jurisdiction over the defendants to provide a basis for this court to enforce the judgments?

(2) Should enforcement be refused on the grounds that the judgments are based on the "penal, revenue or other public law" of a foreign state?

(3) Should enforcement be refused on the grounds that the judgments were obtained in violation of the rules of natural justice?

(4) Should enforcement be refused on the grounds that to enforce the judgments would be contrary to public policy?

FACTS

The parties

Liquid Disposal Inc. ("LDI") is a Michigan corporation which conducted a waste disposal business 20 miles north of Detroit in Shelby Township, Michigan between 1969 and 1982. The defendant Ivey, an Ontario resident, had a controlling interest in LDI and oversaw its management and operations between 1974 and 1982. The defendant Maziv, an Ontario corporation, was the parent of LDI and held 80% of LDI's shares. The defendant Ineco, also an Ontario corporation, acquired the shares Maziv held in LDI in December, 1986, a term of the transfer being that Ineco assumed the liabilities of Maziv. Ivey is the president and chief executive officer of Ineco and was the president, general manager and a director of Maziv from 1961 to 1986.

Injunction and bankruptcy proceedings

There is a lengthy history of court proceedings involving LDI which preceded the judgments upon which this action is brought. The most significant followed a serious accident at the LDI site in January, 1982, which resulted in two deaths and injury to 25 others. The Michigan Department of Natural Resources ("MDNR") issued an order severely restricting operations. An action in nuisance claiming injunctive relief was commenced in the Michigan Circuit Court by the township. On January 22, 1982, Circuit Court Judge Daner granted a temporary restraining order requiring LDI to cease all operations except those necessary for a safe and orderly shut-down of the facility. This order was continued on January 28, 1982, following a further hearing in which Judge Daner refused LDI's request to relax the terms of the order to permit it to continue to incinerate waste. LDI sought and was refused leave to appeal this order.

The defendants assert that the effect of these orders was to shut down all revenue-generating operations of LDI and to preclude LDI from disposing of the wastes on the site. They contend that the injunction action was politically motivated and that Judge Daner's orders were inappropriate. Moreover, they contend that rainwater accumulated as a direct result of the terms

of Judge Daner's order and that this caused further serious problems. Judge Daner made a further order requiring the water levels to be reduced, and LDI was found in contempt of that order, although it took the position that the previous injunction made it impossible to comply.

LDI's situation worsened when its lawyers commenced involuntary bankruptcy proceedings against their client on March 30, 1982. A trustee in bankruptcy was appointed on April 23, 1982. LDI did not oppose the bankruptcy petition. Ivey filed a proof of claim and actively assisted the trustee in her efforts to dispose of the assets of the estate. Maziv filed an appearance and participated in various motions, including a motion for relief from a contempt order to permit Ivey to be present in Michigan to assist with the affairs of LDI.

Despite the bankruptcy, and although the trustee in bankruptcy was not made a party, there were further proceedings before Judge Daner. He granted summary judgment in the nuisance action and ordered LDI to prepare a plan for closure of the site. LDI's plan involved incineration of the waste inventory, and although the parties to the suit agreed to the plan, Judge Daner did not. He found LDI in contempt of his order and directed counsel for the township to take proceedings to have a warrant issued for Mr. Ivey's arrest.

CERCLA proceedings

The EPA became involved in May, 1982. The EPA acted pursuant to delegated authority under CERCLA which confers sweeping powers to deal with the adverse effects of mismanagement and improper disposal of hazardous wastes and substances. The purpose of CERCLA is to provide an effective and swift response to the risks posed by hazardous waste sites and to impose upon those responsible for the creation and maintenance of the hazardous condition the cost of that response. The EPA has the power to issue orders requiring clean-up and, if parties are unable or unwilling to undertake clean-up action, the EPA can initiate a clean-up using the Hazardous Substances Superfund. CERCLA confers authority for two types of response: removal actions, usually short-term measures to clean up or stabilize a site, and remedial actions which usually involve measures designed to address longer-term environmental problems. Both types of response were undertaken with respect to LDI. A detailed regulation to implement CERCLA, the National Contingency Plan, prescribes the process for selecting an appropriate remedy. It is not disputed that the steps contemplated by the statute and

regulation were followed here. A detailed scientific study in consultation with state authorities was undertaken. That study
a was presented to parties with potential responsibility under the statute ("PRPs") (including the defendants) and the public for review and comment prior to EPA's decision as to remedial actions to be undertaken. EPA's decision was then made available to PRPs (including the defendants) and the public before any remedial
b work was begun.

CERCLA provides for recovery of clean-up costs from a variety of parties deemed by the legislation to be responsible for the contamination. Section 107 provides that four elements must be satisfied: (1) that the site is a "facility"; (2) that a "release" or
c "threatened release" has taken place or will take place; (3) that the release or threatened release has caused the plaintiff to undertake response costs; and (4) that the defendants fall within one of the four classes of responsible persons described in §107(a). These include the owner or operator of a facility as well as persons who arranged for disposal of hazardous substances at the facility.
d "Owner or operator" has been interpreted by the United States courts to include individuals or corporations who exercise control even if title to the site is held by a distinct corporation. Defences are strictly limited to act of God, act of war, or acts or omissions of third parties in certain narrowly defined circumstances. Cost
e recovery actions under §107 are civil proceedings heard in the United States District Courts.

EPA conducted four removal actions at the LDI site commencing in May, 1982. These removal actions involved clean-up of oil that had discharged into a river, the removal of liquid waste stored
f in above-ground tanks and drums, excavation and removal of subsurface tanks and drainage and stabilization of lagoons, and removal of incineration equipment.

Before undertaking each of these actions, the trustee in bankruptcy of LDI and Ivey were notified and given an oppor-
g tunity to respond to the environmental problems identified by EPA. Neither assumed any responsibility for the clean-up. The trustee indicated that LDI had insufficient funds to respond.

In May, 1987, a remedial investigation report was completed by a consultant acting under the direction of MDNR. That report
h concluded that there were a wide variety of hazardous substances contaminating the site and posing carcinogenic and other health risks. The report was considered by EPA, which also undertook an extensive consultation process involving the general public as well as PRPs. EPA also sought and obtained written information regarding the site from Ivey. The EPA reached a final remedial

action plan which called for extensive and expensive measures to deal with the environmental problem posed by the situation at the site. All PRPs, including the defendants, were given notice of this plan inviting comments and good faith offers to conduct remedial action. None of the defendants responded.

The plaintiff commenced the action which resulted in the judgments for which enforcement is sought in the District Court on April 18, 1989. The plaintiff's action claimed reimbursement for response costs incurred in relation to the LDI site.

The defendants were served *ex juris* in Ontario. Ivey and Ineco brought a motion in the District Court asking that the action be dismissed for lack of personal jurisdiction. The defendants succeeded in the first instance on the basis that CERCLA did not provide for service out of the jurisdiction, but the plaintiff then relied on the Michigan "long-arm" statute. Evidence was provided by way of affidavits from Ivey and responses to the plaintiff's interrogatory requests. District Court Judge Zatkoff found that the close involvement of Ivey in the day-to-day affairs of LDI and the financial interest of Ineco in LDI provided a clear basis for the assumption of personal jurisdiction over both parties:

> There is no question that the defendant Ivey purposely availed himself of the privilege of conducting activities in Michigan. He oversaw the management of LDI, negotiated sources of finance, assessed the viability of the operation of LDI and approved in detail capital expenditures. Furthermore, he visited on numerous occasions various government offices in Michigan regarding air and water pollution as LDI. The acts of the defendant LDI and the consequences have a substantial connection with Michigan so that the exercise of jurisdiction of Ivey is reasonable.
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> . . . . .
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> In this case, Ineco owns the majority share of LDI and owns an interest in the Michigan mortgage to the LDI site. Maziv Industries, which was LDI's parent corporation and 80% shareholder also held a mortgage to the site, which was transferred to Ineco. It is the opinion of this Court that Ineco has sufficient contacts with the state of Michigan to support the jurisdiction of this Court and that the exercise of jurisdiction is constitutional.

Maziv made no response of any kind and Ivey and Ineco took no further part in the action. The plaintiff obtained summary judgment against Ivey and default judgment against Maziv and Ineco on July 18, 1991, and it is those judgments which form the basis for this action and motion. The judgment against Ivey was granted in response to an unopposed motion for partial summary judgment. On that motion, Judge Zatkoff found that the requisite elements for a claim under CERCLA, §107 had been established, and that the only real issue was whether Ivey was personally liable under §9607(a). Judge Zatkoff concluded that on the basis of the evidence

before him, which included Ivey's answers to the interrogatories taken in relation to the jurisdiction issue, it "was clear that Ivey had control over and actually participated in LDI's day-to-day affairs, including its waste disposal practices". Ivey was, in Judge Zatkoff's view, "properly characterized as an 'owner or operator' and is liable under §9607(a) for cleanup costs incurred by [the plaintiff] at the LDI site". The judge also found that the plaintiff had established that these response costs were recoverable under CERCLA. As of the end of 1990, a total of $9,090,726.14 (U.S.) had been incurred as response costs, $4,218,563 recovered from settlements with other parties, leaving a shortfall of $4,872,163.14. The judgments granted by Judge Zatkoff were for that amount. There is evidence before me that since the date of that judgment, further amounts have been recovered from other parties and the amount now claimed in this action is $4,594,763.70 (U.S.) plus interest from the date of the judgments, July 18, 1991.

ANALYSIS

Jurisdiction

The plaintiff submits that there are two grounds for finding that the District Court had jurisdiction that this court will recognize. First, they submit that the "real and substantial connection" test, established by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256, [1990] 3 S.C.R. 1077, 46 C.P.C. (2d) 1, should be applied. Second, and in the alternative, the plaintiff submits that although the defendants did not defend the District Court action on the merits, the unsuccessful motion brought by Ivey and Ineco to dismiss for want of jurisdiction provides a sufficient basis to hold that those parties attorned to the jurisdiction of the District Court.

Real and substantial connection

The *Morguard* decision dealt specifically with the recognition and enforcement of a judgment of the courts of one province by the courts of another province. The court held that the exigencies of modern life and commerce in the Canadian federation required a departure of the traditional and restrictive rules governing recognition and enforcement. Provided there was a "real and substantial connection" between the rendering province and the subject-matter of the action, the judgment is entitled to recognition and enforcement throughout Canada.

The question of whether *Morguard* applies to the judgments of the courts of the United States and other foreign courts with legal

regimes based upon principles compatible with Canadian concepts of justice has been addressed in a number of subsequent cases. The predominant view of these authorities is that the "real and substantial connection" test mandated by *Morguard* is appropriate. While there is no doubt that considerations relating specifically to Canadian federalism played an important role in the Supreme Court's decision in *Morguard*, principles of broader application were also at work. La Forest J. offered the following rationale for the reformulation of the rules for enforcement of judgments (at p. 270):

> The world has changed since the above rules were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.

The Supreme Court of Canada has not hesitated to apply the comity principle as enunciated in *Morguard* in relation to truly foreign judgments in other areas of conflict of laws: see *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* (1993), 102 D.L.R. (4th) 96, [1993] 1 S.C.R. 897, 14 C.P.C. (3d) 1. In *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 29 C.P.C. (3d) 65, 17 O.R. (3d) 407, 43 A.C.W.S. (3d) 1082, MacPherson J. described the rationale for applying *Morguard* to a United States judgment as follows (at pp. 70-71):

> I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure.
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> . . . . .
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> [T]he historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction.

A similar rationale is expressed by the British Columbia Court of Appeal in *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654 at p. 667, 19 C.P.C. (3d) 219, 57 W.A.C. 146 (leave to appeal to S.C.C. refused 109 D.L.R. (4th) vii, 23 C.P.C. (3d) 294*n*, 78 W.A.C. 239*n*), *per* Cumming J.A.: "Modern rules of

international law must accommodate the flow of wealth, skills and people across state lines and promote international commerce."

Morguard has been applied to non-Canadian judgments in several other cases: *Fabrelle Wallcoverings & Textiles Ltd. v. North American Decorative Products Inc.* (1992), 6 C.P.C. (3d) 170, 33 A.C.W.S. (3d) 392 (Ont. Ct. (Gen. Div.)); *McMickle v. Van Straaten* (1992), 93 D.L.R. (4th) 74, 33 A.C.W.S. (3d) 864 (B.C.S.C.); *Stoddard v. Accurpress Manufacturing Ltd.*, [1994] 1 W.W.R. 677, 84 B.C.L.R. (2d) 194, 41 A.C.W.S. (3d) 1130 (B.C.S.C.); *Clancy v. Beach*, [1994] 7 W.W.R. 332, 92 B.C.L.R. (2d) 82, 45 A.C.W.S. (3d) 846 (S.C.); *Allen v. Lynch* (1993), 21 C.P.C. (3d) 99, 111 Nfld. & P.E.I.R. 43, 41 A.C.W.S. (3d) 959 (P.E.I.S.C.).

The defendants rely on what appears to be the only reported decision which refuses to extend *Morguard* beyond the judgments of other Canadian courts: *Evans Dodd v. Gambin Associates* (1994), 26 C.P.C. (3d) 189, 17 O.R. (3d) 803, 46 A.C.W.S. (3d) 853 (Gen. Div.). In that case, one of the first to be decided on the point, Sheard J. held that it would be inappropriate to defeat the defendant's reliance on the traditional rules and enforce a default judgment obtained in England. No evidence was offered here that the decision not to participate in the District Court action was made in reliance on the pre-*Morguard* rules and, in any event, the summary judgment and default proceedings were taken after the release of the *Morguard* judgment.

In my view, the *Morguard* real and substantial connection test is applicable for reasons expressed by MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd., supra,* and by the British Columbia Court of Appeal in *Moses v. Shore Boat Builders Ltd., supra*. In my view, the law would be seriously deficient and at odds with the reality of modern commercial life if it were possible for a resident of this province to actively engage in a business in the United States for a period of several years, but then shelter behind the borders of Ontario from answering to a claim for civil liability for harm caused by that activity.

Application of the real and substantial connection test

I have no hesitation in finding that with respect to all of the defendants, the real and substantial connection test is met. The defendants engaged in the waste disposal business in Michigan and the cause of action arose within the jurisdiction of the District Court. Maziv and Ivey had a direct ownership interest in LDI and Ivey was a principal officer of both corporations. Ivey regularly was present in Michigan to make decisions concerning the very

environmental issues which gave rise to the plaintiff's claim. Ivey dealt with and appeared before environmental regulatory agencies on behalf of LDI. Ineco acquired its interest in the shares of LDI on the express understanding that it would assume any liability of Maziv. The findings of Judge Zatkoff on the issue of "long arm" jurisdiction, quoted above, may be cited as added support for this finding.

Attornment

In light of the conclusion I have reached on the first ground for jurisdiction, it is unnecessary to consider whether by unsuccessfully challenging jurisdiction in the District Court, Ivey and Ineco should be taken to have attorned.

Penal, revenue or other public law

The defendants submit that the provisions of CERCLA which were the basis for the District Court judgment are "penal", "revenue" or "public" laws and that, accordingly, this court should refuse enforcement.

Penal laws

The scope of the category "penal" laws was defined by the Privy Council in *Huntington v. Attrill*, [1893] A.C. 150 at p. 157 as:

> "... *all suits in favour of the State* for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

In my view, the CERCLA provisions imposing liability against the defendants cannot be classified as penal in nature. In *U.S. v. Monsanto*, 878 F.2d 160 (4th Cir. 1988) at pp. 174-5, CERCLA was characterized as follows:

> CERCLA does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of cleanup costs was not intended to operate, nor does it operate in fact, as a criminal penalty or a punitive deterrent.

The measure of recovery is directly tied to the cost of the required environmental clean-up. The court must be satisfied that the amounts it seeks to recover were actually expended in response to the environmental threat, and that those costs were incurred in the manner prescribed by CERCLA and the National Recovery Plan. While the nature of liability imposed may be unexpected, it is restitutionary in nature and is not imposed with a view to punishment of the party responsible.

Revenue laws

In support of their argument that liability imposed by CERCLA is a revenue law or form of tax, the defendants offer the opinion of an expert on foreign law, Professor Robert Abrams. In his affidavit, Professor Abrams quotes and adopts a passage from Rodgers, *Environmental Law: Hazardous Wastes and Substances* (1992), where the author quotes from a speech given by another commentator, R.J. Marzulla, who states that the liability scheme under CERCLA, §107:

> "may be understood less as a liability system dependent on the assignment of fault or responsibility than as a site-specific taxation system in which certain categories of persons are required to pay simply because of their connection with the site. Those who owned operated the site, or who disposed of their waste there, presumably profited from the activity and should be required to internalize the cost of cleaning up the mess they have created . . ."

The plaintiff submits that the quoted portion of Professor Abrams' affidavit should be disregarded as a subjective critique of the law rather than an objective opinion as to the actual content of foreign law. In my view, the portion of the quoted passage from the Marzulla speech suggesting the CERCLA represents a tax might appropriately be described as ungrounded rhetoric. Indeed, the assertion that the law amounts to a tax appears to me completely inconsistent with the concluding sentence asserting that the effect of the law is to require those who have created a hazard to bear the cost of clean-up.

In any event, it is for this court to characterize the nature of CERCLA for the purposes of these arguments: *Huntington v. Attrill, supra*; Cheshire and North, *Private International Law*, 12th ed., at p. 119. Revenue or tax law appears not to have been precisely defined for these purposes, but it is difficult to imagine how a claim for reimbursement of costs incurred as a result of the actionable conduct of the defendant could be viewed as a tax. In view of the fact that the damages claimed by the plaintiff were measured directly and precisely by the actual cost of removal and remedial measures, I see no basis for the argument the judgments are to enforce the revenue laws of the rendering jurisdiction.

Other public law

The defendants rely on the following passage from Dicey and Morris, *The Conflict of Laws*, 12th ed. (1993), for the proposition that there is a third, related category of "public law" that like penal and revenue laws, will not be enforced (at p. 103):

> English courts have no jurisdiction to entertain an action: 1. for the enforcement, either directly or indirectly, of a penal, revenue or *other public law* of a foreign state.

(Emphasis added.)

The authors admit that the prohibition on enforcement of public law as such has not received the direct approval of the House of Lords and has been the subject of conflicting dicta in lower courts. They also concede that there is "very little authority which deals directly with the general principle" and that:

> The issue thus still remains open for decision in England whether the doctrine that penal and revenue laws will not be enforced extends to laws of a "political", or "public" character.

A strong judicial endorsement of the "public law" exception to enforcement is found in the judgment of Lord Denning M.R. in *Attorney-General of New Zealand v. Ortiz*, [1984] 1 A.C. 1. That case involved an attempt to enforce a New Zealand statute providing for the forfeiture of "historical articles" exported or attempted to be exported in violation of the statute. Lord Denning M.R. held that the English courts would refuse to enforce the law in England at the suit of New Zealand and offered the following explanation of the classes of foreign laws that would and would not be enforced (at p. 21):

> ... the class of laws which will be enforced are those laws which are an exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects wherever they may be. But other laws will not be enforced. By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority.

Lord Denning M.R. concluded that the prohibition of export and automatic forfeiture provisions were an exercise of sovereignty and in the category of non-enforceable "public law". Ackner L.J. disposed of the case on other grounds, but indicated that he was "impressed by the reasoning of [the trial judge] that there is no such ... general residual category" of "public law". The third judge, O'Connor L.J. expressed no opinion on the point. The case was appealed to the House of Lords where the case was disposed of on other grounds. The House of Lords expressly declined to comment on the issue addressed by Lord Denning M.R.

There are dicta in other English cases which accept the "public law" exception: see, *e.g.*, *Re State of Norway's Application*, [1990] 1 A.C. 723 at p. 807, *per* Lord Goff; *United States of America v. Inkley*, [1989] 1 Q.B. 255 at pp. 264-5, *per* Purchas L.J.; see also Mann, "The International Enforcement of Public Rights" 19

Journal of Int'l Law and Politics 603 (1987). Cheshire and North, *supra*, at p. 121, regard the "public law" category as "firmly established" although difficult to define. They repeat Lord Denning's analysis that the "common thread underlying these three categories", *i.e.*, penal, revenue and other public laws, is "the principle that laws will not be enforced if they involve an exercise by a government of its sovereign authority over property beyond its territory".

Perhaps the leading instance of the application of the "public law" exception is the decision of the High Court of Australia in *Attorney General for the United Kingdom v. Heinemann Publishers Australia Pty. Ltd.* (1988), 165 C.L.R. 30, a case arising from the "Spycatcher" affair. The United Kingdom sought an injunction to restrain the publication of a book containing information obtained by the author while a member of the British Security Service. The claim was based upon breach of contract, breach of fiduciary and equitable obligations and a statutory obligation of confidence imposed by the *Official Secrets Act* of the United Kingdom. The High Court of Australia held that injunctive relief ought to be refused on the ground that the court would not "protect the intelligence secrets and confidential political information of the United Kingdom Government" (at p. 54). The court reviewed the authorities dealing with the non-enforceability of foreign "public laws" and noted that the question "whether the principle extends to proscribe the enforcement of foreign public laws as well as foreign penal laws has been a contentious question" (at pp. 41-2). The court observed that "the expression 'public laws' has no accepted meaning in our law" and went on to suggest as follows (at p. 42):

> It would be more apt to refer to "public interests" or, even better, "governmental interests" to signify that the rule applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government.

In the view of the High Court, the claim of the United Kingdom could not be considered (at pp. 46-7):

> ... as an action to enforce private rights or private interests of foreign state. It is in truth an action in which the United Kingdom Government seeks to protect the efficiency of its Security Service as "part of the Defence Forces of the country". The claim for relief made by the appellant in the present proceedings arises out of, and is secured by, an exercise of prerogative of the Crown, that exercise being the maintenance of national security. Therefore the right or interest asserted in the proceedings is to be classified as a governmental interest. As such, the action falls within the rule of international law which renders the claim unenforceable.

It should be noted that faced with precisely the same issue, the New Zealand Court of Appeal came to a different conclusion on the scope of the "public law" exception: *Attorney-General for the United Kingdom v. Wellington Newspapers Ltd.*, [1988] 1 N.Z.L.R. 129 at p. 174, *per* Cooke P.

Canadian authority on the point is sparse, although Canadian courts have frequently been called upon to enforce claims arising under foreign legislation at the suit of a foreign state in circumstances where, if the exception were a broad one, it might well have been applied: see, *e.g.*, *Secretary of State of Canada v. Alien Property Custodian for United States*, [1931] 1 D.L.R. 890, [1931] S.C.R. 169; *Union of India v. Bumper Development Corp.* (1995), 36 C.P.C. (3d) 249, [1995] 7 W.W.R. 80, 29 Alta. L.R. (3d) 194 (Q.B.). Castel, *Canadian Conflict of Laws*, 3rd ed., states (at p. 163) that "laws that are enforced by a foreign state as an assertion of sovereign power ... may not always be recognized and enforced by Canadian courts if they are of a political nature". Rand J. appears to have accepted the proposition that enforcement will not be accorded foreign "political law" in *Laane and Baltser v. Estonian State Cargo & Passenger SS. Line*, [1949] 2 D.L.R. 641, [1949] S.C.R. 530. The case involved an expropriation decree of the Estonian Soviet Socialist Republic purporting to confiscate a ship with compensation fixed at 25% of its value. The majority of the court applied the more usual analysis classifying the confiscatory law as penal.

In my view, the "public law" argument advanced by the defendants should be rejected for two reasons. First, even if one sets to one side the rather shaky foundation of the doctrine, the cases which do apply the "public law" exception are distinguishable. If this vague category is to be applied to the situation before me, it would have to be extended beyond its present scope.

The judgment of Lord Denning M.R. in *Ortiz* and that of the High Court of Australia in the "Spycatcher" case represent the strongest judicial statements of the doctrine. Assuming for the sake of argument that they represent the law of Ontario, the situation here is readily distinguishable. In seeking enforcement of a judgment imposing civil liability for the cost of repairing the harm for which the defendants are being held to account, the United States is not insisting on depriving the defendants of property rights within Canada for some public purpose as in the *Ortiz* case. The law being enforced here more readily fits the first category described by Lord Denning M.R. in the passage quoted above as being enforceable, namely, "those laws which are an exercise by the sovereign government of its sovereign authority

over property within its territory or over its subjects wherever they may be". There is nothing that even approaches the element of an exercise of prerogative of the Crown for the maintenance of national security which determined the result in the "Spycatcher" case. Nor is there anything in these judgments amounting to a confiscation of property for a public purpose as in *Laane and Baltser v. Estonian State Cargo & Passenger SS. Line, supra.*

If one turns to the principle said to underlie these decisions, it does not apply to the present case. The claim advanced here cannot fairly be characterized as an attempt by a foreign state to assert its sovereignty within the territory of Ontario. CERCLA represents the judgment of Congress as to an appropriate regime of civil liability for environmentally hazardous substances in certain circumstances. The defendants chose to engage in the waste disposal business in the United States and the judgments at issue here go no further than holding them to account for the cost of remedying the harm their activity caused.

Second, in my view, it would be highly undesirable in principle to interpret and expand the "public law" defence to encompass the circumstances of the case at bar. Environmental law is but one of many areas where the traditional remedies of the common law have effectively been supplanted by detailed statutory and regulatory regimes. Legislatures have determined that the complex issues of environmental protection and determination of liability for environmental harms require the positive intervention of the state. Common law actions brought by private parties who have suffered individual harm have been found wanting. The issues of liability for clean-up and remedial costs are dealt with awkwardly, if at all, in litigation between private parties and most jurisdictions, including Ontario, have established regulatory regimes which encompass the imposition of civil liability for such costs. In this light, it is difficult to see the rationale for this court to refuse enforcement on the grounds that the efforts of the plaintiff to recover the costs it has incurred to remedy the environmental problems at the LDI site represent an illegitimate attempt to assert sovereignty beyond its borders. There is a public element to all statutes and to virtually all suits brought by a government. If these judgments are to be refused enforcement on the grounds that they represent an assertion of foreign sovereignty, it is difficult to see how enforcement could ever be accorded a civil judgment in favour of a foreign state.

The principle of comity which underpins the recent pronouncements of the Supreme Court of Canada in *Morguard, Amchem, supra*, and *Tolofson v. Jensen* (1994), 120 D.L.R. (4th) 289, [1994] 3

S.C.R. 1022, 26 C.C.L.I. (2d) 1, should, in my view, inform the development of this area of the law. What is sought to be enforced here is a judgment requiring parties who engaged in an environmentally hazardous activity for profit to make good the cost actually incurred to eliminate that environmental hazard. There is clearly a public purpose at stake but, in my view, the presence of that public purpose does not defeat the plaintiff's case. Given the prevalence of regulatory schemes aimed at environmental protection and control in North America, considerations of comity strongly favour enforcement. In an area of law dealing with such obvious and significant transborder issues, it is particularly appropriate for the forum court to give full faith and credit to the laws and judgments of neighbouring states. To the extent that the comity principle entails an element of reciprocity, it is significant to note that the courts of the United States enforce foreign judgments for environmental clean-up costs similar to the those at issue in the case at bar: *Re: Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (1992).

Natural justice

The defendants submit that the judgments sought to be enforced were obtained in a manner which violates the principles of natural justice. No issue is taken with the proceedings in the District Court, but it is submitted that the judgments are tainted by what went before. Before the details of the arguments presented by the defendants on the natural justice defence are considered, it should be noted that the whole foundation for the defendant's position is questionable. The natural justice defence as it is usually understood relates to the proceedings in the court which rendered the judgment sought to be enforced: see Dicey and Morris, *supra* at p. 514 *et seq.* While there is no doubt that the defence exists in theory, it is rarely applied in practice and I am aware of no case which holds that it extends to matters which occurred prior to the proceedings in the foreign court as contended here. Accordingly, it is far from clear to me that a defence would be made out even if I were to accept the arguments of the defendants that the pre-District Court proceedings before Judge Daner and under CERCLA violated the principles of natural justice.

The defendants submit that the actions of Judge Daner in the nuisance action, combined with the bankruptcy proceedings, effectively deprived them of any opportunity to respond to the environmental problems at the LDI site. In the words of their expert in foreign law, Professor Abrams, "to have made the

defendants liable in reliance on an ability to control test and deny them the benefits of a lack of control defence is a skewed and unfair application of the statute". It is further contended that liability was effectively and more or less conclusively determined on the basis of the regulatory procedures imposed by CERCLA, and that those procedures are contrary to the principles of natural justice.

I will deal first with the proceedings before Judge Daner in the Circuit Court. In my view, the defendants are precluded in this action from attacking the validity of those proceedings. There is no question but that the Circuit Court had jurisdiction with respect to the alleged nuisance at the LDI site. LDI and Ivey participated in those proceedings and lost. Whether Judge Daner was right or wrong was a matter for the Michigan courts. As noted, LDI was refused leave to appeal the temporary restraining order. The law is clear that the principles of *res judicata* and issue estoppel apply to proceedings before foreign courts: Dicey and Morris, *supra*, at p. 499; Castel, *supra*, at pp. 268-9. There is, in my view, no legal basis to support the suggestion that Judge Daner's orders should be reconsidered here.

In any event, if there is anything to the argument that the imposition of liability despite the lack of control resulting from Judge Daner's order resulted in "a skewed and unfair application of the statute", that was surely a matter for Judge Zatkoff in the District Court. It is clear that Judge Zatkoff carefully considered the application of the statute and the liability of Ivey before rendering judgment. The defendants had the opportunity to argue the point before him but they chose not to do so. Moreover, even if it could be shown that Judge Zatkoff erred in holding the defendants liable (and I do not suggest that he did), that would not afford a defence to enforcement of the judgments. Error of law on the part of the foreign court is plainly not a ground for refusing enforcement: Castel, *supra*, at p. 269; Dicey and Morris, *supra*, at p. 514.

The defendants focused much of their argument before me on the details of CERCLA and its application and offered a detailed comparison between CERCLA and the Ontario *Environmental Protection Act*, R.S.O. 1990, c. E19 ("OEPA"). It is the defendants' submission that the procedural regime imposed by CERCLA is so wanting in procedural protections as to render the regulatory proceedings leading up the judgments contrary to natural justice.

The alleged procedural shortcomings in the CERCLA regime may be summarized as follows:

(1) The right to be heard in opposition to the EPA's plans for removal and remedial actions is limited.

(2) The statute precludes judicial review of EPA actions prior to the implementation of removal and remedial actions.

(3) Defences to cost recovery actions are severely limited by §107 with the result that a form of strict liability is imposed.

(4) The United States enjoys the benefit of a relaxed burden of proof in cost recovery actions. As plaintiff, the United States bears the "burden of production" or going forward with evidence, but the defendant bears the burden of persuasion.

In my view, these contentions do not establish a defence to enforcement of the District Court judgments. With respect to the right to be heard in opposition to EPA's removal and remedial plan, the statute does accord PRPs a right to comment. While this may fall well short of a full right of hearing, the statute is designed to deal with situations of urgency requiring immediate attention and, within limits those exigencies impose, it does afford a limited right to present one's case. Moreover, as the plaintiff contended, the arguments of the defendants are abstract and academic. Although invited to do so, the defendants did not respond to EPA's proposed plan. While the rights accorded to them at that stage may have been limited, it is difficult to see how, if the defendants failed to avail themselves of the procedural protections actually afforded by CERCLA, they now can complain that they should have been given added rights of participation, particularly as there has been no indication that they had a case to present that might have made a difference.

While it is true that the statute precludes judicial review prior to implementation of the remedial plan, the statute also provides that any matter that could have been raised by way of judicial review may be raised by way of defence in the cost recovery action. The rationale for this arrangement, as explained by affidavit evidence regarding foreign law, is that pre-enforcement judicial review could significantly delay remedial steps and increase response costs. It has been argued in the United States that the preclusion of judicial review violates Fifth Amendment due process rights. This argument has been rejected given the right to raise judicial review arguments by way of defence in the cost recovery action: *J.V. Peters & Co. v. EPA*, 767 F.2d 263 (6th Cir. 1985), at p. 266. In my view, the provision in the statute

permitting a party sued in a cost recovery action to raise as a defence an argument that could have formed the basis for judicial review fully satisfies the requirements of natural justice. In any event, the defendants have not advanced any grounds for judicial review and there is nothing to indicate that they have in fact been prejudiced by the preclusion of pre-enforcement judicial review.

Acceptance of the argument that the imposition of strict liability or a relaxed burden of proof should render American judgments unenforceable in Canada would have far-reaching consequences. Rules of liability and the burden of proof are pre-eminently matters for the law of the foreign jurisdiction. I am aware of no authority for the proposition that a judgment rendered on the basis of a strict form of statutory liability will not be enforced. Moreover, as will be seen below, the Ontario *Environmental Protection Act* (OEPA) imposes similarly strict liability in certain situations.

Public policy

The defendants submit that given the severity of the CERCLA liability regime, both procedurally and substantively, it would be contrary to public policy for this court to enforce the judgments. This argument was supported by a comparison of CERCLA with OEPA which, the defendants allege, does not suffer the same defects as CERCLA.

In my view, this argument fails for a number of reasons. First, most, if not all of the arguments advanced here have already been dealt with under the natural justice defence. Second, while the public policy defence exists in theory, it has rarely been applied. Professor Castel observes that this defence has "very seldom" been invoked and that it "has been construed narrowly": *supra*, at p. 164. There is no authority of which I have been made aware that would allow it to be applied in the present case. It is plainly not the case that enforcement will be refused on the grounds that judgment sought to be enforced depends upon a law or basis of liability more strict or severe than the law of the forum. As noted by Lacourcière J.A. in *Boardwalk Regency Corp. v. Maalouf* (1992), 88 D.L.R. (4th) 612 at p. 616, 6 O.R. (3d) 737, 51 O.A.C. 64: "Where the foreign law is applicable, Canadian courts will generally apply that law even if the result may be contrary to domestic law." In the same case, Carthy J.A. emphasized (at p. 622), "the care which courts must exercise in relying upon public policy as a ground for refusing enforcement". He went on to state:

> The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.

Castel puts it as follows (*supra*, at p. 164): "It is not enough to deny recognition of the claim that the local law on the same point differs from the foreign law. Fundamental values must be at stake."

The comparison between CERCLA and OEPA does not, in my view, advance the case of the defendants. It is my view that the similarities between the two regimes are more striking than the differences. In particular, the plaintiff cites the "spills" provisions of OEPA where provision is made for emergency response by way of ministerial order without a hearing and the imposition of liability for clean-up costs incurred. While the circumstances of the case at bar may well not have fallen into the "spills" category, it cannot be overlooked that the Ontario legislature has adopted measures very similar to CERCLA to deal with environmental hazards. In light of that, it would, in my view, be inappropriate for this court to refuse enforcement on the grounds of public policy. If anything, the comparison with OEPA significantly strengthens the case for enforcement. It demonstrates that the Ontario legislature has deemed it necessary to depart from the traditional common law and establish a regulatory regime which includes drastic powers and the imposition of statutory liability on those responsible for the creation of environmental hazards. These measures include personal liability of corporate officers and directors, ministry-sponsored clean-up, and liability for costs of clean-up. While the measures chosen by our legislature do not correspond precisely with those chosen by the Congress of the United States, they are sufficiently similar in nature to defeat any possible application of the public policy defence.

CONCLUSION

The plaintiff has established that the District Court had jurisdiction to render the judgments sued upon and I have found that none of the defences to enforcement of the District Court judgment are sustainable in law. Both parties moved for summary judgment and there are no material facts in dispute which require a trial. The requirements under Rule 20 for summary judgment have been fully satisfied. Accordingly, there shall be judgment for the plaintiff pursuant to Rule 20 and in accordance with s. 121 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, for the amount in

Canadian currency necessary to purchase $4,594,763.70 (U.S.) plus interest from the date of the judgments, July 18, 1991. I may be spoken to with respect to rate of interest and costs if necessary.

Motion granted.

Harrop, Phillips, Powell and Gibbons v. Insurance Corp. of British Columbia

[Indexed as: Jenik v. Fearn]

Court File No. B921993 Vancouver Registry

British Columbia Supreme Court, Allan J. in Chambers *November 29, 1995.*

Professions — Barristers and solicitors — Lien — Law firm acting for injured party — Proposing settlement — Injured party and common-law husband duping insurer — Settlement funds paid directly to them — Insurance body not determining whether law firm's account paid prior to paying out settlement funds — Acting negligently — Settlement operating or tending to defeat valid solicitor's charge — Void as against that charge — Legal Profession Act, S.B.C. 1987, c. 25, s. 79.

An injured party retained a law firm to act with respect to her claim for injuries arising from a motor vehicle accident. She executed a contingency agreement and the law firm provided legal services and incurred disbursements on her behalf. The law firm wrote to the insurer proposing settlement of the claim;

The injured party then dismissed the law firm. Later, the insurer paid out the funds to the injured party's common-law husband, in trust for the injured party, in the mistaken belief that he was her lawyer. Medical reports obtained by the law firm regarding the injuries referred to her common-law husband; copies had been provided to the insurer before the settlement was made. The insurer did not contact the law firm before paying the settlement. It took no steps to determine whether the law firm had been paid. It took no steps to determine whether the common-law husband was a practising lawyer.

The law firm sought a declaration under s. 79 of the *Legal Profession Act*, S.B.C. 1987, c. 25, that it had a charge, for its account, against settlement proceeds that the insurer paid to its former client. Section 79(4) provides that acts done which operate or tend to defeat a solicitor's charge or right shall be deemed void against the charge.

Held, the injured party and the insurer were jointly and severally liable for the law firm's account.

The insurer was duped and, as a result, the law firm's account remained unpaid. It was highly unlikely that the law firm would recover from the injured.

The insurer acted negligently in paying the settlement proceeds directly to the injured party's common-law husband. There were a number of reasonable steps which it could have taken but did not.

The settlement made directly between the insurer and the injured party's common-law husband operated, or tended to defeat, the valid solicitor's charge and the settlement was void as against that charge.

TAB 59

2011 BCSC 489
British Columbia Supreme Court

Weldon v. Teck Metals Ltd.

2011 CarswellBC 929, 2011 BCSC 489, [2011] B.C.W.L.D. 4588, [2011] B.C.W.L.D. 4589, [2011] B.C.W.L.D. 4590, [2011] B.C.W.L.D. 4694, 200 A.C.W.S. (3d) 645, 90 C.C.P.B. 171

James Weldon, suing on his own behalf and in a representative capacity on behalf of all former members of defined benefit pension plans sponsored, directed, administered or advised by the Defendants and their predecessors who were caused by the Defendants and their predecessors to cease to participate in those defined benefit pension plans and to participate only in defined contribution pension plans commencing on or about January 1, 1993 (Plaintiff) and Teck Metals Ltd., Teck Resources Limited, Cominco Resources International Limited, CESL Limited, Agrium Inc. (formerly Cominco Fertilizers Ltd.), Cominco Pension Fund Society, Cominco Pension Fund Coordinating Society, and Towers Perrin Inc. (Defendants)

N. Smith J.

Heard: March 28, 2011
Judgment: April 18, 2011 *
Docket: Vancouver S095159

Counsel: R. Mogerman, S.A. Quelch for Plaintiff
I.G. Nathanson, Q.C., for Defendants, Teck Metals Ltd., Teck Resources Limited, Cominco Resources International Limited, CESL Limited, Cominco Pension Fund Society, Cominco Pension Fund Coordinating Society
K.C. Bourchier for Defendant, Agrium Inc.
M.L. Bromm for Defendant, Towers Perrin Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial

APPLICATION by defendants to set aside order renewing writ of summons.

N. Smith J.:

1 The defendants apply to set aside an order that renewed the writ of summons in what the plaintiff hopes will become a class action.

2 The plaintiff alleges negligence and breach of fiduciary duty that induced him and other members of the proposed class to accept certain changes in their employee pension plan. The events at issue occurred on or before January 1, 1993. The writ was filed on July 14, 2009 and would normally expire one year later if not served on the defendants. It had not been served as of June 29, 2010, when the plaintiff applied without notice to renew it. Master Scarth ordered renewal for a further six months and it is that order the defendants now seek to aside. The writ was served very near the end of the six-month renewal period.

3 The defendants say the order must be set aside because:

a) The plaintiff's lengthy delay in bringing this claim has prejudiced the defendants' ability to defend it.

b) The material before Master Scarth included a material misrepresentation about the continued availability of witnesses.

c) The plaintiff has no cause or action or, if he did, it is now barred by operation of the *Limitation Act*, R.S.B.C. 1996, c. 266 [*Limitation Act*].

4 The pleadings are still minimal, consisting only of the endorsement on the writ of summons, but it appears to be common ground that that in 1992 certain management employees of Cominco Ltd., now Teck Metals Ltd., and related companies were given the option of transferring from a defined benefit to a defined contribution pension plan. The plaintiff was one of those employees and says in an affidavit that he chose to do so based primarily on information provided by the employer. At some point between 2003 and 2005, he says he and other employees became concerned that the balance in their defined contribution plan was not sufficient to provide them with the same benefits as the old defined benefit plan would have.

5 The plaintiff says that in 2009 he sought advice from a lawyer, Mr. Blair, and concluded that he could not afford to take action as an individual. Mr. Blair advised him of the possibility of a class action, but at that point the plaintiff did not know how many employees had elected to join the new plan or what their total losses might be.

6 In an affidavit that was before the master, Mr. Blair deposed that a writ was issued promptly to minimize the risk from potential limitations issues, but it was then necessary to gather financial information from potential class members. He stated:

> [...] Obtaining, sufficient data to make an informed judgement about continuing this litigation has proven to be more difficult than expected, and as a result, only limited data has been obtained. Had it not been for a limitation risk, the writ would not have been filed until sufficient information was available. As such, it is necessary to extend the writ to provide enough time to obtain sufficient evidence or decide on whether to proceed with the litigation.

7 The writ of summons was filed and renewed under the former *Supreme Court Rules*, B.C. Reg. 221/90, Rule 9(1), which read:

> No original writ of summons shall be in force for more than 12 months, but where a defendant named in the writ has not been served, the court, on the application of the plaintiff made before or after the expiration of the 12 months, may order that the original writ of summons be renewed for a period of not more than 12 months which, unless otherwise ordered, shall commence on the date of the order.

The current *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] require commencement of action by a notice of civil claim, rather than a writ of summons, but a substantially identical renewal provision is found in Rule 3-2 (1).

8 The major factors that the court considers on a renewal application are derived from *Bearhead v. Moorhouse* (1977), 3 B.C.L.R. 81 (B.C. S.C.) [*Bearhead*], aff'd (1978), 87 D.L.R. (3d) 52 (B.C. C.A.) [*Bearhead CA*], and are frequently summarized as:

1. Was the application brought promptly;

2. Did the defendant have notice of the claim from sources other than the writ;

3. Has the defendant suffered prejudice;

4. Was the failure to serve the writ attributable to the actions of the defendant;

5. Was the plaintiff or his solicitor at fault.

9 In this case, the application to renew the writ was brought before its expiry and there was evidence before Master Scarth that the defendants, although not served, had become aware of the writ within about two weeks of its filing.

10 Only the most limited consideration of the merits of an action is permitted on an application to renew the originating process. In *Seeliger v. Eagle Ridge Hospital*, 2007 BCCA 582 (B.C. C.A.) [*Seeliger*], the Court of Appeal referred to the former Rule 1 (5) — now Rule 1-3 (1) — and said:

> [31] The respondents look to Rule 1(5) for support. It states that "the object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits". I do not think an investigation of the substantive merits of the action on a renewal application beyond considering whether the claim is bound to fall advances the Rule 1(5) objective. Filing detailed materials directed to the merits adds to the complexity and expense of a renewal application and broadens the scope of the hearing. The application may be delayed while the necessary materials are being gathered. There has been no opportunity for discovery and, as the chambers judge observed in this case, assessment of the merits is difficult. The likelihood of a wrong assessment at this very preliminary stage is amplified.

11 The defendants say they are prejudiced because the relevant events occurred more than 18 years ago. Relevant documents have long since been disposed of in the ordinary course of business and employees who were involved on behalf the defendants are no longer employed by them.

12 Ms. Erickson, pensions manager of Teck Resources Ltd., says in an affidavit that none of the employees of what was then Cominco Ltd. who were responsible for providing information about the pension plan changes in 1992 are currently employed by that company or by any of the related entities. Two senior employees who she identifies by name retired during the 1990s and one of them has since died.

13 The defendant Agrium was formerly Cominco Fertilizers Ltd. Mr. Rossfeld, on behalf of that company, says in an affidavit that there were 15 employees in the legal and personnel departments at the relevant time and only one of them still works for the company. On behalf of the defendant Towers Watson (now Towers Perrin), Mr. Mercier deposes that two actuarial consultants involved in this matter left the company in 1999 and 2000. He also says that, under his company's document retention policy, relevant documents would have been disposed about a decade ago. A search to determine if any relevant documents had by chance been retained has revealed none.

14 In considering questions of delay and resulting prejudice arising from the renewal of a writ, the authorities make clear that only a relatively brief period is relevant. *Sutherland v. McLeod*, 2004 BCCA 653 (B.C. C.A.) [*Sutherland*], dealt with an application to renew a writ in a personal injury action that was brought some 16 months after the writ expired. In considering the question of delay, the Court of Appeal said:

> [27] [...] the relevant period of delay for purposes of a renewal application brought after the writ has expired runs from the date that the plaintiff learned that the writ had not been served within time to the date of the renewal application.

15 The Court also reviewed the alleged prejudice and concluded:

> [42] Accordingly, I am not persuaded that ICBC suffered any significant prejudice as a result of the plaintiff's failure to initiate the renewal application at an earlier date.
>
> [Emphasis added.]

16 In *Seeliger* the Court re-affirmed *Sutherland* and expressly rejected statements in some other cases "to the effect that the relevant time runs from the commencement of the cause of action": *Seeliger* at para. 38. Similarly, the Court of Appeal in *Imperial Oil Ltd. v. Michelin North America (Canada) Inc.*, 2008 BCCA 216 (B.C. C.A.) [*Fast Fuel Services*], said at paragraph 17 that considerations of prejudice should have been confined to the period from the date counsel learned a writ had not been properly served on one defendant to the date the renewal application was filed. The Court added:

> [24] In any event, delay in the prosecution of the plaintiffs' actions is not relevant to whether they are to be faulted for delay in making application to renew the writs. A plaintiff may be obliged to apply to renew an expired writ promptly, but that is a different consideration than the approach a plaintiff might see fit to take to the prosecution of any given action.

17 The defendants rely on *Mountain-West Resources Ltd. v. Fitzgerald*, 2005 BCCA 48 (B.C. C.A.) [*Mountain-West*]. In that case, an application to renew a writ and for leave to serve it outside British Columbia was made more than four years after the writ was issued and some 30 years after the events at issue. The Court of Appeal said:

> [11] [...] When the cause of an action is old on the date the action is commenced, the plaintiff must proceed in a timely way. This the appellant did not do. It did not get its tackle in order procedurally.
>
> [...]
>
> [13] In my opinion, the delay in this case is inadequately explained and is inexcusable. The authorities say that in circumstances such as exist in this case, prejudice to the defendant is to be presumed. In addition, there is evidence here of actual prejudice - discarded documents, faded memories, and ageing witnesses.

18 In *Seeliger*, the court said *Mountain-West* was distinguishable because the renewal question overlapped with one of service *ex juris*, which requires a greater evidentiary foundation.

19 The application to renew the writ of summons in this case was made before the writ expired, so there is no period of delay of the kind considered in *Sutherland*, *Seeliger* and other cases. At the time of the application before the master, the writ was still valid and the plaintiff still had an absolute right to serve it. The order renewed the writ and extended the plaintiff's right to serve it for a further six months. If any prejudice to the defendants was to be considered, it could only be prejudice that arose between the date the writ would otherwise have expired and the date on which it was ultimately served.

20 The defendants do not allege prejudice arising during that period of a little less than six months. They refer to prejudice arising from the long period that has elapsed since the events at issue, the unavailability of witnesses and the disposal of documents. Those factors may give rise to prejudice but, on the evidence before me, it is prejudice that arose not only before the application was made to renew the writ but long before the writ was issued. That alleged prejudice may ultimately be significant to the disposition of this action, but it was not relevant on the renewal application.

21 The defendants also say that the writ should not have been extended because the plaintiff delayed serving it for purely tactical reasons. In argument, counsel said this is not a case where a plaintiff needed time to investigate the facts giving rise to the action-the plaintiff and his counsel were simply trying to determine the monetary value of a potential claim. I do not find that to be a relevant consideration. In *Fast Fuel Services*, the Court said:

> [22] With respect to the plaintiffs being at fault, the judge suggested they had deliberately chosen to "exploit every delay permitted by the *Rules*". But there can be no suggestion their adhering to the *Rules* was done to disadvantage the defendants. Litigants routinely choose not to initiate litigation before they must to preserve their right to do so in order to avoid its cost until satisfied of the prospect of success or the unlikelihood of satisfactory settlement.

22 The defendants stress that the application before Master Scarth was without notice, which is normally the case for such applications, but rely on the principle that any applicant for an order without notice is under a duty to fully and candidly disclose material facts. On an application to renew a writ, the facts that must be disclosed include "any relevant fact that might persuade the chambers judge not to order renewal": *Bushell v. T & N plc* (1992), 67 B.C.L.R. (2d) 330 (B.C. C.A.) at para 51.

23 The defendants say Mr. Blair's affidavit contained a material misrepresentation by because he said: "I am not aware of any prejudice against the Defendants if the Writ of Summons is renewed as all the witnesses continue to be

available." The defendants point out that this statement purports to be made as a matter of Mr. Blair's direct knowledge, not based on information and belief. They do not suggest that Mr. Blair intended to mislead the court, but say that the statement is clearly not true, as their affidavit material shows, and that it is therefore a material misstatement going to the issue of prejudice.

24 Mr. Blair's statement about the availability of witnesses would certainly be a misstatement if read as an assertion that all witnesses who were involved in this matter in 1992 were still available in 2010. I do not think Mr. Blair could reasonably have been understood to be saying that, but even if he was, the misstatement would not have been material on the renewal application. On the basis of the above authorities, the years before the writ was issued were not relevant to the Master's consideration and no evidence about the disappearance of witnesses during that time would have changed the Master's decision.

25 Mr. Blair specifically links his statement about the continued availability of witnesses to an asserted lack of prejudice to the defendants if the writ is renewed. In that context, he clearly was not addressing the entire period from the events at issue to the date of the renewal application. On the basis of the plain words used and on the basis of the relevant period that he was required to address, the most Mr. Blair could reasonably have been taken to be saying was that any witnesses who were available when the writ was issued were still available when the application was made to renew it. I am not sure how he could have known that, but the defendants have provided no evidence to the contrary.

26 The defendants argue that the plaintiff's action is barred by operation of the *Limitation Act*, or in the alternative, that the plaintiff still does not have a cause of action. Those alternative positions are mutually inconsistent-one asserts that the plaintiff waited to long too commence this action, the other asserts that the action is premature.

27 As set out in the endorsement, the plaintiff's claim appears to be one governed by s. 3 (6) of the *Limitation Act*, which establishes a limitation period of six years from the date the right to bring action arose. If the cause of action arose when the pension plan changes went into effect on January 1, 1993, or at any subsequent date before July 2003, the plaintiff will have the burden of proving a postponement of the limitation period under s. 6 (4). It will be for the court to determine when the plaintiff knew or ought to have known of the facts giving rise to the right to bring action. That is precisely the kind of factual inquiry that is neither possible nor appropriate at this early stage.

28 The plaintiff says there may be no limitations issue because the plaintiff has not yet retired and some authorities suggest the limitation period would not begin to run until he begins receiving reduced pension payments: *Shayler Estate v. United Assn. Local Union Officers & Employees Pension Fund (Trustee of)* [1999 CarswellBC 2856 (B.C. S.C.)] (7 December 1999), Vancouver C964493. If that is the case, the defendants say the plaintiff has not yet suffered any damage, which is an essential element of the tort of negligent misrepresentation. Therefore, the defendants say the plaintiff has no cause of action. The plaintiff responds that even if he has not yet suffered damage, the court could give declaratory relief setting out damages that will be suffered in the future if the defendants fail to rectify the situation: *Spinks v. R.* (1996), 134 D.L.R. (4th) 223 (Fed. C.A.).

29 On a renewal application, the plaintiff is required only to demonstrate that the pleadings disclose a cause of action: *Seeliger* at para. 33. The only pleading so far is the endorsement, which reads:

> The Plaintiff's claim and that of all those in the class he represents is for damages for breach of fiduciary duty and negligence in causing the Plaintiff and all those in the class he represents to cease to be members of defined benefit pension plans and commence to participate only in defined contribution pension plans commencing on or about January 1, 1993.

30 While the factual basis will obviously have to be set out in more detail in a statement of claim, that endorsement states a cause of action well known to the law. There may be any number of factual and legal issues that will eventually determine whether or not the plaintiff can bring his individual circumstances within that cause of action. Some of those issues may be amenable to being considered under s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 when the

plaintiff applies to certify this as a class action. Whether or not the class action is certified, some issues, including the one the defendants now raise, may be susceptible to determination on summary trial under Rule 9-7 or on a special case under Rule 9-3.

31 In *Bearhead*, the Court of Appeal adopted the following statement from *Simpson v. Saskatchewan Government Insurance Office* (1967), 65 D.L.R. (2d) 324 (Sask. C.A.):

> In an application to renew a writ of summons the basic question which faces the Court is, what is necessary to see that justice is done? That question must be answered after a careful study and review of all the circumstances. If the refusal to renew the writ would do an obvious and substantial injustice to the plaintiff, while to permit it is not going to work any substantial injustice to the defendant or prejudice the defendant's defence, then the writ should be renewed.

32 In *Seeliger*, the Court said considerations of justice must include matters relevant to the administration of justice, beyond the narrow interests of the parties. Proper administration of justice requires that issues of importance in an action be decided at the appropriate time through the appropriate procedures. That is also what is necessary for the just determination required by the *Rules*, in Rule 1-3 (1).

33 In my view, a renewal application, with its very limited inquiry into the merits of a case, is not the appropriate occasion to determine whether the plaintiff has a cause of action or whether any cause of action is statute-barred. The injustice to the plaintiff of effectively striking out the action at this stage far outweighs any prejudice to the defendant that may arise from the six month extension of the writ.

34 The application to set aside the order of Master Scarth must be dismissed.

Application dismissed.

Footnotes

* Leave to appeal refused at *Weldon v. Teck Metals Ltd.* (2011), 2011 CarswellBC 1594, 2011 BCCA 300 (B.C. C.A. [In Chambers]).

TAB 60

1997 CarswellBC 896
British Columbia Supreme Court [In Chambers]

W.I.B. Co. Construction Ltd. v. Central Okanagan School District No. 23

1997 CarswellBC 896, [1997] B.C.J. No. 84, 68 A.C.W.S. (3d) 627

W.I.B. Co. Construction Ltd., Plaintiff v. The Board of School Trustees of School District No. 23 (Central Okanagan), and Fulker Maltby Architects Inc., Defendant

Drossos J.

Judgment: January 3, 1997
Docket: Kelowna 26578

Counsel: *Mark Baron* & *C. Conkin*, for the Plaintiff.
Karen Martin, for the Defendants Fulker, Maltby Architects Inc.
Robert E. Groves, for the Defendants The Board of School Trustees of School District No. 23 (Central Okanagan).

Subject: Civil Practice and Procedure

***Mr. Justice Drossos* (In Chambers):**

Facts

1 The defendants in this action, The Board of School Trustees of School District No. 23 (Central Okanagan) ("School District") and Fulker Maltby Architects Inc. ("Architect") each apply under Rule 18A for dismissal of the claim made against each of them by the plaintiff, W.I.C. Co. Construction Ltd. ("Wibco").

2 In February 1995, the defendant the School District invited and offered to receive tenders for the construction of a school.

3 The plaintiff Wibco submitted the lowest tender at $4,145,544.87. The terms and conditions in the Invitation for Tenders and Instructions to Tenderers included the following clauses:

> The Owner reserves the right to reject all Tenders.

> 5.1 Tenderers shall submit, with their Tender, the name of their designated Project Superintendent, including a resume detailing his qualifications and work experience.

4 Wibco's tender named Terry Avery as the designated Project Superintendent and included his resume.

5 The Architect concluded that Mr. Avery did not possess adequate experience and qualifications as a project superintendent and accordingly advised the School District to disqualify the plaintiff's tender as it was not a qualified bid. Acting on the Architect's advice, the School District disqualified the plaintiff's tender and accepted the next lowest tender as the lowest qualified bidder.

6 It appears from the evidence presented that the Architect's decision was largely, if not entirely, based on the recent work of Mr. Avery on the construction of an addition for a local hospital, a project which had faced a number of problems prior to completion. The Architect was also involved with that project. The plaintiff Wibco submits that the Architect, not Mr. Avery, was primarily responsible for the problems with the hospital project. This project was apparently still in progress and substantially, but not fully completed, when Wibco tendered on the School District's project. Mr. Avery's work on the hospital project was not included in his resume filed with Wibco's tender documents on the School District project. The cause of some of the problems on the hospital project are currently the subject of an arbitration.

7 The plaintiff alleges that the Architect failed to act impartially, fairly and objectively in assessing Mr. Avery and, therefore, the plaintiff's tender.

8 There is a duty to treat all bidders fairly in the tendering process (*Chinook Aggregates Ltd. v. District of Abbotsford* (1989), 40 B.C.L.R. (2d) 345 (C.A.)). The School District has acknowledged that the Architect was its agent and if the Architect acted in bad faith in arriving at the decision on which the School District relied, then the School District breached its contract with the plaintiff.

Issue

9 Should the plaintiff's claim against the School District and Architect be dismissed under Rule 18A?

Conclusion

10 No. There is a "head on" conflict in the evidence which goes to the heart of the issue and credibility findings will be necessary in order to determine the issue. In addition, there are complex matters for determination, including the novel issue of whether a design consultant

owes a duty of care to a bidder in assessing tenders which is, as yet, unprecedented in the case law of Canada although cases in recent years have imposed on owners a duty of fairness to bidders. There is also potentially a substantial amount of money in issue and little prejudice involved in proceeding to a conventional trial.

Analysis

1. Conflicts in the Evidence

11 Before turning to the merits, it is necessary to evaluate whether it is appropriate to determine this case under Rule 18A. Sub-section 11 sets out when a court should not grant judgment under Rule 18A. It reads as follows:

> **Judgment**
>
> (11) On the hearing of the application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

12 Rule 18A(11) gives the chambers judge a discretion to not grant judgment under R. 18A where the facts necessary to decide the issues cannot be found or where it would be unjust to decide the issues on the application.

13 As stated in *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), if a chambers judge is satisfied that the claim has been established, judgment must be given unless it would be unjust to do so (at 215).

14 There are then two separate reasons why judgment may not be given under Rule 18A: If the Court cannot find the facts necessary to decide the issues; and, even if the facts are available, if it would be unjust to decide the issues on the application.

15 With respect to the findings of facts, the Court in *Inspiration Management* noted that a chambers judge need not remit a case to trail simply because there are conflicting affidavits (at 215). However, the Court went on to say:

> Subject to what I am about to say, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other. It

> may be, however, notwithstanding sworn affidavit evidence to the contrary, that other admissible evidence will make it possible to find the facts necessary for judgment to be given. (at 215-16)

16 Given a situation with conflicting affidavits, the court suggests that a chambers judge should not decide the matter solely based on those affidavits, but, if other affidavit evidence is available, that evidence may make it possible to find the facts to decide the matter.

17 In *Jutt v. Doehring* (1993), 82 B.C.L.R. (2d) 223 (C.A.), the court was faced with directly conflicting affidavits and found that it was not possible to decide the issue based on that evidence. The court stated as follows:

> The fundamental problem in this case is that the material filed on the 18A application shows a "head on" conflict in the evidence which goes directly to the foundation of the appellants' action against the respondents. It was not possible to resolve the conflicts without credibility findings being made. This case was unsuited to summary trial for the issues of fact should not have been decided solely on the basis of the conflicting material which was before the court, regardless of whether the chambers judge preferred one version to the other. (at 227)

18 With respect to whether a chambers judge can find the facts necessary to decide an issue, the degree of conflict in the affidavits and whether the conflict goes to the heart of the issue must be assessed.

19 In this case, there is a serious conflict in the evidence.

20 The defendant Architect submits affidavits supporting its conclusion that Mr. Avery did not possess adequate experience and qualifications. There is also evidence which speaks highly of Mr. Avery's qualifications. Notwithstanding problems on the hospital project, the defendant Architect's field representative, Mr. Uldis Arajs, a registered professional architect, on that project did not question Mr. Avery's competency as a project superintendent or his qualifications in the construction industry. On the other hand, there is evidence that after Mr. Arajs was replaced by Mr. Alan Purll, a registered professional architect, as the defendant Architect's field representative on the hospital project, a large number of disagreements arose between him and Mr. Avery. The extent of the disagreements were such that Mr. Avery formed the opinion that Mr. Purll was unreasonable in his demands and had developed a personal animosity towards Mr. Avery to the point where their confrontations culminated in Mr. Purll making a veiled threat to Mr. Avery in reference to the plaintiff Wibco's tender concerning the school project. This evidence is challenged and placed in conflict by Mr. Purll denying any personal animosity towards Mr. Avery, and making the statement interpreted by Mr. Avery as a veiled threat. Further, since the Architect's decision was based largely on the work of Mr. Avery on the hospital project,

it makes the evidence about that project central to the issue in this case. The evidence of what happened on the hospital project is in "head on" conflict and there is also currently an arbitration respecting the cause of some of the problems on that project. While the arbitration does not necessarily have any relevance to the court's determination of the issue, the fact that it is in arbitration reflects on the degree of conflict over what happened on that project.

21 In addition, after the tenders closed with Wibco the low bidder and the defendant's concerns arose over the qualifications of Wibco's designated project supervisor, Mr. Avery, a meeting was held at the Architect's office on March 24, 1995, at which representatives of the plaintiff Wibco and the defendants were present. The plaintiff alleges on considering the whole of the evidence that it is apparent that the Architect was predisposed to disqualify the plaintiff's tender and made its decision to do so in bad faith since what transpired before and at the meeting does not support the subsequent decision of the defendants to disqualify the plaintiff.

22 The plaintiff relies on the following in support, which is largely disputed by the defendants:

a) The plaintiff's representatives were not informed of the purpose of the meeting but assumed it was to discuss the start up of the school project;

b) At no time during the meeting did the Architect attribute the problems that arose on the hospital project to Wibco:

c) At no time during the meeting did the Architect or the School District say that Avery was not competent to act as Project Superintendent or that they would require additional assistance for Avery if he was to act in that capacity on the school project;

d) At the conclusion of the meeting the Architect and School District in their demeanour led Wibco to believe that any concerns regarding Avery's acting as Project Superintendent had been satisfied and Wibco would be awarded the contract for construction on this project based upon its tender.

23 The determination to what extent these allegations are sound in fact would involve the resolution of credibility and the weight to attribute to the evidence.

24 On looking to the process and procedure, which is of pivotal importance, followed by the defendant Architect and its employee and representative, Mr. Vance, a registered professional architect, on assessing the qualifications of Mr. Avery as a project superintendent, it is essential, as well established by case law, that it is done in good faith, fairly, and impartially and not arbitrarily or capriciously. The Court is in the position of having to resolve questions of credibility and weight in relation to the conflicting evidence of

whether in fact Mr. Purll bore any animosity and ill-will towards Mr. Avery which created problems on the hospital project between him and Mr. Avery and colored his opinion of Mr. Avery's ability as a project superintendent. If such is the case, the Court will also have to resolve whether this tainted the defendants and Mr. Vance and their assessment of Mr. Avery's qualifications (keeping in mind that the Architect and plaintiffs are at odds over which created the problems on the hospital project) or whether they recognized the situation between Mr. Purll and Mr. Avery and fairly took it into account on assessing the qualifications of Mr. Avery as a project superintendent.

25 Similarly, the Court will have to resolve the conflicting evidence of what transpired before and at the March 24th, 1995, meeting between the parties on whether, once the issue is raised and a meeting is arranged, the plaintiff was adequately apprised, or should have been, of the defendant's concern and issue over Mr. Avery's qualifications as a project superintendent and the material and criteria for such a concern. If not, and assuming the defendant's were entitled to go outside of what was contained in Mr. Avery's resume for additional information and material relating to his qualifications, which the defendant's did by considering Mr. Avery's performance on the hospital project which was not contained in his resume, the issue arises as to what extent, if any, this information and material constitutes criteria which should, in fairness, have be made available by the defendants to the plaintiff to answer.

26 Where there is a concern on the part of the owner and its representative agent on the issue of whether a bidder's designated project superintendent is qualified or not, a question arises on whether the bidder should be made aware of it, together with the material and criteria on which it is based, and given the opportunity to address the issue of "qualification." Any bidder in fairness would expect no less recognizing, of course, and depending upon the terms of the tender documents that the ultimate decision of whether a project superintendent is qualified may be that of the owner. However, not to apprise, or properly to apprise, and give the bidder such an opportunity may go to the issue not only of whether the owner and its representatives considered improper material or secret material on arriving at its decision, but also whether they acted in good faith, fairly, and impartially and not arbitrarily and capriciously towards the bidder. In this case, the Court is unable to resolve on the basis of conflicting affidavits the credibility and weight to attribute to the evidence in order to determine the facts relevant to the foregoing.

27 What the owner and its representative must guard against and not do because of concerns or disapproval of the designated project superintendent is to permit the bidder to replace its project superintendent designated in the tender documents or to indirectly shore up his deficiencies by other means, in effect, carry out a constructive replacement. To do so would result in this case in a material change to the tender documents to the detriment and prejudice of the other bidders and thereby jeopardize the integrity of the tendering

process which the Supreme Court of Canada in *Ronning Engineering* and as expanded upon in subsequent case law must not be permitted to occur. In other words, once the owner finds, after proper assessment, that the designated project superintendent in the tender documents is not qualified that is the end of the matter and the end of that bid.

28 Based on the Court of Appeal decision in *Jutt*, a chambers judge should decline to decide an issue under Rule 18A where there is a "head on" conflict in the evidence which goes to the central issue before the Court and credibility findings will be necessary to the determination of the issue.

29 In this case, there is a "head on" conflict in the evidence between the plaintiff and the Architect that goes directly to the basis of the plaintiff's claim inasmuch as it alleges that the Architect's decision to disqualify the plaintiff's tender was not made in good faith, fairly, and impartially. This conflict goes to the heart of the issues before the Court. The Court is unable to make the necessary findings of credibility and fact on the basis of the affidavits and exhibits alone. This is a case where the persons involved will have to be observed by the Court in the giving of their testimony and weighed accordingly and as against the whole of the evidence. The Court therefore declines to determine this matter under Rule 18A.

Injustice under Rule 18A

30 Even if the facts were available to form the basis for a decision, a chambers judge may decline to decide the case where it would be unjust to do so.

31 In the event that the conclusion above, namely that there is a conflict in the evidence such that a determination under Rule 18A is not appropriate, is wrong, I will go on to assess whether it would be just in this case to settle the matter under Rule 18A if the facts were such that it would be possible.

32 In *Inspiration Management*, the Court set out the matters which the chambers judge should consider when determining whether it would be unjust to give judgment under Rule 18A (at 214). Those matters are:

1. the amount involved

2. the complexity of the matter

3. the urgency of the case

4. the prejudice likely to arise by reason of delay

5. the cost of proceeding to a conventional trail in relation to the amount involved

6. the course of the proceedings

7. any other matters which may arise for consideration

33 This list has been since approved in *Canadian Imperial Bank of Commerce v. Charbonnages de France International S.A.* (1994), 95 B.C.L.R. (2d) 104 (C.A.) and *F.W.C. The Land Co. v. Kopas & Burritt Funding Inc.* (1994), 98 B.C.L.R. (2d) 303 (C.A.)

34 In *Canadian Imperial Bank of Commerce*, the Court noted that the chambers judge was of the opinion that he could decide the issue on the facts as there was little conflict on the evidence and his conclusions did not depend on the determination of disputed facts or on issues of credibility. The chambers judge went on to assess whether it would be unjust to decide the issue as per the list of considerations from Inspiration Management, and found that it would not be unjust. This decision was upheld by the Court of Appeal. The Court of Appeal did, however, comment on one of the considerations, the amount involved, as follows:

> In considering the factors enumerated in *Inspiration Management* (supra) the amount involved is entitled to considerable weight. Here, the amount involved was substantial. While that of itself should be a warning that caution is required, it should not necessarily be a determining factor. That is particularly as where, as here, the amount involved is not in dispute. (at 129)

35 In that case, the amount in issue was over 13 million dollars. It was likely due to the substantial amount of money in issue that the Court of Appeal felt it necessary to comment on it, and specifically on whether, in light of the amount, it was still just to decide the issue under Rule 18A.

36 In the case at bar, there is also a substantial amount of money in issue which is a factor to be given considerable weight. This case is unlike the situation in Canadian Imperial Bank of Commerce where there was little conflict on the evidence and the chamber judge's conclusions did not depend on the determination of disputed facts or on issues of credibility. Here, even if the evidence was not in "head on" conflict and requiring credibility findings, it would still be in dispute and any determination of the issue would require substantial weighing of evidence. Given the substantial amount of money in issue, a chambers judge should be hesitant to do such weighing of evidence.

37 Further, in this case, there does not appear to be any particular urgency, and if need be, an early trial date can more than likely be obtained in the Kelowna Registry. Accordingly, there should be little prejudice from any delay to await a conventional trial. While counsel have referred to the cost of proceeding to a full trial, the consideration set out above indicates

that it is not simply the cost which should be considered, but the cost of proceeding to a conventional trial in relation to the amount involved in the lawsuit. In this case, as noted, there is a substantial amount of money at issue, and since discoveries have been largely completed, a goodly portion of the costs have already been incurred.

38 Finally, as already mentioned, this matter is complex and depending on the findings of fact also includes the novel issue of whether a design consultant owes a duty of care to a bidder on assessing tenders. A determination of this duty would be of broad importance and impact in the construction industry concerning the relationship between contractors tendering on projects and architects assessing the same. It should, in my opinion, be considered and determined in the course of a full trial and not on a summary application.

39 Even if the facts were such that a decision under Rule 18A would be appropriate, which they are not in this case, it would still be appropriate not to decide the issue under Rule 18A as it would be unjust in the circumstances given the substantial amount of money at issue, the lack of prejudice in proceeding to a conventional trial, and the complexity of the matter as well as the raising of a novel issue of importance for consideration and possible determination.

Summary

40 In summary, this case is not suited for disposition by summary trial under Rule 18A. The Court therefore rejects the respective applications of the defendants to dismiss the plaintiff's claim and directs that it proceed to trial with the costs of these applications left to the trial judge for determination.

End of Document

TAB 61

1994 CarswellBC 2925
British Columbia Supreme Court [In Chambers]

Zurich Insurance Co. v. Reksons Holdings Ltd.

1994 CarswellBC 2925, [1994] B.C.W.L.D. 1971, 48 A.C.W.S. (3d) 1239

Zurich Insurance Company, Plaintiff and Reksons Holdings Ltd., Onyx Investment Corp. and Pier Six Enterprises Ltd., Defendants

Smith J.

Heard: May 27, 1994
Judgment: July 4, 1994
Docket: Vancouver C932699

Counsel: L.A. Morse, for Plaintiff
N.M. Kassam, for Defendants Reksons Holdings Ltd. and Onyx Investment Corp.

Subject: Civil Practice and Procedure

Headnote
Civil practice and procedure

***Smith J.*:**

1 This matter was brought on for trial pursuant to Rule 18A by the plaintiff.

2 One defendant, Pier Six Enterprises Ltd., has neither appeared nor defended the action. Counsel have advised me that defendant is insolvent.

3 I preface may reasons with the comment that this case was not organized well for trial by either counsel. My remarks are intended as constructive criticism, and I hope they are received as such. Much of the evidence tendered was inadmissible, and the issues on which I have concluded the trial should turn were not argued, and perhaps not pleaded. The only authority cited was an extract from a text dealing with insurable interests in liability policies. Some documents were simply handed up during argument, with no attempt to prove them. Many documents were incorporated in the written evidence without any thought given to the basis of their admissibility.

4 It was clear that documentary discovery had been incomplete and inadequate and that important documents, if they exist, had not been disclosed. As those documents were important, steps should have been taken to obtain their production or to establish they do not exist before the matter came to trial.

5 Counsel should know that an application under Rule 18A, while summary, is nonetheless a trial. By initiating its application under Rule 18A, the plaintiff represented that is was ready to proceed with a summary trial. In my view it was not. The demand for trial time is such that we cannot waste it, and counsel who elect to go to trial should not routinely expect to be given a second chance if they do not have their cases in order. Careful thought should be given to the legal and factual issues and to the evidence necessary to either make out or defend the case, and the case should be presented with no less care and attention than if it were a trial in the usual way.

6 On February 6, 1986 the plaintiff, as underwriter, issued a cover note to "REDSONS HOLDINGS LTD., et al" confirming $5,000,000 comprehensive general liability insurance coverage from February 6, 1986 to February 7, 1987, subject to attached "terms, conditions and limitations". The cover note provided insurance coverage at seven hotels, including the Fraser Arms Hotel and the Austin Motor Hotel, in Vancouver, B.C. In addition to Reksons Holdings Ltd., it described other persons as "named insureds" with reference to each hotel. For the Fraser Arms Hotel, the named insureds were described as "Wolray Hotels Ltd. A/O Reksons Holdings Ltd. A/O Fraser Arms Hotel". Counsel advised me "A/O" is an abbreviation for "and/or". For the Austin Motor Hotel, the named insureds were described as "Onyx Investment Corporation Austin Motor Hotel".

7 One of the attached "terms, conditions and limitations", read as follows:

3. DEDUCTIBLE/REIMBURSEMENT:

$10,000.00	REIMBURSEMENT INCLUDING ALL FEES, DEFENCE AND ADJUSTING COSTS.

8 Robert Grice, a claims specialist employed by the plaintiff, testified in his affidavit that a comprehensive general insurance policy, number 822 67 50, was issued by the plaintiff pursuant to the cover note. The policy was not placed in evidence by the plaintiff. However, Mr. Grice deposed that two endorsements annexed to his affidavit were part of the policy. They are both entitled "GENERAL ENDORSEMENT" and bear the words "END'T. No.1" and "END'T No.2" respectively. Next to the preprinted word "INSURED" on the form is typed the words "REKSONS HOLDINGS LTD. et al - Per Endorsement No.1". Following that are the preprinted words "FORMING PART OF POLICY No." and the

typewritten numerals "822 67 50". Next to the preprinted words "EFFECTIVE FROM" is the date February 6, 1986, and next to the preprinted word "AGENT" is typed "RICHARDS MELLING LTD. (VANCOUVER) / 5246". There follows, on Endorsement No. 1, the heading "LOCATIONS and NAMED INSURED", underneath which is a listing of the seven hotel locations and the named insureds as described in the cover note.

9 On Endorsement No. 2, following the information common to both documents, is the following:

> REIMBURSEMENT CLAUSE - applicable to all Liability coverages
>
> IT IS HEREBY UNDERSTOOD AND AGREED THAT the Insured shall reimburse the Insurer up to the sum of $10,000 with respect to all claims, legal fees and adjusting expenses combined in any one accident or occurrence and the Insurer shall only be liable for loss, damage or expense in excess of that amount.
>
> The terms of the Policy, including those with respect to notice of accident and the Insurer's right to investigate, negotiate and settle any claim or suit, apply irrespective of the application of the reimbursement.

10 At the bottom of Endorsement No. 2, above the typed words "Signature of Insured", is the signature of Firoz Karim, who is the president of the defendants Reksons Holdings Ltd. and Onyx Investment Corp. Mr. Karim was also, as of October 16, 1992, the president and a director of the defendant Pier Six Enterprises Ltd., according to a corporate search report dated April 7, 1994 which was admitted in evidence with the consent of Mr. Kassam, counsel for the other defendants.

11 Mr. Grice deposes that the plaintiff paid third parties with respect to three claims arising under the coverage between February 6, 1986 and February 7, 1987. All related to incidents at the Austin Motor Hotel.

12 In the first, which occurred on February 9, 1986, a Mr. Carnahan was paid $11,500 in consideration of which he executed a release of Reksons Holdings Ltd. and Onyx Investments Corp., who are described in the release as "Defendants". From that I draw the inference that Mr. Carnahan commenced legal proceedings against those two parties. The release is dated February 23, 1989.

13 The second claim was brought by a Ms. Johnson arising out of an incident which occurred on August 20, 1986. Mr. Grice says that the plaintiff paid $8,029.25 to settle that claim. Ms. Johnson executed a release of Reksons Holdings Ltd. on January 20, 1987.

14 The third claim was brought by a Mr. O'Connor arising out of an incident On November 25, 1986. Mr. Grice says the plaintiff paid $18,000 to settle this claim, and has annexed a document executed by Mr. O'Connor on November 8, 1989 by which he released Onyx Investments Corp., Reksons Holdings Ltd., and Zurich Insurance Company.

15 The plaintiff made demands of Reksons Holdings Ltd. for reimbursement pursuant to its agreement to reimburse as set out above. On July 4, 1990 the plaintiff received a cheque for $1,500 drawn on the operating account of the Austin Motor Hotel. Delivery of that cheque followed closely a letter demanding reimbursement on the Johnson claim, and the plaintiff applied the $1,500 against the amount owing on that claim.

16 On June 21, 1991, the plaintiff wrote to Reksons demanding payment of the cumulative balance of $26,529.25. In response the plaintiff received a letter dated July 11, 1991 on the letterhead of Pier Six Enterprises Ltd. purporting to enclose three cheques totalling $9,500. The letter closed with the words:

> We shall make necessary arrangements to pay you the balance of $17,029.28 during the next three months.

It appears the letter overstated the indebtedness by three cents. It was signed by Firoz Karim, President.

17 Mr. Grice testified in his affidavit that the letter contained only two cheques totalling $6,500 and that the plaintiff applied them against the Johnson claim. Thus, the total allegedly owing with respect to these three incidents is $20,029.25.

18 In answer to this part of the claim, Mr. Karim swore in his affidavit of May 4, 1994:

> As regards the other three claims which relate to the Austin Property, the Plaintiffs were aware that the Defendant Reksons was mentioned on the face of the Policy as a nominee and an agent. Mr. Noel Ashmore of Ashmore Agenores Ltd. (who were acting as agents of the Plaintiff in this matter) was informed by me at the time that Reksons was merely an agent.

19 In my view, that evidence is not admissible. It seeks to contradict the terms of the written agreement in a material way and violates the rule against reception of parol evidence. Even if it were admissible, I would not accept it. Mr. Karim does not say how the plaintiff was aware of what he alleges, nor why he signed the agreement without making that clear on the document. Further, he does not say for whom Reksons was a nominee or agent nor give any factual basis for his assertion that Ashmore Agencies Ltd. was the plaintiff's agent

in the transaction. Before giving any weight to this evidence, I would expect much more amplification of what are merely allegations.

20 This application was before Mr. Justice Davies earlier, and was adjourned specifically to permit the defendant Reksons to file evidence to support its argument that it was merely an agent in effecting the insurance. The evidence filed has not satisfied me in that regard. Accordingly, it is my opinion that Reksons Holdings Ltd. is liable pursuant to its written agreement with the plaintiff to reimburse it for the sum of $20,029,25, and the plaintiff will have judgment in that amount against the defendant Reksons.

21 I can see no basis on which the defendant Onyx Investment Corp. can be held liable for that sum.

22 Mr. Grice deposes to three further claims for which the plaintiff seeks reimbursement. The first, by a Mr. Frank, arose out of an incident at the Fraser Arms Hotel on March 28, 1987. The second, by a Mr. Cochlin, arose out of an incident at the Fraser Arms Hotel on November 19, 1988. The third, by a Mr. Eppich, arose out of an incident at the Austin Motor Hotel on June 17, 1989. The plaintiff claims for $25,000 in relation to Mr. Frank, $4,442.09 in relation to Mr. Cochlin, and $5,000 in relation to Mr. Eppich, totalling $34,442.09.

23 Mr. Grice states in his affidavit as follows: "The insured has paid $5,000 of the $10,000 deductible owing to Zurich". He made that statement in regard to the Eppich claim. The Lindsay Kenny law firm acted as appointed counsel for Pier Six Enterprises Ltd., and Mr. Grice has annexed a copy of a cheque drawn in favour of that firm in the amount of $5,000 on the operating account of the Austin Motor Hotel. The cheque is marked "*RE. EPPICH vs PIER SIX ENT.*" and is dated May 31, 1991. Also annexed to Mr. Grice's affidavit is a copy of a document executed by Mr. Eppich on September 30, 1991 releasing Pier Six Enterprises Ltd. and certain individuals.

24 In those circumstances, I do not accept Mr. Grice's statement that the $5,000 was a payment of money owing to the plaintiff. In my view, it was more likely a contribution by Pier Six Enterprises Ltd. to the settlement of Mr. Eppich's claim.

25 Mr. Grice also placed in evidence a letter to him dated December 17, 1990 on the letterhead of Reksons Holdings Ltd. and signed by Mr. Karim. The letter acknowledges two outstanding accounts in the amounts of $8,500 and $8,029.25, proposes payment at the rate of $2,000 per month, and encloses a Pier Six Enterprises Ltd. cheque in that amount payable to the plaintiff. Mr. Grice says the cheque was either not received or not presented for payment, as no credit was given for it. Mr. Grice does not relate this letter to any particular claim, but in view of the amount referred to in the letter I think it must relate to the amounts outstanding from the 1986 incidents at the Austin Motor Hotel which I have dealt with earlier in these reasons.

26 The argument at the hearing relating to the last three claims revolved around whether the defendants had any insurable interest at the material times. I do not think it is necessary for me to deal with that point, as I do not think the plaintiff has made out a claim in any event.

27 There is no evidence that after the policy period expiring February 7, 1987 there was any promise by either defendant to reimburse the plaintiff, such as was contained in Endorsement No. 1 referred to above. Mr. Grice deposes that in the subsequent policy periods, the issue was governed by the plaintiff's "Deductible Endorsement". So far as it is relevant, it reads:

> Our obligations under [described coverages] to pay compensatory damages on your behalf applies only to the amount of compensatory damages in excess of any deductible amounts stated in the Schedule above as applicable to such coverages...."

28 Accordingly, the plaintiff was not obligated to pay any amounts within the relevant deductible, nor did either defendant covenant to reimburse the plaintiff if it should do so. The plaintiff has pleaded:

> The policies were subject to certain "deductible endorsements" pursuant to which the Defendants were obligated to reimburse the Plaintiff up to certain stated amounts and with respect to expenses incurred in connection with claims made under the policy including expenses for liability payments, legal fees, adjusters fees and the like.

The case was thus pleaded and argued as one of contract, and as the plaintiff has not proven any contract obligating the defendants to make the payments claimed, the plaintiff cannot succeed in relation to these claims.

29 However, Rule 18A was designed to facilitate a prompt and inexpensive hearing on the merits. In my opinion, Rule 18A(7)(a) contemplates that there may be cases where judgment cannot be given because the real legal issue has not been pleaded. If the plaintiff has paid money which ought to have been paid by one or more of the defendants, it may have an equitable claim against them which has not been pleaded. Consequently, I think it would be unjust to grant judgment dismissing this part of the claim on the pleadings as they stand.

30 Accordingly, the plaintiff has leave to amend as it may be advised with respect to the sums claimed relating to incidents which occurred after February 7, 1987. Having regard to the fact that we are now in long vacation, if the plaintiff does not amend on or before September 30, 1994, these claims will be dismissed on application of the defendants.

31 The application for summary trial judgment on these claims is dismissed without prejudice to the plaintiff's right to renew the application if and when the statement of claim is amended.

32 As the plaintiff has succeeded in part against the defendant Reksons, it will have its costs in that regard against that defendant. There will be no costs with respect to the balance of the application.

End of Document

TAB 62

[HOUSE OF LORDS.]

DE BEERS CONSOLIDATED MINES, LIMITED . . . . . } APPELLANTS;

AND

HOWE (SURVEYOR OF TAXES) . . . . . RESPONDENT.

H. L. (E.) 1906 *July* 30.

Revenue—Income Tax—Residence—"Person residing in the United Kingdom"—Company registered Abroad—Head Office Abroad—General Meetings Abroad—Directors' Meetings in England and Abroad—Majority of Directors in England—Company's Business in England and Abroad—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 2; *Sched. D.*

A foreign corporation may reside in this country for the purposes of income tax. The test of residence is not where it is registered, but where it really keeps house and does its real business. The real business is carried on where the central management and control actually abides.

Whether any particular case falls within that rule is a pure question of fact, to be determined not according to the construction of this or that regulation or by-law, but upon a scrutiny of the course of business and trading.

Decision of the Court of Appeal, [1905] 2 K. B. 612, affirmed.

THE facts upon which this appeal turned are fully and clearly stated in the report of the case below. For the purposes of the present report the judgment of Lord Loreburn L.C. is sufficient.

June 18, 19. *Cohen, K.C.*, and *Danckwerts, K.C.* (*F. Cassel* with them), for the appellants. The appellant company is not resident within the United Kingdom. A company incorporated by the law of a foreign country cannot be resident here within the meaning of Sched. D of the Act of 1853. But if to some extent a foreign company may reside here, this company is so constituted that it cannot be considered to be resident here. The first of these contentions is covered by *Attorney-General* v. *Alexander*. (1) In that case the Imperial Ottoman Bank was held to be resident at Constantinople, though it also carried on business here. Phillimore J. and the Court of Appeal confused the question of personal service of process with that of domicil or

(1) (1874) L. R. 10 Ex. 20.

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DE BEERS CONSOLIDATED MINES, LIMITED v. HOWE.

residence. The two questions have nothing to do with each other; personal service does not depend on residence. The distinction is pointed out by Blackburn J. in *Newby* v. *Van Oppen and Colt's Patent Firearms Manufacturing Co.* (1) The mere circumstance that some trade is done in England may suffice for service, but not for taxation: *La Bourgogne.* (2) The mere temporary occupation of a stand at a show was held enough for service in *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (3)

Wingate & Co. v. *Webber* (4) is an express decision that a foreign company cannot be resident within the United Kingdom; and its agents were taxed "without their relation to the company being expressly specified." A corporation is a legal persona whose only residence is the place of its incorporation, and a foreign company has no legal existence in this country. This is illustrated in the American authorities: *Bank of Augusta* v. *Earle* (5); *Blackstone Manufacturing Co.* v. *Inhabitants of Blackstone* (6); *Ohio and Mississippi Railroad Co.* v. *Wheeler.* (7) A company can only have one residence — the place of its foundation. Further, if there be no residence there can be no assessment. The seat of actual authority as fixed by this company's memorandum and articles is the criterion of residence, and that is fixed at Kimberley. The business of the company was conducted at Kimberley, where alone diamonds were delivered to purchasers. The appellants are miners, not merchants, and do not purchase diamonds for resale. The whole of their physical operations are in South Africa. All the general meetings are held at Kimberley, and all shareholders, if they desire to receive notice of these meetings, must have a registered address in South Africa. This distinguishes the case from *Goerz & Co.* v. *Bell.* (8) The company is taxed in South Africa. Further, the expression "carrying on business" imports habitual transactions. Stress is laid upon the word "habitually" and similar words in

(1) (1872) L. R. 7 Q. B. 293, 295.
(2) [1899] A. C. 431.
(3) [1902] 1 K. B. 342.
(4) (1897) 3 Tax Cases, 569; 34 Sc. L. R. 699.
(5) (1839) 13 Peters (U.S.), 519.
(6) (1859) 13 Gray (Mass.), 488.
(7) (1861) 1 Black (U.S.), 286.
(8) [1904] 2 K. B. 136.

Erichsen v. *Last* (1) by Jessel M.R. and Brett L.J., and in *Grainger* v. *Gough* (2) by Lord Herschell and Lord Watson. According to this test the appellants did not carry on business here, for during the years of assessment there were only two contracts entered into in the United Kingdom — in April, 1900, and December, 1901. One contract a year does not make a business. Lord Herschell in *Grainger* v. *Gough* (3) draws "a broad distinction between trading *with* a country and carrying on a trade *within* a country." Here there was no trade carried on within the United Kingdom, and the case is wholly different from *London Bank of Mexico* v. *Apthorpe* (4) and from *San Paulo Ry. Co.* v. *Carter*. (5)

Even if there is residence and business done in the United Kingdom the assessment is wrong. The tax was here imposed "in respect of the profits of the company in the United Kingdom and elsewhere." Under *Colquhoun* v. *Brooks* (6) the tax can only be levied on such portion of the income as is remitted to the United Kingdom.

[The question whether the company exercised their trade in this country within s. 2, Sched. D, of the Income Tax Act, 1853, was not fully argued.]

Sir J. Lawson Walton, A.-G., Sir R. B. Finlay, K.C., and *W. Finlay*, for the respondents, were not heard.

The House took time for consideration.

July 30. LORD LOREBURN L.C. My Lords, the question in this appeal is whether the De Beers Consolidated Mines, Limited, ought to be assessed to income tax on the footing that it is a company resident in the United Kingdom. Had the appellants prevailed upon that question, an ulterior point would have demanded consideration. Your Lordships, however, being satisfied upon the first point, dispensed with further argument.

Under the 2nd section of the Income Tax Act, 1853, Sched. D, any person residing in the United Kingdom must pay on his annual profits or gains arising or accruing to him

(1) (1881) 8 Q. B. D. 414.
(2) [1896] A. C. 325, 335, 340.
(3) Ibid. at p. 335.
(4) [1891] 2 Q. B. 378.
(5) [1896] A. C. 31.
(6) (1889) 14 App. Cas. 493.

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Lord Loreburn L.C.

"from any kind of property whatever, whether situate in the United Kingdom or elsewhere," and also "from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere." Now, it is easy to ascertain where an individual resides, but when the inquiry relates to a company, which in a natural sense does not reside anywhere, some artificial test must be applied.

Mr. Cohen propounded a test which had the merits of simplicity and certitude. He maintained that a company resides where it is registered, and nowhere else. If that be so, the appellant company must succeed, for it is registered in South Africa.

I cannot adopt Mr. Cohen's contention. In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Kelly C.B. and Huddleston B. in the *Calcutta Jute Mills* v. *Nicholson* (1) and the *Cesena Sulphur Co.* v. *Nicholson* (1), now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides.

It remains to be considered whether the present case falls within that rule. This is a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading.

The case stated by the Commissioners gives an elaborate explanation of the way in which this company carried on its business. The head office is formally at Kimberley, and the

(1) (1876) 1 Ex. D. 428.

general meetings have always been held there. Also the profits have been made out of diamonds raised in South Africa and sold under annual contracts to a syndicate for delivery in South Africa upon terms of division of profits realised on resale between the company and the syndicate. And the annual contracts contain provisions for regulating the market in order to realise the best profits on resale. Further, some of the directors and life governors live in South Africa, and there are directors' meetings at Kimberley as well as in London. But it is clearly established that the majority of directors and life governors live in England, that the directors' meetings in London are the meetings where the real control is always exercised in practically all the important business of the company except the mining operations. London has always controlled the negotiation of the contracts with the diamond syndicates, has determined policy in the disposal of diamonds and other assets, the working and development of mines, the application of profits, and the appointment of directors. London has also always controlled matters that require to be determined by the majority of all the directors, which include all questions of expenditure except wages, materials, and such-like at the mines, and a limited sum which may be spent by the directors at Kimberley.

The Commissioners, after sifting the evidence, arrived at the two following conclusions, viz.:—(1.) That the trade or business of the appellant company constituted one trade or business, and was carried on and exercised by the appellant company within the United Kingdom at their London office. (2.) That the head and seat and directing power of the affairs of the appellant company were at the office in London, from whence the chief operations of the company, both in the United Kingdom and elsewhere, were, in fact controlled, managed, and directed.

These conclusions of fact cannot be impugned, and it follows that this company was resident within the United Kingdom for purposes of income-tax, and must be assessed on that footing. I think, therefore, that this appeal fails.

I will merely add that I agree with the Master of the Rolls that residence of a company within the meaning of the Income

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Tax Acts is not necessarily the same thing as residence for the purpose of serving a writ.

LORD MACNAGHTEN. My Lords, I agree.

LORD JAMES OF HEREFORD. My Lords, I concur in the judgments that have been delivered, holding that the decision of the Court of Appeal should be affirmed.

It is true that the appellant company was registered in the colony, and it was contended that this registration constituted a foreign company which could not be resident within the United Kingdom. But I see no reason why this should be the case. Of course, a foreigner can reside here, and so can a foreign company.

Then upon the facts it seems clear that the business of diamond merchants was carried on by the De Beers Company in England. The principal office was here, the majority of directors met here, and although the diamonds sold came from Kimberley, the profits were realised within the United Kingdom. The company, therefore, resided and carried on business here, and necessarily the provisions of the Act of 1853 as to profits and gains arising or accruing to any persons resident within the United Kingdom, and as to profits and gains arising from any trade exercised within the United Kingdom, apply. The appeal must be dismissed.

LORD ROBERTSON. My Lords, I agree in the judgment of the Lord Chancellor.

LORD LOREBURN L.C. My Lords, I am requested by my noble and learned friend Lord Atkinson to say that he concurs in the opinion which I have now offered to your Lordships.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journal, July 30, 1906.

Solicitors: *Hollams, Son, Coward & Hawksley; Sir F. Gore, Solicitor of Inland Revenue.*

TAB 63

The London Steam-Ship Owners' Mutual Insurance Association Ltd v. The Kingdom of Spain, The French State

Case No: 2013-368
2013-920
High Court of Justice Queen's Bench Division Commercial Court
22 October 2013

[2013] EWHC 3188 (Comm)

2013 WL 5338209

Before: Mr Justice Hamblen
Date: 22/10/2013

Analysis

Hearing dates: 3,4,7,8,9,10 and 14 October 2013

Representation

- Mr Christopher Hancock QC and Ms Charlotte Tan and Mr Thomas Corby (instructed by Ince & Co LLP) for the Claimants.
- Mr Joe Smouha QC and Ms Anna Dilnot (instructed by K&L Gates LLP) for the Defendants.

Approved Judgment
Mr Justice Hamblen:

Introduction

1 In November 2002 M/T "PRESTIGE" ("the vessel") was on a voyage from St Petersburg to the Far East carrying 70,000 tonnes of fuel oil.

2 On 13 November 2002 the vessel suffered damage from a storm surge 28 miles from Cape Finisterre and began to list significantly. A distress call was sent to the Spanish authorities but salvage attempts over the following days were unsuccessful. On 19 November 2002 the vessel broke in two and sank.

3 The resulting oil spillage was an ecological disaster severely polluting the Atlantic coasts of Cantabria and Galicia. Its effects spread as far as France where thirteen administrative departments from the western coastal area were affected. Cleaning up after the spill required extensive resources and took years.

4 In late 2002 criminal proceedings were instituted in Spain against the Master, Chief Officer and Chief Engineer and Mr Lopez-Sors, the Spanish official who had ordered the vessel to sail away from the coast ("the Spanish proceedings").

5 In or about June 2010, at the conclusion of the investigatory stage of the criminal proceedings, civil claims were brought against the owners of the vessel, Mare Shipping Inc ("the Owners"), on the grounds of its vicarious liability, and also against the Owners' protection and indemnity ("P&I") insurers, the London Steamship Owners Mutual Insurance Association Limited ("the Club"). These claims were brought under Article 117 of the Spanish Penal Code 1995 ("the Penal Code") (which provides an injured party with a direct right of action against an insurer in certain circumstances) and the Convention on Civil Liability ("CLC") in respect of the damage caused by the loss of the vessel. Claims were brought by several separate legal entities, including the State Administration of Spain ("Spain"), the Spanish Public Prosecutor and two autonomous Spanish territorial entities, Galicia and (although there was a dispute about this) Arteixo. The claims brought in June 2010 by the Spanish entities were for just under €1 billion. However, that amount has now increased to approximately €4.3 billion. At about the same time, the Republic of France ("France") and a number of local French government entities and organisations joined the Spanish criminal proceedings claiming that the Club was civilly liable under the CLC and Article 117 of the Penal Code . France's claim is for approximately €67.5 million.

6 The Club acknowledges its CLC liability. The CLC broadly imposes strict liability (subject to certain limited exceptions) on the owners of ships to compensate persons who suffer oil pollution damage, as defined. To ensure that a ship owner is in a position to meet his obligations under the CLC he is obliged to arrange insurance up to his CLC limit (in this case SDR 18,884,400). In this case, the Club was the Owners' CLC insurer. The CLC provides for direct action against the CLC insurer, but only up to the amount of the CLC Fund: Article VII.8 of the CLC. The amount of the CLC Fund for this incident, which was constituted in Spain on 28 May 2003 (at the then exchange rate), is €22,777,986.

7 In relation to the non-CLC claims the Club's position is that the civil claimants are bound by the terms of the contract of insurance contained in the Club Rules to bring those claims in arbitration and by the English law clause in those Rules. Further, they are bound by any contractual defences available to the Club, including the "pay to be paid" clause (Rule 3.1) and that upon the proper application of the "pay to be paid" clause, the Club has no liability.

8 The Club has accordingly played no part in the Spanish proceedings. It did, however, commence London arbitration proceedings seeking negative declaratory relief in respect of any non-CLC liability to Spain and France. The references against each respondent proceeded separately but the same Tribunal (constituted of Mr Alistair Schaff QC) was appointed in each case. Neither Spain nor France participated in the arbitrations.

9 In awards dated 13 February 2013 (Spain) and 3 July 2013 (France), the Tribunal upheld most of the Club's claims for negative declaratory relief in respect of any non-CLC liability. Declarations were granted that Spain/France were bound by the arbitration clause in the Club's Rules to refer the civil claims being brought in Spain to arbitration; that actual payment of the insured liability by the insured member is a condition precedent to the Club's liability pursuant to the "pay to be paid" clause in the Club Rules ; that in the absence of such prior payment the Club is not liable to France/Spain in respect of the claims, and that the Club's liability shall, in any event, not exceed the amount of US $1,000,000,000 (U.S. Dollars One Billion).

10 The Club now seeks permission pursuant to s.66 of the Arbitration Act 1996 ("the Act") to enforce the two arbitration awards as judgments and/or to have judgments entered in their terms.

11 France and Spain (together "the Defendants") resist the s.66 application as a matter of jurisdiction, on the grounds that they have state immunity, and as a matter of discretion.

12 They have also brought their own applications challenging the substantive jurisdiction of the Tribunal pursuant to s.67 and/or s.72 of the Act on the grounds that they are not bound by the arbitration agreement as their direct action rights are in essence independent rights under Spanish law rather than contractual rights, non-arbitrability and (in relation to France only) waiver.

13 The trial of the Spanish proceedings took place between 16 October 2012 and 10 July 2013. Judgment is expected in November 2013 and the present applications have been brought on before the court on an expedited basis, at the Club's behest.

14 The hearing of the applications took 7 days. I heard oral evidence from Spanish law experts, Professor Andrés Betancor for the Defendants and Dr Ruiz Soroa and Mr Fajardo for the Club; French law experts, Mr Grelon for France and Mr Gautier for the Club; and factual witnesses Mr Irurzun Montoro for the Defendants and Dr Ruiz Soroa for the Club.

15 Both parties made extensive written submissions and I have drawn on those submissions, with adaptations and amendments, in preparing this judgment, particularly in relation to matters of common ground and in setting out the parties' arguments.

The factual background

The insurance contract

16 In the year commencing 20 February 2002, the vessel was entered with the Club in respect of P&I and FD&D cover. The P&I contract of insurance ("the contract") was evidenced by a Certificate of Entry by which the Club agreed to provide P&I cover for the Owners and Managers (Universe Maritime Ltd) of the vessel in respect of, inter alia pollution liabilities up to a maximum aggregate amount of US$1 billion.

17 The contract was subject to the Club's Rules of Class 5 – Protecting and Indemnity ("the Rules"). The Rules included the usual P&I "pay to be paid" clause and incorporated the Marine Insurance Act 1906 .

18 The most material provisions of the Rules are as follows:

> **Introductory**
>
> 1.2 All insurance afforded by the Association within this Class is by way of indemnity and all contracts relating thereto shall be deemed to incorporate the provisions of these Rules, save insofar as those provisions are varied by any special terms which have been agreed pursuant to these Rules…; all such contracts and these Rules shall be governed by English law and shall be subject to the provisions of the Marine Insurance Act 1906 and any statutory modifications thereof.
>
> 1.3 …whatever insurance is afforded by the Association within this Class shall always be subject to the provisos, warranties, conditions, exceptions, limitations and other terms set out in the remainder of these Rules.

Right to Recover

3.1 If any Member shall incur liabilities, costs or expenses for which he is insured, he shall be entitled to recovery from the Association out of the funds of this Class, PROVIDED that:

> 3.1.1 actual payment (out of monies belonging to him absolutely and not by way of loan or otherwise) by the Member of the full amount of such liabilities, costs and expenses shall be a condition precedent to his right of recovery; [hereinafter "the pay to be paid clause"]

Risks Covered

9.1 Subject to any special terms which may be agreed in writing, a Member is insured in respect of each ship entered by him in this Class against the risks set out in Rule 9.2 – 9.28 , PROVIDED that such risks arise:

> 9.1.1 in respect of the Member's interest in such ship; and
>
> 9.1.2 in connection with the operation of such ship by or on behalf of the Member; and
>
> 9.1.3 out of events occurring during the period of entry of such ship.

9.15 Pollution:

> 9.15.1 Liabilities, costs and expenses set out in Rule 9.15.1.1 – 9.15.1.4 to the extent that they are the result of

the discharge or escape from an entered ship of oil or any other polluting substance, or the threat of such discharge or escape, namely:

> 9.15.1.1 Liability for loss, damage or contamination…
>
> 9.15.1.3 The costs of measures reasonably taken (or taken in compliance with any order or direction given by any government or authority) for the purposes of avoiding the threat of or minimising pollution, and liability incurred as a result of such measures

Limitations of Cover

11.3 Recovery shall be limited to a maximum of US$1,000,000,000 (U.S. Dollars One Billion) any one occurrence in respect of any one entered ship in respect of oil pollution liability including fines, costs and expenses and clean-up and damages payable to any other person as may arise in respect of oil pollution liability whether under Rule 9.15 (Pollution)…or any other sections of Rule 9 or any other Rule or combination thereof.

Jurisdiction and Law

43.2 Save for matters referred to in Rule 43.1 [relating to security] and subject to Rule 33.4 [relating to Overspill Claims], if any difference or dispute shall arise between a Member and the Association out of or in connection with these Rules, or out of any contract between the Member and the Association, or as to the rights or obligations of the Association

> or the Member there under, or in connection therewith, or as to any other matter whatsoever, such difference or dispute shall be referred to Arbitration in London before a sole legal Arbitrator and the submission to Arbitration and all the proceedings there under shall be subject to the provisions of the Arbitration Acts 1950 , 1979 and 1996 and any Statutory modification or re-enactment thereof, and to English law. In any such Arbitration, any matter decided or stated in any Judgment or Arbitration Award (or in any Reasons given by an Arbitrator or Umpire for making the Award) relating to proceedings between the Member and any third party shall be admissible in evidence. No Member may bring or maintain any action, suit or other legal proceedings against the Association in connection with any such difference or dispute unless he has first obtained an Arbitration Award in accordance with this Rule. ["the arbitration clause]"

The casualty

19 In May 2002, the vessel was chartered from Owners to Crown Resources AG for a period time charter of 160/240 days. On 31 October 2002, she sailed from St Petersburg with a cargo of fuel oil bound for the Far East via Gibraltar.

20 On or around 13 November 2002, the Vessel began to experience serious difficulties, suffered some damage and began to list significantly. A distress call was sent to the Spanish authorities, seeking assistance.

21 Salvage attempts were unsuccessful. On 19 November 2002 at about 08:00hrs local time, the Vessel broke into two. Later that day, she sank and was declared and accepted as a total loss with effect from 20 November 2002.

22 As a result of the casualty extensive oil pollution was caused, requiring substantial clean up operations and resulting in widespread and significant damage to both Spanish and French coastlines.

The criminal proceedings

23 In late 2002 criminal proceedings were instigated in Spain against, amongst others, the Master, Chief Officer and Chief Engineer of the vessel.

24 On 28 May 2003 the Club constituted a compensation fund of €22,777,986 pursuant to its obligations as liability insurer of the Owners and Managers under the CLC Convention.

25 In November 2005, France initiated proceedings in the Bordeaux District Court against the Owners, the IOPC Fund and the Club seeking damages of €67,499,153.92 as a result of the pollution damage caused to France.

26 In November 2006, France initiated proceedings before an investigating magistrate in the Brest Criminal Court. Those proceedings were against persons unknown i.e. against anybody likely to have committed any relevant offence.

27 On 5 May 2010, the Criminal Court of Corcubión formally declared the investigative stage of the proceedings closed and ordered any claimants to serve accusation pleadings. Following that order, Spain, the Public Prosecutor, and each other claimant in the case filed separate accusation pleadings.

28 On 30 July 2010, the Magistrates' Court No.1 of Corcubión ordered the commencement of the oral proceedings stage, with trial to take place in the Provincial Court of La Coruña. By order dated 28 November 2011, the proceedings were formally transferred to the Coruña Court.

29 The oral trial took place between 16 October 2012 and 10 July 2013. Judgment on criminal and civil liability is expected in November 2013.

30 In broad terms, it is alleged in the Spanish proceedings that the loss was suffered because the vessel was unseaworthy; the Master, Chief Officer and Chief Engineer were deliberately obstructive and uncooperative with the Spanish authorities; the vessel was overloaded, and the Master was negligent in counter-flooding the wing tanks of the vessel in an attempt to correct the list. The Master and Owners deny these allegations. They further say that all but a fraction of the loss was caused by the decision of the Spanish authorities to start the vessel's engines and send her out to sea, rather than sending her to a port of refuge. If the vessel had not been sent out to sea, they say, the pollution damage would have been minimal (if there had been any at all).

The civil claims made in the criminal proceedings

31 Various civil claims have been brought in the Spanish proceedings. In Spain, a party who is criminally liable will also be civilly liable for harm done by the criminal act, in accordance with the general (civil) principle that a party who does harm to another by a wrongful act is liable to compensate that other.

32 Claims are brought by the Spanish State Lawyer and by the Public Prosecutor on behalf of Spain. By the end of the trial the quantum of claims brought on behalf of Spain was €4,328,130,000.

33 Claims are also brought by France. Those claims are for €67,500,905.92. The civil claims brought in Bordeaux have been stayed pending determination of these claims in the Spanish proceedings.

34 Other parties have also claimed that they suffered loss by reason of the casualty. These can be divided into four main categories:

- i) Those persons who entered into subrogation agreements with Spain whereby the State paid out the alleged claim and pursued the claim in its own name. By the end of 2009, Spain was subrogated to all the damages suffered by any Spanish public entity (with one or possibly two exceptions).
- ii) Those persons who have maintained civil claims separately to Spain and France. Included in this category is the Xunta de Galicia (claiming €1,275,458 in respect of a future disbursement). Spain says that the Ayuntamiento de Arteixo ("Arteixo") falls into this category but the Club disputes this.
- iii) Those persons who have made allegations of criminal liability, but no allegations or claims of civil liability against the Club in their favour. It is common ground that the Ayuntamiento de O Grove falls into this category. The Club maintains that Arteixo also falls into this category but Spain disputes this.
- iv) Those persons, who initially made civil liability claims against the Club but, by reason of their non-representation at the trial, are taken to have waived their claims. These claimants include the Comunidad Autonoma del Pais Vasco, the Diputacion Foral de Gipuzkoa, the Diputacion Foral de Bizcaya, the Ayuntamiento de Donostia/San Sebastian, the Diputacion Provincial de A Coruña (though, in any event, these parties have been compensated by the State and the State has been subrogated to their claims).

The arbitration proceedings

35 The Club commenced arbitration against the "Kingdom of Spain" by Notice of Arbitration dated 16 January 2012 and against France by Notice of Arbitration dated 16 January 2012. Although Spain does not accept that the "Kingdom of Spain" was the correct respondent it accepts, for the purpose of these proceedings only, that it will not assert that by failing to name Spain as a party to the arbitration the Club has failed to obtain an award against it.

36 Neither Spain nor France agreed to the appointment of an arbitrator. Accordingly, the Club applied for and obtained orders from the Court pursuant to s.18 of the Act, constituting the respective Tribunals.

37 The references proceeded (separately but with the same Tribunal appointed in each case).

38 In each reference, the Club contended that the respondent was bound by the terms of the Club Rules , including the arbitration clause and the contractual defences available to the Club and sought declarations accordingly.

39 These included a declaration that the Club was not liable to the respondent by reason of the "pay to be paid" clause in the P&I Rules. As a matter of English law it is well established that this clause operates as a complete defence to a claim if the liability in question has not been discharged by the insured member, since such discharge is a condition precedent to the insured member being indemnified by the Club – see The "Fanti" and "Padre Island" [1990] 2 Lloyd's Rep. 191 .

40 The Tribunal invited Spain and France to participate in the proceedings. However, neither respondent took part and the matter proceeded unopposed (though all documents were served upon the respondents at every stage).

41 Separate hearings took place in January 2013 (the Spain reference) and June 2013 (the France reference). In each case, the respondents were given a final opportunity to participate following the close of the hearing but they declined.

42 The Tribunal upheld the majority of the Club's claims in both references. The award in respect of the claim against the Spain is dated 13 February 2013. The award in respect of the claim against the French State is dated 3 July 2013.

43 The relief granted in each case was substantially identical. The following relief was granted:

> "A) …as regards all claims arising out of the loss of the M/T PRESTIGE and the resulting loss and damage which are currently brought in Spain by the Respondent against the Claimant by way of alleged direct public liability under the Spanish Penal Code :
>
> 1) the Respondent is bound by the arbitration clause contained in Rule 43.2 of the Club's Rules and such claims must be referred to arbitration in London;
>
> (i) Actual payment to the Respondent of the full amount of any insured liability by the Owners and/or Managers (out of monies belonging to them absolutely and not by way of loan or otherwise) is a condition precedent to any direct liability of the Claimant to the Respondent in consequence of the "pay to be paid clause" contained in Rule 3.1 ; and accordingly
>
> (ii) Pursuant to the "pay to be paid clause" and in the absence of any such prior payment, the Claimant is not liable to the Respondent in respect of such claims;

44 In addition, in the award against Spain the following further declaration was made in the light of the quantum of the asserted claims;

> 3) the Claimant's liability to the Respondent shall, in any event, not exceed the amount of US$1,000,000,000 (U.S. Dollars One Billion).
>
> B) …the Respondent shall bear and pay the Claimant's costs of this reference and the Tribunal's costs of this reference and this Award, and shall reimburse the Claimant for the Tribunal's costs if they have been borne in the first instance by the Claimant."

The Issues

45 The main issues which arise for determination are as follows:

In relation to the Defendants' applications under ss.67 and 72 of the Act:

i) What is the proper characterisation of the claims?

ii) Are the claims arbitrable?

iii) Has there been a waiver of the right to arbitrate France's claims?

In relation to the applications under s.66 of the Act:

iv) Does the Court have no jurisdiction on the grounds of state immunity?

v) If it has jurisdiction, should the Court grant the applications as a matter of discretion?

46 The Defendants contended that the issue of state immunity should logically be determined first since if the Court has no jurisdiction then that is the end of the matter. However, the state immunity issue is closely bound up with the question of characterisation and it is convenient to consider that first. I accordingly propose to address the issues in the order set out above.

What is the proper characterisation of the claims?

English law

47 The leading modern authority is the decision of the Court of Appeal, upholding (in the relevant part) the decision of Moore-Bick J, in Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Insurance Co (The Hari Bhum) (No 1) [2004] 1 Lloyd's Rep. 206 (Moore-Bick J) and [2005] 1 Lloyd's Rep. 67 (CA).

48 In that case the Court considered the characterisation, according to English conflicts of laws principles, of a claim brought by New India Assurance, as an injured third party,

against an insolvent insured's insurer pursuant to the Finnish Insurance Contracts Act 1994 ("the Finnish Act") which gave such a third party the right to proceed directly against the insurer.

49 According to the Court of Appeal (and Moore-Bick J at first instance), there were two possible characterisations available:

- i) The third party was seeking to enforce a contractual obligation derived from the contract of insurance; or
- ii) The third party was advancing an independent right of recovery under the relevant statute.

50 The proper approach was set out by Moore-Bick J in his judgment at [16] in a passage with which the Court of Appeal expressed their entire agreement at [57]:

> "16 The issue in the present case is whether New India is bound by the arbitration clause which in turn depends on whether it is seeking to enforce a contractual obligation derived from the contract of insurance or an independent right of recovery arising under the Insurance Contracts Act. If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterised as one of statutory entitlement to which there may be no direct equivalent in English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterised as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law: see Adams v National Bank of Greece ."

51 As explained in paragraph 58 of the Court of Appeal judgment, the question is what is the substance of the claim. Is it in substance a claim to enforce the contract, or is it in substance a claim to enforce an independent right of recovery?

52 This involves a consideration of the nature of the right as a matter of the relevant foreign law, but the question of characterisation is a question for the English court applying English conflicts of laws principles – see Moore-Bick J's judgment in Through Transport at [11]; *Briggs* , *The Conflict of Laws* (2nd Ed.; 2008) at p9; *Cheshire and North* (14th Ed; 2008) at p43.

53 In the Through Transport case both Moore-Bick J and the Court of Appeal held that the direct right of action conferred under the Finnish Act was in substance a right to enforce the contract.

Spanish law

The experts

54 The expert for Spain/France was Professor Betancor, a public law professor at Pompeu Fabra University in Barcelona with a particular expertise in environmental law.

55 The expert for the Club was Dr ruiz Soroa, a practising lawyer with particular expertise in maritime law and marine insurance.

56 Dr Ruiz Soroa acts for the Master and the Owners in the Spanish proceedings, whose defence is funded by the Club under their FD&D cover. The Club can therefore be regarded as his ultimate client and to that extent he was not an independent witness.

57 I accept that this means that his evidence has to be approached with caution and I also accept that some criticism can be made of the selective nature of parts of his reports, or at least of his failure to make clear the selectivity involved. However, having carefully considered his evidence, on which he was extensively cross examined, I am satisfied it reflects his genuinely held opinions and was not influenced by his role in the Spanish proceedings and his relationship with the Club. He was throughout able to explain why he held the opinions that he did. There was in fact much common ground between the experts, but to the extent that there was disagreement I consider that those differences must be resolved by reference to the quality and cogency of the evidence they gave rather than their relative independence.

The sources of Spanish law

58 The experts agreed that only multiple consistent decisions of the Supreme Court constitute binding case law. However, although multiple judgments by lower courts do not have binding value, they do have informative and instructive value with regard to the contents of Spanish law.

The relevant statutory provisions

59 The statutory regime relevant to marine insurance contracts may be summarised as follows:

- i) The 1885 Commercial Code governs, amongst other contracts, contracts of marine insurance.
- ii) The 1980 Insurance Contract Act ("the 1980 Act") governs various types of contract, being those not covered by other specific legislation. Such contracts are governed mandatorily by the 1980 Act by reason of s.2 of that Act.
- iii) Marine insurance contracts, as a category of contract covered by a specific statute (i.e. the Commercial Code), are not governed mandatorily by the 1980 Act, save for rules of public order. The fact that the 1980 Act applies in a "subsidiary" manner to marine insurance is reinforced by s.44 of the 1980 Act, which provides that large risks, including marine insurance contracts, are not subject to Article 2 .

60 As the experts agreed, Spanish law recognises the application of the principle of contractual freedom to marine insurance, and P&I insurance is a form of marine insurance.

61 The key provisions addressing the liability of insurers to compensate injured third parties under the 1980 Act are Articles 73 and, in particular, Article 76 which provide that:

> **[Object of civil liability insurance. Limits]**
>
> By means of civil liability insurance the insurer undertakes within the limits determined by the Law and the contract to cover the risk of emergence for the insured of an obligation to compensate a third party for damages and losses caused by an event covered by the contract when the insured has civil liability for the consequences of the same, according to law….

[Direct action against civil liability insurer and the insurer's right to action for recovery]

The injured or aggrieved party or their heirs shall be entitled to a direct action against the insurer to demand of him the fulfilment of the obligation to compensate, without prejudice to the insurer's right to recover from the insured in the event that the damage or injury to the third-party was caused by the wilful misconduct of the insured. Direct action shall be exempt from the defences that the insurer may have had in respect of the insured. The insurer may, however, allege that the injured party is exclusively liable and may also raise the personal defences he may have in respect of the injured party. For the purposes of bringing direct action, the insured shall be obliged to inform the injured third party or their heirs of the existence of an insurance contract and the content of the same".

62 Civil claims can also be brought in criminal proceedings and there is a specific section of the Penal Code (Chapter II) headed "On persons liable under Civil Law". The most relevant provisions are as follows:

"Article 109

1. Perpetration of an act defined as a felony or misdemeanour by Law shall entail, pursuant to the provisions contained in the laws, repairing the damages and losses caused thereby.

2. In all cases, the party damaged may opt to sue for civil liability before the Civil Jurisdiction.

....

Article 116

1. All persons held criminally accountable for a felony or misdemeanour shall also be held liable under Civil Law if the fact gives rise to damages or losses. If two or more persons are responsible for a felony or misdemeanour, the Judges or Courts of Law shall set the proportion for which each one must be held accountable…..

Article 117

Insurers that have underwritten the risk of monetary liabilities arising from use or exploitation of any asset, company, industry or activity when as a consequence of a fact foreseen in this code, an event takes place covered by the risk insured, shall have direct civil liability up to the limit of the legally established or contractually agreed compensation, without prejudice to the right to bring an action for recovery against who such may be appropriate.

….

Article 120

The following persons shall be held civilly liable, failing those held criminally accountable:

> 4. Natural or legal persons dedicated to any kind of industry or commerce, for felonies or misdemeanours their employees or assistants, representatives or managers may have committed in the carrying out of their obligations or services…"

63 It was common ground between the experts that the direct action contemplated in Article 117 of the Penal Code has the same nature and regime as that contemplated in Article 76 of the 1980 Act. As explained by Dr Ruiz Soroa in evidence, the nature of the Article 117 right is treated as a manifestation in the criminal sphere of the right given by Article 76 . They are both civil liability rules, as Professor Betancor confirmed in evidence.

The legal nature of the direct action in Spanish law

64 The experts were agreed that the Judgment of the Provincial Court of Madrid dated 16.10.2012 ("the Madrid Judgment") is a correct exposition of Spanish law on this point, and I so find.

65 The Madrid Judgment included the following:

> "I. Civil liability insurance which is regulated by Insurance Contract Law (LA LEY 1957/1980) within the area of insurance against damage in articles 73 to 76 can be defined as the insurance by which the insurer is obligated to cover the risk of having an encumbrance placed on the assets of the insured party due to the creation of an obligation to indemnify derived from its civil liability. This civil liability could arise from the non-malicious, malicious, or negligent (civil or criminal behaviour of the insured party (or the people for whom it is civilly liable).
>
> …the direct action of a wronged third party against the insurer, for it to indemnify the damage caused, within the coverage of an insurance policy, was consistently recognized by case law… The exercise of this action even became allowed to be admitted by the wronged party against the insurer in criminal procedures in which an act is being tried that has the nature of a criminal infraction which the insured party causes and from which civil liability is derived that is covered by the insurance policy…At a legislative level the cited direct action of the wronged third party against the insurer was … generally established in Article 76 of Law 50/1980 dated October 8 (LA LEY 482 regarding insurance policies (B.O.E number 250 dated October 17 1980; "The wronged third party or its inheritors will be able to take direct action against the insurer to demand that they comply with the obligation to indemnify"). It should be emphasised that this direct action of the wronged third party against the insurer can be exercised both within

civil and criminal jurisdictions (if the accident covered by the insurance has a criminal nature and the insured party is criminally liable).

II. In principle, for the direct action of the wronged third party against the insurer to be successful, it is essential that if it was exercised by the insured party against the insurer, that it was also successful. However this general rule has two clear exceptions in Article 76 of the Insurance Contract Law (LA LEY 1957/1980), in which, despite the fact that the insurer is not obligated to indemnify the insured party for the accident that occurred, nevertheless, it is obligated to indemnify a wronged third party when the direct action is exercised by them. Of course, in these two cases, the insurer is granted the right to a recovery action against the insured party in order to recover the amount of money with which the wronged third party was indemnified.

The first of these two exceptions is when the damage caused to the wronged third party is due to the malicious behaviour of the insured party….

The second of these two exceptions is when the insurer is obligated to pay the indemnity to the wronged third party because it is prevented from bringing up to challenge them, in their exercise of this direct action, any exception that it would have otherwise been able to bring up to challenge the insured party…

So, when faced with a wronged third party who exercises such direct action, the insurer can oppose all the "defences" that it deems convenient, and specifically, those referring to the lack of facts constituting the third party's right (which should be operative even when they have not been alleged by the insurer, if the Judge believes that these facts constituting the right of the claimant have not been proven, then the action that is being exercised would not have been brought about, and would be inexistent). These "defences" or exceptions in a broad sense are the following:

a) Inexistence of a civil liability insurance policy between the insurer and the insured party or the extinguishing of this contractual legal relationship.

b) The absence of the right of the wronged third party to compensation, due to the absence of one or more of the requirements necessary for the civil liability of the insured party to be relevant with respect to the wronged third party.

c) The right of the third party is outside the coverage of the insurance policy: the objective limits to the insurance policy's coverage will determine the substantial contents of the insurer's obligation, such that the right of the wronged third party will have been produced with respect to the insured party, but this is exclusively covered by the insurer against the creation of the obligation to indemnify for acts established in the policy the results of which are civilly liable; This is deduced from the formation of Article 76 of Law 50/1980, dated October 8, regarding Insurance Contracts (LA LEY 1957/1980) which follows precisely from the precept that said that the wronged party will have the ability to take "direct action against the insurer in order to demand from it compliance with the obligation to indemnify, within the limits established by applicable regulations, in the case of obligatory insurance, or due to the contract, in the case of voluntary insurance" (article 108 of the Draft Bill of 1969), a paragraph that was eliminated in the subsequent Draft Bill (Article 76 of the Draft Bill of 1970) because its contents were considered obvious, and therefore its declaration unnecessary. It is also deduced from the need for it to be related to the first sentence of Article 76 , which grants the wronged third party or its inheritors the action to demand from the insurer compliance with its obligation to indemnify, with Article 1 , which reduces the obligation to indemnify on the part of the insurer up to the "limits agreed upon", and which Article 73 , which also adheres to this obligation, on the part of the insurer, to indemnify up to the "limits established in the Law and in the policy".

The insurance coverage comes to be contractually defined by the clauses delimiting the insured risk and by the limiting clauses of the right of the insured party to charge the indemnity produced by the accident, where both the former (those that delimit risk) and the latter (those limiting the rights of the insured party) can be challenged by the insurer, when faced by a wronged third party who exercised direct action.

Lastly, there are the exceptions in a strict sense that are unchallengeable by the insurer when a wronged third party exercises direct action, and which

are none other than those that refer to acts, or more specifically omissions, of the insured party that are legally tied to the release of the obligation of the insurer to indemnify the insured party when an accident occurs or a reduction of the amount of indemnification. They are exceptions based on the behaviour of the insured party, since the subjective valuation of the behaviour of the insured party is irrelevant for the purposes of the direct action of the wronged third party against the insurer. Only these exceptions are unchallengeable by the insurer with respect to the wronged third party. And, even without making an exhaustive list of them, the following can be identified:

a) Failure to comply with the duty of the declaration of risk by the party who took out the insurance policy, both before the conclusion of the policy (Article 10 of Law 50/1980 dated October 8, for Insurance Contracts (LA LEY 1957/1980) and while the legal relationship is in force (Articles 11 LA LEY1957/1980) and 12 of Law 50/1980, dated October 8, regarding Insurance Contracts (LA LEY 1957/1980))

b) Suspension of coverage of the insurance due to failure to pay the premiums (Article 15 of Law 50/1980, dated October 8, regarding Insurance Contracts (LA LEY 1957/1980))

c) Failure to comply with the duty of informing the insurer of the accident (Article 16 of Law 50/1980), dated October 8, regarding Insurance Contracts (LA LEY 1957/1980))

d) Failure to comply with salvaging duties (Article 17 of Law 50/1980, dated October 8 regarding Insurance Contracts (LA LEY 1957/1980))

e) Failure to notify regarding the existence of different insurance policies (Article 32 of Law 50/1980, dated October 8, regarding Insurance Contracts (LA LEY 12957/1980))".

66 The Madrid Judgment makes clear that the general rule and starting point is that the third party can only claim against the insurer if and to the extent that the assured would also have been able to claim against the insurer, subject to the specific exceptions laid down in Article 76 itself.

67 As the Madrid Judgment states, “the objective limits of the insurance policy's coverage will determine the substantial contents of the insurer's obligation”. The Madrid Judgment explains that this is to be inferred from the legislative history of Article 76 which had originally provided that the direct action would be subject to the limits established by the contract, in case of voluntary insurance, but that those words had been deleted as being unnecessary as this was already obvious. As is explained, this limitation is made manifest by Article 73 which provides that the insurer's obligation to compensate is subject to the limits imposed by law (in the case of compulsory insurance) and to the limits imposed by contract (in the case of voluntary insurance).

68 In relation to the exceptions laid down in Article 76 the Madrid Judgment explains that the “defences” referred to are limited to those which are “personal” to the insured party in that they are based on his conduct, the principal examples of which are then listed. All other contractual defences or exceptions may be relied upon by the insurer (save for, as recent cases have shown, a wilful misconduct exclusion).

69 The wilful misconduct exception is also explained and contrasted with Article 19 of the 1980 Act. Recent decisions of the 2nd Division (Criminal) Supreme Court have held that clauses excluding liability for losses which are otherwise within the insurance where such losses are caused by wilful misconduct cannot be relied on as against the injured third party by the insurer, bearing in mind the character of this insurance as intended to protect third parties.

70 In summary, the direct action rights which may be enforced against the insurer are the insured's contractual rights, save that the insurer may not rely as against the third party on “personal” defences or a defence or exclusion based on wilful misconduct.

71 The experts agreed that the source of the third party's direct action right is the law and that it is a right which arises from the law rather than the contract. There was disagreement between them as to whether this meant that the right would be regarded as “independent” as a matter of Spanish law.

72 Dr Ruiz Soroa's view was that although the direct action right is “genetically” independent from the contract, it was not “functionally” independent. Although it does not “flow from” the contract, is does not exist outside the contract and its content is inextricably linked to and determined by the contract, save for the exceptions provided for in Article 76 . As he explained:

> "…in order for the injured party to be able to take action against the civil liability insurer, it is necessary that: a) there is a valid insurance contract between the insured and the insurer, and b) the damage caused to the injured party must be within the limits established in the contract with regards to cause, time, place and nature of the insured risk. Therefore, the direct action of the injured party is functionally dependent on the existence and content of the insurance contract; if the contract does not cover the specific, particular damage caused to the injured third party, then no direct action exists. The direct action is not, in this sense, independent and autonomous from the contract, but rather its existence and content is shaped by the insurance contract".

73 Dr Ruiz Soroa stressed, as I have found, that the general rule is that the third party can only claim against the insurer if and to the extent that the assured would have been able to do so. His evidence was that in considering the nature of the direct action one should look to the general rule, not its exceptions. As he explained in oral evidence:

> "The law states a general rule. The contents of the direct action of the third party are moulded by the contract. You must go to the contract and examine if the contract cover or not this kind of claim — damage. But the law makes an exception. You are trying to deduct the nature of the third party victim from the exception, not for the general principle. … You cannot deduct — you didn't find the nature of the direct action pointing only to the exception….The principal rule is that the third party is in the same position than the assured. This is the general rule. You must consider that in order to deduct which is the exact nature of the direct action. The third party is put, by article 76 and article 117 , in the same position of the assured. If the assured, according to the contract, have not right against the insurer, the third party has not. …"

74 Dr Ruiz Soroa accepted that, as a matter of logic, functional dependency should mean that the insurer would be entitled to rely on a wilful misconduct exclusion, contrary to the recent jurisprudence of the Supreme Court, Criminal Division. However, I accept his evidence that the essential basis of those decisions is the Article 76 wilful misconduct

exception, and that its reasoning does not apply to contractual exclusions generally, and, therefore, does not undermine the general point he makes about functional dependency.

75 Dr Ruiz Soroa was also able to point to a number of Supreme Court decisions that supported his view of functional dependency. For example:

> "…despite the fact that the civil liability insurance contract is a contract of special nature, in favour of a third party, which creates a situation of joint and several liability between the insured and the insurer, to the victim who is then able to bring direct action against the insurance company, it is evident that the entire relation brought about by this situation and this capacity, is both based and limited on and by the same contract, and while the content of which, on the one hand, serves as the basis of the rights of the insured and the third party with respect to the insurer, this also allows this latter to enforce between the two former the restrictions which, in the present case clearly apply …": Judgment 26.10.1984 Supreme Court 1st Division

> "account must be taken — with regard to the latter [sc voluntary insurance] and even with full knowledge of the applicability of the method of the injured party's direct action against the insurer – of the fact that this direct action is based on and limited by the very contract from which this action arises because the content thereof, although it is the source of the right of the insured and of the victim against the insurer, on the other hand allows the latter to assert this restrictive content against both of them and so, since the contract is the law between the contracting parties, … it is clear that the correct interpretation is that the victim cannot be placed in a better position than the contracting party – the insured – to whose legal position he is subrogated, so that he would obtain greater benefits than him…": Judgment 4.5.1989 Supreme Court 1st Division

> "it is also true that the doctrine of this Division has established that the direct action derived from Article 76 of the Law of 8 October 1980 is based on and limited by the very contract from which this action arises because the content thereof, although it is the source of the right of the insured and of the victim against the insurer, on the other hand, allows the latter to assert this restrictive content against both of them…" Judgment 26.5.1989, Supreme Court 1st Division

> "the extent of the victim's rights and those of his successors cannot exceed those of the contracting insured or insurance taker because it is not plausible or logical for the contractual terms agreed between the insurer and the insured to be expanded and extended when it is the beneficiary or beneficiaries of the contract who bring the direct action against the insurer…The scope of an insurance contract is not different for the insured and for the third-party victim or victims… and cannot constitute a dead letter when it was agreed freely and subject to the provisions of the law and the agreement made extends to these victims, who cannot claim to have wider rights than those resulting from the provisions agreed between the insurer and the contracting insured party": Judgment 4.4.1990 Supreme Court 1st Division

> "Given that the insurance company accepted the obligation, under the aforesaid voluntary civil liability, to cover the risk and the consequent obligation of compensating the third party, only within the limits established under the act and in the contract, as established in article 73 which the appellant deems was inappropriately not applied, then clearly the entire issue and the decision that this court must take with regard to the grounds for cassation appeals, has to be based on reviewing the contract clauses entered into under the insurance contract.": Judgment 8.2.1991 Supreme Court 2nd Division

> "with regards to this type of insurance [ie voluntary insurance], the general rule is that the insurers' obligation to the aggrieved third-party is determined by the cover of the insured…": Judgment 29.3.1995 Supreme Court 1st Division

76 Professor Betancor suggested that these decisions were old and that to an extent they had been overtaken by the recent decisions of the Supreme Court, Criminal Division. But, as already found, those recent decisions relate specifically to the issue of wilful misconduct and do not detract from the general point being made in the above cases, which was summarised as the "general rule" in the Madrid Judgment, with which Professor Betancor agreed. Professor Betancor also stated that it was wrong to say that the third party's right

was “based on” the contract given that its source was the law rather than the contract. However, although the law is the source of the right there is no right without a valid insurance contract. In any event, I consider that the Supreme Court is essentially referring to the basis of the content of the right, rather than its basis of origin –“ the content of (the contract)…serves as the basis of the rights of the insured” — Judgment 26.10.1984.

77 In support of his view as to the independence of the third party's right Professor Betancor relied on the fact that the applicable limitation period to the direct action claim has been held to be the civil liability limitation period rather than the insurance contract limitation period and the judgment of the Supreme Court dated 27.09.2007 to this effect. Dr Ruiz Soroa's opinion was that this was the understandable result of the fact the direct action claim arises from the law rather than the contract.

78 Professor Betancor also placed particular reliance on the fact that it is the law which not only creates the right of direct action but which also delimits it. I shall address this issue further below.

79 A point of difference between the experts was whether the “obligation to compensate” referred to in Article 76 refers to the insurer's obligation to indemnify under the insurance policy or the obligation to compensate the third party. I find that it is referring to the insured's obligation to compensate the third party as set out in Article 73 . Under Article 76 the third party has the right to demand that the insurer fulfils that obligation, subject to the limits determined by the insurance contract, as Article 73 and the Madrid Judgment make clear.

80 There was also an issue between the experts as to whether Spanish law involves the third party stepping into the shoes of the insured *vis a vis* the insurer, or the insurer stepping into the shoes of the insured *vis a vis* the third party. Both experts could point to passages in Supreme Court judgments which supported their position. In so far as it matters, I find that Article 76 does entitle the third party to require the insurer to fulfil the insured party's obligation to compensate the third party, but subject to the limits and terms of the insurance contract. In other words there is only an obligation to compensate in so far as the contract imposes an obligation to indemnify. Subject to the Article 76 exceptions, the third party is in the same contractual position as the insured *vis a vis* the insurer, whether or not he is in his shoes.

81 Another point of difference between the experts was the extent to which one could contract out of Article 76 and whether or not it is a rule of public order. I do not consider it necessary to seek to resolve this issue as it is of marginal relevance to the issue between the parties as to the nature of the direct action right.

82 In so far as it is necessary to make any findings as to whether the direct action right is an independent right as a matter of Spanish law, I find that it is independent in origin but not in content. It derives from the law rather than the contract, but it does not exist separately from the contract and its content reflects the contract, save for the Article 76 exceptions. If it is necessary to choose whether or not that means that it is an independent right I find that it is not, for the reasons given by Dr Ruiz Soroa, as outlined above.

Conclusion on characterisation

83 In the light of my findings as to the nature of the direct action under Spanish law I turn to consider the proper characterisation of the right as a matter of English law.

84 The Defendants' case was that the crux of the answer to this question lies in the admitted fact that the right arises from the law and not the contract. The juridical basis of this right of action is non-contractual and therefore independent.

85 Further, the law not only creates the right of action, it also defines its contents and limits. Even though the contents of the right may be referable to the contract it is the law which permits that. It is also the law which sets out the limits to those contractual rights through the Article 76 exceptions. These have the effect of creating a different and greater right for the third party than that possessed by the insured.

86 The Defendants also stressed that the legal mechanism by which the third party acquires his direct action rights is not assignment of or subrogation to the insured's rights, but the imposition of an obligation to compensate the third party subject to prescribed limits.

87 In all these cases both the law creating the right of direct action and the existence and validity of the contract made subject to the direct action will be essential pre-requisites of the third party's right. Both are necessary to the existence of that right. In my judgment, in deciding whether or not the direct action right is “in substance” a claim to enforce the contract or a claim to enforce an independent right of recovery, what is likely to matter most is the content of the right rather than the derivation of that content. It is the content of the right which will be the most telling guide to what “in substance” that right is.

88 The essential content of the right is provided by the contract. Save for the Article 76 exceptions, the third party's right is as set out in and defined by the contract. It is the contract that must be looked to in order to determine whether there is any right to recover from the insurer and, if so, on what basis and with what limitations. In many cases the contract is all that will need to be considered. In the present case, for example, there is

no suggestion of wilful misconduct by the assured or of "personal" defences arising. In those circumstances the third party's rights will be determined solely by reference to and by the contract.

89 Whilst it is correct that the source of the right is the law rather than the contract that will always be the case where there is a right of direct action. By definition the third party is not a party to the contract so that his right will have to arise elsewhere, almost invariably under a direct action statute. Because the right is one which is created by law/statute it will also be the law/statute which defines the content of the right even if, as here, it does so by reference to the contract. The law/statute will usually also set out anti-avoidance provisions or other limitations on the insurer's contractual rights. The key features which are relied upon by the Defendants are therefore features that are likely to be present in most direct action cases. In Through Transport , for example, the direct action right was created by the Finnish Act ; it was the Finnish Act which determined that the right was to be one to claim compensation in accordance with the contract, and it was the Finnish Act which rendered void any contractual provisions which derogated from the protection provided under it. It was nevertheless held to be in substance a right to enforce the contract.

90 Where the present case does differ from Through Transport is in the extent of the exceptions provided by Article 76 . These clearly go beyond the anti-avoidance provisions of the Finnish Act and indeed create a liability for an event which would not normally be insurable (damage caused by wilful misconduct). I agree with the Club (and the arbitrator) that the question is whether the extent of the exceptions is such as to change the essential nature of the right created so that it can no longer be regarded as being in substance a contractual right. Like the arbitrator, I do not consider that the exceptions go this far. Indeed, as already pointed out, in many cases they will be of no relevance and it is the contract alone which will matter. As the arbitrator observed, "the kernel of contractual obligation, as defined by the terms of the contract, remains at the heart of the claim". Indeed, if anything, it is far more than just the kernel.

91 The Defendants submitted that this reasoning is fallacious and amounts to no more than saying that there is an insurance contract and, therefore, the claim must be contractual. However, what matters is not merely the existence of the contract but the contents of the contract and the fact that the direct action right has essentially the same content. The third party's rights depend, primarily and substantially, on the terms of the contract, as reflected in the "general rule".

92 It is fair to observe that most direct action statutes are likely to confer rights which to an extent follow the contract and therefore are liable to be found to be in substance contractual. However, one can have rights created which depend on little more than the

fact of the existence of liability insurance, of which the CLC could be said to be an example. The third party's rights against the insurer under the CLC arise from the mere fact of being an insurer, and the terms of the insurance contract are of no relevance.

93 Nor do I consider that the legal mechanism by which the rights are created is a critical factor. A direct action statute which creates a statutory assignment or subrogation of the insured's rights provides a clear contractual link, but it could then contain provisions that deprived the rights conferred thereby of any real contractual substance. Conversely, one could have a statute which stated in terms that it was creating an independent right of action, but if it then stated that the rights thereby created were the same as those of the insured under his contract it would in substance be a contractual right. What matters is the substance rather than the form of the right, and substance is closely linked to content.

94 This is supported by Aikens J's decision in Youell and others v Kara Mara [2000] 2 Lloyd's Rep. 102 in which he held that a Louisiana direct action statute created a right which was contractual in nature. The statute in that case conferred "a statutory right to make a claim on a contract to which [the third party] was not originally party". Aikens J expressly held that the third party had not become a party to the policies by a mechanism of statutory novation or assignment (as would be the case under the English Third Party (Rights Against Insurers) Act 1930) but that the rights granted under the direct action statute were nevertheless contractual in nature.

95 For all these reasons I conclude that the direct action right conferred by Spanish law against liability insurers is in substance a right to enforce the contract rather than an independent right of recovery. This ground of challenge to the jurisdiction of the Tribunal accordingly fails.

Are the claims arbitrable?

96 The Defendants contended that the claims are not arbitrable because they are brought under a criminal statute and are bound up with issues of criminal liability and/or because they involve Spain, France and the Public Prosecutor fulfilling a constitutional, public policy function, namely the protection of the environment.

97 Section 81 of the Act preserves the common law position as to the arbitrability or otherwise of certain types of dispute. It provides that:

> "(1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to – (a) matters which are not capable of settlement by arbitration …"

98 In *Mustill & Boyd, Commercial Arbitration* (2nd ed) (1989), the common law position is summarised as follows at pp 149–150:

> "English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. The general principle is, we submit, that any dispute or claim concerning legal rights which can be the subject of an enforceable award, is capable of being settled by arbitration. This principle must be understood, however, subject to certain reservations. First, certain types of dispute are resolved by methods which are not properly called arbitration. These are discussed in Chapter 2 , ante. Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding up order or a decision that an agreement is exempt from the competition rules of the EEC under article 85(3) of the Treaty of Rome . It would be wrong, however, to draw from this any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration: indeed, examples of each of these types of dispute being referred to arbitration are to be found in the reported cases."

99 The issue of arbitrability was considered in the Court of Appeal decision in Fulham Football Club (1987) Ltd v Richards and another [2012] Ch 333 . In that case Patten LJ stated at [40] that "it is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an attempt to delegate to arbitrators a matter of public interest which could not be determined within the limitations

of a private contractual process". Longmore LJ at [94] identified the key consideration as being whether reference of such matters to arbitration is prohibited as a matter of statute or English public policy.

100 In the present case the Defendants relied on various statements made to the effect that criminal matters are not arbitrable. For example:

> "Certain disputes may involve such sensitive public policy issues that it is felt that they should only be dealt with by the judicial authority of state courts. An obvious example is criminal law which is generally the domain of the national courts." — *Lew, Mistelis and Kröll, Comparative International Commercial Arbitration* (Kluwer Law International, 2003), Chapter 9 at 9.2.

> "More generally, criminal matters… are usually considered as not arbitrable."- *Redfern and Hunter on International Arbitration* (5th edn, 2009) at p125.

101 As pointed out by *Mustill & Boyd* , however, a distinction needs to be drawn between determinations of criminal liability and the imposition of criminal sanctions, and determinations of issues which may involve criminal liability. The latter are commonly the subject matter of arbitration, as, for example, in cases involving allegations of fraud.

102 The Defendants also relied on statements as to the significance of matters which uniquely involve government authority or the enforcement of obligations through the state's own mechanisms. For example:

> "The types of disputes which are non-arbitrable… almost always arise from a common set of considerations. The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely government authority, that agreements to resolve such disputes by 'private' arbitration should not be given effect." — *Born, International Commercial Arbitration* , at p.768:

> > "There is no body of authority which suggests how and where the line should be drawn. We can offer only the following tentative suggestions … Another possible

> category would include disputes exclusively concerned with obligations which the state, acting in the public interest, enforces through its own mechanisms. We express the matter in this way to distinguish the cases, already mentioned, where matters touching public law and policy arise incidentally in the course of the enforcement of private contractual rights." — *Mustill and Boyd, Commercial Arbitration: 2001 Companion Volume to the Second Edition* (2001) at p. 75

103 The Defendants were unable, however, to point to any English statute or English rule of public policy which is engaged in this case.

104 The Defendants submitted that in relation to the Spanish proceedings, the following matters are of particular relevance and are subject to adjudication in that jurisdiction:

- i) Criminal responsibility of the Master and Chief Engineer of the vessel pursuant to Articles 325 and 326 of the Penal Code (sought by the Public Prosecutor).
- ii) Whether damage has been caused by the commission of any criminal offence and whether there is an obligation on the part of those criminally responsible to pay compensation in that respect arising from Article 109 and following of the Penal Code (pursued by the Public Prosecutor). Thus civil liability is predicated directly upon criminal liability. Similarly, whether there is civil liability on their part under Article 1902 of the Spanish Civil Code .
- iii) Whether the Owners are vicariously liable for the wrongs committed by the Master and Chief Engineer.
- iv) The entitlement of Spain, the Public Prosecutor and France to claim damages from the Master, Chief Engineer, and/or the Owners (i.e. those who are principally or vicariously liable) in respect of damage caused to the environment as a result of the criminal activity. In so doing, Spain and the Public Prosecutor are acting in the public interest and pursuant to Article 45 of the Spanish Constitution. Further, Spain is proceeding in its capacity as a guardian of Spain's natural environment and resources. That role is not confined to seeking redress for property damage. It extends to affording protection based on the intrinsic value of the natural environment, including wildlife. Further, there is international (particularly European) consensus

on the need to protect the environment, particularly with regard to the discharge of oil into the sea, which has resulted in an increased level of criminalisation and the creation of remedies which reflect the particular public disapproval of the consequences of disasters such as the loss of the vessel.

• v) Whether, by reason of the procedural pathway provided by Article 117 of the Penal Code , the Club is liable to any of Spain, the Public Prosecutor and France in respect of the liability referred to above — i.e. and to use the words of Article 117 , whether the Club has direct civil liability in respect of the relevant conduct.

105 The Defendants accordingly submitted that the subject matter of the Spanish and French Awards is inextricably linked with the alleged underlying criminal conduct and the role being fulfilled by Spain, the Public Prosecutor and France in pursuing redress for the damage caused to the natural environment of France and Spain and, as such, is not arbitrable.

106 I am unable to accept these submissions for the reasons given by the Club and in particular:

• i) The Defendants' arguments fall to be considered in the context that it has already been decided that the claims are in substance claims to enforce a contract.

• ii) The Defendants' claims are all monetary claims, for damages (whether allegedly suffered by the State itself or other third parties that the State has paid and to whose rights it is subrogated).

• iii) The Club's alleged liability is fundamentally civil in nature (a liability to pay in accordance with the terms of the insurance) and arises at several steps removed from the criminality, namely as civil liability insurers of Owners who are, themselves, only vicariously liable (for the acts of its employees) and against whom no criminal allegations are made.

• iv) Although the direct claims are brought under the part of a criminal statute which deals with civil liability (including Articles 109 and 117), the relevant provisions are civil in nature and are construed according to civil principles of law. The alleged liability is a civil liability and the forum in which it is asserted cannot alter that fact.

• v) The fact that the civil liabilities arise out of damage to the environment does not alter the fact that the claims are still, in substance, to recover monetary loss.

• vi) Even if the Defendants are fulfilling constitutional or domestic public functions of protecting the environment (or recovering civil damages flowing from criminal offences), the claims pursued are, fundamentally, civil claims which are no different from the claims brought by private parties in respect of the same acts (indeed some of Spain's claims are in respect of losses suffered by private parties, which claims the

State has been subrogated to). Further, although the Public Prosecutor has the right to bring claims (or request payment) on behalf of third parties, the claim remains that of the third party, so that any judgment would be rendered in favour of the third party.
• vii) Arbitrating such claims is not contrary to any identified English statute or English rule of public policy.

107 The main point stressed by the Defendants in oral argument was the fact that liability under Article 117 is predicated on a finding of criminal liability which is not a proper matter for arbitration. However, whether the claim is brought under Article 76 or Article 117 , the right to recover from the insurer depends on proof of an insured liability under the insurance contract and does not require a finding of criminal liability. Even if it did, it would not be a finding involving criminal responsibility or criminal penal consequences. It would simply be a step towards establishment of a civil law monetary claim. Further, it would be remarkable if civil claims advanced in criminal proceedings were inarbitrable, whereas if the same claims had been advanced in civil proceedings they would not have been, so that arbitrability would effectively be at the option of the claimant.

108 For all these reasons I am not satisfied that it has been shown that the dispute referred represents an attempt to delegate to arbitrators a matter of public interest which could not be determined within the limitations of a private contractual process or that such a reference engages, still less is prohibited by, English statute or English public policy or is otherwise inarbitrable. This ground of challenge to the jurisdiction of the Tribunal accordingly fails.

Has there been a waiver of the right to arbitrate France's claims?

109 France's case was that in the civil proceedings in France before the Civil Court in Bordeaux which France commenced against the Club, the Owners, Managers and the IOPC Fund in November 2005 the Club has submitted to the jurisdiction of the French courts and it is no longer open to it to rely on any arbitration agreement contained in the Rules.

110 This involves a consideration of whether there has been a waiver of the right to arbitrate as a matter of French law and, if so, whether that amounts to a waiver as a matter of English law, being the proper law of the arbitration agreement and/or the lex fori, which precludes the Club from relying on the right to arbitrate France's claim subsequently brought in Spain under Spanish legislation permitting direct action.

111 On 8 November 2005 France served its writ against the Owners, the IOPC Fund and the Club claiming compensation for pollution damage in the amount of €67,499,153.92 in the Civil Court of Bordeaux. The writ was served at the address of the Club's counsel in France (Mr Gautier of Ince & Co, Paris) which, in line with the circular letter it had provided, the Club had chosen as its service address for any CLC proceedings.

112 In relation to the claim against Owners, two possible bases of liability are mentioned in the writ:

- i) First, the body of the writ and the *dispositif* (the final, concluding section of the writ in which the relief is set out) refer to the CLC. Mention is made that the ship owner is entitled to limit its liability up to the amount of a limitation fund, if he has set up one, unless the event was caused as a result of the ship owners' personal act or omission, committed with the intention of causing such damage or committed recklessly and knowing that such damage would probably result. Mention is also made of the fact that the Club has set up a limitation fund on account of the Owners, and that damage suffered by France exceeds the amount of the limitation fund. The body of the writ contains no reference to any particular fault on the part of the Owners.
- ii) Secondly, in the *dispositif* only, France refers to Article 1382 of French Civil Code . Article 1382 of the French Civil Code states that where one person causes damage to another through fault, that first person is obliged to compensate the other.

113 In relation to the claim against the Club reference is made in the body of the writ to it being the Owners' insurer and to it having established the CLC fund and to France acting by way of a direct action. In the *dispositif* the Court is asked to order the Owners and the Club to jointly pay the sum of €67,499,153.92, a sum in excess of the CLC fund.

114 The first issue between the French law experts is whether France has brought a claim against the Club under the CLC only, or whether it has also brought a direct action claim on the basis of Owners' liability under Article 1382 .

115 France's position, as reflected in the evidence of Mr Grelon, is that the reference in the *dispositif* to a claim against the Owners and the Club to be made jointly liable for an amount in excess of the CLC limit and to Article 1382 is sufficient to make a claim against the Owners under Article 1382 and against the Club as the Owners' liability insurer. Further, in the body of the writ reference is made to the provisions of the CLC disapplying the limit of liability in the event of fault of the ship owner.

116 The Club's position, as reflected in the evidence of Mr Gautier, is that it is not sufficient to refer to a claim in the *dispositif* . The factual basis for making a claim has to be set out in the body of the writ for a claim to be made. In this case there is no factual basis set out for a claim against the Owners under Article 1382 . If so, there is no basis for a non-CLC claim against the Club. In any event neither the factual nor legal basis for a non-CLC right of direct action against the Club is set out.

117 I prefer the evidence of Mr Gautier on this issue. He was very firm in his evidence that it is essential to lay factual grounds in the body of the writ for any relief claimed in the *dispositif* . No facts relating to or alleging fault are set out. The descriptive reference to the CLC provision dealing with the loss of the right to limit does not involve any averment of fault. Nor is any legal or factual basis for the non-CLC direct action liability of the Club identified. I accordingly find that the only claim made against the Club in the French proceedings is a CLC claim and that therefore the issue of waiver of the right to arbitrate non-CLC claims does not arise.

118 Even if that be wrong and as a matter of French law such claims are to be considered to have been made, I consider that it is far from clear that that is so and that as a matter of English law there was no clear choice to be made for the purpose of the doctrine of waiver by election. It was not objectively clear that the Club was being presented with two alternative and inconsistent options at the time of the alleged election. If so, there can be no waiver as a matter of English law.

119 In these circumstances it is not necessary to decide the further French law issue which arises as to whether the Club did in fact raise a procedural exception in January 2007 by requesting a stay of proceedings, as opposed to simply joining in the request made by others for such a stay.

120 This ground of challenge to the jurisdiction of the Tribunal accordingly also fails.

Does the Court have no jurisdiction on the grounds of state immunity?

121 By s.1(1) of the State Immunity Act 1978 ("the SIA"), a State is immune from the jurisdiction of the courts of the United Kingdom except as provided for in the subsequent provisions of the SIA .

122 By s.14(1) of the SIA , the immunities and privileges conferred by the SIA apply to any foreign or commonwealth State other than the UK, and references to a State include references to the sovereign or other head of that State in his public capacity (s.14(1)(a)

), the Government of that State (s.14(1)(b)) and any department of that Government (s.14(1)(c)).

123 Thus Spain and France are prima facie immune from the jurisdiction of the English Court. That immunity will only be lost to the extent that they fall within one of the exceptions set out in the SIA .

124 The Club contended that the immunity has been lost on the following grounds:

- i) Pursuant to s.9(1) of the SIA the Defendants have agreed in writing to submit the relevant dispute to arbitration; and
- ii) These are proceedings relating to an obligation of the Defendants which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the UK (see s.3(1)(b) of the SIA). The Club says that the relevant contractual obligation to which these proceedings relate is the obligation to arbitrate and to do so in London; and
- iii) The Defendants have submitted to the jurisdiction of the English courts for the purposes of s.66 application. By virtue of s.2 of the SIA , the Defendants are therefore not immune in respect of the s.66 proceedings.

125 The Club further contended that any plea of immunity is unsustainable in respect of the Defendants' own ss.67/72 applications. In respect of those applications, the Defendants have "instituted the proceedings" and are therefore taken to have submitted to the jurisdiction of the courts of England pursuant to section 2(3)(a) SIA .

Section 9 of the SIA

126 S.9(1) of the SIA provides that:

> "Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

127 The Defendants submitted that even if they were bound by the arbitration clause by reason of the Through Transport analysis they were not party to any agreement to

arbitrate, as the Court of Appeal decision makes clear. Even if they were, that was not sufficient for the purposes of s.9(1) which requires some written manifestation of express consent on the part of the State. Tacit consent does not suffice.

128 The Court of Appeal in Through Transport held that New India was bound by the arbitration clause (and granted a declaration to that effect). However, it also held that in commencing proceedings in Finland New India was not in breach of contract and could not have been sued in damages for so doing, and it set aside both the declaration that there had been a breach of contract and the anti-suit injunction which had been granted. The relevant passages from Clarke LJ's judgment are as follows:

> "52 Some of the argument in this appeal proceeded on the footing that the question is whether New India became a party to the agreement to arbitrate contained in clause D2 of the General Provisions in the Club Rules . However, we do not think that that is quite the right question and, as we read his judgment, the judge did not go so far. We accept Mr Smith's submission that New India did not become a party to an arbitration agreement. We agree that self-evidently New India was not an original party and there is no basis upon which it could be held that there was any novation or transfer to New India of the rights and obligations of the insured under the Club Rules . This is in our view important on the question whether it was appropriate to grant an anti-suit injunction discussed below.
>
> .....
>
> 64 It seems to us to follow from the conclusions which we have reached so far that the Club is entitled to the first of those declarations. For the reasons given above under the heading 'the arbitration clause', an application of English conflict of laws principles leads to the conclusion that, if New India wishes to pursue a claim under the section 67 of the Finnish Act , it must do so in arbitration in London because the Club is entitled to rely upon the arbitration clause in the Club Rules , which are the very rules which New India relies upon in order to make a claim under the Act: see, in the context of the Third Parties (Rights Against Insurers) Act 1930 , The Padre Island (No. 1).

> 65 It is less clear that the Club is entitled to the second declaration. In our view the Club is not entitled to such a declaration if it means, on its true construction, that New India was in breach of contract in commencing the Kotka proceedings. As indicated in para 52 above, we do not think that New India was in breach of contract. So, for example, the Club could not in our view sue New India for damages for commencing the proceedings in Finland. It seems to us that the declaration could be so construed and for that reason we think it right to set aside that declaration….

129 The Defendants also relied on Waller LJ's summary of the Through Transport decision in The "Wadi Sudr" [2010] 1 Lloyd's Rep 193 at [50]:

> "50 What the Finnish court had decided was that the Finnish statute provided the basis for the claim in Finland and thus the arbitration clause had no application. So far as the English court was concerned, the issue was whether that was a correct characterisation of New India's claim. The Court of Appeal (in agreement with Moore-Bick J (as he then was)) confirmed that, under English conflict of laws, issues of characterisation are to be resolved by applying principles of English law (see paragraph 55) and that Moore-Bick J had been correct in his characterisation and in holding New India bound by the arbitration clause but only in the sense of the club being entitled to raise the same as a defence. The court found that New India was not a party to the contract containing the arbitration clause and was thus not in breach of contract in commencing proceedings in Finland (see paragraph 65). It thus held that since New India were pursuing a claim which, under Finnish statute, it was entitled to do, it was not a case where an injunction should be granted (see paragraph 96)."

130 The most detailed consideration of the nature of the right/obligation arising under the Through Transport analysis is to be found in Moore-Bick J's judgment in Through Transport No 2 [2005] 2 Lloyd's Rep 378 . Following the Court of Appeal decision the P&I Club involved in that case applied to the Court for an appointment of an arbitrator pursuant to s.18 of the Act. New India argued that the Court had no jurisdiction to do so

as the Court of Appeal had held that it was not party to an agreement to arbitrate. Moore-Bick J rejected New India's argument and granted the application.

131 Moore-Bick J considered paragraph 52 of the Court of Appeal's judgment and explained it as follows:

> "15 In my view the debate in the present case has suffered to some extent from a misunderstanding of the significance of what the Court of Appeal said in paragraph 52 of its judgment. As I read it, all that the court was seeking to do in that paragraph was to dispose of the suggestion that New India had become a party to a contract with the Club as a result of the transfer to it of the rights and obligations of the insured under the Club's Rules . The court clearly thought that it had not, but it is equally clear that it did not think that that was the right question. Having disposed of that point, it went on to consider the nature of the claim being made by New India and whether it was one that had to be pursued in arbitration. It is quite clear from paragraph 60 of the judgment and from the declaration contained in the order drawn up to give effect to its decision that the court considered that New India was bound to pursue its claim in arbitration in England and was not entitled to act in disregard of the arbitration clause.
>
> 16 Similarly, the fact that the Court of Appeal reached the conclusion that it was inappropriate in this case to grant an anti-suit injunction against New India provides only limited support for the conclusion that there is nothing that can be regarded as amounting to an arbitration agreement between the Club and New India for any purposes. When discussing the nature of the relationship between New India and the Club the court pointed out that New India was not acting in breach of contract in commencing proceedings in Finland, despite the fact that it was under an obligation to pursue its claim in arbitration, but that does not of itself make it inappropriate to grant relief of this kind…"

132 Moore-Bick J then considered the analysis of the Court of Appeal in The "Jay Bola" [1997] 2 Lloyd's Rep 279 as to why and how an assignee of a contract is bound by an arbitration clause contained therein, as set out in particular in the judgment of Hobhouse LJ. Moore-Bick J concluded that the case was authority for the following:

> "22 ….In my view the decision in this case is authority for the proposition that a person who obtains by an assignment or transfer of some other kind the right to pursue a claim under a contract can only enforce that right in accordance with the terms of the contract and subject to any restrictions or limitations which those terms may impose. In other words, what he obtains is a chose in action whose precise scope is determined by the contract under which it arises and which is inherently subject to certain incidents, in this case a requirement that it be enforced by arbitration."

133 Moore-Bick J then addressed the application of that principle to the Through Transport case and stated as follows:

> "24 Although this distinction can be drawn between the position of New India in this case and the position of the insurer in The Jay Bola, it is not in my view one that is ultimately of any substance. In the present case the Court of Appeal has held, applying English rules of characterisation, that section 67 of the Finnish Insurance Contracts Act gives a person in the position of New India the right to enforce the obligations of the Club under the contract of insurance. Whether one describes New India as a statutory transferee or simply as the beneficiary of a statutory provision, therefore, the right it enjoys is a right to enforce a chose in action which is itself subject to certain inherent limitations. One of those is the pay to be paid clause; another is the obligation to enforce any claim by arbitration in London. In Finland those limitations may be disregarded if mandatory provisions of the relevant legislation so require, but in English law, as the Court of Appeal has held, that legislation is not recognised as capable of affecting the parties' rights and obligations.
>
> 25 For these reasons I am satisfied that, however one describes its position, New India is seeking to enforce a chose in action which is subject to certain inherent limitations, including the obligation to enforce it by arbitration in London. Section 82(2) of the Arbitration Act 1996 provides that references in Part I of the Act to a party to an arbitration agreement include any person claiming under or through a party to the agreement. An assignee seeking to enforce the contract clearly falls within that provision because he claims

> under or through the assignor, as the Court of Appeal recognised in The Jay Bola. Accordingly, if New India were to commence arbitration against the Club, I have no doubt that it could apply to the court for relief under section 18 …"

134 Moore-Bick J went on to consider whether it made any difference that it was the P&I Club who was making the s.18 application and that New India did not wish to arbitrate and concluded that it did not. In this connection he referred to and relied upon s.82(2) of the Act which provides that:

> "(2) References in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement"

135 Moore-Bick J concluded as follows:

> "28 For the reasons given earlier I accept that New India's position is not quite the same as that of a simple assignee and I also accept that it has a right to choose whether to seek to enforce the rights of the insured against the Club. However, as soon as a third party in the position of New India makes a demand on the insurer there is the potential for a dispute to arise, as indeed happened in this case, and once a dispute has arisen in relation to the third party's right to recover from the insurer it is one which must be determined by arbitration in accordance with the contract. Clearly the third party can invoke the contractual arbitration machinery and as soon as he does so he becomes a person who claims under or through a party to the agreement within the meaning of section 82(2) of the Arbitration Act . However, I am unable to accept that once a dispute has arisen the insurer is powerless to act until the claimant chooses to take a formal step of that kind. The arbitration clause in the present case contemplates that either party may refer disputes to arbitration and that necessarily allows for the possibility that the Club itself may commence proceedings. In my view it was not necessary for New India to commence proceedings in order to bring itself within the scope of section 82(2) ; it became a person claiming under or through a party to the

> arbitration agreement within the meaning of that subsection as soon as it sought an indemnity from the Club in the right of Borneo Maritime Oy. Having rejected the claim, the Club was entitled to refer the resulting dispute to arbitration and to invoke section 18 of the Act against New India as a party to the arbitration agreement contained in the Club's Rules ."

136 I accept and adopt Moore-Bick J's helpful analysis of the legal position arising under the Through Transport analysis. When the third party makes a claim under an insurance policy containing an arbitration clause he becomes a person claiming under or through a party to the arbitration agreement and thereby a party to the arbitration agreement for the purposes of the Act. When that claim is disputed he becomes bound to refer the dispute to arbitration in accordance with that arbitration agreement. He is not an original party to the arbitration agreement, nor does he become a party to that agreement by reason of a novation or other legal transfer of the rights and obligations of the agreement. He is not therefore a party to the agreement "in the full sense". But he is bound by it and he is a party to the agreement for the purposes of the Act.

137 The question which then arises is whether a State which becomes a party to an arbitration agreement in this sense "has agreed in writing" to submit a dispute to arbitration within the meaning of s.9(1) of the SIA .

138 There is undoubtedly an agreement in writing. The State is bound by it by reason of the Through Transport analysis. The State is a party to that agreement for the purposes of the Act. Is that sufficient? I am satisfied that it is for a number of reasons.

139 First, it would be surprising if the test for whether there was an agreement in writing in the SIA was different to that under the Act, and there is no language in s.9 to suggest that there is some further or added requirement. The SIA is an English statute. S.9 is addressing matters relating to arbitration. The English law of arbitration is as set out in the Act.

140 Secondly, this is borne out by the purpose of s.9 which is, I accept, to ensure that where a State is bound to arbitrate it is also bound to submit to the supervisory jurisdiction of the courts, to ensure that the arbitration is effective. As explained by Moore-Bick LJ in Svenska Petroleum Exploration AB v Government of the Republic of Lithuania [2008] QB 886 at [17]:

> "the principle underlying section 9 is that, if a state has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective".

141 For the achievement of that purpose one would expect the "agreement in writing" for the purposes of that provision to be no different from the "agreement in writing" for the purposes of the Act.

142 Thirdly, there is nothing in the language of the Act to suggest that a State is to be put in a different position to a private party and that the State is not to be treated as having made an agreement in writing in circumstances where a private party would be so treated.

143 Fourthly, some support for the Club's case is to be found in the two main authorities on s.9 , although they are both factually distinguishable.

144 The first case is Ministry of Trade of the Republic of Iraq and Anor v Tsavliris Salvage (International) Ltd ("the Altair") [2008] 2 Lloyd's Rep 90 . In that case shipowners entered into a salvage agreement with Tsavliris on a Lloyds Standard Form of Salvage Agreement ("the LOF"), containing a London arbitration agreement. The cargo was owned by the Grain Board of Iraq ("the GBI"). Tsavliris commenced arbitration against the GBI under the LOF. The Tribunal held that the GBI was bound by the LOF. The GBI challenged the award, arguing that there was no binding arbitration agreement and that the GBI was part of the Ministry of Trade of Iraq and therefore immune from the arbitration proceedings.

145 Gross J held that the GBI was bound by the LOF (including the arbitration agreement) by reason of article 6.2 of the International Convention on Salvage 1989 (which Iraq had not ratified). In essence, that provision grants the master or owner of a vessel authority to conclude contracts for salvage operations on behalf of the owner of the property on board the vessel. Thus, the GBI was not a signatory to the LOFs themselves, though they were held bound by reason of a statutory provision. The GBI were held bound, not by reason of any particular manifestation of intention to arbitrate on their part, but by reason of the operation of an International Convention. The only relevant positive conduct on their part was shipping their goods on board the vessel.

146 Gross J considered whether s.9 of the SIA imposed some additional requirement for an agreement in writing to that which would be generally applicable and concluded that it did not. He stated that:

> "56 …
>
> v. It would be curious if the GBI was bound to the LOF and hence a party to the arbitration and yet somehow was held not to have "agreed in writing" to submit a dispute to arbitration for the purposes of section 9(1) . I do not think there could be a halfway house of this nature, in particular under English law, given its broad and permissive view of the requirement that an arbitration agreement should be in writing.
>
> ….
>
> 58. For my part, I can see neither any basis for, nor any attraction in, reading into section 9(1) some additional requirement for a relevant agreement in writing; for instance, a requirement that for section 9(1) to "bite", the agreement must be signed by the parties themselves (whatever that would entail) or that an agreement for the purposes of section 9(1) cannot be entered into by an authorised agent on behalf of a party in question. But that is where Mr Hoyle's argument would seek to drive section 9(1) . With respect, I cannot agree."

147 Gross J's approach provides some support for the Club's contention that to answer the question of whether there is an "agreement in writing" for the purposes of the SIA , one looks at whether there is an agreement in writing for the purposes of the Act which binds the State in question and that in this respect private parties and States are in the same position.

148 The second case is Svenska Petroleum Exploration AB v Lithuania (No.2) [2006] 1 Lloyd's Rep 181 (Gloster J); [2008] QB 886 (CA). That case concerned a joint venture agreement made with a Lithuanian state-owned oil company which contained an arbitration clause governed by Lithuanian law. The Lithuanian government was not a party to the joint venture agreement but had signed an acknowledgment that it approved the agreement and acknowledged itself to be legally and contractually bound as if it were a signatory to the agreement. The arbitration tribunal found that it had jurisdiction over a claim made against the government and awarded the claimant damages and the claimant

then obtained permission to enforce the award as a judgment. The government applied to set aside that order and claimed immunity under s.9 of the SIA . Their application and claim was dismissed at first instance and on appeal.

149 The Court of Appeal recognised that the arbitration agreement did not contain an express agreement on the part of the government to arbitrate, but rejected the argument that "as a matter of law the government cannot be treated as having intended to arbitrate in the absence of an express assurance to that effect" – at [81]. In the light of the finding made that as a matter of Lithuanian law the government was bound by the arbitration agreement the Court concluded that the government had made an agreement to arbitrate within the meaning of s.9 of the SIA . As they stated at [116]:

> "The arbitrators, of course, did not have to decide whether the government had agreed in writing to refer the dispute to arbitration within the meaning of section 9 of the State Immunity Act , but they did have to decide whether, and if so how, the government was bound by an agreement to arbitrate. They held that it was a party to the agreement and in our view the government cannot go behind that decision. The first award therefore establishes that the government agreed in writing to refer disputes to arbitration and is therefore sufficient to bring the case within section 9 ."

150 The Court of Appeal therefore treated the requirements for a s.9 "agreement in writing" as being the same as whatever requirements applied under the law of the arbitration agreement. This therefore provides some support for the position that the English court looks to the law governing the arbitration agreement (in this case English law, specifically the Act). If there is an agreement under the relevant arbitration law, that is sufficient to bring the case within s.9 .

151 In this connection it is to be noted that, in considering the Svenska case in *The Law of State Immunity, Fox,* 3rd Ed. (2013) fn. 193 it is stated that:

> "If on the overall construction of a transaction a State is held to be bound by a written arbitration agreement that will be sufficient to find that the State as a party had agreed in writing to refer the dispute to arbitration within the meaning of section 9 of the State Immunity Act "

152 The Defendants submitted that s.9 requires some written manifestation of express consent to arbitrate by the State on three main grounds:

- i) The provisions of the 2004 UN Convention on State Immunity ("UNSCI") and "the state of the modern law on immunity";
- ii) S.2 of the SIA ; and
- iii) The Svenska case.

153 As to i), it was pointed out that Article 7 of the UNCSI lays down a requirement of "express consent" by a State to the exercise of jurisdiction over it and that a tacit submission does not suffice. However, I can derive little assistance from a differently worded provision in a Convention made 26 years after the SIA , which has not yet been ratified. It might be different if there was evidence that it reflected customary international law at the time of the SIA , but there is no such evidence.

154 As to ii), s.2 of the SIA provides that:

> "(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.
>
> …
>
> (7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract."

155 The Defendants submitted that what is envisaged by s.2 is express written consent by the State emanating from a person with authority to commit the State to that course of action and that the same must apply to s.9(1) . However, as the Club submitted, the language of s.2(2) ("prior written agreement") is different to s.9(1) ("agreed in writing"). If anything, the use of different language in different parts of the Act indicates that a different approach is required. In any event, s.2(2) does not state that a State must have given its express written consent to submit to the jurisdiction of the English courts. Further, the emphasis on s.2(7) is misplaced: that provision is permissive (stating for clarity two particular persons who are deemed to have the requisite authority to bind a State) and is not in any way limiting.

156 As to iii), the Defendants emphasised the importance attached in the Svenska case to the signed acknowledgment given by the government in considering whether it was bound by the arbitration agreement. They submitted that this showed that the Court of Appeal was looking for and found express written consent. However, I do not agree that the Court was looking for such consent. The Court held that the government could not go behind the arbitrators' decision that they were bound by the arbitration agreement and that that was sufficient for the purposes of s.9(1) of the SIA . What mattered was that it was bound by the arbitration agreement.

157 The Defendants also made the general point that it would be surprising and unsatisfactory if a state was to lose its immunity by means of making a claim which it is entitled to do under its own law and in its own state. However, that is the consequence of the Through Transport analysis. You cannot seek to take the benefit of the insurance contract without accepting its incidents and limitations.

158 For all these reasons I conclude that the Defendants have lost their immunity by reason of s.9(1) of the SIA .

Section 3(1)(b)

159 Section 3(1)(b) provides:

> "(1) A State is not immune as respects proceedings relating to—
>
> …

> (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom."

160 There are therefore four requirements:

- i) "An obligation of the State"
- ii) which "by virtue of a contract (whether a commercial transaction or not)"
- iii) " falls to be performed wholly or partly in the United Kingdom" and
- iv) the relevant proceedings must be "proceedings relating to" the obligation.

161 The Club submitted that all these requirements are satisfied.

162 As to i), the relevant "obligation of the State" is the agreement to arbitrate. The Defendants are bound to arbitrate by reason of the Through Transport analysis.

163 As to ii), the obligation to arbitrate arises "by virtue of a contract", namely the insurance contract between the Club and the insured and that that is the very nature and effect of the Through Transport analysis.

164 As to iii), the obligation to arbitrate falls to be performed wholly or partly in the United Kingdom.

165 As to iv), the s.66 application is a proceeding "relating to" the obligation to arbitrate. The application to enforce an arbitration award is "about" or "arising out of" the obligation to arbitrate in that it is an application seeking to honour and give effect to the arbitration agreement.

166 The Defendants disputed that there was here any or any sufficient "obligation" to arbitrate on the grounds of the limited nature of any such obligation, as made clear by the Court of Appeal decision in Through Transport .

167 The Defendants further submitted that the SIA deals with arbitration specifically in s.9 . It cannot have been intended that a State could lose its immunity under s.3 even though the requirements of s.9 were not met. Further, there is no good reason for treating

an arbitration which happens to have its seat here differently to any other arbitration agreement. Section 9 is clearly intended to be of general application.

168 In the light of my ruling on s.9 it is not necessary to decide this issue, although I consider that there is force in the Defendants' contention that it is s.9 alone which governs loss of immunity under the SIA in matters relating to arbitration.

Section 2 of the SIA

169 Section 2 provides:

> "(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> …
>
> (3) A State is deemed to have submitted—
>
> (a) if it has instituted the proceedings; or
>
> (b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
>
> (4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of—
>
> (a) claiming immunity; or
>
> (b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it."

170 The Club submitted that the question of what amounts to a "step in the proceedings" must be answered in light of English procedural law as to the proper steps to be taken in

relation to proceedings commenced in the English courts. English court procedural law is governed by the CPR .

171 Pursuant to CPR Part 11 :

> (1) A defendant who wishes to –
>
> (a) dispute the court's jurisdiction to try the claim; or
>
> (b) argue that the court should not exercise its jurisdiction
>
> may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
>
> (2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10 .
>
> (3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.
>
> (4) An application under this rule must –
>
> (a) be made within 14 days after filing an acknowledgment of service; and
>
> (b) be supported by evidence.
>
> (5) If the defendant –
>
> (a) files an acknowledgment of service; and
>
> (b) does not make such an application within the period specified in paragraph (4),
>
> he is to be treated as having accepted that the court has jurisdiction to try the claim."

172 The Club submitted that the Defendants had taken a step in the proceedings pursuant to s.2(3)(b) i.e. a step which impliedly affirms the correctness of the proceedings and the willingness of the Defendants to go along with a determination by the courts — see Kuwait Airways v Iraqi Airways [1995] 1 Lloyd's Rep 25 . Such a step involves an election – i.e. an unequivocal act done with knowledge of the material circumstances – see Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd [1978] 1 Lloyd's Rep 357 per Lord Denning at [361].

173 The Club submitted that Spain had taken a step in the proceedings by reason of the following:

- i) In its acknowledgment of service it did not tick the box indicating "I intend to dispute the court's jurisdiction".
- ii) It failed to make an application to challenge the Court's jurisdiction within 14 days of acknowledgment of service and accordingly it is to be treated as having accepted the court's jurisdiction pursuant to CPR Part 11.1(5)(b) – see Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] 1 Lloyd's Rep 475 .
- iii) On 28 June 2013 it applied for an extension of time to submit evidence in response to the s.66 application. Neither the arbitration claim form nor the application notice referred to any challenge to the court's jurisdiction to hear the s.66 application, although the supporting witness statement sought to reserve the right to do so.
- iv) No mention of immunity was made in the skeleton for the hearing or the hearing itself.
- v) When the s.67/72 applications were issued no application was made to challenge the Court's jurisdiction to hear the s.66 application and the only mention of immunity was in the supporting witness statement.
- vi) To date no application to dispute the Court's jurisdiction has been made.

174 In relation to point ii), whilst that may be the position as a matter of English procedural law, that does not mean that a step in proceedings has been taken for the purpose of the SIA . To do so requires an election – i.e. an act rather than a mere omission.

175 As to the other points, I am satisfied that Spain's position throughout has been that it was disputing the jurisdiction of both the Court and the arbitrator.

176 Thus in the acknowledgment of service it stated that it was "reserving all rights of any description, whether jurisdictional or otherwise" and specifically stated that it "will rely on grounds of challenge available under the… Sovereign Immunity Act 1978 ".

177 The assertion of immunity was repeated in its solicitors' letter of 21 June 2013 which was the first time Spain had set out its substantive position on the s.66 application. It was repeated in Mr Meredith's witness statements of 27 June 2013 and 5 August 2013.

178 The other applications made must be seen in the context of these general reservations and the practical desirability of dealing with all the applications together. Its continuing objection to the Court's jurisdiction was maintained and it was reasonably clear that this was to be raised in answer to the Club's own s.66 application. There was therefore no need for a separate application to be issued. Looking at Spain's conduct as a whole I am satisfied that it never affirmed the correctness of the proceedings and its willingness to go along with a determination by the courts.

179 France's position is similar to that of Spain, although the CPR Part 11.1(5)(b) point does not arise in its case. I find that the position is otherwise the same as in relation to Spain. Neither of the Defendants have taken a step in the proceedings within the meaning of s.2 of the SIA .

180 In summary, I hold that immunity has been lost by reason of s.9(1) of the SIA . In those circumstances it is not necessary to consider the position separately in relation to the Defendants' own applications. I accordingly conclude that the Court has jurisdiction over the Defendants.

Should the Court grant the applications as a matter of discretion?

181 Section 66 of the Act provides:

> "(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
>
> (2) Where leave is so given, judgment may be entered in terms of the award.
>
> (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.
>
> The right to raise such an objection may have been lost (see section 73).

> (4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under the Geneva convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award."

182 On an application under s.66 , the Court has a discretion whether or not to enforce the award – it "may" do so.

183 In many cases the discretionary issue will relate to the validity of the award and it will be for the respondent to "show" that the tribunal lacked jurisdiction. However, I accept that the discretion is a wide one to be exercised in the interests of justice and that it will embrace issues such as the utility of a declaratory judgment, as is illustrated by West Tankers Inc v Allianz SpA [2012] 1 Lloyd's Rep 398 .

184 In West Tankers Toulson LJ, with whom Lloyd and Carnwath LLJ agreed, stated that:

> "37. … I cannot see why in an appropriate case the court may not give leave for an arbitral award to be enforced in the same manner as might be achieved by an action on the award and so give leave for judgment to be entered in the terms of the award.
>
> 38. I use the words "in an appropriate case" because the language of the section is permissive. It does not involve an administrative rubber stamping exercise. The court has to make a judicial determination whether it is appropriate to enter a judgment in the terms of the award. There might be some serious question raised as to the validity of the award or for some other reason the court might not be persuaded that the interests of justice favoured the order being made, for example because it thought it unnecessary…"

185 The West Tankers case concerned whether the Court had jurisdiction to give leave to enforce a declaratory award as a judgment under s.66 of the Act and, if so, whether the Court should do so as a matter of discretion. The jurisdictional argument was that there was no power to enforce such an award since a declaratory judgment does not involve enforcement. This argument was rejected by Field J and the Court of Appeal. Field J's exercise of his discretion to make an order under s.66 was not challenged on appeal.

186 The Club relied upon Field J's discretionary decision in West Tankers and submitted that it was on all fours with the present case. The Club's stated objective in these proceedings is to obtain an English judgment which, by virtue of Article 34(3) of the Judgments Regulation, would take primacy over any inconsistent Spanish judgment which might be rendered in November. A similar issue arose in West Tankers . Field J decided that the declaratory award would be enforced because there was utility in so doing. He stated that:

> "28. The purpose of s66(1) and (2) is to provide a means by which the victorious party in an arbitration can obtain the material benefit of the award in his favour other than by suing on it. Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. In short, in such a case, the grant of leave will not facilitate the realisation of the benefit of the award. Where, however, as here, the victorious party's objective in obtaining an order under s66(1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award.
>
> ….
>
> 30 On an application under s. 66 or to set aside a s. 66 order, it is enough, in my view, in a case such as this, for the party seeking to enforce the award to show that he has a real prospect of establishing the primacy of the award over an inconsistent judgment. It is not necessary, nor is it appropriate, for the court finally to decide this hypothetical question– hypothetical because the unsuccessful party to the arbitration will not have

> obtained an inconsistent judgment in a member state at the time the court is dealing with the s. 66 application."

187 Similarly there is here a real prospect of establishing the primacy of the award over any inconsistent judgment which may be rendered in Spain and therefore a clear utility in granting leave to enforce. The prospect of so establishing primacy is borne out by cases in which it has been stated — The Wadi Sudr [2010] 1 Lloyd's Rep. 193 at [63] (per Waller LJ) — or assumed – West Tankers per Field J at [25–26] — that an award under s.66 is a "judgment" under s.34(3) , and the decision to that effect of Beatson J in African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG [2011] EWHC 2452 (Comm) at [27–28].

188 In the African Fertilizers case Beatson J followed and applied Waller LJ's obiter statement in The Wadi Sudr that Article 34(3) could be relied upon. As he stated at [28]:

> "(b) Mr Happé's submissions on this issue are inconsistent with the obiter statement of Waller LJ in National Navigation Co v Endesa Generacion SA (The Wadi Sudr) [2009] 2 CLC 1004 at [63]. Waller LJ stated that, where the English court had granted a declaration that an arbitration clause was incorporated into a contract (in that case a bill of lading) and a court in another member state subsequently refused to stay proceedings in that state, '… the claimant in England could proceed with the arbitration in England; if that were inconsistent with the judgment obtained in the member state then that would provide an answer on its own [see article 34(3)]'."

189 The Defendants challenged the correctness of Beatson J's decision, but I agree with Field J that it would not be appropriate to decide that issue in circumstances where any inconsistency is still hypothetical and that it is sufficient for there to be a real prospect of establishing primacy, as there clearly is on the current authorities.

190 The Defendants submitted that there are two possibilities. The first is that the s.66 judgment is not a Regulation Judgment and therefore there is no utility in it. The second is that it is a Regulation Judgment, in which case it would be an inappropriate exercise of the

Court's discretion to grant leave for such a judgment to be entered. The same applies to the exercise of that discretion on the basis that there is a real prospect of it being a Regulation Judgment.

191 The Defendants submitted that it would be an inappropriate exercise of the Court's discretion because it would serve to subvert the Regulation jurisdictional regime because:

- i) The subject matter of the proceedings in Spain mean that they fall within the scope of the Regulation (Article 1) and any resulting judgment will be a Regulation Judgment;
- ii) The subject matter of the enforcement proceedings in England is arbitration and thus outside the scope of the Regulation (Article 1(2)(d));
- iii) The Spanish court was the court first seised for the purposes of Article 27(1) of the Regulation and were it not for the fact that s.66 proceedings fall outside of the Regulation the English Court would be obliged to stay its proceedings until such time as the jurisdiction of the court first seised was established;
- iv) Thus if the English Court were to grant a Regulation Judgment in non-Regulation proceedings in the present case, it would be declining to respect the lis pendens provision in Article 27 and the direct action provision in Article 11 , which it would be obliged to respect if these proceedings fell within the Regulation and by so doing, allocating itself primacy for the purposes of Article 34 over the judgment of the Spanish court as that which was first seised.

192 In short, the non-Regulation nature of the s.66 proceedings allows the Court to ignore the mandatory stay imposed by the Regulation and yet it would assert the status of having issued a Regulation judgment in order to trump the judgment of the Court first seised. The Defendants submitted that such a result is not countenanced by the Regulation and that the Court should not exercise its discretion so as to encourage such a result.

193 This argument assumes that the Court should treat the present application as if it was regulated by the Regulation. However, this is an arbitration application and arbitration falls outside the Regulation. Potentially inconsistent decisions and lack of co-ordination are recognised consequences of the arbitration exclusion. As the Club put it, why should the Court refuse to grant a party the full benefit of an award which it has because to do so would run counter to the scheme of a Regulation that does not apply to arbitration?

194 In my judgment, as in the West Tankers case, there is a clear utility in granting judgment and the Regulation regime is not a good or sufficient reason for preventing the Club from seeking to realise the full benefit of their awards.

195 The Defendants raised a number of other matters which they submitted should persuade the Court not to exercise its discretion. These included the effect of declaratory relief on parties not before the Court; the risk of inconsistent judgments involving third parties; the fact that the Public Prosecutor is not party to these proceedings; and the potential effect of any judgment on criminal and civil proceedings which are all but concluded in which the Public Prosecutor is pursuing claims under the Spanish Penal Code in respect of matters of substantial public interest and importance in Spain and in France concerning the natural resources and heritage of those countries.

196 As to the effect on third parties, the awards do not bind any third parties and therefore do not affect their rights. Nor is there a risk of inconsistent judgments since the judgments will involve different parties. Although the Public Prosecutor is not party to these proceedings, the evidence is that any judgment obtained in Spain in respect of the civil claims brought by him on behalf of other parties (including Spain) will be in the name of the relevant party. There will therefore be no civil judgment for the Public Prosecutor.

197 As to the points made about the importance of and the public interest in the Spanish proceedings, I recognise the significance of the issues raised and the claims made in those proceedings, but there cannot be one rule for publicly important cases and another for less important cases. I also recognise that, if no English law advice was taken prior to bringing the direct claims against the Club, the Defendants might be surprised to learn that they are bound to bring those claims in arbitration. However, the Club entered into an English law insurance contract on agreed terms and priced the cover provided accordingly. Those terms involve no liability in the events which have happened over and above the CLC liability, an international convention limit of liability which has been fully met. This Court has always upheld the principle of freedom of contract and supported the enforcement of contractual bargains freely entered into. The Club is doing no more than seeking to enforce its contractual rights in respect of a claim which is in substance a claim under the contract that it made.

198 For all these reasons I conclude that there is utility in granting the declarations sought, that no good reason has been shown why the Court should refuse to allow the Club to seek to realise the full benefit of the awards it has obtained, and that in the exercise of my discretion and in the interests of justice I should grant the s.66 application.

Conclusion

199 I answer the Issues raised as follows:

- i) The proper characterisation of the claims is contractual.
- ii) The claims are arbitrable.
- iii) There has been no waiver of the right to arbitrate France's claims.
- iv) The Court has jurisdiction because any state immunity has been lost pursuant to s.9(1) of the SIA .
- v) In the exercise of its discretion the Court should grant the s.66 applications.

200 In the light of my conclusion on issues i) to iii) I refuse the Defendants' applications under ss.67/72 .

201 In the light of my conclusions on issues iv) and v) I grant the Club's applications under s.66 .

2013 WL 5338209

TAB 64

[COURT OF APPEAL]

*MACMILLAN INC. v. BISHOPSGATE INVESTMENT TRUST PLC. AND OTHERS (No. 3)

[1991 M. No. 12739]

1995 Oct. 4, 5, 6, 9, 10, 11, 12; Nov. 2

Staughton, Auld and Aldous L.JJ.

Conflict of laws—Moveables—Proper law—Ownership of shares—Shares of company incorporated in New York held by English company as nominee for plaintiff—Share certificates deposited in England without knowledge or consent of plaintiff as security for moneys lent—Shares afterwards registered in central depository system in New York in names of companies holding them as security—Whether English or New York law applying

In November 1990 a number of shares in B. Inc. were transferred from the name of the plaintiff, a wholly-owned subsidiary of M.C.C. incorporated in Delaware, into the name of the first defendant to be held as nominee. Subsequently 7·6m. of the shares were transferred to the central depository system of D.T.C. in New York without the plaintiff's knowledge or consent and later used as security for loans to finance the Maxwell group of companies. The second defendants became the holders of 19m. shares under securities created by the deposit of share certificates in London afterwards perfected in New York through the D.T.C. system. The third defendants acquired a security interest in 24m. shares by means of book entries in New York in the D.T.C. system. The fifth defendant acquired an interest in 1m. shares through the D.T.C. system, and in 500,000 shares by delivery of share certificates and an executed transfer form in England. The plaintiff applied for a declaration that the shares were held on a constructive trust and for damages for breach of trust. The judge dismissed the action, holding that the issue of priority between the competing claims to the shares had to be decided according to the law of the place where the transactions relied on took place, which he held to be New York law, and that, as none of the defendants had had notice of the plaintiff's interest in the shares, the plaintiff's claims failed.

On appeal by the plaintiff on an agreed preliminary issue as to whether the claim was governed by New York law or English law:—

Held, dismissing the appeal on the preliminary issue, that the rules of conflict of laws had to be directed at the issue of law in dispute, rather than at the cause of action on which the plaintiff relied; that the disputed issue was whether the defendants were purchasers for value in good faith without notice of the plaintiff's claim so as to obtain a good title to the shares; that a question as to who had the better title to shares in a company was to be decided by the law of the place where the shares were situated, which was the place where the company was incorporated, unless (*per* Staughton and Auld L.JJ.) the shares were negotiable instruments; and that, accordingly, in the circumstances, the issue as to who had the better title to the shares was to be determined by the law of New York (post, pp. 398H–399A, B–C, 405A–B, C, E–F, 406H, 411D–E, 412B, 413H, 417H–418A, 419E, 424F, 425E–F).

Colonial Bank v. Cady and Williams (1890) 15 App.Cas. 267, H.L.(E.) considered.

Decision of Millett J. [1995] 1 W.L.R. 978; [1995] 3 All E.R. 747 affirmed on different grounds.

The following cases are referred to in the judgments:

Alcock v. Smith [1892] 1 Ch. 238, Romer J. and C.A.
Braun v. The Custodian [1944] 3 D.L.R. 412; [1944] 4 D.L.R. 209
British South Africa Co. v. Companhia de Moçambique [1893] A.C. 602, H.L.(E.)
Brown, Gow, Wilson v. Beleggings-Societeit N.V. (1961) 29 D.L.R. (2d) 673
Cammell v. Sewell (1858) 3 H. & N. 617; (1860) 5 H. & N. 728
Canada Deposit Insurance Corporation v. Canadian Commercial Bank [1993] 3 W.W.R. 302
Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd. [1981] Ch. 105; [1980] 2 W.L.R. 202; [1979] 3 All E.R. 1025
Cranstown (Lord) v. Johnston (1796) 3 Ves. 170
Dearle v. Hall (1828) 3 Russ. 1
Deschamps v. Miller [1908] 1 Ch. 856
Disconto-Gesellschaft v. United States Steel Corporation (1925) 267 U.S. 22
El Ajou v. Dollar Land Holdings Plc. [1993] 3 All E.R. 717; [1994] 2 All E.R. 685, C.A.
Embericos v. Anglo-Austrian Bank [1904] 2 K.B. 870; [1905] 1 K.B. 677, C.A.
Goodwin v. Robarts (1875) L.R. 10 Ex. 337; (1876) 1 App.Cas. 476, H.L.(E.)
Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd. [1979] A.C. 508; [1978] 3 W.L.R. 378; [1978] 2 All E.R. 1168, H.L.(E.)
Holroyd v. Marshall (1862) 10 H.L.Cas. 191, H.L.(E.)
Holthausen, Ex parte; In re Scheibler (1874) L.R. 9 Ch.App. 722
Hongkong and Shanghai Banking Corporation Ltd. v. United Overseas Bank Ltd. [1992] 2 S.L.R. 495
Hunt v. The Queen (1968) 67 D.L.R. (2d) 373
Inglis v. Robertson [1898] A.C. 616, H.L.(Sc.)
Jellenik v. Huron Copper Mining Co. (1900) 177 U.S. 1
Jogia (A Bankrupt), In re [1988] 1 W.L.R. 484; [1988] 2 All E.R. 328
Kelly v. Selwyn [1905] 2 Ch. 117
Koechlin et Cie v. Kestenbaum Brothers [1927] 1 K.B. 889, C.A.
Le Feuvre v. Sullivan (1855) 10 Moo.P.C. 1, P.C.
Lipkin Gorman v. Karpnale Ltd. [1991] 2 A.C. 548; [1991] 3 W.L.R. 10; [1992] 4 All E.R. 512, H.L.(E.)
London Joint Stock Bank v. Simmons [1892] A.C. 201, H.L.(E.)
Maudslay, Sons & Field, In re; Maudslay v. Maudslay, Sons & Field [1900] 1 Ch. 602
Mercantile Investment and General Trust Co. v. River Plate Trust, Loan and Agency Co. [1892] 2 Ch. 303
Morson v. Second National Bank of Boston (1940) 29 N.E. 2d 19
Norris v. Chambres (1861) 29 Beav. 246; 3 De G.F. & J. 583
Norton v. Florence Land and Public Works Co. (1877) 7 Ch.D. 332
Oliner v. Canadian Pacific Railway Co. (1970) 34 A.D. 2d 310
Paget v. Ede (1874) L.R. 18 Eq. 118
Penn v. Lord Baltimore (1750) 1 Ves. Sen. 444
Pennsylvania Co. for Insurance on Lives and Granting Annuities v. United Railways of Havana & Regla Warehouses Ltd. (1939) 26 F.Supp. 379
Picker v. London and County Banking Co. Ltd. (1887) 18 Q.B.D. 515, C.A.
Queensland Land and Coal Co., In re; Davis v. Martin [1894] 3 Ch. 181
Queensland Mercantile and Agency Co., In re; Ex parte Australasian Investment Co.; Ex parte Union Bank of Australia [1891] 1 Ch. 536; [1892] 1 Ch. 219, C.A.
Rodick v. Gandell (1852) 1 De G.M. & G. 763
Royal Brunei Airlines Sdn. Bhd. v. Tan [1995] 2 A.C. 378; [1995] 3 W.L.R. 64; [1995] 3 All E.R. 97, P.C.
Simultaneous Colour Printing Syndicate v. Foweraker [1901] 1 K.B. 771
Swiss Bank Corporation v. Lloyds Bank Ltd. [1982] A.C. 584; [1981] 2 W.L.R. 893; [1981] 2 All E.R. 449, H.L.(E.)

United Cigarette Machine Co. Inc. v. Canadian Pacific Railway Co. (1926) 12 F. 2d 634
United States Surgical Corporation v. Hospital Products International Pty. Ltd. [1982] 2 N.S.W.L.R. 766; (1984) 156 C.L.R. 41
Webb v. Webb (Case C-294/92) [1994] Q.B. 696; [1994] 3 W.L.R. 801; [1994] 3 All E.R. 911, E.C.J.
Westdeutsche Landesbank Girozentrale v. Islington London Borough Council (1993) 91 L.G.R. 323
Williams v. Colonial Bank (1888) 38 Ch.D. 388, C.A.; sub nom. *Colonial Bank v. Cady and Williams* (1890) 15 App.Cas. 267, H.L.(E.)
Winkworth v. Christie Manson and Woods Ltd. [1980] Ch. 496; [1980] 2 W.L.R. 937; [1980] 1 All E.R. 1121

The following additional cases were cited in argument:

Assaf v. Fuwa [1955] A.C. 215; [1954] 3 W.L.R. 552, P.C.
Barnes v. Addy (1874) L.R. 9 Ch.App. 244
Dodds v. Hills (1865) 2 H. & M. 424

The following cases, although not cited, were referred to in the skeleton arguments:

Anziani, In re; Herbert v. Christopherson [1930] 1 Ch. 407
Attorney-General v. Bouwens (1838) 4 M. & W. 171
Attorney-General v. Higgins (1857) 2 H. & N. 339
Bailey v. Barnes [1894] 1 Ch. 25, C.A.
Bankers Trust International Ltd. v. Todd Shipyards Corporation [1981] A.C. 221; [1980] 3 W.L.R. 400; [1980] 3 All E.R. 197, P.C.
Blackwood v. London Chartered Bank of Australia (1874) L.R. 5 P.C. 92, P.C.
Blackwood v. The Queen (1882) 8 App.Cas. 82, P.C.
Borland's Trustee v. Steel Brothers & Co. Ltd. [1901] 1 Ch. 279
Brassard v. Smith [1925] A.C. 371, P.C.
Colorado, The [1923] P. 102, C.A.
Cook v. Gregson (1854) 2 Drew. 286
Eagle Trust Plc. v. S.B.C. Securities Ltd. [1995] B.C.C. 231
Erie Beach Co. Ltd. v. Attorney-General for Ontario [1930] A.C. 161, P.C.
Hanson v. Walker (1829) 7 L.J.O.S. Ch. 135
Harrison v. Sterry (1809) 9 U.S. (5 Cranch) 289
Libyan Arab Foreign Bank v. Bankers Trust Co. [1989] Q.B. 728; [1989] 3 W.L.R. 314; [1989] 3 All E.R. 252
Liverpool Marine Credit Co. v. Hunter (1868) L.R. 3 Ch.App. 479
Manchester Trust v. Furness [1895] 2 Q.B. 539, C.A.
New York Life Insurance Co. v. Public Trustee [1924] 2 Ch. 101, C.A.
Republica de Guatemala v. Nunez [1927] 1 K.B. 669, C.A.
Rex v. Williams [1942] A.C. 541; [1942] 2 All E.R. 95, P.C.
Roberts Petroleum v. Bernard Kenny Ltd. [1983] 2 A.C. 192; [1983] 2 W.L.R. 305; [1983] 1 All E.R. 564, H.L.(E.)
Rossano v. Manufacturers' Life Assurance Co. [1963] 2 Q.B. 352; [1962] 3 W.L.R. 157; [1962] 2 All E.R. 214
Royal Trust Co. v. The King [1949] 2 D.L.R. 153
Secretary of State of Canada v. Alien Property Custodian for United States [1931] 1 D.L.R. 890
Société Générale de Paris v. Walker (1885) 11 App.Cas. 20, H.L.(E.)
Stern v. The Queen [1896] 1 Q.B. 211, D.C.
Stubbs v. Slater [1910] 1 Ch. 632, C.A.
Tahiti Cotton Co., In re; Ex parte Sargent (1874) L.R. 17 Eq. 273
Taylor v. Russell [1892] A.C. 244, H.L.(E.)
Treasurer of Ontario v. Blonde [1947] A.C. 24, P.C.
Webb, Hale and Co. v. Alexandria Water Co. Ltd. (1905) 93 L.T. 339, D.C.
Winans v. The King [1908] 1 K.B. 1022, C.A.; sub nom *Winans v. Attorney-General (No. 2)*; [1910] A.C. 27, H.L.(E.)

APPEAL from Millett J.

On 5 November 1990 106m. shares in Berlitz International Inc. ("Berlitz"), a company incorporated in New York, U.S.A., which belonged to and had previously stood in the name of the plaintiff, Macmillan Inc. ("Macmillan"), a company incorporated in Delaware, U.S.A. and a wholly-owned subsidiary of an English company, Maxwell Communications Corporation, which was controlled by the late Mr. Robert Maxwell, were transferred into the name of Bishopsgate Investment Trust Plc. to be held by it as trustee or nominee for Macmillan. Subsequently certain of the share certificates in Berlitz were, without the knowledge or consent of Macmillan, deposited in England with various other companies and used as security for money lent for the benefit of companies in the private group of companies owned or controlled by Mr. Maxwell. In March 1991 76m. of the shares were deposited in the central depository system of the Depository Trust Co. ("D.T.C.") in New York, and the shares ceased to be registered in the name of Bishopsgate Investment Trust Plc. and were registered instead in the name of Morgan Stanley Trust Co. (incorporated in New Jersey, U.S.A.), which acted as Mr. Maxwell's D.T.C. agent.

On 9 December 1991 Macmillan, in an endeavour to recover the shares, issued a writ against eight defendants, viz. (1) Bishopsgate Investment Trust Plc., (2) Shearson Lehman Bros. Holdings Plc. ("Shearson Lehman"), (3) Swiss Volksbank (incorporated in Switzerland), (4) Morgan Stanley Trust Co., (5) Crédit Suisse (incorporated in Switzerland), (6) Prudential Securities Inc. (incorporated in New York, U.S.A.), (7) Paine Webber Inc. (incorporated in New York, U.S.A.) and (8) Advest Inc. (incorporated in Delaware, U.S.A.). In the event the action was fought as against Shearson Lehman, Swiss Volksbank and Crédit Suisse only. The writ, as re-re-amended, claimed (1) a declaration that Macmillan was, remained and still was beneficially entitled to the 10·6m. shares of common stock in Berlitz purportedly transferred by it to Bishopsgate Investment Trust Plc. under a nominee agreement between them dated 5 November 1990, (2) an order that Bishopsgate Investment Trust Plc. should restore and account to Macmillan for the 10·6m. shares and an inquiry as to (a) the proceeds of the use of any such shares other than on behalf of Macmillan and/or (b) compensation by Bishopsgate Investment Trust Plc. for breaches of trust, (3) a declaration that the following shares were held on constructive trust for Macmillan, namely (a) 1·9m. by Shearson Lehman purportedly transferred by Macmillan to Lehman Bros. International Ltd. pursuant to a memorandum dated 27 September 1991 and by that company to Shearson Lehman on or about 6 November 1991, (b) 24m. by Swiss Volksbank purportedly transferred by Robert Maxwell Group Plc. pursuant to an agreement dated 13 November 1991, (c) 3·3m. by Morgan Stanley referred to under D.T.C.'s number D.T.C. 2761, (d) 1·5m. by Crédit Suisse as to 1m. referred to under the number D.T.C. 102 and as to 500,000 shares the subject of certificate number B.I. 233, (e) any shares held by the sixth defendant derived from the 76m. previously held by Morgan Stanley, (f) 400,000 shares by the seventh defendant referred to under the number D.T.C. 221 and (g) 1m. by the eighth defendant referred to under the number of D.T.C. 107. The writ sought such orders as were required for preserving and restoring to Macmillan the shares and all dividends, distribution, voting and other rights appertaining thereto, and the certificates and records relating thereto and the proceeds thereof, and for tracing their whereabouts etc. As re-re-amended the writ also sought against

Shearson Lehman, Swiss Volksbank and Crédit Suisse compensation and/or damages for breach of constructive trust and/or conversion, payment of all sums found due, together with interest thereon, pursuant to the court's equitable jurisdiction and/or section 35A of the Supreme Court Act 1981, and all other necessary accounts, inquiries, orders and directions, and costs.

On 10 December 1993 Millett J. held that the issue as to who had priority to the shares was to be determined by the law of the place of the relevant transactions, which was New York, and that, in the circumstances, the plaintiff's claim was to be dismissed.

By notices of appeal dated 12 April 1994 the plaintiff appealed on the grounds, inter alia, that (1) the judge was wrong to hold that the claims were governed by New York law rather than English law; the claims should be governed by the law of the place which had the closest and most real connection with the defendants' alleged obligation to make restitution of the shares to the plaintiff, which was English law, and not by the law of the place of the transaction; (2) alternatively, the judge should have held that the law of the place of the transaction was English law since the relevant acts for the purpose of resolving the dispute took place in England and not New York.

By respondents' notices dated 6 June, 3 May and 18 May 1994 respectively, Shearson Lehman, Swiss Volksbank and Crédit Suisse sought to affirm the judgment on the findings of fact and law of the judge and on additional grounds.

On 7 April 1995 Staughton L.J. ordered that the hearing of the appeal commence with and be limited in the first instance to the issue whether the judge was wrong to hold that the plaintiff's claims were governed by New York law rather than English law.

The facts are stated in the judgment of Staughton L.J.

David Oliver Q.C. and *Murray Rosen Q.C.* for Macmillan.
Charles Aldous Q.C. and *Robert Hildyard Q.C.* for Shearson Lehman.
William Blair Q.C. for the Swiss Volksbank.
Simon Mortimore Q.C. and *William Trower* for Crédit Suisse.

Cur. adv. vult.

2 November. The following judgments were handed down.

STAUGHTON L.J. In any case which involves a foreign element it may prove necessary to decide what system of law is to be applied, either to the case as a whole or to a particular issue or issues. Mr. Oliver, for Macmillan Inc., has referred to that as the proper law; but I would reserve that expression for other purposes, such as the proper law of a contract, or of an obligation. Conflict lawyers speak of the lex causae when referring to the system of law to be applied. For those who spurn Latin in favour of English, one could call it the law applicable to the suit (or issue) or, simply, the applicable law.

In finding the lex causae there are three stages. First, it is necessary to characterise the issue that is before the court. Is it for example about the formal validity of a marriage? Or intestate succession to moveable property? Or interpretation of a contract?

The second stage is to select the rule of conflict of laws which lays down a connecting factor for the issue in question. Thus the formal

validity of a marriage is to be determined, for the most part, by the law of the place where it is celebrated; intestate succession to moveables, by the law of the place where the deceased was domiciled when he died; and the interpretation of a contract, by what is described as its proper law.

Thirdly, it is necessary to identify the system of law which is tied by the connecting factor found in stage two to the issue characterised in stage one. Sometimes this will present little difficulty, though I suppose that even a marriage may now be celebrated on an international video link. The choice of the proper law of a contract, on the other hand, may be controversial.

In an ideal world the answers obtained in these three stages would be the same, in whatever country they were determined. But unfortunately the conflict rules are by no means the same in all systems of law. In those circumstances a choice of conflict rule may have to be made. It is clear that, in general, the second and third stages are to be determined by the law of the place where the trial takes place (lex fori). That law must tell one what the connecting factor is for the issue before the court, and what system of law it points to. But the first stage, characterisation of the issue, presents more of a problem. In *Dicey & Morris, The Conflict of Laws,* 12th ed. (1993), vol. 1, p. 35 there is this passage:

> "The problem of characterisation has given rise to a voluminous literature, much of it highly theoretical. The consequence is that there are almost as many theories as writers and the theories are for the most part so abstract that, when applied to a given case, they can produce almost any result."

Fortunately the next sentence reads: "They appear to have had almost no influence on the practice of the courts in England." The authors conclude, at p. 44:

> "The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law. In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation, a new conflict rule should be created."

Later, at p. 47: "the way lies open for the courts to seek commonsense solutions based on practical considerations."

Before leaving these preliminary matters, I would add that if at all possible the rules of conflict should be simple and easy to apply. One might say that all rules of law should be of that character; but we have less control over rules of domestic law. The litigant who is told by his advisers that his case may or may not involve the application of a foreign system of law, and that he must be armed with expensive expert evidence which may, in the event, prove unnecessary, deserves our sympathy. For many years even cases of tort/delict involved uncertainty and the analysis of five different speeches in the House of Lords. Academic writers of distinction concern themselves with conflict, not surprisingly since it is a subject of great intellectual interest. We must do our best to arrive at a sensible and practical result.

These proceedings

Macmillan Inc., a Delaware corporation, started an action against eight defendants claiming the return of 10·6m. shares in Berlitz

A International Inc., a New York corporation of renown in the language teaching field, or compensation for the loss of the shares. The action continued against the second defendants (Shearson Lehman Bros. Holdings Plc.), the third defendants (Swiss Volksbank) and the fifth defendants (Crédit Suisse). The trial lasted for the best part of a year, from October 1992 to July 1993, before Millett J. He gave judgment in favour of the defendants, dismissing the claims of Macmillan. One of the problems B which he had to resolve on the route to that conclusion—one might say the first—was whether the dispute should be resolved by English law or the law of and prevailing in the State of New York. In other words, which was the lex causae? The judge held that it was New York law.

Macmillan have appealed. All parties agreed that we should first determine that same question as a preliminary issue in the appeal; and an C order has been made to that effect. The order reads as follows:

> "(2) that the hearing of these appeals commence with and be limited in the first instance to the following issues ('the proper law appeal issues') on which argument is estimated to occupy the court for 10 days namely: (a) paragraph 2 of the notice of appeal as against the second defendant and paragraph 1 of the second defendant's respondent's notice; (b) paragraph 2 of the notice of appeal as against D the third defendant; (c) paragraph 2 of the notice of appeal as against the fifth defendant, and paragraph 1 of the fifth defendant's respondent's notice."

The paragraphs in the three notices of appeal are all the same in substance. One of them read as follows:

E > "2.1 The judge was wrong to hold that the plaintiff's claim against Shearson was governed by New York law rather than English law. That claim is to be governed by the law which has the closest and most real connection with Shearson's alleged obligation to make restitution of the relevant Berlitz shares to the plaintiff and not by the lex loci actus."

F The respondents' notices of the second and fifth defendants introduce alternative reasons for choosing New York law.

I am not entirely happy with the way that the preliminary issue is drafted, although I have to confess that I certainly approved it, and may have had a hand in its drafting. However, the right course would seem to be first to arrive at an answer to the problem, and then to see if the G question needs redrafting.

There are in essence three issues before us, corresponding to the three stages in a conflict case which I have mentioned. They are: (a) how does one characterise the question in this action? (b) What connecting factor does our conflict rule provide for questions of that character? (c) What system of law does that connecting factor require to be applied?

H *The facts*

There are differences in the material facts relating to each of the second, third and fifth defendants. But some are common to all. Macmillan were a wholly-owned subsidiary of Maxwell Communications Corporation Plc., a company owned partly by the public and partly by Mr. Robert Maxwell and his family. Macmillan in turn had a majority holding of 10·6m. shares in Berlitz, registered in Macmillan's name in New York. (In

point of fact it would seem that the transfer sheets of the company's transfer agent, Manufacturers Hanover Trust Co., constituted the register.)

On 5 November 1990 the shares were transferred out of Macmillan's name to a company called Bishopsgate Investment Trust Plc., which was in a part of the Maxwell group that was owned and controlled by Mr. Robert Maxwell and his family. This was done on the instructions of Mr. Maxwell, and (as the judge found) with the authority of a resolution of the executive committee of the board. Macmillan's share certificates were cancelled, and replaced by 21 certificates in the name of Bishopsgate. They were brought to London from the United States by Miss Ghislaine Maxwell on the following day. But not long afterwards Mr. Maxwell signed a nominee agreement in which Bishopsgate acknowledged that it held the shares as nominee for the account and benefit of Macmillan, and had "no power or right to take any action with respect thereto without the express consent of Macmillan." That agreement provided that it should be governed by the law of New York. To say that this pious declaration was disregarded before the ink on it was dry may be something of an exaggeration. But a practice began whereby numbers of the shares were used as security for debts owed to creditors by companies in the private ownership of Mr. Maxwell and his family. Thus the property of Macmillan, a company which was in part publicly owned through its parent and no doubt had creditors of its own, was used to secure loans to the private side of the Maxwell empire.

In order to facilitate that process, in March 1991 7·6m. of the shares were deposited with the Depository Trust Co. in New York. That is said to be a paperless transfer system, and is much used in the United States. Shares are transferred to Depository Trust Co. and registered in the name of their agents, a partnership called CEDE. In order to deal with D.T.C., as I shall call them, it was necessary to go through a D.T.C. agent. In the case of the Maxwell group the agent was Morgan Stanley Trust Co., a company incorporated in New Jersey. So after the shares entered the D.T.C. system, they were registered in the Berlitz register in the name of CEDE, in the records of CEDE as held for Morgan Stanley, and in the records of Morgan Stanley as held for an associated company of Bishopsgate. But not for long. Various transactions followed in which the shares were used as security, until we come to those which give rise to the present dispute.

(1) *Shearson Lehman*

A total of 1·9m. Berlitz shares were deposited with Lehman Bros. International Ltd. by a Bishopsgate company in three parcels in November and December 1990 and September 1991. The deposit was as security for the obligations of the borrowers under a stock lending agreement. I need not enter upon the detail of that agreement; it had the effect of making money available on loan to one or more companies in the private ownership of Mr. Maxwell. The security was created by the deposit of the share certificates in London accompanied by duly executed share transfer forms. In July and October 1991 the security was, as the judge found, perfected in New York by deposit in the D.T.C. system. This was done by Lehman Bros. sending the certificates to Bankers' Trust, their agent in the D.T.C. system. So CEDE became the registered owners, and held the shares for Bankers' Trust who in turn held them for Lehman Bros.

A On 6 November 1991, the day after the death of Mr. Robert Maxwell, Lehman Bros. sold the 1·9m. shares to Shearson Lehman, in the exercise of their power of sale. It is said that Shearson Lehman thereby obtained as good a title as Lehman Bros. previously had, even if they now had notice of a breach of trust by Bishopsgate. That sale was completed on 4 December 1991, when the shares were registered in the name of Shearson Lehman in place of CEDE; and Shearson Lehman obtained a stock B certificate.

(2) *Swiss Volksbank*

On 12 November 1991 2·4m. Berlitz shares which were already in the D.T.C. system were transferred to Swiss Volksbank. This was achieved by CEDE holding the shares for Citibank N.A., who were Swiss Volksbank's C agents in the D.T.C. system. The purpose of the transaction became clear on the following day, when security documents were executed in London. This was to cover a loan of some $35m. by Swiss Volksbank to a company privately owned within the Maxwell empire. The pledge agreement was expressed to be governed by New York law, and other documents by English law.

D On 3 December 1991 Macmillan's solicitors wrote to Swiss Volksbank demanding return of the Berlitz shares. Swiss Volksbank thereupon realized their security, and on 6 December were registered as owners with the company's transfer agents in place of CEDE, and obtained a share certificate.

(3) *Crédit Suisse*

E

In this instance there were two parcels of shares that were treated differently, although both were pledged as security for a loan of £50m. to a privately owned company in the Maxwell empire. There were memoranda of deposit and a facility letter, expressed to be governed by English law.

First, 500,000 shares in Berlitz were deposited with Crédit Suisse on 27 September 1991, together (as it happened) with shares in other F companies incorporated in other countries. The deposit was of a single share certificate in the name of the Bishopsgate company, with a stock power executed in blank by the Maxwell brothers, who were directors of that company.

Secondly, on 12 November 1991, 1m. Berlitz shares already in the D.T.C. system were transferred to Crédit Suisse. This was achieved by G debiting Morgan Stanley's account with CEDE (Morgan Stanley being, as I have mentioned, the D.T.C. agents of the Bishopsgate companies), and crediting Swiss American Securities Inc., who were Crédit Suisse's agents.

An interim injunction was in force between 20 January and 13 April 1992, restraining Crédit Suisse from dealing with the 1·5m. Berlitz shares. On the later date an extension was refused by Hoffmann J., on the ground that Macmillan's undertaking in damages was not sufficiently secured. In H the view of Millett J. this was a critical event for part of the shares. For in May 1992 Crédit Suisse withdrew the 1m. shares from the D.T.C. system and secured their registration in the name of their own nominee company; and in June they achieved the same result for the 500,000 shares which had never been in the D.T.C. system. All that happened while the action was in progress.

There were thus two different routes by which the shares were pledged in the first instance—by deposit of share certificates in London, and by a

transaction in the D.T.C. system in New York. Shearson Lehman (or rather Lehman Bros.) were an example of the first, and Swiss Volksbank of the second. Crédit Suisse received one parcel by each of the two methods. In all cases the pledgees eventually became registered as owners of the shares. And in all cases the pledge of shares was, as the judge found, a breach of trust by Bishopsgate.

The issues

The relief sought in the amended statement of claim comprised, so far as is material for present purposes, (1) a declaration that Macmillan are still beneficially entitled to the 10·6m. shares transferred to Bishopsgate on 5 November 1990, (2) a declaration that the shares subsequently transferred to Shearson Lehman, Swiss Volksbank and Crédit Suisse are held on constructive trust for Macmillan, (3) such orders as are required for restoring the shares to Macmillan and (4) inquiries as to compensation and/or damages for breach of constructive trust and/or conversion.

Paragraph 5.2 reads as follows:

> "Macmillan has expressly notified each defendant . . . that they hold the said various shares respectively on constructive trust on its behalf. It will (so far as may be necessary) deny any claim by Shearson Lehman, Swiss Volksbank and/or Crédit Suisse . . . to have acquired legal ownership thereof and to have done so bona fide for value and without any notice of Macmillan's rights."

During the trial and with the co-operation of all parties the 5·8m. shares with which this action is concerned were sold to a Japanese company for $137m. in cash and other consideration. The proceeds of sale have now replaced the shares to the extent that they were the object of the claim.

All three defendants pleaded that the statement of claim did not disclose any cause of action. Had that been the main issue, or indeed a significant issue, it may well be that it would affect the law applicable to the suit, for reasons which will appear. But so far as I can detect that plea was not persisted in. What has been sustained is the plea of all three defendants that they acquired title to the shares in good faith and for value, without notice of any beneficial interest in Macmillan. That is said to be the case both by English and by New York law.

Millett J. made findings as to the effect of New York law. They may be in issue at a later stage in this appeal; but I quote his summary now so as to show briefly why there is a contest as to the applicable law.

The Berlitz shares were "certificated securities" within article 8 of the New York Uniform Commercial Code. That was the case whether or not the shares were entered in the D.T.C. system. They were negotiable instruments by New York law. Since property in a negotiable instrument passes both at law and in equity by delivery, no distinction is made in article 8 between legal estates and equitable interests. The priority rules are consequently much simpler than in English law. The main differences are: (1) as between the parties to a transfer and persons claiming under the transferor, the transfer of a certificated security (including a security interest in it) takes place when the purchaser or a person designated by him acquires possession of the certificate, not when he obtains registration; (2) special provision is made for delivery of shares through the D.T.C. system; (3) a bona fide purchaser for value who takes delivery of a certificated security, including delivery through the D.T.C. system, takes

free from any adverse claim of which he had no notice at the date of delivery, whether he subsequently obtains registration or not; (4) notice is defined more narrowly than in English law, and does not include constructive notice.

The judge held that the applicable rule of conflict of laws required him to apply the law of the place of the transaction (lex loci actus), which in turn he held to be New York law. Both those conclusions are challenged. Macmillan argue for the law of the restitution obligation, which in turn they claim to be the law of the place where the benefit was received, or the law with which the transaction has its closest and most real connection. Alternatively they say that the place of the transaction, even applying the judge's rule, was England and not New York.

The defendants are content with the judge's conclusions as they stand. But the preferred view of Shearson Lehman and Crédit Suisse is that the applicable law is the lex situs of the shares, or (if there is any difference) the law of the place of incorporation or where the register is kept. All these tests point to New York in this case. Swiss Volksbank on the other hand adopt the judge's solution as their primary case, but are content with the lex situs or the law of the place of incorporation as alternatives.

Stage 1: characterisation

Macmillan contend, as they did before the judge, that their claim is restitutionary in nature; and that in consequence the appropriate conflict rule is rule 201 in *Dicey & Morris,* 12th ed., vol. 2, p. 1471:

> "(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation. (2) The proper law of the obligation is (semble) determined as follows: (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract; (b) If it arises in connection with a transaction concerning an immoveable (land), its proper law is the law of the country where the immoveable is situated (lex situs); (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."

The rule appears in the section of *Dicey & Morris* which deals with the law of obligations. It is sub-paragraph (c) which is said to be relevant here.

Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd. [1981] Ch. 105 was cited in support of the rule. That was a case of money paid under a mistake of fact; but, the defendants being in liquidation, there was a proprietary claim to trace the money asserted as well as a common law claim for money had and received. It was, as Goulding J. said, at p. 115: "common ground that the legal effects of the mistaken payment must in the first instance be determined in accordance with New York law as the lex causae." Counsel (Mr. Chadwick) had cited the predecessor of rule 201(2)(c) from *Dicey & Morris*, 9th ed. (1973).

El Ajou v. Dollar Land Holdings Plc. [1993] 3 All E.R. 717 was about a claim to trace the proceeds of fraud. Millett J., at first instance, held, at p. 736, that "the law governing such claims is the law of the country where the defendant received the money," and referred to *Dicey & Morris,* 11th ed. (1987) and the *Chase Manhattan* case [1981] Ch. 105. In the Court of Appeal [1994] 2 All E.R. 685 the decision was reversed, but not upon any consideration of the applicable law—perhaps because there had been no evidence of foreign law.

In re Jogia (A Bankrupt) [1988] 1 W.L.R. 484 concerned claims for money paid under a mistake and/or for money had and received. Sir Nicolas Browne-Wilkinson V.-C. said, at p. 495:

> "As at present advised, I am of the view that quasi-contactual obligations of this kind arise from the receipt of the money. I find it difficult to see how such obligation can be said to be 'made' or 'arise' in any place other than that of the receipt. As to the proper law, *Dicey & Morris, The Conflict of Laws*, 10th ed. (1980), p. 921 expresses the view that, save in cases where the obligation to repay arises in connection with a contract or an immoveable, the proper law of the quasi-contact is the law of the country where the enrichment occurs. This accords with the American Restatement and seems to me to be sound in principle."

This passage was not essential to the decision, but rather obiter. Rule 201 was followed by Hwang J.C. in the High Court of Singapore in *Hongkong and Shanghai Banking Corporation Ltd. v. United Overseas Bank Ltd.* [1992] 2 S.L.R. 495 in relation to money purloined from a bank account.

Millett J. in the present case accepted (as he had done in *El Ajou's* case [1993] 3 All E.R. 717) that *Dicey's* rule applied to some restitutionary claims; but he held that it did not apply to all. He drew a distinction between the claim of an equitable owner to recover his property, or compensation for the failure to restore it, from the person into whose hands it had come and a claim by a plaintiff in respect of a breach of a fiduciary obligation owed to him. Whilst the latter class of a case would be within rule 201(2)(c), the former would not. The issue in the former case was one of priority, to be governed by the law selected by a conflict rule as appropriate to that issue.

It is clear that Macmillan's claims in the present case are to some extent proprietary. Mr. Oliver asserts that they are receipt based. But he needs to do more than show that the defendants received the shares; he must also plead, in effect, that they are Macmillan's shares; and the statement of claim does indeed say that. Millett J. described this requirement as "an undestroyed proprietary base." Against that it is said that, whilst Macmillan do have an equitable title to the shares, equity acts in personam and gives effect to that title only by orders directed at those who would disturb it. Hence the fact that, while the English courts do not have jurisdiction to decide questions of title to foreign land (*Dicey & Morris*, 12th ed., vol. 2, rule 116), there are many instances where they will grant a remedy against defendants who are here and who are sued here: *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan and Agency Co.* [1892] 2 Ch. 303; *Webb v. Webb* (Case C-294/92) [1994] Q.B. 696. Mr. Oliver points out that Macmillan claim not only a declaration as to their proprietary rights, but also an order that the defendants restore the shares to Macmillan and compensation or damages.

In my judgment the considerable learning directed at those issues does not need to be considered in the present case. This part of this appeal is not in my opinion the place to confront the law of restitution "in a logical, consistent and coherent fashion" (Joanna Bird, "Restitution's Uncertain Progress" [1995] L.M.C.L.Q. 308, 313). I am prepared to accept that Macmillan's claim is restitutionary in nature; and I would accept without deciding that rule 201 of *Dicey & Morris,* 12th ed. determines what system of law governs such a claim. But the issue is not, or not any longer, whether Macmillan have a cause of action for restitution; it is whether the

A defendants have a defence on the ground that they were purchasers for value in good faith without notice of Macmillan's claim. As the judge said [1995] 1 W.L.R. 978, 1011, and Mr. Oliver asserts, "Shearson Lehman cannot resist Macmillan's claim unless it can establish the defence of bona fide purchaser for value without notice." The same applies to Crédit Suisse and Swiss Volksbank. Mr. Oliver went so far as to submit that, once one has determined the law which governs the cause of action, that same B system governs all issues which arise in the suit. That cannot be right. Procedure, for instance, which sometimes includes limitation, is governed by the law of the place of trial; or, to take a rare example, a contract to exchange one currency for another may be invalid by its proper law, or by the law of the place of performance, or by the law of the forum, or by the law of the country whose currency is involved! I would regard it as C plain that the rules of conflict of laws must be directed at the particular issue of law which is in dispute, rather than at the cause of action which the plaintiff relies on. We should translate lex causae as the law applicable to the issue, rather than the suit. In this case the issue is whether in law the defendants were purchasers for value in good faith without notice, so as to obtain a good title to the shares.

Macmillan still assert, against Crédit Suisse only, a claim in conversion, D although the judge thought that it had been abandoned during the trial. That claim, it is said, must be governed by English law. But again it is the defence which identifies the issue. If Crédit Suisse have by New York law a good title as purchasers for value in good faith and without notice, they are not liable in damages; or, if for some reason they became liable at one stage, there are now no damages. That, I suppose, is an issue to be E determined at a later stage of this appeal; so we must not be taken to have made a definite ruling upon it. But Mr. Oliver mentioned the point in his reply, and I feel that we should make it plain that it has not been overlooked.

Stage 2: the appropriate conflict rule

F *(i) For property issues in general*

The general rule, which is subject to exceptions, appears to me to be that issues as to rights of property are determined by the law of the place where the property is. That is shown in relation to land (including priorities) by *Norton v. Florence Land and Public Works Co.* (1877) 7 Ch.D. 332.

G The same applies to chattels: see *Cammell v. Sewell* (1860) 5 H. & N. 728, 744–745, where Crompton J. quoted Pollock C.B. in the court below (1858) 3 H. & N. 617, 638: "If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere." This was treated as the general rule, although subject to exceptions, in *Winkworth v. Christie Manson and* H *Woods Ltd.* [1980] Ch. 496. It was applied by the House of Lords to a dispute about priority in *Inglis v. Robertson* [1898] A.C. 616, although the purist might say that the decision was as to the Scots as opposed to English rules of conflict. As was pointed out by Mr. Blair, for Swiss Volksbank, the law of the place of the transaction (lex loci actus), in the case of the sale of a chattel, will almost invariably be the same as the law of the place where the chattel is (lex situs). But the courts have chosen situs as the test rather than locus actus.

There is in my opinion good reason for the rule as to chattels. A purchaser ought to satisfy himself that he obtains a good title by the law prevailing where the chattel is, for example in Petticoat Lane, but should not be required to do more than that. And an owner, if he does not wish to be deprived of his property by some eccentric rule of foreign law, can at least do his best to ensure that it does not leave the safety of his own country.

Thirdly, there are negotiable instruments. These are assimilated to chattels, so that the lex situs applies: see *Alcock v. Smith* [1892] 1 Ch. 238 (although arguably this supports the law of the place of the transaction); *Embericos v. Anglo-Austrian Bank* [1904] 2 K.B. 870. See also *Dicey & Morris,* 12th ed., vol. 2, p. 1420: "In the conflict of laws, negotiable instruments are therefore treated as chattels, i.e. as tangible moveables." In *Brown, Gow, Wilson v. Beleggings-Societeit N.V.* (1961) 29 D.L.R. (2d) 673 a Canadian court held that title to bearer shares in a company should be determined by the law of the place of incorporation, not the law where the certificates are. This decision might appear to be out of line, unless (as Mr. Mortimore for Crédit Suisse suggests) the certificates had ceased to be negotiable.

Then a question arises as to which system of law is to determine whether an instrument is negotiable. One might have thought that in principle this should be the lex fori, since one is still at the stage of choosing a lex causae. *Dicey & Morris,* vol. 2, p. 1420 appear to suggest otherwise, and to prefer the law of the place where negotiation is said to have occurred. I find this a difficult question, and we do not need to decide it. By English law, whether as the law of the forum or the law of the place of alleged negotiation, the share certificates are not negotiable; so English law is not applicable. By New York law they may be negotiable; but New York is not the forum or the place of alleged negotiation. So one must look elsewhere for a choice of law rule in this case, and not apply the rule for negotiable instruments.

I turn now to other moveable but intangible property, that is to say choses in action. The general rule for this kind of property is stated by *Dicey & Morris,* vol. 2, p. 979, rule 120 as follows:

> "(1) The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') are governed by the law which applies to the contract between the assignor and assignee. (2) The law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged."

Paragraph (1) of the rule raises a topic to which I shall have to return later in relation to *Cady's* case (*Colonial Bank v. Cady and Williams* (1890) 15 App.Cas. 267). It also leaves a question as to what happens if there is no contract between the assignor and the assignee; but that does not arise in the present case. The rule is based on article 12 of the Rome Convention on the Law Applicable to Contractual Obligations and the Contracts (Applicable Law) Act 1990. It is said by *Dicey & Morris,* vol. 2, p. 979 to represent the common law.

The law governing the right to which the assignment relates, in paragraph (2) of the rule, in the case of a debt points to the proper law of the contract or other obligation by which the debt was created. The

corresponding rule in *Dicey & Morris,* 11th ed., vol. 2, p. 964, rule 123 was as follows: "The priority of competing assignments of a debt or other intangible thing is governed by the proper law of the debt or the law governing the creation of the thing." The commentary has this passage, at p. 965:

> "It is obvious that questions of priorities cannot be governed by the lex loci actus of the assignment or by its proper law, because the assignments may have been made in different countries or may be governed by different proper laws, and there is no reason why one law should govern rather than the other."

The commentary in the 12th edition, vol. 2, p. 981, reads:

> "Since the law governing the creation of the right assigned determines the rights and obligations of the debtor that result from the assignment, it must also decide questions of priorities between competing assignments."

Cheshire and North's Private International Law, 12th ed. (1992), p. 812 makes the same point:

> "where there have been assignments in different countries, no confusion can arise from a conflict of laws since all questions are referred to a single legal system. The same merit is not shared by the law of the situs, since this follows the residence of the debtor and is not therefore a constant. . . . It is suggested, then, that the most appropriate law to govern the question at any rate of priorities is the law governing the transaction by which the subject matter of the various assignments was created."

In the case of a simple contract debt the lex situs is thus rejected, because it is uncertain. That was not always *Dicey's* view. *In re Maudslay, Sons & Field*; *Maudslay v. Maudslay, Sons & Field* [1900] 1 Ch. 602 was a case concerning competing claims to a debt from a French firm. Cozens-Hardy J. said, at p. 610:

> "It seems to me that I am bound to hold that that assignment which alone is recognised by the law of France ought to prevail . . . This is the view taken by Mr. Dicey in his work on the *Conflict of Laws*, 1st ed. (1896), rule 141: 'An assignment . . . of a debt, giving a good title thereto according to the lex situs of the debt (in so far as by analogy a situs can be attributed to a debt), is valid.' "

Situs is now replaced by the proper law of the contract by which the debt was created. But with other monetary obligations the choice of "the law governing the creation of the thing" approximates closely, in my opinion, to the lex situs. Thus in *Kelly v. Selwyn* [1905] 2 Ch. 117 there was a contest between competing assignees of an interest in reversion under a will. Warrington J. said, at p. 122:

> "The ground on which I decide it is that, the fund here being an English trust fund and this being the court which the testator may have contemplated as the court which would have administered that trust fund, the order in which the parties are to be held entitled to the trust fund must be regulated by the law of the court which is administering that fund."

The obligees in such a case are not likely to be mobile, and there is less risk that the lex situs will turn out to be transient.

Another example is to be found in *In re Queensland Mercantile and Agency Co.; Ex parte Australasian Investment Co.; Ex parte Union Bank of Australia* [1891] 1 Ch. 536, which was concerned with competing claims to moneys due to the company in respect of unpaid calls on its shares. North J. said, at p. 545:

> "there is another equally well-known rule of law, viz., that a transfer of moveable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled."

His decision was upheld on appeal [1892] 1 Ch. 219. But it seems that there had been a stay of proceedings in Scotland on terms that the dispute should be decided in England in exactly the same way as it would have been decided in Scotland. As Lindley L.J. observed, at p. 226, that involved the application of Scots rules of the conflict of laws, even if they led to a different view from that which an English court would take.

But, at all events, for choses in action in general the lex loci actus has been rejected. So has the proper law of the assignment except for the limited purposes of rule 120(1). There have been cases where other solutions have been reached: see for example *Canada Deposit Insurance Corporation v. Canadian Commercial Bank* [1993] 3 W.W.R. 302, where it was held that priorities were governed by the law of the forum—an invitation to forum shopping if ever there was one; and *United States Surgical Corporation v. Hospital Products International Pty. Ltd.* [1982] 2 N.S.W.L.R. 766, where it appears to have been held that the availability of equity and equitable remedies was governed by the law of the forum, provided the defendant was in New South Wales (but we were told that the case had gone to a higher court). I would not follow either of those decisions.

(ii) Shares in particular

I now turn to the specific case of an issue as to the ownership of shares in a company. It is not argued that shares are within article 12 of the Rome Convention on the Law Applicable to Contractual Obligations, and therefore within rule 120 of *Dicey & Morris*. Indeed it may be that shares have a rule of their own. I must consider the authorities as to shares separately, but against the background of the law relating to land, chattels, negotiable instruments and other debts which has already been discussed. We have the authority of the House of Lords for the proposition that to some extent, as between transferor and transferee, the effect of an assignment of shares is determined by the law of the place where the assignment takes place. As with rule 120(1) in *Dicey & Morris*, it is important to determine the limits of that proposition. The case is *Williams v. Colonial Bank* (1888) 38 Ch.D. 388 in the Court of Appeal, and *Colonial Bank v. Cady and Williams,* 15 App.Cas. 267 in the House of Lords. The plaintiffs were the executors of the deceased holder of shares in New York Central and Hudson River Railroad Co. In order that the shares might be registered in their names, the executors signed blank transfers together with powers of attorney, which were endorsed on the certificates. Those would entitle the rightful holder of the certificates to be registered by the company as owner of the shares, provided that the company was satisfied as to the genuineness of the signatures. The executors handed the

A certificates to their brokers, who fraudulently deposited them with the defendant banks as a security for money due from the brokers. At the time when the action was commenced the shares were still registered in the name of the deceased, and the transfers were still blank as to the transferee.

The evidence of American law was that the certificates were not negotiable instruments; but that the banks obtained a good title in law B and equity because the owners had "so dealt with that certificate as to lead the purchaser for value to believe honestly that he was taking a good title to it. In other words the foundation rests in the principle of estoppel" (38 Ch.D. 388, 399).

In those circumstances it is scarcely surprising that the law of England was held to be applicable. Cotton L.J., at p. 399, said that the question C whether the bank obtained a good title "depends on transactions in England" and so must be governed by English law, although the law of America would be "properly referred to for the purpose of deciding what would be the effect of a valid effective transfer of the certificates on the title to shares in an American company." Lindley L.J. said, at p. 403:

> "We must look to the American law for the purpose of understanding D the constitution of the railway company and the proper mode of becoming a shareholder in it. Moreover, it may be that the consequences of having acquired a title to the certificate may depend on American law, but the question how a title is to be acquired to a certificate by a transaction in this country does not depend on American law at all."

E The judgment of Bowen L.J. is to the same effect. He said, at p. 408:

> "The key to this case is whether the defendants have a right to hold these pieces of paper, these certificates. What the effect upon their ulterior rights in America would be, if we were to declare that they were entitled to these pieces of paper, is another question."

So the Court of Appeal held that the issue was to be determined by the F law of England, which was the locus of the transaction (and also the situs of the certificates). Other problems would have to be decided by American law, sc. as the law of the place of incorporation, if they arose.

In the House of Lords, 15 App.Cas. 267, 272, Lord Halsbury L.C. recorded that the transaction of loan took place in London. He added:

> "if it were necessary to consider what law must govern, as between G these parties, the right to these certificates on the one hand, and the right to detain them as pledged for the money advanced on them on the other, though the certificates themselves were the certificates of shares in a foreign corporation, I should not doubt that it is to the law of England you must look, and not to the law of the United States."

H Lord Watson said, at pp. 276–277:

> "That the interest in the railway company's stock, which possession of these certificates confers upon a holder who has lawfully acquired them, must depend upon the law of the company's domicil, seems clear enough, and has not been disputed by the respondents. But the parties to the various transactions, by means of which the certificates passed from the possession of the respondents into the hands of the appellants, are all domiciled in England; and it is in my opinion

equally clear that the validity of the contracts of pledge between Blakeway and the appellants, and the right of the latter to retain and use the documents as their own, must be governed by the rules of English law."

Lord Bramwell said, at p. 281:

"the shares being of an American company domiciled in one of the United States of America, an act effectual by the law of that state to transfer the property, and no other, would transfer it."

Lord Herschell said, at p. 283:

"I agree that the question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by a reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here."

Four points are clear from that decision. First, there is a dual conflict rule, which allocates some issues to one country and others to another. Secondly, the issue in *Cady's* case was as to who was entitled to the certificates, not as negotiable instruments but as pieces of paper. Thirdly, that issue was to be decided by English law, since the transaction took place here or (*per* Lord Watson) the parties to it were domiciled here. Fourthly, any issue as to the effect of possession of the certificates, or as to how shares could be transferred, should be decided by the law of the company's domicile or (it would seem) its place of incorporation.

I do not find it easy to determine the precise borderline between points three and four in that case, or for that matter between paragraphs (1) and (2) in rule 120 of *Dicey & Morris*. But what is in my judgment clear is that the issue in the present case comes in the second class, and must be decided by the law of New York. It is not an issue as to the validity of a contract between Macmillan and one or other of the defendants; so far as the facts go they had never met each other and there was no contract between them. Nor is there any issue as to the validity of the contract of loan between one of the Maxwell companies and one or other of the defendants, or as to the validity of the pledge as between those parties. The issue is whether, in the words of Lord Bramwell and Lord Herschell, there has been an act effectual by New York law to transfer the property in the shares.

We were referred to a number of transatlantic cases. In some of them the question was decided by the law of the place where the certificates were, apparently on the ground that by the law of the place of incorporation the company was given power to issue certificates having that effect. Subject to that, the preponderance of authority is that the ownership of shares is to be determined by the law of the situs, which for this purpose is the place of incorporation. See *Jellenik v. Huron Copper Mining Co.* (1900) 177 U.S. 1, 13 (United States Supreme Court, Harlan J.); *Disconto-Gesellschaft v. United States Steel Corporation* (1925) 267 U.S. 22, 28 (United States Supreme Court, Holmes J.); *United Cigarette Machine Co. Inc. v. Canadian Pacific Railway Co.* (1926) 12 F. 2d 634, 636; *Pennsylvania Co. for Insurance on Lives and Granting Annuities v. United Railways of Havana & Regla Warehouses Ltd.* (1939)

26 F.Supp. 379, 390; *Morson v. Second National Bank of Boston* (1940) 29 N.E. 2d 19, 20; *Braun v. The Custodian* [1944] 3 D.L.R. 412, 428, [1944] 4 D.L.R. 209, 214; *Hunt v. The Queen* (1968) 67 D.L.R. (2d) 373, 378; *Oliner v. Canadian Pacific Railway Co.* (1970) 34 A.D. 2d 310, 313.

I conclude that an issue as to who has title to shares in a company should be decided by the law of the place where the shares are situated (lex situs). In the ordinary way, unless they are negotiable instruments by English law, and in this case, that is the law of the place where the company is incorporated. There may be cases where it is arguably the law of the place where the share register is kept, but that problem does not arise today. The reference is to the domestic law of the place in question; at one time there was an argument for renvoi, but mercifully (or sadly, as the case may be) that has been abandoned.

Stage 3: the system of law

Whether it be situs, place of incorporation or place of share register, the answer is the law of and prevailing in the State of New York. I therefore agree with the conclusion reached by Millett J., although I have reached it by a somewhat different route. It is unnecessary to pursue the issue as to *where* the relevant events took place, as I have not adopted the lex loci actus. It seems to me that situs and incorporation have the advantage of pointing to one system of law which is very unlikely to be transient, and cannot be manipulated by a purchaser of shares in order to gain priority. If a lender of money chooses to take as security shares in companies incorporated in a number of different jurisdictions, he may have to make different inquiries so as to satisfy himself as to his title. He does not deserve much sympathy on that account—particularly as I do not know whether lenders are particularly diligent in making any inquiries at all.

Subject to what counsel may say, I would answer the preliminary question in these appeals by saying that the issue as to whether the defendants have title to the shares as purchasers in good faith for value without notice of adverse claims should be decided by the law of New York, not including its conflict rules. That in effect involves that the appeals thus far have failed.

AULD L.J. The question between the parties to this appeal is "Who has the better right to ownership of shares in a corporation?" The question in this part of the appeal is "How, in the English conflict of laws, is the applicable law for such an issue to be determined?" Is it a matter of property to be governed by the location of the shares or the incorporation of the company? Or is it to be determined by one or other of the rules governing obligations? If the latter, does it come within the existing rules governing choses in action, or does it form, as Millett J. held [1995] 1 W.L.R. 978, 992, "a special sub-species of chose in action with its own rules?"

Macmillan was a Delaware company controlled by the late Robert Maxwell through Maxwell Communications Corporation Plc. It owned about 55·6 per cent. of Berlitz International Inc., a company incorporated in New York. Mr. Maxwell, contrary to Macmillan's interests, through a series of transfers and other corporate vehicles, agreed in London with Lehman, Crédit Suisse and Swiss Volksbank to pledge Berlitz shares as security for loans made by them to his private interests. The shares were immediately or ultimately transferred to Shearson Lehman as assignee of

Lehman, Swiss Volksbank and Crédit Suisse in New York in accordance with its law. New York law treats the shares in the manner in which they were transferred there as negotiable instruments.

The loan and security transactions were negotiated and concluded in London. Such notice as the banks, as I shall call them, received of Macmillan's interest in the shares, they received in London. Some of the share transfers, namely that to Lehman and part of that to Crédit Suisse, were by way of delivery of share certificates and an executed transfer form in London followed by transfer in New York. Some, that to Swiss Volksbank and part of that to Crédit Suisse, were made directly in New York.

Mr. Maxwell's private interests defaulted on the loans, and there is a dispute between Macmillan and the three banks as to who has the better claim to the Berlitz shares. Macmillan claims that it is the equitable owner. Each of the banks says that at the time of each relevant transfer in New York it was a transferee for value in good faith without notice of Macmillan's interest. Each says that it had no notice, or in Shearson Lehman's case no effective notice under New York law, which affects its entitlement.

As to the applicable law, Macmillan maintains that it is English law because the transactions giving rise to the issue had their closest and most real connection to England. Shearson Lehman and Crédit Suisse contend that New York law applies because it is the law of the country of incorporation of Berlitz. Alternatively, they contend for New York as the lex situs, the place where the shares were. Swiss Volks bank maintains, as the judge held, that the applicable law is the lex loci actus, namely that of New York where the transfer of the shares took place, coinciding in the circumstances with the law of incorporation and the lex situs.

The parties are at odds as to whether it is the claim or the issue that has to be characterised in order to determine the connecting factor for identification of the applicable law. Macmillan says it is the claim; the banks say it is the issue. To add to the problems the parties are also not agreed as to the nature of the transaction giving rise to the claim or the issue.

As to the claim, Macmillan says it is based on obligation not property. It describes it as a restitutionary claim, albeit based on its equitable property in the shares. The banks say that it is a proprietary claim, not one arising out of an obligation since there was no contract or equity between the parties. Millett J., while accepting Macmillan's description of the claim as restitutionary, held that it was the issue that mattered and that it was one of priority of property rights. He held, at pp. 994B, 1011B, that that issue is governed by the lex loci actus, which he described as "the law of the place where the transaction took place on which the later assignee relies for priority over the claim of the original owner"—namely New York where the transfers took place. He also said that he saw no reason in the circumstances to distinguish the lex loci actus from the lex situs or the law of incorporation, because the shares were also in New York, Berlitz's place of incorporation.

I agree that the issue provides the starting point. It is whether each bank can resist Macmillan's equitable claim to return of the shares by showing that it was a bona fide transferee for value without notice and thus acquired an interest in them superior to that of Macmillan. More specifically, the issue is whether the banks can show that they acquired the shares without notice of Macmillan's interest.

A As to the transaction, on Macmillan's approach it was the lending and security arrangements made in London, and the alleged notice there to the banks of Macmillan's prior interest, leading to the transfer of the shares in New York. For the banks, the transaction was solely the transfer of the shares in New York.

Subject to what I shall say in a moment, characterisation or classification is governed by the lex fori. But characterisation or B classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity C between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system: see *Cheshire & North's Private International Law*, 12th ed., pp. 45–46, and *Dicey & Morris*, vol. 1, pp. 38–43, 45–48.

D The dispute about the nature of the issue in this case, whether it is about restitution, stemming from the developing notion of a "receipt-based restitutionary claim" or about property, is a good example of the danger of looking at the problem through domestic eyes. There is a long and growing line of cases, recently comprehensively reviewed by Hobhouse J. in *Westdeutsche Landesbank Girozentrale v. Islington London* E *Borough Council* (1993) 91 L.G.R. 323, indicating a right to restitution flowing from the circumstances of receipt regardless of the knowledge of or notice to the recipient. See also *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 A.C. 548, 570–572, 577–581 *per* Lord Goff of Chieveley and *Royal Brunei Airlines Sdn. Bhd. v. Tan* [1995] 2 A.C. 378, 386 *per* Lord Nicholls of Birkenhead ("Recipient liability is restitution-based . . ."). Charles Harpum, a Law Commissioner, in "Accessory Liability for Procuring or F Assisting a Breach of Trust" [1995] L.Q.R. 545, 546, suggested that the *Royal Brunei Airlines* case vindicates the school of thought that treats receipt-based claims as restitutionary as against that which bases them on equitable wrongdoing.

The "receipt-based restitutionary claim" is a notion of English domestic law that may not have a counterpart in many other legal systems, and is G one that it may not be appropriate to translate into the English law of conflict. In my view, it would wrong to attempt to graft this equitable newcomer onto the class of cases where English courts will intervene to enforce an equity in respect of property abroad. Adrian Briggs made the point, albeit a little more diffidently, in an article prompted by Millett J.'s judgment in this case entitled "Restitution Meets the Conflict of Laws" [1995] R.L.R. 94, 97:

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> "It is a commonplace that conceptual divisions in domestic law do not necessarily translate into the conflict of laws . . . To take a distinction which is struggling to define itself within the domestic law of restitution and then project this into the realm of choice of law may be unwise."

As to land, the normal rule in England is that the lex situs applies to competing claims. See rule 116(3), *Dicey & Morris*, vol. 2, pp. 946,

952–955; and *British South Africa Co. v. Companhia de Moçambique* [1893] A.C. 602 and *Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd.* [1979] A.C. 508. Cf. the position in Canada where the lex fori is said to determine such questions of priority: *Canada Deposit Insurance Corporation v. Canadian Commercial Bank* [1993] 3 W.W.R. 302.

One of the exceptions to rule 116(3), expressed in sub-paragraph (a), is where "the action is based on a contract or equity between the parties:" see *Dicey & Morris*, 12th ed., vol. 2, pp. 952–955; and *Deschamps v. Miller* [1908] 1 Ch. 856, 863 *per* Parker J.; and e.g. *Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 444; *Lord Cranstown v. Johnston* (1796) 3 Ves. 170; *Ex parte Holthausen; In re Scheibler* (1874) L.R. 9 Ch.App. 722; *Paget v. Ede* (1874) L.R. 18 Eq. 118; and *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan and Agency Co.* [1892] 2 Ch. 303, 311, in which an English court ruled that it had jurisdiction to enforce a foreign charge on foreign land against its English owners. Cf. *Norris v. Chambres* (1861) 29 Beav. 246; 3 De G.F. & J. 583, where the court declined jurisdiction to enforce a claimed equitable lien on foreign land sold to a third party with notice. See also *United States Surgical Corporation v. Hospital Products International Pty. Ltd.* [1982] 2 N.S.W.L.R. 766, reversed without consideration of the question of choice of law (1984) 156 C.L.R. 41; and cf. *Webb v. Webb* (Case C-294/92) [1994] Q.B. 696, 716.

Moving from land to other forms of property, my view is that the concept of a "receipt-based restitutionary claim" would not, in any event, provide a firm basis in the circumstances of this case for identifying the appropriate connecting factor. I say that for the following reasons.

First, the importance to Macmillan's case that the claim or issue should be regarded as restitutionary rather than proprietary is its reliance on the tentative *Dicey & Morris*, vol. 2, p. 1471, rule 201(2)(c) that the proper law of a non-contractual obligation relating to moveables arising from unjust enrichment is that of the country where the enrichment occurs. I say "tentative" rule because, as the commentary in *Dicey & Morris*, pp. 1476–1478, makes plain, the authority on which it is said to be based, *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.* [1981] Ch. 105, does not expressly decide it; and the other authorities applying it appear to rest on that insecure foundation. It is true that in *In re Jogia (A Bankrupt)* [1988] 1 W.L.R. 484, 495 Sir Nicolas Browne-Wilkinson V.-C. expressed the view that the rule accorded with the American Restatement and seemed to be sound in principle, but that was a case concerning service out of the jurisdiction under the then R.S.C., Ord. 11(1)(*f*), and his view was obiter. In *El Ajou v. Dollar Land Holdings Plc.* [1993] 3 All E.R. 717, 736 Millett J. relied, without discussion, on the rule and the *Chase Manhattan Bank* case [1981] Ch. 105 as authorities for the proposition that the law governing"receipt-based restitutionary claims" is the law of the country where the defendant received the money. So also did Hwang J.C. in *Hongkong and Shanghai Banking Corporation Ltd. v. United Overseas Bank Ltd.* [1992] 2 S.L.R. 495, 500. At the highest, as Mr. David Oliver, on behalf of Macmillan, put it, there is "a tendency in the cases to endorse *Dicey's* proposition." None of them binds this court, and, as will appear, I do not consider it necessary to express a view on it. In any event, acceptance and application of the proposition would not assist Macmillan on the facts. Such enrichment or benefit as the banks received, they received in New York on the transfer to them there of the shares. I shall return to that aspect in another context in a moment.

A Second, even if *Dicey's* rule is valid, it is difficult to see what unjust enrichment the banks have had, since they gave full value.

Third, even if the facts could support a claim for unjust enrichment, it is the issue that determines the matter. As I have said, it is essentially a proprietary one, whether the banks could defeat Macmillan's interest by establishing that they were bona fide transferees for value without notice. In my view, rule 201(2)(c) has no application to such an issue. It, the B issue, is more within the sphere of the rules governing priority of ownership.

Before I turn to those rules, I should consider the alternative argument of Macmillan that the lex loci actus should govern the matter, namely the law of England, because that is where the transaction took place. As I have said, on Macmillan's approach, the transaction was the lending C and security arrangements made in London, part of which involved the transfer of the shares in New York, the banks deriving the benefit through the documentation in London to secure their title to the shares elsewhere. London also was where the banks received such notice as they did of Macmillan's interest. For the banks, the transaction was solely the transfer of shares immediately or ultimately in New York.

Mr. Oliver cited a number of authorities in support of his submission D that the court should consider the underlying transaction, including: *Rodick v. Gandell* (1852) 1 De G.M. & G. 763; *Holroyd v. Marshall* (1862) 10 H.L.Cas. 191; *In re Queensland Land and Coal Co.*; *Davis v. Martin* [1894] 3 Ch. 181; *Simultaneous Colour Printing Syndicate v. Foweraker* [1901] 1 K.B. 771; and *Swiss Bank Corporation v. Lloyds Bank Ltd.* [1982] A.C. 584.

E Millett J. was driven to reject that submission by his identification of the issue as one of priority of property rights rather than one arising out of an obligation. He accepted [1995] 1 W.L.R. 978, 991 as a general proposition that the governing law should be that which has "the closest and most real connection with the transaction," but stated:

> "It is in order to identify the relevant transaction and to ascertain the law which has the closest and most real connection with it that it is F necessary to undertake the process of identifying and characterising the issue in question between the parties."

He identified the transaction, at p. 994:

> "issues of priority in a case such as the present fall to be determined by . . . the law of the place where the transaction took place on G which the later assignee relies for priority over the claim of the original owner. This does *not* lead to the adoption of English law in respect of every transaction in the present case, as Macmillan contends. The relevant transaction is not the contract to grant security, which affects only the parties to the contract, but the actual delivery of possession or transfer of title which created the security interest on which the particular defendant relies." H

In my view, the judge correctly identified the transaction for this purpose via his identification of the issue. The authorities relied on by Mr. Oliver were all cases where there was privity of contract or some fiduciary relationship between the parties stemming from more than mere receipt of property with notice of another's claim to an interest in it. That is not so here. The negotiations and agreements in England preceding the transfer were not with Macmillan; there was no privity of contract between

the parties, and, apart from the claimed equity which Macmillan relies upon to support its "receipt-based restitutionary claim," no equitable or other fiduciary relationship between them.

The question remains whether Millett J. was correct to take the lex loci actus of the transaction, the transfer, as the means of identifying the applicable law. In general, disputes about the ownership of land and of tangible and intangible moveables, including negotiable instruments, are governed by the lex situs. See, in relation to land: *Norton v. Florence Land and Public Works Co.* (1877) 7 Ch.D. 332; in relation to tangible moveables: *Dicey & Morris,* vol. 2, pp. 965, 967, rule 118, *Cammell v. Sewell* (1860) 5 H. & N. 728, 742–747 and *Winkworth v. Christie Manson and Woods Ltd.* [1980] Ch. 496, 501B, 512–514; in relation to intangible moveables, including negotiable instruments: e.g. *Alcock v. Smith* [1892] 1 Ch. 238, *In re Maudslay, Sons & Field; Maudslay v. Maudslay, Sons & Field* [1900] 1 Ch. 602, 609–610 in which Cozens-Hardy J. expressed the view that the principle of *Norton v. Florence Land and Public Works Co.*, 7 Ch.D. 332 applies to a debt, even though it is a chose in action, because a debt has a "quasi locality," and *Embericos v. Anglo-Austrian Bank* [1904] 2 K.B. 870; [1905] 1 K.B. 677.

Swiss Volksbank, albeit contending for the lex loci actus, maintains that the same principle applies to shares in a company when by the law of the place where they are situate at the time of transfer they are treated as negotiable.

Shearson Lehman and Crédit Suisse contend for the law of incorporation, relying in large part on the commentary to rule 120(2) in the current edition of *Dicey & Morris,* 12th ed., vol. 2, p. 979 that the priority of competing assignments of an intangible thing is governed by the law governing the creation of the thing. Rule 120(2), which reproduces article 12.2 of the Rome Convention on the Law Applicable to Contractual Obligations, states:

> "The law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged."

The commentary, at p. 981, reproducing the former *Dicey & Morris,* 11th ed., rule 123, is:

> "Since the law governing the creation of the right assigned determines the rights and obligations of the debtor that result from the assignment, it must also decide questions of priorities between competing assignments. Thus, if the same right is assigned twice to different assignees, the law under which the right was created decides which assignment prevails."

See also *Cheshire & North,* 12th ed., pp. 811–812, 816.

Millett J.'s view was that such a principle or rule does not apply to the priority of competing claims to interests in the shares of a corporation. He said [1995] 1 W.L.R. 978, 992H that he regarded it as limited to successive assignments by the same assignor of the same debt or fund or other chose in action governed in English domestic law by the rule in *Dearle v. Hall* (1828) 3 Russ. 1. That also appears to be the context in which the editors of *Cheshire & North,* 12th ed., at pp. 811–812, 816 argue, in support of the same proposition.

A As Millett J. observed [1995] 1 W.L.R. 978, 993A–D, none of the authorities cited in support of the old rule 123 concerned the shares in a corporation. *Le Feuvre v. Sullivan* (1855) 10 Moo.P.C. 1 was a dispute about the deposit of a life insurance policy as security for a loan. It contains no statement of principle and is explicable on one of several bases, lex loci actus of the deposit and grant of the security, the law of domicile of the lender or the lex loci actus of the making of the contract B of insurance. *Kelly v. Selwyn* [1905] 2 Ch. 117 concerned an English trust fund created by an English testator with trustees in England, in which the expressed ratio was that the English law applied because it must have been contemplated by the testator that an English court would administer the fund. Two other authorities relied upon by Mr. Charles Aldous, for Shearson Lehman in this context, *In re Queensland Mercantile and Agency* C *Co.; Ex parte Australasian Investment Co.; Ex parte Union Bank of Australia* [1891] 1 Ch. 536; [1892] 1 Ch. 219 and *In re Maudslay, Sons & Field* [1900] 1 Ch. 602, do not appear to me to throw any light on the subject where, as here, the competing claims do not result from successive assignments or dispositions by the same person. And, as Millett J. also noted, the rule in *Dearle v. Hall,* 3 Russ. 1 does not apply to dealings by the owner of shares in an English company.

D Accordingly, I agree with Millett J. that former *Dicey & Morris*, 11th ed., rule 123 is not a suitable route for selecting the applicable law in this case.

In my view, there is authority and much to be said for treating issues of priority of ownership of shares in a corporation according to the lex situs of those shares. That will normally be the country where the register E is kept, usually but not always the country of incorporation. If the shares are negotiable the lex situs will be where the pieces of paper constituting the negotiable instruments are at the time of transfer. As to the law determining negotiability, the views of *Dicey & Morris,* 12th ed., vol. 2, p. 1420 and *Cheshire & North*, 12th ed., pp. 523 and 823 are that it is determined by the law of the country where the alleged transfer by way of "negotiation" takes place, namely where the instrument is at the time. The F logical result is that beneficial ownership is extinguished by an act of transfer recognised in the jurisdiction in which it occurs. See *Goodwin v. Robarts* (1875) L.R. 10 Ex. 337; affirmed (1876) 1 App.Cas. 476; *Picker v. London and County Banking Co. Ltd.* (1887) 18 Q.B.D. 515; and *London Joint Stock Bank v. Simmons* [1892] A.C. 201. As negotiability is just a step on the way to determining situs for this purpose, the reasoning may G appear, in the abstract, to be circular. However, it should be an obvious enough exercise when applied to the facts of most cases. And, in my view, there is judicial support and good common sense for it and for treating the lex situs of shares at the time of the last relevant transfer as the applicable law in disputes about priority.

The judicial support is to be found in *Alcock v. Smith* [1892] 1 Ch. 238, 255 *per* Romer J.; affirmed in the Court of Appeal—see, in H particular Lopes L.J., at p. 266; *Embericos v. Anglo-Austrian Bank* [1904] 2 K.B. 870; affirmed [1905] 1 K.B. 677; and *Koechlin et Cie v. Kestenbaum Brothers* [1927] 1 K.B. 889. See also *Picker v. London and County Banking Co. Ltd.*, 18 Q.B.D. 515.

The common sense of determining negotiability according to the lex situs and of treating the lex situs of the last relevant transfer as the applicable law in priority disputes is, first, that it treats shares as other property, situate at and subject to the law of the place where they are at

the time of the transaction in issue. Second, it provides certainty in cases of successive or competing assignments in different countries, also a characteristic of the law of incorporation. That is so even where, according to the lex situs, some other law, say that of the country of incorporation, applies. It may be burdensome in a single transaction involving transfers of parcels of shares in a number of countries to have to check the law of the place where each is at the time of transfer. However, that requirement, which is a matter of common commercial prudence, applies to all the tests of applicability contended for in this appeal.

I, therefore, conclude that the shares are in the same position as chattels and that the dispute as to priority of ownership of them should be determined by the law of New York as the lex situs.

That, in my view, is enough to dispose of the matter. However, I should not leave the matter without referring to the decision of the House of Lords in *Colonial Bank v. Cady and Williams* (1890) 15 App.Cas. 267 and to some North American authorities.

Cady's case was a case in which the London brokers of owners of shares in a New York company dishonestly deposited the (non-negotiable) share certificates with banks in London to secure a loan. In a dispute between the share owners and the banks, the latter claiming to have no notice of the dishonesty, the House of Lords held that if it had to decide whether the matter was governed by New York or English law it would have held that English law applied, but that, as the law of New York and England on the issue appeared to be the same, there was no need to determine the matter.

The dispute was as to the validity of the transfer of the share certificates, not in the event as to priority of ownership of the shares. Lord Halsbury L.C. and Lord Watson, in common with Cotton, Lindley and Bowen L.JJ. in the court below, 38 Ch.D. 388, appear to have preferred English law because the property in issue was the share certificates in London not the shares in New York. Lord Bramwell and Lord Morris did not consider it necessary to express a view. Both Lord Watson and Lord Herschell, however, distinguished between the formal requirements of, and contractual rights connected with, the transfer of shares, the former being governed by the law of incorporation, the latter by the place of the transaction. Lord Watson distinguished between ownership of the shares and rights deriving from ownership of the share certificates representing them. He said as to the latter, 15 App.Cas. 267, 277–278:

> "delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner."

Lord Herschell said, at p. 283:

> "I agree that the question, what is necessary or effectual to transfer the shares . . . or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by a reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here."

The case supports the proposition that where there is delivery of possession of property, in that case certificates, the law of the country

where the property was at the time of delivery governs the question whether the transferee is entitled to retain them as against the true owner. As to the shares themselves, the remarks of Lord Watson and Lord Herschell were not, and had no need to be, directed at the law of incorporation as distinct from the law of situs; there, as in this appeal, they were the same. To the extent, if at all, that those remarks point to the former rather than the latter, they were obiter.

As to the North American jurisprudence, it provides support for the law of incorporation, and also, by derivation, for the lex situs where the law of incorporation makes or permits transfer of shares elsewhere. It also distinguishes, as did the House of Lords in *Cady's* case, between shares and non-negotiable share certificates evidencing them. As to the latter, see e.g. *Disconto-Gesellschaft v. United States Steel Corporation* (1925) 267 U.S. 22, 28—an expropriation case in which Holmes J. in the United States Supreme Court said, in a dispute as to title to share certificates: "the question who is the owner of the paper depends upon the law of the place where the paper is." As to the combined operation of the law of incorporation and lex situs where the former makes the shares assignable in other countries, see *Pennsylvania Co. for Insurance on Lives and Granting Annuities v. United Railways of Havana & Regla Warehouses Ltd.* (1939) 26 F.Supp. 379, a decision of the United States District Court for the District of Maine, and *Morson v. Second National Bank of Boston* (1940) 29 N.E. 2d 19, a decision of the Supreme Judicial Court of Massachusetts. As to the primacy of the law of incorporation where it does not permit the shares to be assigned elsewhere, see, as a starting point, *Jellenik v. Huron Copper Mining Co.* (1900) 177 U.S. 1. That was a decision of the Supreme Court of the United States in which the shares were situate in the state where the company was incorporated. The other cases cited to us were in the main expropriation cases, namely: *United Cigarette Machine Co. Inc. v. Canadian Pacific Railway Co.* (1926) 12 F. 2d 634; *Braun v. The Custodian* [1944] 3 D.L.R. 412; [1944] 4 D.L.R. 209, note *per* Thorson J. at p. 421, distinguishing between title to the property in the share and that in the share certificate; *Brown, Gow, Wilson v. Beleggings-Societeit N.V.* (1961) 29 D.L.R. (2d) 673; *Oliner v. Canadian Pacific Railway Co.* (1970) 34 A.D. 2d 310; see also *Hunt v. The Queen* (1968) 67 D.L.R. (2d) 373, a succession duty case.

For my part, I do not derive much direct assistance from the North American jurisprudence. However, it confirms the distinction between shares and share certificates where the latter are non-negotiable and, overall, it is as consistent with selection of the lex situs as of the law of incorporation as the applicable law to disputes about the ownership of shares.

In the preliminary question for decision before us, we are concerned with the transfer of shares in New York, not the transfer of share certificates in England, the distinction made in *Cady's* case, 15 App.Cas. 267 and many of the North American cases. For the reasons I have given, my view is that the applicable law for determination of the issue of priority of ownership of those shares is the domestic law of New York because it was the lex situs of the shares at the time of transfer. It so happens, on the facts, that it was also the law of incorporation and of the lex loci actus. Accordingly, I would reject Macmillan's submission on the preliminary issue, but for different reasons than those given by Millett J.

ALDOUS L.J. Macmillan appeal from an order of Millett J. in an action in which they were the plaintiffs and the relevant defendants were Shearson Lehman Bros. Holdings Plc., Swiss Volksbank and Crédit Suisse. The action was concerned with shares in a New York company called Berlitz International Inc. The shares in question had been owned by Macmillan, but were transferred into the name of Bishopsgate Investment Trust Plc., which held those shares on trust for Macmillan under an agreement governed by New York law. In breach of that trust agreement, Bishopsgate Investment Trust Plc. pledged the shares to the defendant banks in consideration of loans. After default, and after the collapse of the Maxwell organisation, the action was started to recover the shares. Macmillan claimed restoration of the shares, but that was resisted by the defendants, who contended that they were the owners of the shares and their title had priority over any claim of Macmillan because they were bona fide purchasers for value without notice of the legal estate in the shares. They also contended that the question of whether they had notice should be determined according to New York law, the reason being that under New York law the test is actual knowledge or suspicion and deliberate abstention from inquiry lest the truth be discovered; whereas under English law it is sufficient if the purchaser had reason to know or cause to suspect.

The judge concluded that the question as to whether the defendants were bona fide purchasers for value of the legal estate without notice should be decided pursuant to New York law and applying that law he held that the defendants' right to the shares in Berlitz ranked in priority to the equitable title of Macmillan. Macmillan believe the conclusion of the judge to be wrong and appealed, but we were only concerned with the issue as to what was the appropriate law to apply to decide whether the defendants were bona fide purchasers for value of the legal estate without notice, and in particular whether the appropriate law was English or New York law.

The facts

Before the court the parties accepted, for the purposes of the hearing only, the facts as found by the judge, not all of which are relevant to the matters before this court. I will therefore only provide a summary of the facts to set the background against which the decision of law can be decided.

Mr. Robert Maxwell and his family controlled a large and complex web of private companies and trusts which were referred to as "the private side." One of those companies was Bishopsgate Investment Trust Plc. Maxwell Communications Corporation was not part of the private side, but was controlled by the Maxwell family. It acquired the shares of Macmillan in 1988. Berlitz is a company incorporated under the law of New York. It was a wholly-owned subsidiary of Macmillan at the time that Macmillan was taken over by Maxwell Communications Corporation. Subsequently, 44·4 per cent. of Berlitz common stock was offered for sale to the public and thereafter the shares were listed and traded on the New York Stock Exchange. The rest of the shares were held by Macmillan and were represented by a single share certificate in its name. In October 1990 the single stock certificate representing 10·6m. Berlitz shares was cancelled and was replaced by nine certificates, subsequently 21, in the name of Bishopsgate Investment Trust Plc. Bishopsgate Investment Trust Plc. held those shares upon trust for Macmillan, but there is no doubt that the

purpose of obtaining the transfer of the shares to Bishopsgate Investment Trust Plc. was to enable money to be raised for the private side, which was contrary to the interests of Macmillan. At the beginning of 1991, 7·6m. of the 10·6m. Berlitz shares were placed in the transfer system in operation in New York called the D.T.C. system. The letters D.T.C. refer to the Depository Trust Co., which is a company organised as a depository for shares. It accepts securities for deposit which are then credited to the account of the depositing participant in the scheme. When shares are deposited the certificates are returned to the company's transfer agents and cancelled. The shares are then registered in the name of CEDE & Co., which is a nominee of D.T.C., and a fresh certificate is issued in CEDE's name. Thus in March 1991 the certificate representing 7·6m. shares in Berlitz in the name of Bishopsgate Investment Trust Plc. was cancelled and CEDE & Co. was recorded as the owner of those shares, which it held as nominee for D.T.C., who in turn held them on behalf of the depositing company. The remaining shares were retained and the certificates were held in London.

Shearson Lehman

Lehman Bros. International Ltd. is an associate company of the second defendant Shearson Lehman. It entered into an agreement dated 3 November 1989 pursuant to which it lent Treasury Bills to Bishopsgate Investment Management Ltd. in return for the deposit of collateral. The Berlitz shares in question formed part of that collateral. They were deposited in three tranches on 30 November 1990, 31 December 1990 and 27 September 1991 respectively. The first tranche consisted of a certificate relating to 500,000 Berlitz shares endorsed as to 370,000 to Lehman Bros. That share certificate was delivered to, and held by, Lehman Bros. in London. The second tranche consisted of two endorsed certificates for 500,000 shares respectively which were also delivered and held in London. After a review of security, Lehman Bros. deposited the three share certificates in the D.T.C. system. Pursuant to that deposit 1·37m. shares in Berlitz were registered in the name of CEDE in July 1991 and held to the order of Bankers' Trust, the agents acting for Lehman Bros. The third tranche consisted of two endorsed certificates for 500,000 and 130,000 Berlitz shares. They were delivered in London to Lehman Bros., which forwarded them to New York for incorporation into the D.T.C. system. That took place on 16 October 1991.

On 29 October 1991 Lehman Bros. sought return of the Treasury Bills lent to the Maxwell organisation. On 5 November 1991 Mr. Robert Maxwell was reported missing at sea and on 6 November 1991 Lehman Bros. served formal notice of default and on the same day sold to Shearson Lehman the Berlitz shares that they held. That sale was completed on 4 December 1991 and Shearson Lehman was registered as owner of the shares on the Berlitz register in place of CEDE.

Swiss Volksbank

Swiss Volksbank, the second defendant, is a Swiss company which has offices in London and New York. In 1991 it held 1m. shares in an Israeli company as security for a loan to one of the private side Maxwell companies. On 11 October 1991 Mr. Kevin Maxwell requested release of those shares so that a sale could be completed. Swiss Volksbank agreed to that upon substitution of 2·4m. Berlitz shares as security. Those shares

were part of the D.T.C. holding and the relevant transfer within the D.T.C. was completed by 13 November 1991. After demand for payment, Swiss Volksbank enforced its security by buying the shares from itself. The shares were withdrawn from the D.T.C. system on 4 December 1991 and Swiss Volksbank was registered as the owner of the shares on 6 December 1991 and a new certificate to that effect was issued.

Crédit Suisse

Crédit Suisse is a company incorporated in Switzerland. In 1990 it approved the grant to one of the Maxwell private side companies of a £50m. facility secured against a portfolio of shares. To secure that facility a single endorsed certificate in respect of 500,000 Berlitz shares was deposited with Crédit Suisse in London on 27 September 1991. On 8 November 1991 a further 1m. shares in the D.T.C. system were offered as security and the appropriate transfer was completed on 13 November. Crédit Suisse made a formal demand for repayment on 5 December 1991. Thereafter solicitors acting for Macmillan demanded return of the shares and Crédit Suisse was joined in this action on 13 December. On 16 December 1991 Crédit Suisse undertook not to transfer, sell, charge or otherwise dispose of or deal with the Berlitz shares that it held. As Crédit Suisse was not prepared to continue that undertaking until trial, ex parte relief was sought and granted on 25 January 1992. On 13 April 1992 Hoffmann J. refused to continue the injunction. Thereafter Crédit Suisse arranged for the 1m. shares held to its benefit to be withdrawn from the D.T.C. and registered in a nominee company owned by it. It also arranged for the nominee company to become the registered owners of the other 500,000 shares that were covered by the certificate held in London. Since the action started all the shares in Berlitz have been sold to a Japanese company with the agreement of the parties. That is irrelevant to the issue before us as the parties accept that the dispute is to be decided upon the pleadings.

The issue

In the amended statement of claim, Macmillan plead that since the end of 1989 they have been entitled to 10·6m. shares of Berlitz stock; that they remain the beneficial owners of the shares and are entitled to the share certificates and the dividends and that the defendants hold their Berlitz shares on constructive trust for them. Macmillan claim a declaration that they remain and still are beneficially entitled to the shares, a declaration that the defendants hold their Berlitz shares on constructive trust for the plaintiffs and inquiries as to compensation, damages for breach of trust and conversion and ancillary relief. The defences vary, but as now amended each defendant pleads how it came into possession of its shares and claims that it is entitled to the shares as a bona fide purchaser for value of the legal estate without notice of any right of Macmillan. The defendants also allege that the relevant law to decide that issue is the law of New York.

Before us and before the judge, Macmillan submitted that the appropriate law to decide whether the defendants were bona fide purchasers of the legal estate without notice was English law. Macmillan submitted that their claim was based upon a restitutory obligation and that the law to be applied was English law as that was the law of the place where the benefit was received. They submitted that the benefit was the

A security which was the subject of negotiation in London and was supplied in London. Thus it was submitted that rule 201(2)(c) of *Dicey & Morris,* vol. 2, p. 1471 applied:

> "(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation. (2) The proper law of the obligation is (semble) determined as follows: (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract; (b) If it arises in connection with a transaction concerning an immoveable (land), its proper law is the law of the country where the immoveable is situated (lex situs); (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."

The defendants submitted that the dispute between the parties concerned the title to the shares and in particular it was a dispute as to whether the plaintiffs or the defendants had the better title. That being so, New York law applied. However, the defendants did not agree as to the reason why New York law applied. Counsel for Shearson Lehman and Crédit Suisse submitted that New York law applied because the appropriate law was the law of incorporation of Berlitz, the lex situs. Swiss Volksbank on the other hand submitted that the appropriate law was that of lex loci actus, being the law of the place where the transaction on which the assignee relied for priority over the claim of the original owner took place. That submission was accepted by the judge, who held that the place where the transaction took place was the place of actual delivery of possession or transfer of title which created the security interest on which the particular defendant relied. Thus, as the shares claimed by Shearson Lehman and Swiss Volksbank were transferred in New York, New York law applied.

It must be remembered that Crédit Suisse was in a slightly different position to the other defendants in that at the date of the writ it still held a certificate in London and thus at that time the lex loci actus was English law. After the injunction was lifted, the shares were registered in New York in the name of a Crédit Suisse nominee with the result that New York law became the lex loci actus.

Characterisation

As appears from the second chapter of *Dicey & Morris,* 12th ed., vol. 1, pp. 34–47 the problem of characterising which judicial concept or category is appropriate is not easy, but it is a task which is essential for the court to complete before it can go on to decide which system of law is to be used to decide the question in issue. In this case, the court's task is made easier as the parties are agreed that the characterisation of the issue is to be determined according to English law.

Macmillan submitted that their claim was in essence a claim for the performance of an obligation by the defendants to restore their property or the proceeds or the value of the property. That, it was said, was a claim in equity for restitution. That is true, but to succeed it involves establishing a number of facts, including that they owned the shares and that they were transferred to the defendants in breach of trust. The reply of the defendants is that the shares are registered in their names and they were bona fide purchases for value without notice.

The issue between the parties concerns the title to the shares and, in particular, whether Macmillan or the defendants have the better title. The

issue is one of priority. I agree with the judge when he said [1995] 1 W.L.R. 978, 988: "In order to ascertain the applicable law under English conflict of laws, it is not sufficient to characterise the nature of the *claim*: it is necessary to identify *the question at issue.*" Any claim, whether it be a claim that can be characterised as restitutionary or otherwise, may involve a number of issues which may have to be decided according to different systems of law. Thus it is necessary for the court to look at each issue and to decide the appropriate law to apply to the resolution of that dispute. The judge concluded, at p. 990: "In my judgment the defendants have correctly characterised the issue as one of priority." I agree, but believe it right to add what is implicit in that statement, namely that the issue is one of priority of title to shares in Berlitz. Those shares are in the nature of choses in action. They give to the registered holder the rights and liabilities provided by the company's documents of incorporation as governed by New York law. The issue between the parties concerns the right to be registered as the holder of the shares and therefore entitled to the rights and liabilities stemming from registration or the right to registration.

Mr. Oliver, who appeared for Macmillan, referred us to a number of cases concerning restitutionary claims, mainly in respect of money paid under a mistake or obtained by fraud. None of them seemed to me to be relevant, once it is appreciated that the issue in the present case concerns priority to the title of the shares and in particular the property represented by the shares. As Sir Nicolas Browne-Wilkinson V.-C. pointed out in *In re Jogia (A Bankrupt)* [1988] 1 W.L.R. 484, 495 different considerations apply to quasi-contractual obligations relating to money to those where the obligation relates to an immoveable:

> "As at present advised, I am of the view that quasi-contractual obligations of this kind arise from the receipt of the money. I find it difficult to see how such obligation can be said to be 'made' or 'arise' in any place other than that of the receipt. As to the proper law, *Dicey & Morris, The Conflict of Laws*, 10th ed. (1980), p. 921 expresses the view that, save in cases where the obligation to repay arises in connection with a contract or an immoveable, the proper law of the quasi-contract is the law of the country where the enrichment occurs. This accords with the American Restatement and seems to me to be sound in principle."

The applicable law

I cannot agree with the plaintiffs' submission that rule 201 of *Dicey & Morris* applies. That rule is concerned with what has been called unjust enrichment, not a case like the present where the defendants gave value for the shares and the dispute is whether the legal titles they obtained have priority over that of the plaintiffs. Further, in so far as the defendants have obtained any benefit or enrichment, it was the legal titles to the shares which were obtained in New York. It follows, if rule 201(2)(c) were to be applied, there is a strong case for concluding that New York law was the applicable law.

Macmillan went on to submit that, whether or not the issue between the parties should be characterised as restitutionary, the appropriate system of law to resolve the issue was that which had the closest and most real connection with the issue. That, Macmillan submitted, was English law because in every case the agreement under which the shares were

A provided as security was negotiated in London, the loans were repayable in London and the benefit, the shares, were received in London. The transaction must be considered as a whole and, if so, the bulk of the transaction took place in London. Thus, it was said, English law is the lex loci actus and should be applied to the transaction as a whole.

The judge dealt with that submission. He said [1995] 1 W.L.R. 978, 991:

B

> "It is impossible to quarrel with the contention that the governing law should be the law which has 'the closest and most real connection with the transaction.' In the present case, however, the incantation of the formula is not particularly helpful. It is merely to state the question, not to solve it. It is in order to identify the relevant transaction and to ascertain the law which has the closest and most
> C real connection with it that it is necessary to undertake the process of identifying and characterising the issue in question between the parties."

He went on to conclude that the issue which he had characterised as one of priority should be determined by the lex loci actus. He said, at p. 994:

> D "This does *not* lead to the adoption of English law in respect of every transaction in the present case, as Macmillan contends. The relevant transaction is not the contract to grant security, which affects only the parties to the contract, but the actual delivery of possession or transfer of title which created the security interest on which the particular defendant relies."

E I agree with the view expressed by the judge in the extracts I have just quoted. In any case, it is important to remember that none of the defendants had any dealings with Macmillan. Thus there was no transaction between Macmillan and the defendants. The issue being one of priority, the law having the closest and most real connection must be New York law. That is the law which governs the right in dispute, namely the right to be placed on the register.

F As I have said, Shearson Lehman and Crédit Suisse submitted that the issue should be decided by the law of incorporation, namely New York law. They submitted that rule 120(2) of *Dicey & Morris* was determinative. It is in this form:

> "The law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and
> G the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged."

That rule does not equate to the facts of this case as the rule is directed to determination of issues between assignors and assignees and, by implication where shares are involved, the company whose shares have
H been assigned. In the present case the issue is one of priority in circumstances where there is no legal relationship between the parties claiming the shares. In any case I have no doubt that the transferability of shares in a corporation, the formalities necessary to transfer them and the right of the transferee to be registered on the books of the corporation as the owner of the shares are all governed by the law of incorporation. That was the conclusion of the judge, at p. 992D. It is also a conclusion supported by the judgments of the Court of Appeal and the speeches of

the House of Lords in *Williams v. Colonial Bank* (1888) 38 Ch.D. 388; (1890) 15 App.Cas. 267. In that case English executors of a holder of shares of an American company signed blank transfers to enable them to be registered as holders of the shares. Their brokers fraudulently deposited the share certificates with the defendant bank as security for advances. The brokers subsequently became bankrupt and the executors sought the return of the share certificates. It was concluded both by the Court of Appeal and by the House of Lords that in the absence of attestation by a consul, the transfers were not in order and therefore they did not give the bank title to the shares. The pertinent conclusions to this case can be derived from two extracts from the speeches of the House of Lords. Lord Halsbury L.C. said, at p. 272:

> "My Lords, if it were necessary to consider what law must govern, as between these parties, the right to these certificates on the one hand, and the right to detain them as pledged for the money advanced on them on the other, though the certificates themselves were the certificates of shares in a foreign corporation, I should not doubt that it is to the law of England you must look, and not to the law of the United States."

Lord Watson said, at pp. 276–277:

> "That the interest in the railway company's stock, which possession of these certificates confers upon a holder who has lawfully acquired them, must depend upon the law of the company's domicil, seems clear enough, and has not been disputed by the respondents. But the parties to the various transactions, by means of which the certificates passed from the possession of the respondents into the hands of the appellants, are all domiciled in England; and it is in my opinion equally clear that the validity of the contracts of pledge between Blakeway and the appellants, and the right of the latter to retain and use the documents as their own, must be governed by the rules of English law. In the application of these rules the appellants are, of course, entitled to the benefit of any privilege which the law of America attaches to possession of these documents, as conferring right or title to the property of the shares."

The judge rightly concluded [1995] 1 W.L.R. 978, 997:

> "In my judgment that case is authority for the following propositions: (i) the formal validity of a transfer of shares in a foreign corporation must be determined by the law of incorporation; (ii) the rights, if any, in the shares of a foreign corporation, conferred by the lawful possession of the share certificates, must be determined by the same law; but (iii) where the certificates are delivered into the possession of the holder in England, the prior question whether he is entitled to retain possession of them against the claim of the true owner must be determined by English law."

However, he went on to say, at p. 997:

> "In my judgment the case is clear authority in favour of the lex loci actus and against the application of the law of incorporation for the purpose of deciding questions of priority while the transfer remains unregistered."

He also concluded that the application of the law of incorporation to the issue of priority of title in the shares was contrary to principle and

A authority, in particular *Cady's* case, 15 App.Cas. 267. I believe that that latter statement was not correct. The question of priority was not before the court in *Cady's* case nor was the question as to what law determined the rights to the shares as opposed to the right to the share certificates.

The judge also considered that there was persuasive authority in foreign cases to suggest that the appropriate law to apply when deciding the issue of priority was that of lex loci actus. For myself, I am of the B view that the authorities indicate, rather than decide, that the appropriate law to apply when deciding whether one party has a better title to shares is the lex situs, that being the law of incorporation.

In *Braun v. The Custodian* [1944] 3 D.L.R. 412 Thorson J., sitting in the Exchequer Court of Canada, gave judgment in a case where an American citizen had purchased in Germany from an enemy alien shares C in the Canadian Pacific Railway Co. Those shares were registered and transferred into his name in New York. The Canadian custodian of enemy property claimed the shares. It was contended on behalf of the American citizen that the order vesting the shares in the custodian was a nullity on the grounds that the situs of the shares was in New York because the transfers were registered there and therefore the shares were not property in Canada and consequently not subject to the jurisdiction of the Canadian D legislation. After citing *Cady's* case, 15 App.Cas. 267, Thorson J. concluded that there was a difference between the property in the share certificates and the property in the shares themselves. He said [1944] 3 D.L.R. 412, 428:

> "It is, I think, a sound rule of law that the situs of shares of a company for the purpose of determining a dispute as to their E ownership is in the territory of incorporation of the company, for that is where the court has jurisdiction over the company in accordance with the law of its domicile and power to order a rectification of its register, where such rectification may be necessary, and to enforce such order by a personal decree against it. It is at such place that the shares can be effectively dealt with by the court. The Canadian Pacific Railway was incorporated in Canada under the law F of Canada and is governed by it and, under such law, is subject to the jurisdiction of the Canadian courts. The situs of the shares in dispute for the purposes of the present case is, therefore, in Canada and they constitute property in Canada."

It is true that Thorson J. was not dealing with a question of priority G of rival claims to shares, but he was concerned with rival claims and concluded the appropriate law was the law of incorporation. If that be right, as I believe it to be, then it would be odd to apply a different system of law to resolving claims to title in which the issue was concerned with priority to title to that applicable where the issue was whether a particular person had any title at all.

Braun's case was followed in *Hunt v. The Queen* (1968) 67 D.L.R. (2d) H 373, where the Supreme Court of Canada held that, for the purpose of execution, the property in shares was situated at the place of incorporation.

In *Braun's* case [1944] 3 D.L.R. 412, 426 Thorson J. referred to *Jellenik v. Huron Copper Mining Co.* (1900) 177 U.S. 1, a case decided in the U.S. Supreme Court. The decision is mainly concerned with whether the suit of the plaintiffs could proceed in the absence of the defendants. The suit was brought in the Circuit Court of the United States for the Western District of Michigan by parties who were citizens of other states against the

Michigan Mining Corporation and certain individuals holding shares in that corporation being citizens who resided in Massachusetts. The plaintiffs claimed that they were the real owners of certain shares of the company which were held by the Massachusetts defendants and sought a decree to that effect. Harlan J., who gave the judgment of the court, said, at p. 13:

> "But we are of opinion that it is within Michigan for the purposes of a suit brought there against the company—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicil of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner. This principle is not affected by the fact that the defendant is authorised by the laws of Michigan to have an office in another state, at which a book showing the transfers of stock may be kept."

That judgment also indicates that shares are property which is situated in the country of incorporation and it is the law of that country which should be applied when determining questions of ownership.

A similar conclusion was reached by Manton J. giving the judgment of the Circuit Court of Appeal, Second Circuit, in *United Cigarette Machine Co. Inc. v. Canadian Pacific Railway Co.* (1926) 12 F. 2d 634. In so doing he cited, at p. 636, this passage from the judgment of Holmes J. in *Disconto-Gesellschaft v. United States Steel Corporation* (1925) 267 U.S. 22, 28:

> "Therefore New Jersey having authorised this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognises as owner anyone to whom the person declared by the paper to be owner has transferred it by the endorsement provided for, wherever it takes place. It allows an endorsement in blank, and by its laws as well as by the law of England an endorsement in blank authorises anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books. But the question who is the owner of the paper depends upon the law of the place where the paper is."

That quotation was cited by Millett J. [1995] 1 W.L.R. 978, 998. However, Manton J. in his judgment drew a distinction between owning the paper and owning the rights attaching to the shares. The latter as he made clear was to be governed by the law of Canada, being the law of incorporation. Thus his judgment like the others to which I have referred suggests that the appropriate law to apply when deciding the ownership of the shares as opposed to the ownership of the certificates is the law of incorporation.

Judgments to a similar effect were given by District Judge Peterson in *Pennsylvania Co. for Insurance on Lives and Granting Annuities v. United Railways of Havana & Regla Warehouses Ltd.* (1939) 26 F.Supp. 379 and the Supreme Judicial Court of Massachusetts in *Morson v. Second National*

Bank of Boston (1940) 29 N.E. 2d 19. In that case the court had to decide whether a testator had prior to his death made a valid gift in circumstances where the share certificates were handed over in Italy and were subsequently endorsed. It was argued that the validity of the gift had to be judged by the law of Italy and that as certain formalities required by Italian law had not been observed there had been no transfer of ownership of the shares. The court held that there had been a valid gift according to the law of incorporation and therefore property passed. In the judgment of the court the following was said, at pp. 20–21:

> "Doubtless it is true that whether or not there is a completed gift of an ordinary tangible chattel is to be determined by the law of the situs of the chattel. . . . Shares of stock, however, are not ordinary tangible chattels. A distinction has been taken between the shares and the certificate, regarded as a piece of paper which can be seen and felt, the former being said to be subject to the jurisdiction of the state of incorporation and the latter subject to the jurisdiction of the state in which it is located. . . . The shares are part of the structure of the corporation, all of which was erected and stands by virtue of the law of the state of incorporation. The law of that state determines the nature and attributes of the shares. If by the law of that state the shares devolve upon one who obtains ownership of the certificate it may be that the law of the state of a purported transfer of the certificate will indirectly determine share ownership. . . . But at least when the state of incorporation has seen fit in creating the shares to insert in them the intrinsic attribute or quality of being assignable in a particular manner it would seem that that state, and other states as well, should recognise assignments made in the specified manner wherever they are made, even though that manner involves dealing in some way with the certificate. Or the shares may be regarded for this purpose as remaining at home with the corporation, wherever the certificate may be—much as real estate remains at home when the deeds are taken abroad."

The English authorities to which we were referred did not involve questions of priority to shares. However they do in my view tend to support the proposition that the appropriate law to apply in this case is the law where the property is situated, namely the law of incorporation or lex situs. In *Norton v. Florence Land and Public Works Co.* (1877) 7 Ch.D. 332 a company with an office in London and property in Florence raised money by the issue of "obligations" purporting to bind the property. Subsequently, by a mortgage in Italian form, the company mortgaged the property to an Italian bank with a London office which had notice of the "obligations." The bank took proceedings in Florence to enforce the mortgage and the holders of the "obligations" sought to restrain the sale of the property claiming priority over the bank. The court refused to interfere. Sir George Jessel M.R. said, at pp. 336–337:

> "The answer is very simple. It depends on the law of the country where the immoveable property is situated. If the contract according to the law of that country binds the immoveable property, as it does in this country, when for value, that may be so, but if it does not bind the immoveable property, then it is not so. You cannot by reason of notice to a third person of a contract which does not bind the property thereby bind the property if the law of the country in which the immoveable property is situate does not so bind it. That

would be an answer to the claim so far as regards the notion that mere notice would do." A

Clearly the facts of that case are very different to the present; but shares are property in the nature of a chose in action which is immoveable in the sense that it remains at the place of the company's incorporation. Thus the reasoning of Jessel M.R. would suggest that the title to the shares in this case, the title to the chose in action, should depend upon B whether the defendants were bona fide purchasers for value without notice according to the law of incorporation: that being the law where the property is situated.

In *In re Maudslay, Sons & Field; Maudslay v. Maudslay, Sons & Field* [1900] 1 Ch. 602 it was held that the existence of a valid charge according to English law did not entitle a debenture holder to prevent a company who was an unsecured creditor from enforcing rights given to it by French C law. The reason given by Cozens-Hardy J. was that the question of whether there was an equity in favour of the debenture holders had to be answered according to the law of the debt, which was where the debt was situated. Thus, as French law allowed recovery, the debenture holders had no prior equity. Again the facts are very different, but the decision is consistent with the view that the appropriate law to apply in deciding D questions of title is the law of the place where the property in dispute is situated. In the present case that is the law of incorporation, namely New York law.

In *Kelly v. Selwyn* [1905] 2 Ch. 117 Mr. Selwyn, who was domiciled in New York, assigned to his wife his reversionary interest under his late father's will. To be a completed assignment, a notice to the trustees was not required under New York law. Three years later he assigned the same E interest by way of mortgage to the plaintiff, who gave notice to the trustees. Thereafter, Mrs. Selwyn gave notice to the trustees and the question arose as to whether her claim had priority. Warrington J. held that, as the trust fund was an English trust fund, the question of priority was governed by English law and therefore the plaintiff's claim had priority. Thus the judge looked at the lex situs of the property in the same F way as in the United States cases to which I have referred looked to the law of incorporation to decide questions of title in respect of shares.

As a matter of principle I believe the appropriate law to decide questions of title to property, such as shares, is the lex situs, which is the same as the law of incorporation. No doubt contractual rights and obligations relating to such property fall to be determined by the proper law of the contract. However, it is not possible to decide whether a person G is entitled to be included upon the register of the company as a shareholder without recourse to the company's documents of incorporation as interpreted according to the law of the place of incorporation. If that be right, then it is appropriate for the same law to govern issues to title including issues as to priority, thus avoiding recourse to different systems of law to essentially a single question. Further, it is to the courts of that H place which a person is likely to have to turn to enforce his rights.

The conclusion that the appropriate law is the law of incorporation is, I believe, also consistent with the general rule relating to moveables and land. In both cases the courts look to the law of the place where the moveable or land is situated. Further, the conclusion that it is the law of incorporation which should be used to decide questions of title, including questions as to priority of title, does, I believe, lead to certainty as

A opposed to applying the lex loci actus which can raise doubt as to what is the relevant transaction to be considered and where it takes place. That is particularly so in modern times with the explosion of communication technology. The conclusion is, I also believe, consistent with the trend of authority both in this country and abroad.

Although Swiss Volksbank submitted that New York law applied, it sought to support the conclusion of the judge that the appropriate law B was the lex loci actus, being the law of the place where the transfers took place. Swiss Volksbank accepted that the dispute should be characterised as one relating to priority of title to the shares. It submitted that this issue should be decided by the principle that the applicable law was that of the place where the property was situated as the time of the transfer. If so, following cases to which I have referred, you would expect it to have C submitted that the appropriate law was the law of incorporation. Not so. Counsel submitted that under New York law the shares were negotiable instruments and therefore the place where the property was situated was the place of transfer. That, it submitted, was in New York where the shares passed through the D.T.C. system.

In the present case the submissions of Swiss Volksbank arrive at the same conclusion, namely that New York law applies, but that will not D necessarily be the result in every case. That is demonstrated by the facts of *Braun v. The Custodian* [1944] 3 D.L.R. 412. For myself, I would reject the submission that the situs of the rights and liabilities which are the subject of the shares is the place where they are transferred. I believe that the property the subject of shares is situated at the place of incorporation, even though that property can be validly transferred and traded in other E places. That being so, I conclude the submissions of Swiss Volksbank are based on a misconception, namely that the property the subject of the shares can be situated in a number of countries and the appropriate law to determine title to that property is the law of the country where the transfer takes place.

Although I have concluded that the law applicable to the resolution of the dispute is the law of incorporation and not that of the lex loci F actus, the result is the same as New York law is the law of both places. That is the law for which the defendants contend and is the law applied by the judge. It follows that the submissions of the plaintiff should in my view be rejected and I would dismiss the plaintiff's appeal on the question before this court.

G *Appeal on preliminary issue dismissed with costs.*
Leave to appeal refused.

Solicitors: Herbert Smith; Freshfields; Watson Farley & Williams; Clifford Chance.

H [Reported by JILL SUTHERLAND, Barrister]

TAB 65

***1 Raiffeisen Zentralbank Sterreich AG v. An Feng Steel Co. Limited & Others**
Case No A3/2000/2385, Neutral Citation Number: [2001] EWCA CIV 68
Court of Appeal (Civil Division)
26 January 2001

2001 WL 14955

Before: Lord Justice Aldous Lord Justice Mance and Mr. Justice Charles
Friday 26th January, 2001

Analysis

On Appeal from QBD (Longmore J.)

Representation

- Alexander Layton QC & Michael Davey (instructed by Messrs Howard Kennedy for the Respondents).
- Jeffrey Gruder QC (instructed by Messrs Stephenson Harwood for the Appellants).

JUDGMENT
***2**
LORD JUSTICE MANCE:

Introduction and facts

1. This appeal from a judgment of Longmore J. now reported at [2000] 2 Ll.R. 684 concerns rival attempts to obtain the benefit of the proceeds of claims arising under an English law marine insurance policy placed by Dubai owners of the vessel Mount I with French insurers. The insurance claims arise out of a collision between the Mount I and the ICL Vikraman. The Respondent is an Austrian mortgagee bank claiming as assignee of the benefit of the insurance. The Appellants are Taiwanese companies, who, as owners of cargo on the ICL Vikraman, have obtained provisional attachment orders in France against any insurance proceeds.

2. The appeal raises at least one moot issue of private international law. The judge was warned that he was being set an examination question on the applicable law. We have to consider the judge's response, conscious that our own may itself be reviewed. Although a central issue involves the scope of the Rome Convention (given the force of law in the United Kingdom law under the Contracts (Applicable Law) Act 1990), there is, as yet, no court to which such an issue may be referred to ensure a uniform international interpretation.

3. The collision occurred in the Malacca Straits on 26 th September 1997. The ICL Vikraman vessel sank, with the tragic loss of life of her 29 crew, and also loss of her cargo. The Appellants, who are the Eleventh to Fifteenth Defendants in the proceedings, claim as owners of cargo of the ICL Vikraman and on the basis that the Mount I was responsible for the collision. The Mount I was on a voyage from Singapore to India or Bangladesh for scrapping. She had been purchased for this purpose by the First Defendants, Five Star General Trading L.L.C. ("Five Star"), a Dubai company. To enable her purchase and scrapping, the Respondent, the Claimant in the proceedings, Raffeisen Zentralbank Oesterreich AG ("RZB"), through its London branch, had agreed on 16 th September 1997 to lend Five Star up to US$3,760,219. The facility letter of that date required as a condition of drawdown the provision of, inter alia, a mortgage over the vessel, the insurance policies and other documents relative to the insurance effected on her, an assignment of such insurances ("in such form as the Bank may require") and notice of such assignment duly signed.

4. The mortgage executed on the next day under the laws of St. Vincent and the Grenadines included further extensive provision regarding insurance. The vessel was to be and remain insured against marine risks (for her full market value and in any event not less than 120% of the loan), entered in a protection and indemnity association or club, insured against oil pollution risks and insured against excess and war risks (clause 5.1). RZB was to approve in advance the markets with which such insurances were placed, and Five Star was not to alter their terms without RZB's prior written consent and was to supply RZB "from time to time on request and at least annually (sic)" with such information as RZB might require regarding the insurances (clause 5.3). Five Star was to procure letters of undertaking from the brokers or P & I associations or clubs in such form as RZB might approve (clause 5.6). By clause 5.7 Five Star agreed that, at any time after the occurrence or during the continuation of an event which was (or would be with notice, or the passage of time or the satisfaction of any materiality test) an Event of Default as defined, RZB should be entitled to collect, sue for, recover and give a good discharge for all claims in respect of the insurance, and by clause 5.11 it was agreed:

> "In the event that any sums shall become due under any protection and indemnity entry or insurance, such sums shall be paid to the Owners to reimburse them for, and in discharge of, the loss, damage or expense in respect of which such sums ***3** shall have become due PROVIDED THAT if at the time such sums become due, there shall have occurred and be continuing an Event of Default or any event which, with the giving of notice and/or the passage of time and/or the satisfaction of any materiality test would constitute an Event of Default, the Mortgagees shall be entitled to receive such sums and to apply them either in reduction of the indebtedness or, at the option of the Mortgagees, to the discharge of the liability in respect of which they were paid."

5. The Deed of Assignment dated 17 th September 1997 dealt with insurance in different terms. Five Star thereby purported to "assign absolutely and unconditionally and agree to assign to the Bank all their right, title and interest in and to the Insurances" (clause 2.1) and undertook to give notice to the insurers in a form recording that it had "assigned absolutely to [RZB] all insurances effected or to be effected in respect of the above vessel, including the insurances constituted by the policy whereon this notice is endorsed, including all moneys payable and to become payable thereunder or in connection therewith (including returns of premium" (clause 2.3.2 and Appendix A). However, by clause 2.3.4 Five Star also covenanted that it would procure that a loss payable clause in the form of Appendix B (or such other form as RZB might approve) or in the case of P & I entries a note of RZB's interest in such form as RZB should approve should be endorsed upon or attached to the relevant policies and that letters of undertaking in such form as RZB should approve would be issued to RZB by the brokers. The terms of the form of loss payable clause contemplated by Appendix B are set out later in this judgment. The Deed was entered into in London and made expressly subject to English law and to the jurisdiction of the English courts as regards "any disputes which may arise out of or in connection with [it]". Finally, also on 17 th September 1997 Five Star signed a notice of the absolute assignment of the insurances in favour of RZB in the form of Appendix A.

6. As from 17 th September 1997, the vessel was insured by Five Star for US$4.8 million (or 125% of the market value of the vessel as scrap at the time of sailing, whichever was less)

against total loss only. The policy terms further conferred protection and indemnity cover in terms of clause 9 of the Institute Time Clauses Hulls Port Risks (20/7/87) with certain amendments and, most importantly in this case, cover in respect of collision liability in terms of clause 6 of the Institute Voyage Clauses — Hulls — Total Loss (1/10/83) with amendments to read as follows:

> "6.1 The Underwriters agree to indemnify the Assured for four-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for:
>
> 6.1.1 loss of or damage to any other vessel or property on any other vessel …."

7. The insurers were the Second to Tenth Defendants, companies incorporated and carrying on business in France ("the insurers"). The Second and Tenth Defendants were joint leaders for the purposes of the insurance. The insurance was placed through C. E. Heath (Insurance Broking) Ltd. (U.A.E. Office) ("C. E. Heath") who in turn used sub-brokers, Philmar Assurances S.A. ("Philmar") of Paris. It was on terms evidenced by these brokers' cover notes dated respectively 15 th and 22 nd September 1997. By such terms the insurance was expressly subject to English law. On 19 th September 1997 RZB's solicitors, Stephenson Harwood, wrote to C. E. Heath asking that RZB's interest be noted on the policy. By fax on 7 th October 1997 Philmar sent a memorandum to the two leaders, enclosing a copy of Five Star's notice of assignment to RZB dated 17 th September 1997 together with a draft policy memorandum No. 2, by which it was "further noted and agreed to register interest of RZB Bank as Mortgagee on vessel "MOUNT I" with effect from 17 th September 1997, and corresponding Notice of Assignment is attached". The Second Defendants ***4** agreed to this memorandum by fax on 10 th October 1997. Despite the terms of clause 2.3.4 of the Deed of Assignment, the notice of assignment given to the insurers was, so far as appears, given in unqualified terms. No clause along the lines of Appendix B was attached to it or ever endorsed upon or attached to the policy or any cover note or certificate.

8. After the collision of 26 th September 1997, the Mount I was arrested in Malaysia by the owners of the ICL Vikraman. She was later sold by order of the Malaysian court. Her

sale realised US$3,082,805 which is presently held by the Malaysian court. The substantive issue of liability for the collision is being litigated in Malaysia by both vessels' owners and the Appellants. We were told by Mr Gruder QC for RZB that, under Malaysian law, third party claimants such as the Appellants will, if successful in establishing liability on the part of Five Star, take priority over RZB's claim as mortgagees as against the Malaysian fund. However that may be, the Appellants evidently do not regard the Malaysian fund as sufficient to satisfy all their claims. They have obtained from the Tribunal de Commerce of Paris five orders dated between 9 th October to 6 th November 1997. These orders authorised *saisies conservatoires* or, as I may call them, preventive attachments in respect of proceeds of the insurance, by way of security for the Appellants' claims against Five Star. Thus, the specimen order put before us (relating to the 14th and 15thDefendants' claims) authorised such Appellants:

> "to carry out a seizure of all sums in the hands of [the insurers] held for the account of Five Star General Trading … in their capacity as owner of the vessel "MOUNT I" for security and conservation of their [i.e. the arrestors] maritime lien which we value provisionally at the principal sum of $2,685,005.63 or the equivalent in French Francs"

9. The bailiff's order notifying the insurers of the attachments in favour of the 14th and 15th Defendants related specifically to "sums owed by you to the debtors: Five Star … Owner of the vessel "MOUNT I". It advised insurers that "the present order freezes the sums which you hold for the account of the debtor [i.e. Five Star]", and requested the insurers to inform the bailiff of the sums held for the debtor's account. It went on:

> "Any third parties whose property has been seized are required to declare to the Applicants the extent of the debtor's claims against them, the extent of any future modes of enforcement which might come to affect these claims and the existing satisfaction of any claims, the existing assignment of any debts or the existence of prior Orders."

10. Since the hull and machinery insurance on the Mount I was total loss only, the insurance's only relevance may well lie in the potential claims under the collision liability cover. Mr Gruder QC said (without contradiction from Mr Layton QC for the Appellants) that it is the Appellants' probable aim (a) to receive the Malaysian fund, (b) to treat such receipt as a payment pro tanto of their claims, so triggering the insurers' liability under the collision liability cover to indemnify Five Star in a like amount and then (c) relying on the French attachments, to seek payment of that amount also, up to the amount of their full loss. This plan, if successful, would ensure that the Appellants received payment in respect of their full loss, before RZB as mortgagee received any sum at all.

The present proceedings

11. On 25 th October 1997 RZB started the present proceedings in the Commercial Court. The claim recites the relevant facts, and claim four declarations, in summary: (1) that notice of the ***5** assignment dated 17 th September was validly given to the insurers and that the assignment took effect as a legal assignment under s.136 of the Law of Property Act 1925 on 19 th September 1997; (2) that as from 17 th September 1997 Five Star had no right, title and interest in and to the vessel's insurances, particularly that with the insurers; (3) that as from 17 th September 1997, RZB had all right, title and interest in such insurances; and (4) that all monies payable by the insurers arising out of the casualty are payable to RZB and not to Five Star. The claim was served on Five Star and on the insurers, in each case by consent through their solicitors, on 28 th October 1997.

12. On 12 th November 1997 RZB applied for permission to serve a concurrent copy of the claim form and particulars of claim out of the jurisdiction on the Appellants in Taiwan. Permission was sought on the primary basis that the Appellants were necessary and proper parties to the claims brought against and duly served on Five Star and the insurers, and on the alternative bases that the claims were to enforce Five Star's contract of assignment to RZB, which had been made in England, was by its terms governed by English law and contained a term conferring jurisdiction on the English courts to hear and determine any action in respect of the assignment. Permission was granted by order dated 17 th November 1997. Service was effected, and acknowledged on 6 th January 2000 with a statement of intention to contest jurisdiction. On 19 th January 2000 the Appellants through their solicitors gave notice that they no longer intended to contest jurisdiction, but intended to defend; they entered a further acknowledgement of service accordingly.

13. On 1 st February 2000 RZB verified its claim through Mr Foord of Stephenson Harwood and applied for summary judgment, on the basis that the Appellants had on the evidence no real prospect of successfully defending the claim. By witness statement of their solicitor, Ms O'Keefe, and by defence served 30 th March 2000, the Appellants took issue with this. The defence denies that the notice of assignment was valid and binding on the Appellants. It alleges that the notice's validity "with respect to third parties is governed by French law, being the law of the country of domicile of the insurers"; that by art 1690 of the French Civil Code an assignment is not binding on third parties unless notice is served on the debtor (i.e. the insurers) by a bailiff; that this did not occur; that the Appellants had "attached in France the insurances and/or the proceeds thereof, to which [Five Star] are or were entitled"; that "the effect of the attachment as a matter of French law is that entitlement to the insurances and/or the proceeds thereof is frozen as at the date of attachment and [RZB] are not entitled thereafter to serve notice of the assignment through a bailiff"; and, in the premises that the Appellants are not bound by the assignment, and, further, that Five Star remained the insured under the policy. Alternative allegations are made that the assignment was made by way of security and, in the light of the loss payable clause, that it did not operate to divest Five Star of its beneficial interest or its entire such interest.

14. Ms O'Keefe's statement records advice from a M. Nicolas of the Appellants' French lawyers on French law. According to this advice, unless and until RZB serve notice through a bailiff, the Appellants as "third parties" are entitled to proceed against the insurances and their proceeds as the property of the assignor, Five Star; further, the attachments prevent any payments of the insurance proceeds and preclude service of notice through a bailiff. The Appellants have subsequently amplified their case on French law by producing an opinion from Prof. Emeritus Philippe Malaurie of the University of Panthéon-Assas (Paris II). He sets out art. 1690 :

> "The assignee is only *saisi* in relation to third parties through notification of the assignment to the debtor (" *signification de transport faite au débiteur* ").
>
> Nevertheless, the assignee may also be *saisi* by acceptance of the assignment in the form of a legal deed, passed in front of a *Notaire* . (" *l'acceptation du transport faite par le débiteur dans un acte authentique* ")"

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15. Prof. Malaurie is more specific than the defence or M. Nicolas. According to his opinion, "third parties" within art. 1690 does not refer to "persons who are completely strangers to the assignment, the *penitus extranei* ". The position of such persons, he indicates, would be governed by art. 1165 , whereby

> "agreements are only valid between contracting parties: they cannot harm third parties and they may profit from them only in the case provided for in Article 1121".

16. Rather, "third parties" in art. 1690 includes both (a) the assigned debtor, i.e. here the insurers, and (b) those deriving title from the assignor, e.g. "another assignee or, as in this case, a creditor of the assignor, whether or not he has executed an enforcement measure, such as an attachment, on the claim". Prof. Malaurie also says that, when a claim has been assigned without fulfilment of the formalities provided by art. 1690 , the assignor and the assignee become joint and several creditors of the debtor, and both may claim payment; but that, once due notice has been given, the claim no longer belongs to the assignor who can therefore no longer claim. He adds that, although the Cour de Cassation's jurisprudence was that only those attachments ordered prior to due notice of the assignment took priority, by a law on civil execution proceedings dated 9 th July 1991 (in force since 1 st January 1993), priority in such a case was also conferred on any subsequently ordered attachments. These statements of French domestic law are not admitted. But, for the purposes of the present appeal we must, like the judge below, take them as accurate. It is clear, however, that they relate to situations all aspects of which are subject to French law.

The order under appeal

17. The application for summary judgment came before Longmore J. on 11 th May 2000. On 26 th May 2000 he handed down judgment in favour of RZB. By his order of the same date he declared, in relation to the first declaration claimed, that notice of the assignment

contained in the Deed dated 17 th September 1997 had been validly and effectively given to the insurers. In relation to the remaining three heads, he granted declarations as sought.

18. Longmore J. started by seeking to characterise the issues. His initial analysis suggested that the issues arising from claims (1) and (4) were contractual, while those arising from claims (2) and (3) were proprietary. But he concluded that the "real" question was whether RZB "can invoke, as against the insurers, the assignment to them of the contract of insurance". On that basis, in his view, article 12(2) of the Rome Convention , as scheduled to the Contracts (Applicable Law) Act 1990 , provided the key to identification of the applicable law. English law, governing the contract of insurance, was thus the law by which to determine whether RZB had a good claim against the insurers.

The issue(s)

19. I turn to the opposing analyses of the issue. In RZB's submission, the issue is whether the insurance contract, and/or the right to claim unliquidated damages from insurers for failure to pay under it, was effectively and validly assigned by Five Star to RZB. This, in its submission, is a contractual issue. The judge was therefore right in his general approach. The Appellants, in contrast, maintain that the relevant issue concerns the validity against "third parties" of an assignment of an intangible right of claim against insurers. In support of their analysis, the Appellants submit that the dispute is essentially between RZB as purported assignee and the Appellants, who attached the insurance claim and have no other nexus, let alone contractual, with ***7** anyone. So viewed, the dispute in their submission raises an essentially proprietary issue, to be resolved by the *lex situs* of the attached debt, that is by French law. Under French law, they submit, their attachment prevails over RZB's assignment in the absence of any bailiff's notification or debtor's acceptance by *acte authentique* .

20. These opposing analyses both assume that the factual complex raises only one issue and, in their differing identification of that issue, emphasise different aspects of the facts. In my judgment a more nuanced analysis is required. This can be demonstrated by a chronological approach. Prior to 9 th October 1997 there was no attachment or competing claim to any insurance monies at all. On 7 th October 1997 notice of assignment was given by fax by the sub-brokers to the insurers. From 7 th to 9 th October 1997, the only persons with any conceivable right to claim or receive sums payable under the insurance were Five Star and/or RZB. The first issue for consideration raised by the parties' opposing cases is whether, in the light of the assignment and notice and apart from any attachment, the right or title to such

claim and sums as against the insurers was and is in RZB or Five Star (or both). This is an issue concerning the effect on insurers' liability under the contract of insurance of Five Star's voluntary assignment to RZB (coupled with RZB's notice of such assignment to insurers).

21. If, consequent on such assignment and notice, RZB acquired no right or title to any insurance claim arising, the matter ends there. But, even if RZB had such right and title from 7 th to 9 th October 1997, it is possible to conceive of a second issue, arising from 9 th October 1997. That is whether the Appellants' attachments of any insurance claim in France override such right and title, or, putting the point the other way around, whether the Appellants as attachors are bound to recognise the transfer of Five Star's right or title to RZB. This second issue (if it arises at all — see below) concerns the effect (involuntary as regards all three contracting parties) of the preventive attachments obtained by third parties (the Appellants) in the French courts.

22. If each of these issues now arises before us, it is our task to identify and apply the appropriate law to decide each in turn. But in Mr Gruder's submission, we are only concerned, at least at this stage, with the first issue. He points out that the attachments were obtained on the basis that any insurance claims on the insurers belonged to Five Star. On this basis, he submits, all that RZB would need to demonstrate is that, applying the appropriate law, the insurers had by 9 th October 1997 become liable to pay any insurance claims to RZB, and not Five Star. No-one has produced evidence to show that, if this issue were to be decided in RZB's favour, the French attachments could still apply, or that any second issue would remain. Prof. Malaurie's opinion addresses French domestic law in purely domestic factual situations, and is predicated upon the first issue being decided by reference to French law. If all parties were French residents and the insurance claims arose under a French law policy, art. 1690 would mean that (without a bailiff's notification or debtor's acceptance by *acte authentique*) RZB would n0***o***t acquire the sole right and title in respect of the insurance claim, even as against the insurers, and would not (therefore) be able to assert any right or priority in relation to attachment creditors of Five Star like the Appellants. Art. 1690 is thus a provision limiting both the passing from Five Star to RZB of the right and title to sue the insurers and so the effect on (other) third parties. But, if the issue of entitlement to the insurance monies, as between the insurers, Five Star and RZB, falls to be referred to English law, and if, applying that law, RZB acquired the sole right and title to the insurance claim and proceeds as against Five Star and the insurers on 7 th October 1997, then there is nothing in Prof. Malaurie's opinion to suggest that, under French law, the attachments could override this position. On the other hand, it is right to add that there is also nothing positive to assist us as to what attitude French law would take in this situation. Nor, before us, did Mr Layton's

submissions address any further issue discretely. Mr Layton's consistent submission was that the validity of the assignment was for all purposes ***8** referable to French law, against both the insurers prior to 9 th October 1997 and the Appellants thereafter.

23. I note the terms of the judgment dated 18 th October 2000 by the Juge de l'Execution of the Tribunal de Grande Instance de Paris, granting to the insurers a stay, of proceedings brought by the Appellants and other cargo interests, pending resolution of the present proceedings. She drew attention to the nature of RZB's claim in England and the fact that English jurisdiction had not been contested, and expressed the view that the "cause" and "objet" of the present proceedings and those brought before the French court were identical. This is at least consistent with the possibility that the resolution of the first issue may be regarded in France as determinative of the whole matter.

24. Mr Gruder did not however submit that we could, on the information before us, rule out the possibility of any further or separate argument on the lines of the second issue altogether. He said that it will, if it ever arises, have to be identified and dealt with later. In these circumstances and in the light of the way in which this case has been presented and argued on both sides, it seems to me that we must proceed on the basis for which Mr Gruder submits. If there is any scope at all for any second issue, after determination of the first issue identified above, that second issue will have to be identified and considered separately, whether in these or in the French proceedings. This means however that the scope of any declarations should be appropriately limited.

25. I turn to the first issue. The parties' respective positions have already been stated. They throw up a choice between the proper law of the insurance and the *lex situs* of the insurance claim. But a proper legal analysis cannot depend exclusively upon the legal systems for which two parties happen to contend in their own partisan interests. The jurisprudential and academic material which we have been shown indicates the existence of other possible candidates — such as the law of the assignor's place of residence or business and the law governing the contract of assignment — which may need to be kept in mind.

Principles governing identification of the appropriate law

26. Both parties accept that, at common law, the identification of the appropriate law may be viewed as involving a three-stage process: (1) characterisation of the relevant issue; (2)

selection of the rule of conflict of laws which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue: see Macmillan Inc. v. Bishopsgate Investment Trust Plc [1996] 1 WLR 387 , 391–2 per Staughton LJ. The process falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum, here England.

27. While it is convenient to identify this three-stage process, it does not follow that courts, at the first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most *appropriate* law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage 2, if this is necessary to achieve the overall aim of identifying the most appropriate law (cf also Dicey & Morris on The Conflict of Laws, 13 th Ed. paragraph 2–005). That is implicit in the discussion in academic texts of the appropriate law by which to judge the validity of voluntary assignment: see e.g. Dicey at paragraph 24–049, Cheshire and North's Private International Law (13 th Ed.) at page 957–8 and articles by P.J. Rogerson "The Situs of Debts in the Conflict of Laws — Illogical, Unnecessary and ***9** Misleading" (1990) CLJ 441 and M. Moshinsky "The Assignment of Debts in the Conflict of Laws" (1992) 109 LQR 591 . So also, Professor Sir Roy Goode, while generally favouring as the appropriate law the lex situs of the debt assigned, prefers the law of the assignor's place of business in the context of global assignments of receivables, e.g. by factoring or discounting: cf Commercial Law (2 nd Ed.) p.1128).

28. The three-stage process identified by Staughton LJ cannot therefore be pursued by taking each step in turn and in isolation. As Auld LJ said in Macmillan , at page 407:

> "… the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence. *This requires a parallel exercise in classification of the relevant rule of law* . However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too

> narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system …" (emphasis added).

29. There is in effect an element of inter-play or even circularity in the three-stage process identified by Staughton L.J. But the conflict of laws does not depend (like a game or even an election) upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations.

30. England, in common with France, is party to and has incorporated into its domestic law the principles of the Rome Convention . This led before us to abstract argument about whether an assignee's right or title to claim under the contract involves a question of contract or of (intangible) property. Viewing the issue of RZB's right or title to sue the insurers as involving a dispute about property, albeit intangible, the Appellants submit that all issues relating to property are subject to the lex situs of the relevant property; and that here that means French law, since the claim is on insurers resident in France. RZB in contrast submits that the case involves a dispute about contractual rights, the right to sue the insurers, and that the relevant law is, under article 12(2) of the Rome Convention , that governing the insurance contract.

31. Article 12 provides:

> • 1 The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between assignor and assignee.
> • 2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged."

32. The Appellants emphasise that the Rome Convention is concerned with the law applicable to contractual obligations. The Guiliano-Lagarde report, which (under s.3(3) of the Contracts (Applicable Law) Act 1990) "may be considered in ascertaining the meaning or effect of any provision of that Convention", states in its commentary on article 1 (scope of the Convention): ***10**

> "First, since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions. An Article in the original draft had expressly so provided. However, the Group considered that such a provision would be superfluous in the present text, especially as this would have involved the need to recapitulate the differences existing between the various legal systems of the Member State of the Community."

33. National courts must clearly strive to take a single, international or "autonomous" view of the concept of contractual obligations, that is not blinkered by conceptions — such as perhaps consideration or even privity — that may be peculiar to their own countries. Further — and perhaps particularly so when the search is for an autonomous international view — the man-made concepts of contractual obligations and proprietary rights are neither so clear nor so inflexible that they may not receive shape from the subject matter and wording of the Convention itself.

Application of principles to present case

34. Approaching the present issue on this basis, I confess to an initial impression that the case fits readily into a contractual, and less readily into a proprietary, slot. The dominant theme influencing the modern international view of contract is party autonomy. Parties are free to determine with whom they contract and on what terms. They are free to cancel or novate their contracts and make new contracts with third parties. A simple issue whether a contractual claim exists or has arisen in these situations cannot be regarded as an issue about property, however much an acknowledged contractual right may be identified as property in certain other contexts. An issue whether a contract has been novated appears to me essentially

contractual. Under a contract which, from its outset, purports to confer on a third party a right of action, an issue whether the third party may enforce that right appears to me again essentially contractual. An issue whether, following an assignment, the obligor must pay the assignee rather than the assignor falls readily under the same contractual umbrella.

35. The Appellants seek to redescribe the issue, as being whether the title to the right of suit or cause of action which formerly vested in the assignor was vested in or was now owned by the assignee. In this way they seek to give the issue a proprietary aspect. However, it is unclear why it is necessary to talk of "title to the right", or to focus on its transfer from assignor to assignee, rather than upon the simple question: who was in the circumstances entitled to claim as against the debtor? The artificiality seems to me to be underlined at the next stage of the argument, which seeks to refer any dispute about title to sue to the place where the "property" consisting of such title is "situated" (see below).

36. Mr Layton relies upon various factors as supporting a categorisation of the issue as involving property rights. He argues that there should be a single rule for all types of property, tangible and intangible. The rationale of the characterisation of issues as proprietary, and of the rule of English law referring such issues to the lex situs, is that control of property is exercisable at the place it is sited. In the case of intangible property, English law has, for various purposes (e.g. inheritance) traditionally allocated to it a situs at the place of the debtor's residence. This is on the basis that the debtor is there directly subject to the coercive power of the courts to enforce the obligation. The location of a right of action in this or any way is, however, evidently artificial. Parenthetically, I add that "coercive power" would itself appear to be an unstable international concept, capable of widely differing interpretation — indeed, a "power theory" forms the basis on which American courts exercise and recognise *long-arm* jurisdiction, which may extend to allow personal jurisdiction in respect of overseas defendants having "minimum contacts" in the form of ***11** acts directed to the forum (cf Kevin M. Clermont on Jurisdictional Salvation and the Hague Treaty (1999) 85 Cornell L.R. 89).

37. Modern conditions underline the artificiality of selecting supposed control at the debtor's residence as an appropriate basis for characterisation or choice of the relevant law to determine questions regarding the validity or effect as against the debtor of an assignment. Jurisdiction may be grounded on consent and various other bases apart from residence. Obligations are commonly enforced today not against the person, but against assets. Debtors often trade or hold some or even all of their assets overseas. Proceedings are as a result often begun and enforced against debtors in countries other than that of their residence

(as in this case). The move towards single legal markets, like those involving countries party to the Brussels and Lugano Conventions, makes judgments readily exportable between countries. Even at the world level, with the Preliminary Draft Convention on Jurisdiction and Judgments in Civil and Commercial Matters adopted for further negotiation in the context of the Hague Conference on Private International Law, there is the ambition, at least, of greater legal coherence. To my mind, the "control" or coercive power over a debt which may be exercised by the courts of a debtors' residence is not a persuasive reason either for treating a debt as property in the present context or for looking to the law of the place of the debtor's residence to determine the effect of an assignment as between the assignee and the debtor.

38. Advocates of a proprietary view themselves acknowledge that the application of the lex situs cannot provide a satisfactory solution in all cases. Thus, they accept that in cases of global assignments (e.g. under factoring or discounting arrangements) it may well not be appropriate to adopt a rule which would make the validity of assignment depend upon consideration of the residence of each debtor and lex situs of each debt assigned: see Commercial Law (2 nd Ed.) by Prof. Sir Roy Goode at page 1128 (cited above) and The Assignment of Debts in the Conflict of Laws by M. Moshinsky (1992) 109 L.Q.R. 591 , 613. Prof. Goode and Mr Moshinsky both favour the law of the assignor's residence as the applicable law in such cases. In the present case it happens that all the co-insurers were French resident companies. But this is by no means typical in international insurance business. Under a typical co-insurance involving insurers from different countries, the lex situs rule could require the separate consideration of each of a large number of different laws of the situs, with a view to determining separately, as regards each insurer's proportionate share, the validity of a purported assignment of insurance proceeds. That would undermine the general intention (evident in the present case in the leading underwriter provisions) that there should be a homogeneous treatment of insurance underwriting and claims, despite the ultimate limitation of each insurer's financial liability to its own proportionate share.

39. Mr Layton submits that a proprietary analysis is appropriate, because any assignment diminishes the assignor's assets to the potential detriment of its creditors; and that the lex situs ought to determine the validity of any such assignment. This argument may have force in relation to physical assets in the apparent ownership of an assignor in his country of residence. But, it also demonstrates why it is not necessarily appropriate to attempt an analogy between physical assets and intangible rights. Whether a person has acquired or retains contractual rights is a matter about which creditors are (especially in modern business conditions) often unlikely to know anything.

40. Mr Layton argues that the application of the lex situs in cases of voluntary assignment would be consistent with its application in cases of involuntary assignment (such as In re Queensland Mercantile and Agency Co. [1891] 1 Ch. 536 ; aff'd [1892] 1 Ch. 219 , to which I return below). But consensual and non-consensual situations are, in their nature, quite different, and it is neither surprising nor even inconvenient, if the differences lead to the application of different laws.

***12**

41. Mr Layton next submits that any potential assignee or a third party can without difficulty consider the lex situs in order to assess the validity of any assignment. The submission assumes knowledge about the original contract and the assignment. Assuming such knowledge, the same submission can be made in favour of either the proper law of the obligation assigned or, indeed, the proper law of the assignor's place of business.

42. For his part, Mr Gruder suggests that a contractual analysis is assisted by the consideration that a claim against indemnity insurers sounds in damages for failure to hold the insured harmless: cf e.g. The Italia Express (No. 2) [1992] 2 Ll.R. 292 . A claim for damages for breach of contract must, he submits, be essentially contractual. But the consideration to which Mr Gruder refers has itself an artificial and peculiarly domestic flavour about it, and I find it of no assistance to the exercise of characterisation in a broad internationalist spirit which has here to be undertaken.

43. In my view, there is a short answer to both characterisation and resolution of the present issue as between the insurers, Five Star and RZB. It is that article 12(2) of the Rome Convention manifests the clear intention to embrace the issue and to state the appropriate law by which it must be determined. Article 12(1) regulates the position of the assignor and assignee as between themselves. Under article 12(2) , the contract giving rise to the obligation governs not merely its assignability, but also "the relationship between the assignee and the debtor" and "the conditions under which the assignment can be invoked as against the debtor", as well as "any question whether the debtor's obligations have been discharged". On its face, article 12(2) treats as matters within its scope, and expressly provides for, issues both as to whether the debtor owes monies to and must pay the assignee (their "relationship") and under what "conditions", e.g. as regards the giving of notice.

44. Mr Layton submits that this is to read article 12(2) too comprehensively. In his submission, the "relationship" between debtor and assignee merely refers to their relationship under the contract, *provided* there has been an effective passing of property; the reference to

"conditions" under which the assignment can be invoked merely refers to any *contractual* conditions, which must be satisfied before any assignment will be recognised; it says nothing again about the general requirement that there should have been an effective *passing of property* ; and that requirement must be further satisfied in each case by reference to the lex situs of the relevant property.

45. To my mind, however, these submissions by Mr Layton postulate a most unlikely thought process on the part of the draughtsmen of the Convention, and a misleadingly drafted article. Article 12(1) concentrates on its face on the contractual relationship between assignor and assignee. In contrast, there is no hint in article 12(2) of any intention to distinguish between contractual and proprietary aspects of assignment. The wording appears to embrace all aspects of assignment. If the draughtsmen had conceived that the basic issue, whether and under what conditions an assignee acquires the right to sue the obligor, could involve reference to a quite different law to either of the two mentioned in article 12(1) and (2) , one would have expected them to say so, if only to avoid confusion. Further, on Mr Layton's case, it is unclear why the draughtsmen troubled to refer so explicitly in article 12(2) to the relationship of the parties and the conditions under which the assignment could be invoked against the debtor. It seems self-evident that an assignee could not succeed to any other relationship with the debtor than that established by the contract assigned, and that he could not avoid any conditions prescribed by that contract. I note that, in an interesting article "The proprietary aspects of ***13** international assignment of debits and the Rome Convention, Article 12 " (1998) LMCLQ 345 , 354 by Prof. Teun H.D. Struycken of Nijmegen University, the writer suggests that

> "Article 12(2) is not about the person to whom the debtor owes the debt nor about who has the right to demand payment, but only about the conditions on which the creditor — either assignor or assignee, depending on whether there has been a valid and effective transfer of ownership — may exercise the right to demand payment, whether notice to the debtor is required, and about the contractual aspects of the obligation to pay such as the terms, the place and the time of payment, and the possibilities of set-off, and the like. It is also about the conditions under which there is a valid discharge of the debtor, i.e. about bona fide payment to the wrong person"

46. On this basis, as Prof. Struycken acknowledges at p. 358, it would follow that the debtor always enjoys not merely the protection of the proper law of the obligation assigned, but also "the additional benefit of the law governing the debt he owes" in other words the benefit of any "additional defence from the law governing the proprietary aspects" (which Prof. Struycken suggests should be identified with the law of the assignor's place of residence). This highlights the double hurdle, which would, on Mr Layton's case, apply and the extent to which article 12 would then have to be regarded as presenting a partial and misleading picture.

47. The Guiliano-Lagarde report states bluntly under article 12 that:

> "The words "conditions under which the assignment can be invoked" cover the conditions of transferability of the assignment as well as the procedures required to give effect to the assignment in relation to the debtor."

48. That, in my judgment, is a compelling indication that (whatever might be the domestic legal position in any particular country) the Rome Convention now views the relevant issue — that is, what steps, by way of notice or otherwise, require to be taken in relation to the debtor for the assignment to take effect as between the assignee and debtor — not as involving any "property right", but as involving — simply — a contractual issue to be determined by the law governing the obligation assigned.

49. While there is, as yet, no international court to which issues of construction of the Rome Convention may be mandatorily referred, we have had our attention drawn to a limited number of cases in other European jurisdictions. Of particular relevance are two decisions of the German Supreme Court. In its judgment of 20 th June 1990 (VIII ZR 158/89) (1990) RIW 670, the German Supreme Court held that priority as between successive assignments fell to be determined by reference to the law governing the claim assigned. The assignments related to instalments due under a shipbuilding contract, between a wharf and a foreign state, made subject to English law. In July 1986 the wharf contracted to acquire the new vessel's rudders from the claimant on terms assigning the wharf's claim to the instalments due for the vessel to the claimant, as security for the price of her rudders. On or about 8 th September 1986, the wharf obtained a loan from the defendant again in return for an

assignment of its claim to the instalments. In May 1987 the wharf became insolvent. Notices were given of these assignments in reverse order, that is first by the defendant and later by the claimant (although the claimant contended that the defendant had known of its prior assignment, when taking its own). The Supreme Court held that assignment was governed by the so-called law of the debt. It relied both upon consistent German case-law, giving a number of ***14** references, and prevailing doctrine (including a learned article by a most distinguished comparativist, Prof. Christian von Bar of Osnabrück University, *Abtretung und Legalzession in neuen deutschen Internationalen Privatrecht* , RabelZ 53 (1989) 462) . The court of appeal had reached its conclusion based on the incorporation into German law of article 12(2) of the Rome Convention as article 33(2) of the EGBGB. It was objected that this incorporation only took effect from 1 st September 1986, but the Supreme Court held that the objection was unimportant, since, as Prof. von Bar had maintained, article 33(2) merely reproduced the previous German legal position. The case was remitted to the lower court, for reconsideration, applying English law principles, of the issue regarding knowledge.

50. In a later decision of 26 th November 1990, concerned with an assignment prior to 1 st September 1986, the German Supreme Court repeated that article 33(2) reflected the previous law. The first issue was whether the assignment by the creditor of the benefit of a loan debt subject to German law was invalidated by virtue of the fact that the claim was assigned pursuant to an agreement to contribute the claim as capital in return for shares in a Swiss company, which agreement was apparently invalid under Swiss law in the absence of any resolution to increase that company's capital. The Supreme Court held that it was not. The decision identifies the distinction made in some continental legal systems, to which both Mr Layton before us and Prof. Struycken in his article have drawn attention, between an agreement to assign and the assignment itself. But it also shows that this distinction would not lead the German Supreme Court to accept Mr Layton's submissions that article 12 only embraces the contractual and not the “proprietary” aspect of a voluntary assignment. In the decision of 26 th November 1990 the latter aspect was determined under principles which the Supreme Court said were now reflected in article 33(2) of the German law, which in turn reflects article 12(2) of the Rome Convention .

51. The Dutch Supreme Court has addressed the application of article 12 in the case of Brandsma q.q. v. Hansa Chemie AG (16th May 1997) (RvdW 1997, 126C). This is a more problematic and evidently controversial decision, discussed both by Prof. Struycken in his article and also by M. E. Koppenol-Laforce in The Property Aspects of an International Assignment and Article 12 Rome Convention (1998) NILR 129 . Hansa Chemie SA was the German supplier to Brandsma q.q., a Dutch company, under a contract subject to German

law which contained terms assigning, to Hansa, Brandsma's claims under Dutch law against its Dutch sub-buyers as security for the price due to Hansa. German law recognises such an assignment as valid. Dutch law does not, even as between assignor and assignee, (a) because the claims assigned could not be and were not specified and individualised at the moment of assignment and (b) because they were only assigned by way of security (cf. Struycken at p.352). The liquidator of Brandsma therefore challenged Hansa's right to the monies receivable from the sub-buyers. The Dutch Supreme Court held that article 12 applied to govern the requirements necessary in order to transfer a debt, in a way having effect against third parties (as the liquidator was apparently viewed as being). But it rejected the application of article 12(2) on the grounds that this article was in restrictive terms and that its application could require the application of a number of different legal systems (e.g., presumably, in cases of assignment of global assignments of receivables) and would deprive the assignor and assignee of full freedom of choice. In the Court's view, article 12(1) applied. It also considered that article 12(1) would otherwise be superfluous, having regard to articles 3 and 4 of the Rome Convention .

52. I find it difficult to express any definite views on the reasoning or outcome of the Dutch Supreme Court's decision, not having seen a full translation. Its effect, Prof. Struycken points out, was to side-step recently enacted, but much criticised, provisions of Dutch law, in the context of an assignment of a Dutch debt by a Dutch creditor. I find unconvincing the argument that article 12(1) ***15** must have been intended to cover the issue or would be superfluous. It would seem no surprise that the first paragraph of an article dealing specifically with voluntary assignment should, for clarity, re-capitulate a result which was consistent with and could anyway flow from other provisions of the Convention (cf also Struycken's comment to like effect on p. 351 in his article). On the face of it, the issue which arose before the Dutch Court might appear to have been one of assignability within article 12(2). It is unclear what (if any) significance may have been attached to the fact that the issue involved a liquidator of Brandsma, and was being litigated between the liquidator and Hansa, rather than (for example) between Hansa and the Dutch sub-buyers. A liquidator may by law sometimes stand in a stronger position than the company would have had prior to its winding up (cf. Chitty on Contracts (28 th Ed.) Vol. 1, para. 20–063, instancing ss.395–398 of the English Companies Act 1985). The Dutch Supreme Court's decision also relates to a situation where the governing laws of the debt and the assignment differed and had different effects — so that a choice between article 12(1) and article 12(2) was critical. As it happens in the present case, both the insurance contract claims and their assignment by Five Star to RZB were expressly made subject to English law. The claims and their assignment, together with all aspects of the resulting relationship between the insurers, Five Star as assignor and RZB as assignee, are in my judgment clearly covered by article 12(1) and (2). In these circumstances — even if one were to follow the Dutch Supreme Court's reasoning (which, so far as I follow

it, I find myself presently unable to do) — the effect of Five Star's voluntary assignment to RZB and of the notice given of it to the insurers, would here fall to be determined by English law.

53. Mr Layton referred to In re Maudsley, Sons & Field [1900] 1 Ch. 602 . In that case the English company, Maudsley, was owed money by a French firm, Delaunay & Cie. In October 1899, receivers were appointed in respect of Maudsley's undertaking and assets in debenture-holders' actions. In November 1899, Thomas Piggott & Co. Ltd., English creditors of the company took proceedings in France to attach the French debt. The debenture-holders sought to injunct P & Co. from, inter alia, such attachment. Cozens-Hardy J. refused such relief, holding at pp.609–610 that the French debt had a "locality" or "quasi-locality" and that:

> "It seems to me that I must treat the debt due from Delaunay & Cie. as being situate in France, and subject to French law, and I cannot therefore prevent the claimants, at the suit of the debenture-holders, from taking any proceedings the law of France allows for recovering their debt out of this French asset."

54. He went on at p. 610 to hold, on the evidence of French law before him, that the French attachment prevailed over any title of the debenture-holders:

> "The debenture-holders having according to English law a good assignment of the French debt, but having according to French law no such assignment, and the claimants having according to French law a good inchoate charge or assignment, which ought to prevail? It seems to me that I am bound to hold that that assignment which alone is recognised by the law of France ought to prevail, and that the claimants have a better title than the debenture-holders. This is the view taken by Mr. Dicey in his work on the Conflict of Laws, rule 141: "An assignment of a movable which cannot be touched, i.e. of a debt, giving a good title thereto according to the lex situs of the debt (in so far as by analogy a situs can be attributed to a debt), is valid." I am not satisfied that the authorities cited by him necessarily involve this principle; but I think it is correct, and, indeed, is a necessary consequence from the admission that a debt has a locality or quasi-locality."

***16** Finally, he held that the appointment of English receivers made no difference to this result.

55. I do not find this case of assistance. Firstly, on the facts, the debt was both against a French debtor and subject to French law. Cozens-Hardy J. did not have to choose between the lex situs and the proper law of the debt, or indeed to distinguish between the voluntary and involuntary aspects of the facts in the manner involved in the present case. Secondly, the decision is only a first instance decision. Thirdly, it was a decision on the common law; we are concerned with an international Convention, which must be approached on its own terms and given an appropriate international interpretation.

56. We were also referred to In re Queensland Mercantile and Agency Co. [1891] 1 Ch. 536 ; aff'd [1892] 1 Ch. 219 . The Queensland company had charged to an English debenture-holder (a bank) the unpaid capital in respect of its shares. The Queensland company made calls on such capital on, inter alios, Scottish shareholders. The shareholders did not pay such calls, and had no notice of the debenture. An Australian creditor of the Queensland company obtained Scottish arrests in respect of the claims on such shareholders. The Queensland company was then ordered to be wound up both in Australia and in England. The question of priority between the debenture-holder and the creditor was argued in the English winding-up. The evidence was that the Scottish arrest had the effect of an assignment with notice and took priority over an earlier assignment without notice. This case therefore concerned an issue of priority between an earlier voluntary assignment and a later involuntary assignment by operation of law. North J. took the simple approach that the debt was situated in Scotland, where the debtors resided. The Court of Appeal upheld his decision, after receiving further evidence of Scottish law and rejecting an argument that this should be disregarded as being in conflict with international law. The case is of no assistance on the issue of the effect between insurers, Five Star and RZB of Five Star's voluntary assignment to RZB. It might have relevance as an authority in favour of applying the lex situs to determine any issue arising along the lines of the second issue identified earlier in this judgment — if for example there were evidence to suggest that a French attachment takes effect as an involuntary assignment and overrides a prior voluntary assignment completed by notice under the law governing the validity of such a voluntary assignment: see the citation of Queensland case in Cheshire and North (13 th Ed.) at p.965, and the text to Dicey & Morris (13 th Ed.) Rule 119, citing at para. 24–076 a dictum of Lord Goff in Deutsche Schachtbau-und Tiefbohr-gmbH v. Shell International Petroleum Co. Ltd. [1990] 1 AC 295 , 354B — although I would also note the vigorous attack on the appropriateness of the lex situs to govern even this type of issue by

Rogerson in her article in [1990] CLJ 441 cited above. As I have said earlier in this judgment, no such second issue arises on the material before us, and so the Queensland case is of no present relevance.

57. I therefore conclude that article 12 of the Rome Convention applies and that the effect, as between insurers, Five Star and RZB, of Five Star's assignment to RZB falls to be determined by reference to English law.

The nature and scope of the assignment

58. Under English law, an assignment may occur in a pot-pourri of three different forms, with variegated terminology. First, s.50 of the Marine Insurance Act 1906 (re-enacting s.1 of the Policies of Marine Insurance Act 1868) provides: ***17**

> "(1) A marine insurance policy is assignable, unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.
> (2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.
> (3) A marine policy may be assigned by indorsement thereon or in other customary manner."

59. Secondly, s.136(1) of the Law of Property Act 1925 (re-enacting S.25(6) of the Judicature Act 1873) provides:

> "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of

> such notice— (a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same; and (c) the power to give a good discharge for the same without the concurrence of the assignor …".

60. Thirdly, there may be an equitable assignment, which, once notified to the debtor, will have the effects of obliging the debtor to pay the assignee, of preventing further equities attaching to the debt and of protecting the assignee against subsequently notified assignments. An equitable assignment may relate either to the whole interest in a thing in action or to a partial interest: see Chitty on Contracts (28 th Ed.) Vol. 1 paras. 20–037–040. The Evelpidis Era (cited below) is an example of the latter. There is a rule of practice that the assignor should be joined, but that rule will not be insisted upon where there is no need, in particular if there is no risk of a separate claim by the assignor: Central Insurance Co. Ltd. v. Seacalf Shipping Corp. (The Aiolos) [1983] 2 Ll.R. 25 , 33–34; Weddell v. J.A. Pearce & Major [1988] Ch. 26 , 40–41; and a decision of my own in Sim Swee Joo Shipping Snd Bhd v. Shirlstar Container Transport Ltd. (Com. Ct., 17th February 1994) . The case for joinder will obviously be strongest, if there is an issue between assignor and assignee regarding the existence of an assignment or the equitable assignee has acquired only part of a chose in action: see e.g. Chitty, paras. 20–037 and 20–040. In the present proceedings, no problem about joinder arises, since all relevant parties are before the court. Although at law future things in action could not be assigned, equity will give effect to the assignment of a future thing in action (or "expectancy") supported by consideration: see Chitty on Contracts (28 th ed.) Vol. 1 para. 20–032. I return to this aspect below.

61. RZB has asserted that Five Star's assignment took effect in each of these three ways. Longmore J. held that any assignment took effect either under s.50 or in equity and regarded any question of an assignment under s.136 as beside the point.

62. Prior to the Policies of Marine Insurance Act 1868 and the Judicature Act 1873 (and leaving aside further presently immaterial statutory provisions relating to life insurance), choses or things in action were assignable if at all only in equity. The statutory provisions of s.50 and s.136 must be seen against this background. S.50 must also be seen in the ***18** context of ss.15 and 51 of the Marine Insurance Act providing that an assured parting with his interest in a subject-matter insured does not thereby assign his rights under the contract of insurance, unless he expressly or impliedly agrees to do so; and further providing that

any such agreement must occur before or when the assured parts with his interest and not subsequently, save in the case of assignment of a policy after loss. The operation of s.50 depends upon there having been an assignment of "the beneficial interest in such policy", but no notice is required to the insurers. The operation of s.136 depends upon there having been an "absolute assignment" of "a debt or other legal thing in action" and upon express notice in writing being given to (in this case) the insurers.

63. The reference in s.50 to assignment "so as to pass the beneficial interest in such policy" has been held to require the passing of the whole beneficial interest in the policy: Arnould on Marine Insurance (16 th Ed.) para. 254; Williams v. Atlantic Assurance Company Ltd. [1933] 1 KB 81 ; The First National Bank of Chicago v. The West of England Shipowners Mutual P. & I. Association (The "Evelpidis Era") [1981] 1 Ll.R. 54 , 64. In these two cases the assignment did not satisfy this requirement because, it was held, the assignors retained at least a limited interest in recoveries that might be made under the policy. In order to identify when the beneficial interest passes, it is also necessary to distinguish between situations of assignment before and after loss. Before loss, the policy is alive, and the assured cannot, in my judgment, be said to have parted with all beneficial interest in it, so long as he retains and does not part with the insurable interest in the subject-matter insured that the policy is intended to cover. The classic application of s.50 is thus to circumstances where the assured sells the subject-matter insured (be it cargo, as happens daily, or ship) to another person with the benefit of the policy. S.1 of the 1868 Act made this point clear, by providing:

> "Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name …."

64. In Lloyd v. Fleming (1872) LR 7 QB 299 , Blackburn J. delivering the judgment of the Court of Queen's Bench said at p. 303 that "the words relied upon [namely "entitled to the property"], in the case of an assignment before loss, express what is necessarily implied, and so are superfluous, perhaps inserted pro majore cautela". The Marine Insurance Act 1906 was expressly a codifying measure. Sir Mackenzie Chalmers prepared it to reflect pre-existing statute and case-law, citing Lloyd v. Fleming both in his and Owen's pre-Act Digest of the Law relating to Marine Insurance (1 st ed. 1901 and 2 nd ed. 1903), under what became ss.50

and 51, and in their post-Act work entitled The Marine Insurance Act 1906 (now in its 10 th edition). The inference is not that the change in s.50 from the wording of s.1 of the 1868 Act was intended to alter the effect, but that the words omitted were considered, as Blackburn J. had said, superfluous in relation to assignment before loss — as well as inappropriate and potentially misleading (see the losing argument in Lloyd v. Fleming and see para. 66 below) in relation to assignment after loss. A person cannot be said to have parted with his beneficial interest in ongoing insurance cover, if he remains the person whose interest is insured, even if (for example) he has assigned the entire right to the benefit of any claims which arise in respect of his interest. As MacGillivray on Insurance Law (9 th Ed.) para. 20–9 points out, the assignor remains the insured in such circumstances, and only he can cancel the policy. The ***19** analysis which I have set out is expressly adopted, though without citation of authority, in Arnould on Marine Insurance at para. 253:

> "A valid assignment before loss supposes the co-existence of three things at the time of assignment: (1) an insurable interest in the subject-matter of the policy in the assignor; (2) the continuance of the risk insured in the policy; (3) the assignment of an insurable interest in the subject-matter of the policy to the assignee, and its exposure to the perils during the continuance of the risk."

65. A similar proposition in an earlier edition of Arnould was approved by Slesser LJ in his judgment in Williams v. Atlantic Assurance Co. at p.105:

> "The principle that the contract is one of indemnity implies that the beneficial interest in the policy cannot while it remains in force be severed from the interest insured: Arnould, 11 th ed., s.176."

66. After a loss, different considerations apply. The interest in a claim on insurers, the chose in action, may then be regarded as "the only property which is covered by the policy" and the words of the Act thus "literally complied with" by a simple assignment of the benefit of such a claim: per Blackburn J. in Lloyd v. Fleming at p.303. This is obviously so, when the subject-matter insured has become totally lost so as to exhaust the policy. It may also be so

in the case of a partial loss, at least once the policy has expired: see e.g. Swan v. Maritime Insurance Co. Ltd. [1907] 1 KB 116 (a case of assignment after a partial loss and after the expiry of a time policy).

67. In Mr Gruder's submission the assignment took effect under s.50. The assignment took place before any loss. Did Five Star assign to RZB an insurable interest in the subject-matter of the insurance? So far as the hull and machinery cover is concerned, it can be said that it did. The mortgage dated 17 th September 1997, which was subject to the laws of St. Vincent and the Grenadines, was expressed to

> "grant, convey, mortgage, pledge, assign, transfer, set over and confirm to the Mortgagees the whole of the vessel and all shares in the Vessel TO HAVE AND TO HOLD the same unto the Mortgagees for ever upon the terms set forth in this Mortgage for the enforcement of payment to the Mortgagees of the Indebtedness ….".

68. William Pickersgill & Sons Ltd. v. London and Provincial Marine and General Insurance Co. Ltd. [1912] 3 KB 614 instances the application of s.50 to an assignment in favour of a mortgagee. However, the fact that Five Star transferred an insurable interest to RZB does not necessarily mean that it intended to or did transfer the benefit of its insurance so as to cover the assignee in respect of that interest. Whatever interest it transferred, it clearly also retained an insurable interest of its own as mortgagor and operator of the vessel. Bearing this in mind, I find it hard to see how other terms of the present mortgage (as summarised at the start of this judgment) can be reconciled sensibly with any idea that Five Star and RZB intended that the whole beneficial interest of even the hull cover should be transferred to RZB in order to protect the interest that RZB acquired as mortgagee. The thrust of clause 5 of the mortgage is that Five Star would ensure that it continued to take out insurances in respect of *its own* insurable interests and continue (subject to the proviso in clause 5.11) to receive any insurance payments in ***20** reimbursement of insured losses which *it* incurred. It may, however, be said that the mortgage is not the, or the only, relevant document. The Deed of Assignment deals directly with the assignment of the insurances. For my part, whatever policy or cosmetic considerations led to these two separate documents, I would think it appropriate to look at the overall position resulting from both. But, even if it is right to restrict one's vision to the Deed dealing expressly with the assignment of insurances, it seems to me that, although its draughtsman started in clause 5.1.1 with a valiant attempt to express an assignment in the

widest and most absolute terms, the underlying reality (that the insurance was to continue to cover Five Star's insurable interest, although losses would be payable as set out in the loss payable clause) appears from the provisions of clauses 2.3.2 and 2.3.4 referring to the letters of undertaking and the loss payable clause.

69. The form of loss payable clause set out in Appendix B provided as follows:

> "It is noted that by an Assignment in writing dated the day of 1997 (together "the Assignment") made in consideration of the Bank advancing a loan to us pursuant to a Loan Facility dated 1997 ("the Loan Agreement") we FIVE STAR GENERAL TRADING of PO Box 2274, Ajman, United Arab Emirates, ("the Owners") owners of the vessel "MOUNT I" (ex "MOUNT ATHOS I") ("the Vessel") assigned absolutely to RAIFFEISEN ZENTRALBANK ÖSTERREICH AKTIENGESELLSCHAFT of 36–38 Botolph Lane, London EC3R 8DE ("the Bank") this policy and all benefits thereof including all claims of whatsoever nature (including return of premiums) hereunder.
>
> Claims hereunder payable in respect of a total or constructive total or an arranged or agreed or compromised total loss or unrepaired damage and all claims which (in the opinion of the Bank) are analogous thereto shall be payable to the Bank.
>
> Subject thereto all other claims, unless and until underwriters have received notice from the Bank of a default under the Loan Agreement in which event all claims hereunder shall be payable directly to the Bank, shall be payable as follows:—
>
> • (i) a claim in respect of any one casualty where the aggregate claim against all insurers does not exceed ONE HUNDRED THOUSAND UNITED STATES DOLLARS (US $100,000) or the equivalent in any other currency prior to adjustment for any franchise or deductible under the terms of the policy shall be paid directly to the Owners for the repair salvage or other charges involved or as a reimbursement if they have fully repaired the damage and paid all of the salvage or other charges;
> • (ii) a claim in respect of any one casualty where the aggregate claim against all insurers exceeds ONE HUNDRED THOUSAND UNITED

> STATES DOLLARS (US $100,000) or the equivalent in any other currency prior to adjustment for any franchise or deductible under the terms of the policy shall subject to the prior written consent of the Bank be paid to the Owners as and when the Vessel is restored to her former state and condition and the liability in respect of which the insurance loss is payable is discharged provided that the insurers may with such consent as aforesaid make payment on account of repairs in the course of being effected.
>
> Notwithstanding the terms of the said Loss Payable Clause and Notice of Assignment unless and until Brokers receive notice from the Bank to the contrary ***21** Brokers shall be empowered to arrange their proportion of any collision and /or salvage guarantee where the aggregate liability under all guarantees given in respect of any one casualty shall not exceed ONE HUNDRED THOUSAND UNITED STATES DOLLARS (US $100,000) or the equivalent in any other currency to be given in the event of bail being required in order to prevent the arrest of the Vessel or to secure the release of the Vessel from arrest following a casualty.
>
> All collections are to be made through [ ].”

This wording seems to me to recognise, as I have said, that the insurances, despite and following any assignment, were intended to and did continue to protect Five Star's insurable interests in respect of any losses and liabilities which it incurred as mortgagor (and, in commercial terms, owner) or as operator of the vessel.

70. This conclusion is to my mind reinforced when one remembers that the present insurance provided more than mere hull and machinery cover. It included both collision cover and protection and indemnity cover. It is an essential part of RZB's case that the assignment embraced — in some sense — not merely the total loss cover on hull and machinery cover, but also the protection and indemnity cover and, above all, the collision cover. They submit that these too were assigned to RZB under s.50. The Appellants take issue with these propositions at each point. In their submission, the risks of liability insured by the protection and indemnity and collision cover remained Five Star's risks, and cannot have been transferred to RZB. Five Star continued to operate and crew the vessel. RZB as mortgagee never

took possession or took over operation of the vessel. That seems to me clearly correct. Accordingly, if the assignment of the insurances to RZB embraced the protection and indemnity and collision cover at all, it cannot have done more than transfer to RZB the benefit of any claims that might subsequently accrue under such cover. The insurable interest in the subject-matter to which such cover related, namely Five Star's pecuniary interest in maintaining its patrimony free of the burden of such expenditure or liability, must then have remained with Five Star. On that basis, once again s.50 could not apply. If, on the other hand, the assignment did not even transfer to RZB the benefit of any claims arising under the collision cover, then again s.50 could not apply — the policy cannot be split into a series of sub-policies; if the collision cover was not assigned at all, then the whole beneficial interest in the policy was not assigned for that even broader reason.

71. For these reasons, s.50 cannot in my judgment have applied to the present assignment.

72. We were referred to Mocatta J's brief treatment of the application of s.50 in The "Evelpidis Era" (above) at p.64, which was relied upon as pointing in the contrary direction to the conclusion which I have just expressed. An assignment to the mortgagee bank of the benefit of protection and indemnity cover was there held outside s.50, but the sole reason given was the provisions of a letter of undertaking which provided for the Club to continue to pay claims directly to the shipowners or their creditors until receipt of notice to the contrary from the bank. In Mocatta J's judgment the whole of the beneficial interest in the policy had not therefore been assigned. The fact that the shipowners remained the persons at risk in respect of the expenditure or liability insured (for example, on the facts of that case, the repatriation expenses: see [1981] 1 Ll.R. 54 , 57) does not appear to have been suggested as a further and more fundamental reason why s.50 could not apply. Nor ***22** does Arnould raise this as a problem when referring to the case: see 16 th Ed. Vol.3 (1997) Part 2 para. 254. Nevertheless, and despite the distinction and expertise of counsel and the judge in The "Evelpidis Era" , this further reason must, in my view and for reasons I have explained, prevent the application of s.50 in such a case.

73. There is a further reason why s.50 was in my view inapplicable in this case. Clause 2.3.4 of the Deed of Assignment contemplated that the loss payable clause set out above, providing inter alia for insurers to continue to pay some, though not all, claims directly to Five Star until notice to insurers of a default under the loan agreement, would be endorsed upon or attached to the insurance. There are differences between the terms of the assignment and intended loss payable clause in this case and those of the assignment and the letter of undertaking in in The "Evelpidis Era" , and no loss payable clause was actually endorsed upon or attached to

the present insurance. Nevertheless, the parties agreed in both the mortgage and the Deed of Assignment that there should be a loss payable clause, in terms defined by Appendix B of the Deed and entitling Five Star, at least until further notice, to receive certain claims payments. The intention, although this does not appear to have been effected, was also that this clause should also be endorsed on the policy, so as to affect the insurers. It seems to me that these facts alone would prevent s.50 from applying — as Mocatta J. considered the letter of undertaking did on the facts before him.

74. I turn to s.136 of the Law of Property Act 1925 . The requirement here is that there should have been an absolute assignment of the legal thing in action. A legal thing in action may be either the policy as a whole or a right of claim under it. Despite the different terminology, somewhat similar considerations to those relevant under s.50 may arise here. First, in my judgment, an agreed assignment of the whole benefit of an insurance policy in conjunction with a sale or other transfer of the subject-matter insured could come within s.136 (so that the section represents in that respect, prior to any loss, an alternative means to the same end as s.50). As Clarke observes in The Law of Insurance Contracts paras. 6–3 and 6–4, "Under a contract of insurance the insured has present rights which are assignable even though their full value may not have matured". Compare also the examples of other contracts assignable under s.136 given in Halsbury's Laws of England Vol. 6 (4 th ed. reissue, 1991) Title Chose in action, citing Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd. [1903] A.C. 414 (assignment of the benefit of a contract to be supplied with chalk) and Torkington v. Magee [1902] 2 K.B. 427 (assignment of a contract for the purchase of a reversionary interest; reversed on a different point at [1903] 1 KB 644). I also accept that, for the purposes of s.136, an assignment is not prevented from being absolute by virtue of the fact that it may have been entered into for the purpose of security and may (as here) be subject to an equity of redemption, in the form of a provision for reassignment on repayment of the loan: see Chitty on Contracts (28 th ed.) Vol. 1 para. 20–012.

76. Nevertheless, s.136 is not, in my judgment, applicable on the facts of this case. First, for reasons which parallel those which I have given in relation to s.50, there was here no assignment of the whole benefit of the insurance cover, and so, in the terms of s.136, no absolute assignment of this nature. On the contrary, Five Star remained covered as mortgagor and operator of the vessel. Second, the most that the assignment may therefore have achieved, whatever the generality of the language used in clause 2.1.1 of the Deed of Assignment, was to assign the benefit of any particular claims arising. There may under s.136 be an absolute assignment of a claim or claims, but only of a *present* ***23** claim or claims. At the date of Five Star's assignment to RZB, any insurance claim(s) were merely an unwished-for future possibility dependant upon some future casualty. The distinction between present

claims (which category includes rights that may mature in future under a presently existing contract) and future claims is not always easy. But future insurance claims which depend on future casualties which may never occur appear to me to fall clearly into the latter category and not to be assignable under s.136: see the discussion in Chitty at paras. 20–028 and 20–029. Third, quite apart from the objection that what was agreed was an assignment of future, not present claims, the parties' agreement on the provisions of the loss payable clause — splitting the proceeds of such claims between them, at least until further notice — means, despite the language of clause 2.1.1 of the Deed of Assignment, the assignment cannot be regarded as having been absolute.

76. It follows that the assignment cannot have taken effect under s.50 or s.136. But these are, as I have indicated, merely two specific statutory possibilities, which, where applicable, offer some advantages either in relation to the general requirement of notice (dispensed with under s.50) or procedure (the general facility to sue without any need to consider joining the assignor under both sections). Where they do not apply, effect may still be given to an assignment in equity, both as between the parties to it and as against the debtor (or here the insurers) in consequence of the notice given to them. Before considering this further, however, I propose to deal with the issue raised relating to the scope of the assignment. The Appellants submit that this excluded altogether the benefit of any claims that might arise under the collision cover. The submission is consistent with their likely overall objective. The mortgage contemplated insurance against both marine risks and P & I risks. It may be observed that marine risks on hulls are commonly insured (as this vessel was) on the Institute Voyage Terms — Hulls, clause 6 of which includes collision cover. It is perhaps also worth noting that clause 3 of the standard wording of such Terms (where not deleted, as it was in this particular case) purports to regulate assignment of "this insurance or … any moneys … payable thereunder" without suggesting any distinction between the pure hull cover and the collision cover conferred by the Institute terms. The Deed of Assignment, clause 2.1 of which witnessed that Five Star "with full title guarantee assign absolutely and unconditionally and agree to assign to the Bank all their right, title and interest in and to the Insurances". "Insurances" was defined as meaning: "all policies and contracts of insurance (including all entries in Protection and Indemnity or War Risks Associations) which are from time to time taken out or entered into in respect of or in connection with the Vessel or her increased value and (where the context permits) all benefits thereof including all claims of whatsoever nature and returns of premium". Thus far the scope of the assignment seems on its face to embrace collision cover.

77. In the Appellants' submission, the terms of the loss payable clause (as agreed between Five Star and RZB, although never actually endorsed on the policy) suggest that the collision

cover was not being assigned. The Appellants point out that, although the first paragraph of the loss payable clause refers to "this policy and all benefits thereof including all claims of whatsoever nature (including return of premiums) hereunder", the next paragraphs, dealing with total losses or unrepaired damage and "all other claims", focus on physical loss or damage. But this submission itself requires some qualification, in so far as the penultimate paragraph would have allowed the brokers to put up collision and/or salvage guarantees if required to prevent the arrest of the Vessel or to secure her release from arrest following a casualty. This paragraph suggests that collision liability claims fall within the scope of the assignment, but would have allowed the limited incurring of ***24** expenditure under clause 6.3 and/or under the sue and labour provisions in clause 11 of the Institute Voyage Clauses — Hulls — Total Loss.

78. Mr Layton submits that an assignment of collision liability claims is either impossible or inimical to the concept and purpose of an insurance like the present. The purpose of collision liability insurance is to cover the assured against third party liability. Assignment would, he submits, undermine this. I do not consider that this proposition is made good, even if one assumes that the collision insurance was intended to produce funds which the assured would be able to use to pay third party claimants. Even if that was its intention and effect, it does not follow that the assured was bound to use any insurance recoveries for that purpose; he would remain free to pay the third party claimants from any funds he wished (and indeed free not to pay them at all, if he wished); likewise he could dispose of any recovery made from insurers in any way he wished. In reality, however, the terms of the present collision insurance (although not as crystal-clear as those considered in Firma C-Trade SA v. Newcastle P. & I. Association (The "Fanti") [1991] 2 AC 1) probably mean that Five Star could not recover from the insurers in respect of collision liability except in respect of sums previously "paid", in the sense of disbursed, to the third party claimants by reason of such liability. On that basis, it is clear that, having paid the third party, the assured could dispose of any insurance recoveries in any way he wished, including by assignment.

79. It follows that I see nothing about the collision insurance cover which either makes assignment impossible or is inimical to the concept or purpose of such insurance. Indeed, the scenario presented to us — according to which, under the law of Malaysia where the fund representing the vessel is held and where the collision action is proceeding, the Appellants as third party claimants may take priority over the vessel's mortgagees — indicates a good reason why it may be very prudent for a mortgagee to take from a shipowner an assignment of the benefit of collision insurance claims. Here, the assignment was in the widest terms. The context does not require any exclusion of the benefit of the collision insurance claims, and I would hold that they were duly assigned.

80. On that basis, I consider that there was an assignment of the benefit of any claims under the policy, including collision liability claims. Further, although such assignment cannot in my judgment have taken effect under either s.50 or s.136, there is no reason why it did not take effect in equity. Equity recognises and gives effect to any assignment, for value, of a thing in action depending on a future contingency (an "expectancy"): see Chitty para. 20–032; and also Snell's Equity (13 th ed.) para. 5–28, summarising the position on the authorities as follows:

> "The principle that equity regards as done that which ought to be done is applied, so that, once the assignor has received the valuable consideration and became possessed of the property, the beneficial interest in the property passes to the assignee immediately."

81. An assignor and assignee are thus bound from the moment of their agreement, while the debtor is (subject to notice) bound as soon as the expectancy develops into an actuality. Here, Five Star's assignment to RZB was for value — being supported (as recited in the Deed of Assignment) by ample consideration in the form of the loan advance. It had at least contractual effect between Five Star and RZB from 17 th September 1997 onwards. Once the collision occurred on 26 th September 1997, Five Star acquired present rights to ***25** look to the insurers pursuant to (technically, under English law, for breach of) the insurers' duty to hold them harmless or indemnify them in respect of any loss or liability falling within the policy terms and arising out of the collision. One can accept for present purposes that liability claims made against Five Star, for example by the Appellants as cargo owners, would fall to be agreed or adjudicated upon, before insurers could actually be required to disburse monies under the policy. Even so, as from the collision, any entitlement to indemnity under the policy as against the insurers in respect of the consequences of such collision was in law no longer an expectancy; an insured loss had occurred and there was a present and assignable right to be indemnified against any loss or liability which might result. The previously agreed assignment could in equity operate accordingly and pass to RZB the beneficial interest in relation to any insurance claims. Finally, notice of such assignment was given by or on behalf of RZB to the insurers on 7 th October 1997. In these circumstances, all the ingredients of a valid equitable assignment, binding not only on Five Star and RZB, as assignor and assignee, but also on the insurers, were fulfilled from 7 th October 1997. The insurers were from that

moment onwards bound to RZB, rather than Five Star, in relation to any claim under the insurance as and when it fell to be settled. All these parties being before this court, we are both entitled and bound to recognise and give effect to that assignment.

82. There is nothing to indicate that the loss payable clause has any relevance in relation to any such insurance claims as have arisen. There is nothing to indicate that any such claim, or any part of it, would, under sub-clause (i) or (ii) or the penultimate paragraph of the loss payable clause, fall for payment to Five Star, rather than to RZB. I also add, for completeness, that there is nothing to indicate whether or when the insurers may have received any notice from RZB of a default under the loan agreement precluding the operation of sub-clause (i) and (ii) or notice precluding the operation of the penultimate paragraph.

83. Accordingly, the situation is on the face of it one in which RZB as assignee became entitled in equity as against Five Star and the insurers to the whole benefit of all claims arising from the collision. But, even if (contrary to the position so far as it appears) Five Star could be said, under the loss payable clause, to retain any interest in any part of any claim that may have arisen, RZB is still entitled in equity in relation to, and by virtue of, the assignment of the remainder of such claim. Further, all parties being before the court, there is no obstacle to giving effect to any partial interest; since Five Star is in fact before the court, it is unnecessary to consider whether, as a matter of procedure, the court would, in the case of either a complete or a partial assignment in equity, have insisted upon its presence before granting RZB appropriate relief.

The appropriateness of declaratory relief

84. Having reached clear conclusions as to the legal positions of Five Star, RZB and the insurers, all of whom are before this court, the question remains what if any relief the court should now grant. In this court, the Appellants submit — with I think considerably greater emphasis than before Longmore J. — that, whatever the rights and wrongs of the substantive issues argued, this is not a case where it is appropriate for the English courts to grant any declaratory relief. Mr Layton seeks to support this submission by four considerations: the declarations sought are intended for use in France to challenge the French attachments; the declarations relate to contracts to which the Appellants were not party; they would serve no useful purpose, since there will have inevitably to be French proceedings; and great caution should always be exercised before granting any ***26** declarations. To these he added the arguments relating to collision cover, which I have already resolved against the Appellants.

86. The present proceedings were begun against Five Star and the insurers, who in each case submitted to the English jurisdiction. Leave to serve the Appellants out of the jurisdiction was obtained on the basis that they were necessary and proper parties to the litigation against Five Star and the insurers, and they in turn submitted to the jurisdiction. I agree that that does not preclude the Appellants from raising points on the appropriateness of declaratory relief. But the fact remains that English jurisdiction has been accepted by all parties involved, in relation to the legal position of the parties to an insurance and an assignment, each of which is subject to English law. If this were, as Mr Layton submits, a case of "naked forum shopping", one would expect that to have been raised as a jurisdictional objection. In fact, however, it is a case where the first issue, as identified earlier in this judgment, concerns the effect of the voluntary assignment of the insurance as between Five Star, RZB and the insurers. That involves identifying the appropriate law by which to consider such effect. My conclusions have been that article 12 of the Rome Convention applies to identify the relevant law, that this is English law and that under English law there was a valid equitable assignment of the benefit of claims arising under the insurance, including any claim in respect of collision liability. It is true that the Rome Convention should mean that the same conclusions would have been, or would be, reached in France if the issue had been, or were to be, litigated there. But that is no reason at all for refusing to grant declaratory relief to record the decision here by the courts of the country whose law governs under article 12 — rather the contrary. The declaratory relief which this court grants may indeed (as I have noted in paragraph 23 of this judgment) prove the end of the whole matter. But even if, after the present judgment, there do remain further matters for argument either in England or in France, it is clearly appropriate to grant declaratory relief to confirm what has been now decided. That will then serve as a starting point for any further argument.

86. That the declarations relate to the effect of an English law insurance contract and an assignment to which the Appellants were not party is no objection to declaratory relief. The Appellants, by their French attachments, have themselves put in issue the effect of the insurance and its assignment. The issue as to its effect has to be resolved somewhere. For reasons just given, England is the appropriate place to resolve it, not just because all parties have submitted to English jurisdiction on the point, but because, under article 12, English law is the relevant law. The fact that other parties to the insurance contract and the assignment have been content to leave the English court to decide the point, without submitting arguments of their own, is neither here nor there. They may not mind what answer is given. The present judgment and any declarations granted will still establish their position with certainty, and they will be both bound and protected by them, here and no doubt in France.

87. The case of Meadows Indemnity Co. Ltd. v. Insurance Company of Ireland plc [1989] 2 Ll.R. 298 is neither analogous nor helpful. In that case, Meadows, as reinsurers, sought to claim declarations against the original insured (International Commercial Bank — "ICB") to the effect that the original insurer (Insurance Company of Ireland — "ICI") was entitled to avoid the original insurance and was not obliged to indemnify ICB. This court took the view that no contested issue arose between Meadows and ICB and that there was no basis for any claim for declaratory relief. Meadows had rights in relation to ICI and no-one else. That is quite a different situation from the present, where the Appellants have ***27** obtained attachments against a claim on insurers on the basis that Five Star has the right to claim. The Appellants themselves, by their attachments and by the basis on which these were obtained, have raised an issue as to who had the benefit of the claim against insurers as at the date of such attachments.

88. Nor do I find in other cases cited by Mr Layton, including Russian Commercial and Industrial Bank v. British Bank for Foreign Trade [1921] 2 AC 438 and Messier-Dowty Ltd. v. Sabena SA [2000] 1 WLR 2040 , any principle or statements that should discourage the court from granting declaratory relief on the issue which arises and which I have determined. These are not authorities requiring either extreme circumstances or extreme, or even great, caution before granting declaratory relief. Of course the court will always scrutinise with care the context, utility and likely effect of any such relief. But where its grant "would help to ensure that the aims of justice are achieved" the courts should not be reluctant to grant even negative declarations: Messier-Dowty per Lord Woolf MR at p.2050H. At least as favourable a test must apply in the present context. For all the reasons I have given, I regard the grant of declaratory relief in this case as both useful and called for.

Conclusion and relief to be granted

89. In the result I would dismiss the appeal in so far as it maintains, on the basis of the evidence of French law before the court, that the assignment to RZB was invalid, that RZB acquired no right or title by virtue thereof as against Five Star and the insurers and that RZB's claim to any insurance proceeds was bound to fail. I would also dismiss the appeal in so far as it maintains that, even if (as I have held) the Appellants are wrong on these points, declaratory relief is not appropriate. It remains only to consider the detailed terms of the appropriate declaratory relief, on which the Appellants took a number of further points. In the light of my conclusions as to the nature of the issue regarding entitlement under the insurance that we have at this stage to address, and as to the nature of the assignment that took place, some re-formulation of the declarations granted by Longmore J. will be required.

As suggested during argument, I would invite counsel, after considering this judgment, to submit redrafted declarations in the forms for which they would now contend, with a view to our hearing further oral argument on this aspect when this judgment is handed down.

MR JUSTICE CHARLES:

I agree

LORD JUSTICE ALDOUS:

I also agree

ORDER: Appeal from the order of Rimer J allowed; appeal from the order of Harman J dismissed; the costs relating to that part of the appeal before Rimer J to be paid by the Defendants to the Claimant and be the subject of a detailed assessment; costs of the appeal from the order of Rimer J to be paid by the Defendants to the Claimant, assessed in the sum of £5,000; the Defendants to pay the costs of the appeal from the order of Harman J, assessed in the sum of £10,000; the order not to be drawn up because of the need to decide a further point; Claimant to lodge a skeleton argument as to the form of the order within 14 days of today; the Defendants' skeleton argument in answer to be lodged 14 days thereafter; both skeleton arguments to be served on the Legal Services Commission, who have leave to intervene; any skeleton argument that the Legal Services Commission wish to rely on should be lodged within 21 days from receipt of the Defendants' skeleton argument; the matter then to be set down to be heard by this court ***28** on a convenient day, if possible before Aldous and Robert Walker LJJ; but if not, by another court consisting of at least two Lords Justices. (Order not part of approved judgment) ***29**

2001 WL 14955

TAB 66

Through Transport Mutual Insurance Association (Eurasia) Limited v. New India Assurance Association Company Limited

A3/2004/0153

Court of Appeal (Civil Division)

2 December 2004

Neutral Citation Number: [2004] EWCA Civ 1598

2004 WL 2714108

Before: The Lord Chief Justice of England and Wales Lord Justice Clarke , and Lord Justice Rix

Thursday 2nd December, 2004

Analysis

On Appeal from the High Court Queen's Bench Division Mr Justice Moore-Bick

[2003] EWHC 3158 (Comm)

Representation

- Mr Mark Howard QC and Mr Ricky Diwan (instructed by Birketts) for the Claimant/ Respondent.
- Mr Christopher Smith (instructed by Holmes Hardingham Walser Johnston Winter) for the Defendant/Appellant.

JUDGMENT

Lord Justice Clarke:

Introduction

1. This is the judgment of the court on an appeal from an order of Moore-Bick J dated 18 December 2003. By that order he dismissed the defendant's challenge to the jurisdiction of

the English High Court, declared that the defendant was bound to refer certain claims to arbitration in England and that proceedings issued by the defendant in Finland were brought in breach of the agreement to arbitrate and granted an injunction restraining the defendant from continuing with the proceedings in Finland and/or from commencing proceedings otherwise than by way of arbitration in London. The judge also ordered the defendant to pay the claimant's costs and gave the defendant permission to appeal.

The facts

2. The facts are not in dispute and can be taken from the judge's judgment. In October 1999 an Indian merchant, Saluja Fabrics, shipped on board the vessel *Hari Bhum* at Calcutta a container said to contain various types of garments for carriage to Moscow. The container was shipped under two through transport bills of lading issued by Borneo Maritime Ltd ("BML"), which provided for the goods to be carried by sea to Kotka in Finland and thence by road to Moscow. The goods were insured against loss or damage in transit by the defendant, New India Assurance Company Limited ("New India").

3. The container arrived at Kotka on 30 November 1999. On 16 December Borneo Maritime Oy ("BMO"), an associated company of the carrier incorporated in Finland, issued a CMR waybill for the carriage of the container by road from Kotka to Moscow. Unfortunately, the container did not reach Moscow, having been lost in circumstances which are still in dispute somewhere in the course of its journey through Russia.

4. The claimant, Through Transport Mutual Insurance Association (Eurasia) Ltd ("the Club"), is a mutual insurance association which provides insurance to its members in respect of various kinds of losses and liabilities incurred in connection with the carriage of goods. BML was a member of the Club for the year beginning 1 September 1999. BMO was also insured under the same cover as an associated company of BML.

5. Following the loss of the container, Saluja Fabrics made a claim against New India which was in due course compromised. As a result of the compromise New India became entitled to exercise Saluja Fabrics' rights against the carrier, either as assignee of those rights or by way of subrogation; we are not sure which. During 2002 BMO filed for bankruptcy and on 26 November 2002 it was struck off the register in Finland. As the judge observed, it is not clear whether any claim had been intimated to the company before that occurred, but it is

common ground that no payment had been made by either BMO or BML in respect of the loss of the container.

6. The Club rules for the year beginning 1 September 1999 included the following provisions:

> **Cargo Liabilities**
>
> **Risks Insured**
>
> **Loss of or Damage to Cargo**
> 1.1 You are insured for your liability for physical loss of or damage to Cargo and for consequential loss resulting from such loss of damage.
>
> **General Provisions**
>
> **Exclusions & Qualifications**
>
> **Standard Exclusions and Qualifications**
>
> …
>
> **Indemnity insurance**
> Insurance with the Association is on the basis of indemnity which means that the Association shall pay you only
>
> • (a) after you have suffered a physical loss of your insured property, for example, your Equipment, or
> • (b) after you have expended money, for example, by paying a claim of your Customer or a Third Party for which you are liable or by paying for repairs to your insured property.

Law & Disputes

Law

Every insurance provided by the Association and the rights and obligations of you (or any other person) and the Association arising out of or in connection with such insurance, is subject to and shall be construed in accordance with English law.

Disputes

If any difference or dispute shall arise between you (or any other person) and the Association out of or in connection with any insurance provided by the Association or any application for or an offer of insurance, it shall be referred to arbitration in London.

2.2 The submission to arbitration and all proceedings in connection with it shall be subject to English law.

2.3 No action or other legal proceedings against the Association upon any such dispute may be maintained unless and until it has been referred to arbitration and the award has been published and become final.

2.4 The sole obligation of the Association to you in respect of such dispute is to pay such sum, if any, as such final award may direct."

7. Clause A1.3(b) is colloquially known as a pay to be paid clause and clauses D2, 2.3 and 2.4 together contain both an arbitration clause and a Scott v Avery clause and are very similar to the clauses considered by Leggatt J in Socony Mobil Oil Co Inc v West of England Ship

Owners Mutual Insurance Association (London) Ltd (The Padre Island (No 1)) [1984] 2 Lloyd's Rep. 408 .

8. On 19 October 1999 the Club issued a certificate of membership ("the certificate") with the terms of the cover attached. The parties to the contract at that time were of course only BML and BMO on the one hand and the Club on the other. Neither Saluja Fabrics nor New India was a party. However, having paid Saluja Fabrics, New India naturally wanted to recover the amount it had paid from those responsible for the loss. It could not recover from BMO because it was insolvent (or indeed from BML presumably for the same reason) and it naturally considered how it could recover directly from the Club as the liability insurer of both BMO and BML. The claim is, by today's standards, comparatively modest. We were told that it is of the order of US$250,000 plus interest.

9. New India did not proceed in England under the Third Party (Rights Against Insurers) Act 1930 , no doubt because of the pay to be paid clause and the decision of the House of Lords in Firma C-Trade S.A. v Newcastle Protection and Indemnity Association (The Fanti) and Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd (The Padre Island (No.2)) [1990] 2 Lloyd's Rep. 191 . Instead, on 16 December 2002 New India began proceedings in its own name against the Club in Finland by applying to the District Court of Kotka for the issue of a writ in respect of its claim for the loss of the container. The claim was made under section 67 of the Finnish Insurance Contracts Act 1994 ("the Finnish Act").

10. Section 67 provides as follows:

> **"Injured person's entitlement to compensation under general liability insurance**
>
> A person who has sustained bodily injury, property damage or financial loss under general liability insurance is entitled to claim compensation in accordance with the insurance contract direct from the insurer, if:
>
> • 1) the insurance policy has been taken out pursuant to laws or regulations issued by the authorities;
> • 2) the insured has been declared bankrupt or is otherwise insolvent; or
> • 3) the general liability insurance has been mentioned in marketing efforts launched to promote the insured's business.

> If such claim is made to the insurer, the insurer shall inform the insured of the claim without undue delay and reserve the insured an opportunity to give further information on the occurrence of the insured event. The insured shall also be notified of the subsequent processing of the claim.
>
> If the insurer accepts a claim made by a person who has sustained bodily injury, property damage, or financial loss, such acceptance is not binding on the insured."

Section 67 thus gives a third party the right in some circumstances to proceed directly against a liability insurer such as the Club when the insured who would otherwise be liable to the third party is insolvent.

11. The only other section of the Finnish Act which is (so far as we are aware) relevant or potentially relevant is section 3 , which provides as follows:

> **"Peremptory nature of the provisions**
>
> (1) Any terms or conditions of an insurance contract that deviate from the provisions of this Act to the detriment of an injured person or a person entitled to compensation or benefits other than the policyholder shall be null and void.
> (2) Any terms or conditions of an insurance contract that deviate from the provisions of this Act to the detriment of the policyholder shall be null and void if the policyholder is a consumer or a business which in terms of the nature and scope of its operations or other circumstances can be compared to a consumer as a party to the contract signed with the insurer. What is provided in this Subsection is not applied to group insurance contracts.
> (3) The provisions contained in Subsections 1 and 2 are not applied to credit insurance, marine or transport insurance taken out by businesses, or insurance taken out by businesses to insure aircraft."

As can be seen, section 3 is an anti-avoidance provision not dissimilar from that contained in the Third Party (Rights Against Insurers) Act 1930 .

12. On 3 January 2003 a writ was issued in Finland which was served on the Club in England on 31 March. On 30 April the Club took steps to contest the jurisdiction of the District Court of Kotka. As we understand it, it did so without submitting to the jurisdiction for any other purpose. On 8 May it issued an arbitration claim form in the High Court seeking a declaration that New India is bound to pursue any claim in arbitration and an injunction to restrain it from pursuing its claim in Kotka. On 16 May Gross J gave the Club permission to serve the claim form on New India out of the jurisdiction and on 2 July, following service of the proceedings in Mumbai, New India applied for the order for service out of the jurisdiction to be set aside or, in the alternative, for the proceedings here to be stayed in the exercise of the court's discretion.

13. On 22 October 2003 the District Court of Kotka rejected the Club's challenge to its jurisdiction. In reaching its conclusion the court held that it had jurisdiction to determine the claim because it arose out of an international contract for the carriage of goods by road and because, under article 10 of the EC Judgments Regulation (Council Regulation (EC) No 44/2001) ("the Regulation"), claims against insurers may be brought in the courts of the country where the harmful event occurred. It appears to have held that, although the loss occurred in Russia, the harmful event occurred in Finland on the basis that the loss was caused there, although the court does not spell out the basis of that finding in its judgment.

14. As to the arbitration clause the court said:

> "As grounds for the District Court's lack of jurisdiction, TT-Club has also invoked the fact that the insurance contract made between TT-Club and Borneo Maritime Oy's parent company Borneo Maritime Ltd contains an arbitration clause. According to it, all disputes rising from the insurance and the insurance contract must be settled according to the arbitration procedure in London under English law. The District Court observes that Saluja Fabrics and The New India are not contractual parties to that insurance contract. The arbitration clause thus does not concern The New India. Because The New India does not derive its right to insurance compensation from Borneo Maritime Oy, the arbitration clause does not concern The New India on this basis either. Nor have such other grounds been presented in the case as would

> lead to a situation in which the arbitration clause would be binding upon The New India."

15. The court thus held that neither Saluja Fabrics nor New India was a party to the contract of insurance and that New India's claim against the Club was not derived from BMO. For these reasons it was not bound by the arbitration agreement. We understand that an appeal against that decision is pending, although no date for it has yet been fixed. The order which is the subject of this appeal expressly permits New India to defend the appeal in Finland, notwithstanding the injunction.

The issues

16. The parties' positions before the judge can be summarised in this way. The Club relied upon the arbitration clause in its rules. It said that, if New India is to recover under section 67 of the Finnish Act , it can only do so "in accordance with the insurance contract" between the BMO and the Club and that it follows that it is, at least for that purpose, bound by all the Club rules including the arbitration clause. It thus follows that New India must bring the claim by way of arbitration in England. It makes that submission in these proceedings. In due course it will submit in the arbitration that it is entitled to a declaration that New India's claim is doomed to failure because it is bound by (and cannot satisfy) the pay to be paid clause. The Club said that in these circumstances it is entitled to an injunction to restrain New India from proceeding in Finland or elsewhere in breach of the arbitration clause.

17. New India's case was that it is suing in Finland in reliance upon an independent statutory cause of action created by a Finnish statute and that the English court has no jurisdiction because the Finnish court was first seised of the dispute under Article 27 of the Regulation. Moreover it said that it is not suing on the contract of insurance in the Club rules or indeed bringing a claim in contract at all and that it is not bound by the arbitration clause in the rules. In any event it said that the issue whether it was bound by the arbitration clause was one in respect of which the Finnish court was first seised and that under Finnish law both the arbitration clause and the pay to be paid clause are void. Alternatively New India said that the English proceedings should be stayed on the ground of *forum non conveniens* and in any event that no injunction should be granted.

18. Since the case was before the judge there have been two important decisions of the European Court of Justice ("ECJ") upon which New India places considerable reliance in support of its submissions, and especially in support of its case that no injunction should be granted by the English Court restraining proceedings in Finland. They are Erich Gasser GmbH v Misat Srl, ECR C-116/02 , in which the judgment was given on 9 December 2003, and Turner v Grovit, ECR C-159/02 [2004] All ER (EC) 485 , in which judgment was given on 27 April 2004. The judgment of the judge was given on 18 December 2003 at a time when he was unaware of the decision in Gasser .

The decision of the judge

19. The judge's conclusions may be shortly summarised in this way.

- i) New India was bound to submit the claim under section 67 of the Finnish Act to arbitration in London. In proceedings before an English court a dispute about New India's claim can only be resolved by applying the principles of English private international law relating to characterisation. On the authorities, notably National Bank of Greece and Athens v Metliss [1958] AC 509 , Adams v National Bank of Greece [1961] AC 255 and Macmillan Ltd v Bishopsgate Investment Trust Plc (No 3) [1996] 1 WLR 387 , the question depends on whether New India is seeking to enforce a contractual obligation derived from the contract of insurance or an independent right of recovery arising under the Finnish Act . If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterised as one of statutory entitlement to which there may be no direct equivalent in English law. In that case the issue would have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterised as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law: see Adams v National Bank of Greece .
- ii) The effect of section 67 is in substance to enable an injured party who has a claim against an insolvent insured to bring proceedings directly against the insurer to obtain the benefit that the insured would himself have been entitled to obtain under the contract. The essential nature of the right created by section 67 is to enforce the terms of the contract.
- iii) The obligations of the Club under the contract of insurance are governed by English law and accordingly Finnish legislation will not be recognised in this country as effective

to modify them. It follows that if New India wishes to pursue a claim against the Club, it must do so in accordance with the terms of the contract under which it arises. That includes the arbitration clause.

• iv) It further follows that the court had jurisdiction in this case to give permission to serve the claim form out of the jurisdiction under CPR 6.20(5)(c) and rule 62.5(1)(c) and that it has jurisdiction to grant an injunction to prevent the continuation of proceedings contrary to the terms of the arbitration clause.

• v) The court was not bound to stay the proceedings under Article 27.1 of the Regulation because by Article 1.2(d) it does not apply to arbitration and because, following the decision of Aikens J in Navigation Maritime Bulgare v Rustal Trading Ltd (The 'Ivan Zagubanski') [2002] 1 Lloyd's Rep. 107 , these proceedings are within the arbitration exception and thus outside the Regulation.

• vi) There was no basis for staying the proceedings or setting aside the service outside the jurisdiction as a matter of discretion, given the judge's conclusion that the Club was entitled to have the matter arbitrated in England and not pursued in litigation in Finland or elsewhere.

• vii) Applying the principles in the authorities as to anti-suit injunctions, the club was entitled to an injunction restraining New India from proceeding further in Finland.

The appeal

20. The argument in the appeal ranged somewhat more widely than before the judge because it was submitted by Mr Smith on behalf of New India that, as the court first seised, the Finnish court and not the English court must decide whether these proceedings are within the arbitration exception or not. He also submitted that, if it was open to the English court to determine that question, we should hold that The Ivan Zagubanski was wrongly decided and that the proceedings are outside the arbitration exception, with the consequence that the proceedings are within the Regulation and that this court must decline jurisdiction or stay the proceedings under Article 27 . Mr Smith further relied upon the decisions of the ECJ in Gasser and Turner v Grovit in support of his submission that in any event no anti-suit injunction should have been granted.

21. The principal questions which arise in the appeal seem to us to be these:

• i) Should the court decline jurisdiction or stay the proceedings under the Regulation?

• ii) Was the judge right to hold that New India is bound to pursue its claim under the Finnish Act by arbitration in England?

- iii) Should the permission to serve the claim form out of the jurisdiction be set aside or the proceedings be stayed as a matter of discretion?
- iv) Should the judge have granted the declarations he did?
- v) Should he have granted an anti-suit injunction?

We will consider those questions under these headings: the Regulation, the arbitration clause, setting aside service and stay, the declarations and the anti-suit injunction.

The Regulation

22. The Regulation provides, as far as relevant, as follows:

> **Scope**
>
> **Article 1**
>
> 2. The Regulation shall not apply to:
>
> …
> (d) arbitration.
>
> **Jurisdiction**
>
> **Lis Pendens — Related Actions**
>
> **Article 27**
>
> 1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.
>
> **Article 28**

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Recognition and Enforcement

Article 32

For the purposes of this Regulation 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Recognition

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedure provided

for in Section 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 34

A judgment shall not be recognised:

- 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
- 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
- 3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
- 4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

> 3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.
>
> **Article 36**
>
> Under no circumstances may a foreign judgment be reviewed as to its substance."

23. It is common ground that the Finnish court is the court first seised. Mr Smith submitted that the English court should decline jurisdiction or stay the proceedings under Article 27 or stay them under Article 28 . Mr Howard submitted on behalf of the Club that the Regulation has no application because these proceedings relate to arbitration and are within the arbitration exception in Article 1.2(d) . However, Mr Smith took a prior point, namely that, as the court first seised, it is for the Finnish court and not the English court to decide whether these proceedings are within the Regulation or not and that the English court should stay these proceedings in the meantime under Article 27 of the Regulation, pending a decision of the Finnish court on that question. We will therefore consider that question first.

24. There is undoubted force in Mr Smith's submission if it is considered in principle and without regard to the decided cases. It seems to us to be at least arguable that the court first seised should indeed decide whether any relevant set of proceedings in a member state is within the Regulation or outside it because the arbitration exception applies, in order to have a clear rule on that question and in order to avoid conflicting judgments on that very question. However, that is not the approach which has so far been adopted.

25. Mr Howard relied upon the decision of the ECJ in Marc Rich & Co AG v Societa Italiana PA (The Atlantic Emperor) [1992] 1 Lloyd's Rep 342 . He submitted that that decision is inconsistent with the proposition advanced by Mr Smith. In that case plaintiff buyers ('Marc Rich') claimed damages for breach of contract from defendant sellers of crude oil ('Impianti')

alleging that the oil was contaminated. On February 18 1988 Impianti issued a writ in Italy claiming a declaration that it was not liable to Marc Rich. The writ was served on February 29 and on the same day Marc Rich commenced an arbitration in London. Impianti failed to appoint an arbitrator. On May 20 Marc Rich issued an originating summons asking the English court to appoint an arbitrator and obtained leave to serve the summons out of the jurisdiction. On July 8 Impianti applied to set aside the order giving leave to serve out of the jurisdiction on the ground that the dispute between the parties was whether or not the contract contained an arbitration clause and fell within the arbitration exception in Article 1(4) of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 ("the Brussels Convention"), which was of course the forerunner to the Regulation. Marc Rich argued that the Brussels Convention did not apply on the ground that the arbitration exception in Article 1(4) , which was in the same terms as Article 1.2(d) of the Regulation, applied.

26. The Court of Appeal referred these questions to the ECJ for a preliminary ruling:

> • "1. Does the exception in Article 1(4) of the Convention extend:
>
> > • (a) to any litigation or judgments and, if so,
> > • (b) to litigation or judgments where the initial existence of an arbitration agreement is in issue?
>
> • 2. If the present dispute falls within the Convention and not within the exception to the Convention, whether the buyers can nevertheless establish jurisdiction in England pursuant to:
>
> > • (a) Article 5(1) of the Convention, and/or
> > • (b) Article 17 of the Convention.
>
> • 3. If the buyers are otherwise able to establish jurisdiction in England than under paragraph 2 above, whether:
>
> > • (a) the Court must decline jurisdiction or should stay its proceedings under Article 21 of the Convention or, alternatively,
> > • (b) whether the Court should stay its proceedings under Article 22 of the Convention, on the grounds that the Italian Court was first seised."

27. Impianti relied upon a report prepared for them by Mr Jenard, who had of course previously made a report on the Brussels Convention and the 1971 Protocol to which, like that of Professor Schlosser on the 1978 Accession Convention , the court may consider and which must be given such weight as is appropriate in the circumstances, by reason of the express terms of section 3(3) of the Civil Jurisdiction and Judgments Act 1982 . In paragraph 22 of his report prepared for Impianti Mr Jenard said this:

> "Both the Italian and the English Courts are presently seised of this matter. The Italian Court (which was the court where proceedings were first brought) is asked to deal with the merits of the claim brought by Marc Rich under the sale contract and, incidentally to that claim, to confirm its own jurisdiction and determine the validity of the disputed jurisdiction clause in the contract. The English Court, on the other hand is asked to decide whether the arbitration clause is valid and if so to appoint an arbitrator. It is therefore certain that both the English and Italian Courts will directly or indirectly rule on the validity of the arbitration clause and it is further possible that they could come to different conclusions, in the event that the Italian courts, in reaching a conclusion on the merits, consider the Arbitration Clause to be invalid or non-existent and the English Court find that there is a valid Arbitration Agreement . In this respect it is important to remember the aims of the Brussels Convention ."

28. Mr Jenard then referred to Effer v Kantner [1982] ECR 825 and in paragraph 24 stressed the desirability of avoiding simultaneous proceedings on the same subject matter before the courts of two or more contracting parties "since this would lead to conflicting judgments and difficulties in the enforcement thereof". His view was that, since the Italian court was the court first seised, it should determine the question whether the arbitration clause was valid and that, if it held that it was, the parties should be sent to arbitrate in England, whereas if it held that it was not, the litigation should remain in Italy. In the meantime the English court should stay its proceedings under Article 21 of the Brussels Convention , which was the equivalent of Article 27 of the Regulation.

29. There was in our view some force in that approach but Advocate General Darmon did not agree. His view was that the principal subject matter of the proceedings pending before the English court was arbitration, that the arbitration exception therefore applied and that the Convention did not apply because it did not apply to that principal subject matter and that was so whether or not the English court had before it the preliminary issue of whether or not the arbitration existed: see eg paragraph 30 and following. The Advocate General was of the view that it was of decisive importance to determine whether the principal issue before the court fell within the scope of the Convention (paragraph 47), which in his view the principal issue in the English proceedings did not.

30. In considering question 1, the ECJ reformulated it by posing this question:

> "Whether a preliminary issue concerning the existence or validity of an arbitration agreement affects the application of the Convention to the dispute in question."

It answered the question in this way:

> "22 Impianti contends that the exclusion in Article 1(4) of the Convention does not extend to disputes or judicial decisions concerning the existence or validity of an arbitration agreement. In its view, that exclusion likewise does not apply where arbitration is not the principal issue in the proceedings but is merely a subsidiary or incidental issue.
>
> 23 Impianti argues that, if that were not so, a party could avoid the application of the Convention merely by alleging the existence of an arbitration agreement.
>
> 24 Impianti contends that, in any event, the exception in art 1(4) of the Convention does not apply where the existence or validity of an arbitration agreement is being disputed before different Courts to which the Convention applies, regardless of whether that issue has been raised as a main issue or as a preliminary issue.

25 The Commission shares Impianti's opinion in so far as the question of the existence or validity of an arbitration agreement is raised as a preliminary issue.

26 Those interpretations cannot be accepted. In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the Court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.

27 It would also be contrary to the principle of legal certainty, which is one of the objectives pursued by the Convention (see judgment in Case 38/81, Effer v Kantner, [1982] ECR 825 , paragraph 6) for the applicability of the exclusion laid down in Article 1(4) of the Convention to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties.

28 It follows that, in the case before the Court, the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator.

29 Consequently, the reply must be that Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national Court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation."

31. The court then said that, in view of the answer given to the first question, the second and third questions did not call for a reply. Mr Howard submitted that it follows from the reasoning of the ECJ that it rejected the suggestion that only the Italian court, as the court first seised, was entitled to determine the question whether the English proceedings fell within the Convention. He submitted that, if it had reached that conclusion, it would simply have so held and the problems with which it was faced would have been solved.

32. There is force in that submission. It seems clear that the Advocate General did not think that it was a matter for the Italian court, as the court first seised, to determine whether the English proceedings were within the arbitration exception. Moreover there is nothing in the ECJ decision or reasoning to suggest that that was not a matter for the court in which the proceedings said to be subject to the arbitration exception are brought, which was of course the English court in that case, to determine. Although the ECJ did not specifically address that question, it is we think reasonably clear that that was its view and we do not accept Mr Smith's submission that, because the Finnish court was the court first seised, the judge should have stayed the proceedings under Article 27 of the Regulation pending a decision by the Finnish court on the question whether the English proceedings were within the arbitration exception under Article 1.2(d) of the Regulation.

33. Mr Smith submitted that that conclusion is inconsistent with the decision of the ECJ in Gasser , where the facts were shortly these. On 19 April 2000 MISAT, who were Italian buyers of children's clothing from an Austrian company called Gasser, started proceedings in Rome seeking a ruling that the contract between the parties had been terminated. On 4 December Gasser brought an action in Feldkirch in Austria for payment of outstanding invoices. Gasser asserted not only that Austria was the place of performance under the contract but also that the Austrian court was designated by a choice of jurisdiction clause which had contractual effect between the parties so that it had jurisdiction under Article 17 of the Convention, which is now Article 23 of the Regulation. MISAT challenged the existence of the agreement as to jurisdiction and asserted that the question whether there was such an agreement was a matter for the court first seised, which was the court in Rome. On 21 December 2001 the Austrian court declined jurisdiction of its own motion pending the decision on jurisdiction by the court in Rome.

34. On appeal the Oberlandesgericht in Innsbruck stayed the proceedings and referred a number of questions to the ECJ, including what was the second question, which the ECJ formulated in this way in paragraph 28:

> "whether Article 21 of the Brussels Convention must be interpreted as meaning that, where a court is second seised and has exclusive jurisdiction under an agreement, it may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction."

The ECJ held in paragraphs 51 and 54 of its judgment that the answer to the second question must be that Article 21 must be interpreted as meaning that a court second seised must await the decision of the court first seised as to whether it (ie the court second seised) has jurisdiction to determine the dispute under a jurisdiction clause.

35. Mr Smith relied upon paragraphs 41, 42, 47, 48 and 51 of the judgment, where the court made it clear that the issues to be determined solely by the court first seised included issues "as to the very existence of a genuine agreement between the parties, expressed in accordance with the strict formal conditions laid down by Article 17 " because, as the court put it, "it is conducive to the legal certainty sought by the Convention that, in cases of *lis pendens* , it should be determined which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention." It held that it was clear from the wording of Article 21 that it was for the court first seised alone to determine that question.

36. Mr Smith submitted that the same reasoning leads to the conclusion that the court first seised should decide whether the claim in the court second seised is within the Regulation or outside it because of the arbitration exception. As we indicated earlier, there is force in that submission but we do not accept it for the reason given by Mr Howard. The reason is that there is a crucial distinction between this case and Gasser , namely that in Gasser it was common ground that the claims in both courts were within the Convention and governed by Articles 21 and 22 , whereas here that is not common ground. The question here is whether the claim in England is within the Regulation or not.

37. In these circumstances we do not accept Mr Smith's submission that the English court is no more entitled to consider the applicability of the arbitration exception than the Austrian court was entitled to consider Article 17 of the Convention in Gasser . As already indicated, it appears to us that the reasoning of the Advocate General and of the ECJ in The Atlantic Emperor supports the conclusion that it is open to the court in which the issue whether the arbitration exception applies to consider that question, even if it is the court second

seised. If it concludes that the arbitration exception applies so that the claim and proceedings are outside the Convention it is entitled to proceed in the ordinary way. If, on the other hand, it concludes that the exception does not apply and that the proceedings are within the Convention, the provisions of the Convention apply in their full rigour, in which event, if a question arose as to whether the court second seised had jurisdiction under an exclusive jurisdiction clause to which Article 23 applied, it would be for the court first seised to determine that question by reason of Article 27 in accordance with the decision of the ECJ in Gasser . It follows that we do not accept the submission that the judge should have stayed the proceedings under Article 27 of the Regulation pending a decision by the Finnish court on the question whether the English proceedings were within the arbitration exception under Article 1.2(d) of the Regulation.

38. The next question is whether the judge was right to hold that the claim in these proceedings comes within the arbitration exception and is thus outside the Regulation altogether by reason of Article 1.2(d) . Mr Smith submitted that the decision of Aikens J in The Ivan Zagubanski was wrong and that it follows that the decision of the judge, which followed it, was also wrong. This is a topic upon which there has been some divergence of opinion at first instance. This can be seen from the judgment of Aikens J, who (at pp 118–9) disagreed with the analysis of Judge Diamond QC in Pertenreederei M/S 'Heidberg' v Grosvenor Grain and Feed Co Ltd (The Heidberg) [1994] 1 Lloyd's Rep 287 .

39. We note in passing that at one stage during the argument we considered referring a number of questions to the ECJ because this appeal seems to us to raise some issues which are at least arguably not *actes clairs* . However, since the conclusion of the argument our attention has been drawn to Article 68 of the revised EC Treaty which adapted Article 234 (formerly 177) so that it provides in this context:

> "Where a question on the interpretation of [the Regulation] is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the [ECJ] to give a ruling thereon."

It is common ground between the parties that under the revised EC Treaty this court no longer has power to refer questions on the interpretation of the Regulation to the ECJ. The only court which can do so is the House of Lords, which, as a court against whose decisions

there is no judicial remedy in the United Kingdom, is bound to refer such a question in the circumstances identified in the adapted Article 234 quoted above.

40. In The Ivan Zagubanski Aikens J considered a number of first instance decisions in addition to The Heidberg , including Qingdao Ocean Shipping Co v Grace Shipping Establishment (The Xing Su Hai) [1995] 2 Lloyd's Rep 15 , Toepfer International GmbH v Molino Boschi Srl [1996] 1 Lloyd's Rep 510 , Lexmar Corporation and The Steamship Mutual Underwriting Association (Bermuda) Ltd v Nordisk Skibsrederforensig and Northern Tankers (Cyprus) Ltd ("The Lexmar case") [1997] 1 Lloyd's Rep 289 and Toepfer International GmbH v Société Cargill France [1997] 2 Lloyd's Rep 98 .

41. In The Ivan Zagubanski explosions and fire had caused damage to cargo, which had been shipped under bills of lading containing English arbitration clauses. Cargo interests brought proceedings in Marseille and elsewhere against the shipowners. The claimant shipowners claimed a declaration that there was a valid arbitration agreement between the parties and sought an anti-suit injunction restraining the cargo interests from pursuing court proceedings in Marseille or elsewhere. Aikens J held that the claims were within the arbitration exception and thus outside the Brussels Convention and granted both the declaration and the injunction sought. In reaching his conclusion on the first point he analysed the opinion of Advocate General Darmon in The Atlantic Emperor and relied both upon it and upon the decision and reasoning of the ECJ, part of which we have already set out.

42. Aikens J set out what in our view is an entirely accurate account of the Advocate General's opinion in paragraph 70 of his judgment as follows:

> "Mr Advocate General Darmon's opinion is elaborate and gives a detailed analysis of the structure and scope of the Convention and its relationship with arbitration. The following points in his opinion seem particularly relevant to the present case:
>
> • (1) Before the Brussels Convention there were already important international conventions governing the enforcement of arbitration agreements and awards, particularly the New York Convention of 1958 .
> • (2) Although the application before the English Courts in Marc Rich was for the appointment of an arbitrator, there was a threshold or "preliminary" question that had to be considered: whether an arbitration agreement existed at all.

• (3) The "principal issue" before the English Court was the appointment of an arbitrator. That is not within the Convention.
• (4) If the "principal issue" is outside the scope of the Convention, then even if a "preliminary matter" is within the Convention, that cannot bring the whole proceedings within the scope of the Convention. In this case the "preliminary matter" is whether an arbitration agreement exists.
• (5) In any event a dispute as to the existence of an arbitration agreement falls outside the scope of the Convention. This opinion is reinforced by the view at par 64 of Professor Schlosser's report on the Accession Convention .
• (6) Whether or not the existence of an arbitration agreement is a preliminary or principal issue, "it seems that the principal subject-matter of the dispute before the national Court relates to arbitration."
• (7) The views of Mr Schlosser (expressed in an opinion prepared specifically for that case when before the ECJ) that the Convention applied to *all proceedings* before Courts must be rejected. They are contrary to the views expressed in the reports by Mr Jenard and Mr Schlosser on the original Convention and the Accession Convention . They stated:

> • (a) The Brussels Convention … does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration … and does not apply to the recognition of judgments given in such proceedings.
> • (b) … the 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the dismissal of arbitrators, the fixing of the judgment determining whether an arbitration agreement is valid or not … is not covered by the 1968 Convention.

• (8) The report of Messrs Evrigenis and Kerameus (on the accession of the Hellenic Republic to the Brussels Convention in 1986) also stated that:
•Proceedings which are directly concerned with arbitration as the principal issue … are not covered by the Convention.
• (9) It is not legitimate to suggest that arbitration awards that are made into judgments must be capable of recognition and enforcement under the Convention. They are enforceable under the New York Conventions as awards or as judgments "under bilateral conventions or by domestic law". Furthermore, there is no reason for it to be "desirable" to apply the Brussels Convention and *annul* arbitration awards.

> • (10) The Brussels Convention should also not apply to the issue of the recognition and enforcement of judgments concerning the existence and validity of arbitration agreements. That is because there is the danger that such a judgment may be given in a state other than the place of the arbitration.
> • (11) Finally on this aspect of the case he said that the application of the Brussels Convention to determine jurisdiction would undermine international arbitration. That is because arbitration needs the assistance of the Courts of the state where the arbitration is to take place in order to aid the arbitration process itself. Yet that Court might not have jurisdiction under the Convention unless a special jurisdiction could be invoked by art 5(1) or 17 . But attempts to use those articles to found a Court's jurisdiction in relation to arbitration were open to strong objection or criticism."

43. In paragraph 70(5) Aikens J referred to paragraph 64 of Professor Schlosser's report on the Accession Convention . Paragraph 64(b) is in these terms:

> "The 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example, the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time-limit for making awards or the obtaining of a preliminary ruling on the question of substance as provided under English law in the procedure known as "statement of special case" (Section 21 of the Arbitration Act 1950). In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention."

The case contemplated in the last sentence is very close to this case on the facts.

44. Aikens J expressed his conclusions derived from the Advocate General's opinion in paragraphs 71 and 72 in this way:

> "71. In my respectful view the opinion of Mr Advocate General Darmon is comprehensive and its analysis compelling. The theme and overall conclusion of it is that the Brussels Convention does not apply to any Court proceedings or judgments in which the principal focus of the matter is "arbitration". That includes proceedings concerning the validity or existence of an arbitration agreement; the appointment of arbitrators; ancillary assistance to arbitration proceedings and the recognition and enforcement of awards.
>
> 72. Based on his opinion and the views of Messrs Jenard and Schlosser on which he relies, I would have no hesitation in saying that proceedings in the English Court for (i) a declaration that arbitration clauses bound the defendants; and (ii) an injunction to restrain proceedings in Courts in breach (or threatened breach) of binding arbitration agreements fall within the exception in art 1(4) of the Convention. That is simply because the principal focus of those proceedings is "arbitration"."

We entirely agree with that analysis and cannot improve upon it.

45. In paragraph 73 Aikens J summarised the conclusions of the ECJ, the substance of which we have set out in paragraph 30 above. We should also refer to paragraph 18 of the ECJ judgment upon which Aikens J placed some reliance. It is in these terms:

> "The international agreements, and in particular the abovementioned New York Convention on the recognition and enforcement of foreign arbitral awards …, lay down rules which must be respected not by arbitrators themselves but by the courts of the Contracting States. Those rules relate, for example, to agreements whereby parties refer a dispute to arbitration and the recognition and enforcement of arbitral awards. It follows that, by excluding arbitration from the scope of the Convention on the ground that it is already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings before national courts."

46. Aikens J correctly observed in paragraph 73 that the ECJ generally followed the view of the Advocate General and in paragraph 74 he said this:

> "[Counsel] submitted that the decision of the ECJ was narrow and confined to the single issue of whether litigation for the appointment of an arbitrator was excluded from the Convention under art 1(4). He is correct about the decision. But that cannot detract from the fact that the Court took a very broad view of the scope of the "arbitration exception" in art 1(4), as particularly expressed in pars 18 and 21 of its judgment. Nor is there one word of disapproval of the approach of Mr Advocate General Darmon or his views."

47. In the result Aikens J, in our opinion correctly, held that the question in each case is whether the (or a) principal focus of the proceedings is arbitration. That test seems to us to be consistent, not only with The Atlantic Emperor , but also with the first instance decisions to which he referred and we agree with him that the reasoning in those decisions is to be preferred to that in The Heidberg . Another way of putting the same point is to ask the question posed by Rix J in The Xing Su Hai , namely whether the essential subject matter of the claim concerns arbitration. We do not think that that is any different from the test which seemed to Clarke J to be correct in The Lake Avery [1997] 1 Lloyd's Rep 540 , namely whether the relief sought in the action can be said to be ancillary to, or perhaps an integral part of the arbitration process.

48. In our opinion the decisions in The Ivan Zagubanski that both the claim for a declaration that there was a binding arbitration agreement between the parties and the claim for an anti-suit injunction were within the arbitration exception were correct for the reasons given by Aikens J. We see no distinction in this regard between the facts of that case and this. It follows that the judge was correct to hold on the facts of the instant case both that the claims for declarations that New India was bound to refer its claim to arbitration and that the Finnish proceedings were brought in breach of an agreement to arbitrate and that the claim for an anti-suit injunction were within the arbitration exception in Artice 1.2(d) of the Regulation.

49. It follows that the answer to the first question identified in paragraph 21 above, namely whether the court should decline jurisdiction or stay the proceedings under the Regulation is no, since the Regulation has no application to the claims brought in the English proceedings.

50. A number of other questions which might arise under the Regulation were touched on in argument. In particular, there was some debate on the question whether the judgment of the District court of Kotka is entitled to recognition under Article 33 . However, we do not think that this question arises for decision at present. As we understand it, the judgment obtained to date is simply to the effect that that court has jurisdiction to entertain a claim by New India under the Finnish Act . That was essentially a matter for that court in proceedings which seem to us to be within the Regulation. Whether that judgment is entitled to recognition or not does not seem to us to be relevant to the question whether the judge was correct to grant the declarations or injunction which he did.

51. The fact that arbitration is excluded from the Convention means that from time to time there are likely to be conflicting judgments in different member states and it is therefore possible that questions of recognition and enforcement of conflicting judgments may arise in the future in a case like this. In our opinion such questions are best left for decision when and if they arise.

The arbitration clause

52. Some of the argument in this appeal proceeded on the footing that the question is whether New India became a party to the agreement to arbitrate contained in clause D2 of the General Provisions in the Club Rules . However, we do not think that that is quite the right question and, as we read his judgment, the judge did not go so far. We accept Mr Smith's submission that New India did not become a party to an arbitration agreement. We agree that self-evidently New India was not an original party and there is no basis upon which it could be held that there was any novation or transfer to New India of the rights and obligations of the insured under the Club Rules . This is in our view important on the question whether it was appropriate to grant an anti-suit injunction discussed below.

53. As we read his judgment, the judge accepted the submission made to him on behalf of the Club that, if New India wished to make a claim against it under section 67 of the Finnish Act , the claim was properly characterised under English principles of conflict of laws as a claim under the contract to enforce the obligations of the Club and that, just as New India

could rely upon the terms of the rules to establish liability, so the Club could rely upon the terms of the rules to defeat or limit the claim. One of those rules was the arbitration clause in clause D2 of the General Provisions and another was the Scott v Avery clause in clause D2.3, which expressly provided that no action can be brought on a dispute "unless and until it has been referred to arbitration and the award has been published and become final".

54. In our judgment, if the judge was right to hold that the claim under section 67 of the Finnish Act was properly characterised under English principles of conflict of laws as a claim under the contract to enforce the obligations of the Club, he was plainly correct to hold that the Club could, as a matter of English law, rely upon the terms of the rules, whether they be provisions relating, say, to the extent of the cover or the arbitration clause. The key question under this head is therefore whether he correctly classified New India's claim under section 67 of the Finnish Act .

55. Mr Smith submitted that he did not. He pointed to the judge's own conclusion that if in substance the claim is independent of the contract of insurance and arises simply as a right of action under the Finnish Act against an insolvent insured, the issue must be determined under Finnish law. Mr Smith submitted that that is precisely what the Finnish Act is. There is undoubtedly some force in that submission but, like the judge, we do not accept it. The authorities, which are referred to in paragraph 19(i) above and were relied upon by the judge, show that the nature of New India's claim can only be resolved by applying the principles of English law relating to characterisation.

56. We agree with the judge that those principles involve a consideration of the substance of the claim being advanced. The judge cited two passages from the judgments of this court in Macmillan Ltd v Bishopsgate Investment Trust Plc (No. 3) [1996] 1 W.L.R. 387 which bear this out. The first is in the judgment of Auld LJ at page 407B–C, where he said this:

> "Subject to what I shall say in a moment, characterisation or classification is governed by the *lex fori* . But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the *lex fori* , or

> that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the *lex fori* which may not be applicable under the other system: see *Cheshire & North's Private International Law* , 12th ed, pp 45–46, and *Dicey & Morris* , vol 1 pp 38–43, 45–48."

The second is in the judgment of Aldous LJ at page 418A-B, where he said this:

> "I agree with the judge when he said [1995] 1 WLR 978 , 988: "In order to ascertain the applicable law under English conflict of laws, it is not sufficient to characterise the nature of the *claim* : it is necessary to identify *the question at issue* ." Any claim, whether it be a claim that can be characterised as restitutionary or otherwise, may involve a number of issues which may have to be decided according to different systems of law. Thus it is necessary for the court to look at each issue and to decide the appropriate law to apply to the resolution of that dispute."

57. We agree with the judge that those are helpful statements because they recognise that the court is concerned to identify the true issues or, as Aldous LJ put it, the question at issue. Applying that approach the judge expressed his conclusion in paragraph 16 as follows:

> "The issue in the present case is whether New India is bound by the arbitration clause which in turn depends on whether it is seeking to enforce a contractual obligation derived from the contract of insurance or an independent right of recovery arising under the Insurance Contracts Act . If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterised as one of statutory entitlement to which there may be no direct equivalent in English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterised as one of obligation. In that case the court will resolve it

> by applying English law because the proper law of the contract creating the obligation is English law: see Adams v National Bank of Greece .”

We entirely agree with that approach, which seems to us to be consistent with the authorities.

58. The question is therefore what is the substance of New India's claim under section 67 of the Finnish Act . The judge held that the claim is in substance to enforce against the Club as insurer the contract made by the insured. He was in our opinion right so to hold for the reasons he gave. In short, the title to section 67 is the “ *insured person's entitlement to compensation under general liability insurance* ” and the right is defined as a right “to claim compensation in accordance with the insurance contract direct from the insurer” in certain defined circumstances. The claim under the Act is not therefore in any sense independent of the contract of insurance but under or in accordance with it. In these circumstances it seems to us that the judge was correct to hold that the issue under the Act is one of obligation under the contract. The judge noted in passing in paragraph 18 of his judgment that the Finnish court itself described the Act as giving the injured party the right to claim compensation “according to the insurance policy”.

59. In all the circumstance, we agree with the judge that, although the Act gives the claimant a right of action directly against the insurer without the need for the formalities of an assignment, what he obtains is essentially a right to enforce the contract in accordance with its terms. As to the anti-avoidance provisions in section 3 (quoted above), the judge said this in paragraph 19:

> “The statute renders void those terms of the contract which have the effect of restricting the right to recovery in a way that is inconsistent with its terms and those provisions must, of course, be applied in any action before the Finnish courts. However, that does not in my view detract from the conclusion that the essential nature of the right created by section 67 is to enforce the terms of the contract.”

We agree.

60. For these reasons, which are essentially those of the judge, our answer to the question posed in paragraph 21(ii) is that the judge was right to hold that, if New India wishes to pursue a claim under the Finnish Act , it is bound to do so by arbitration in England because the Club is entitled to rely upon the arbitration clause, just as it is entitled to rely upon any other clause in the contract to defend the claim.

Setting aside service and stay

61. Mr Smith submitted that the judge should in any event have set aside service out of the jurisdiction or granted a stay on the basis of *forum non conveniens* . The judge rejected two specific submissions in this regard in paragraphs 22 and 23 of his judgment:

> "22. The first of these is his submission that Kotka is clearly the appropriate forum for any claim against Borneo Maritime Oy and the fact that the same issues will necessarily arise in New India's action against the TT Club makes Kotka the more appropriate forum for the trial of that claim as well. I do not regard this as a factor of much importance in this case. No doubt Kotka would have been an appropriate forum for a claim against Borneo Maritime Oy because it was a Finnish company which carried on business there. It was also the place where the goods were accepted for carriage and where the documentation relating to the road haulage leg of their journey was issued. However, the question in this case is not whether the claim should be litigated in Finland or England but whether it should continue to be litigated through the courts or determined in arbitration. There is nothing as far as I can see to suggest that the issues surrounding the issue of the documents or the loss of the goods cannot be effectively and fairly determined in arbitration and, to be fair to him, Mr. Smith did not suggest otherwise.
>
> 23 The second is his submission that the very fact that the District Court was first seised of the dispute is itself a factor that points in favour of Kotka. However, that is of no relevance once the court is satisfied if the parties have agreed that the claim should be pursued in arbitration. The fact that proceedings were begun first in Kotka is simply a consequence of the failure on the part of New India to accept that the obligation it seeks to enforce must be pursued in that way."

62. In our judgment, the judge was plainly correct in this regard. Once it is held by the English court that New India is bound to submit its claim under the Finnish Act to arbitration it does not seem to us that it would be just to stop the Club seeking a declaration to that effect in proceedings in England. In any event we see no proper basis upon which this court could interfere with the exercise of the judge's discretion under this head.

The declarations

63. The declarations granted were set out in paragraphs 2(a) and (b) of the order as follows:

> • "(a) It is declared that the Defendant is bound to refer any claims against the Claimant, in respect of the consignment carried from Calcutta (India) to Kotka (Finland) and onwards to Moscow (Russia) pursuant to 2 bills of lading … and CMR International Way Bill ("the consignment"), to arbitration in accordance with the arbitration clause contained in Section D, Clause2.1 of [the certificate] ("the arbitration clause").
> • (b) It is declared that the proceedings commenced by the Defendant against the Claimant in Kotka, Finland, by summons dated 16 December 2002 ("the Kotka proceedings"), are in breach of the arbitration clause."

64. It seems to us to follow from the conclusions which we have reached so far that the Club is entitled to the first of those declarations. For the reasons given above under the heading 'the arbitration clause', an application of English conflict of laws principles leads to the conclusion that, if New India wishes to pursue a claim under the section 67 of the Finnish Act , it must do so in arbitration in London because the Club is entitled to rely upon the arbitration clause in the Club Rules , which are the very rules which New India relies upon in order to make a claim under the Act: see, in the context of the Third Parties (Rights Against Insurers) Act 1930 , The Padre Island (No 1) .

65. It is less clear that the Club is entitled to the second declaration. In our view the Club is not entitled to such a declaration if it means, on its true construction, that New India was in breach of contract in commencing the Kotka proceedings. As indicated in paragraph 52 above, we do not think that New India was in breach of contract. So, for example, the Club could not in our view sue New India for damages for commencing the proceedings in Finland. It seems to us that the declaration could be so construed and for that reason we think it right to set aside that declaration. As we see it, the Club is sufficiently protected by the first declaration and either does not need the second or, if it is construed as just suggested, is not entitled to it.

The anti-suit injunction

66. The judge granted an anti-suit injunction restraining New India from commencing or continuing any claims arising out of the consignment otherwise than by arbitration in London. As a result New India is at present enjoined from proceeding with the Kotka proceedings, save so far as necessary to defend the Club's appeal on jurisdiction. The judge considered this topic in detail between paragraphs 25 and 43 of his judgment.

67. The judge referred to what is now a considerable body of authority to the effect that the court will readily grant an injunction to restrain proceedings elsewhere in breach of an exclusive jurisdiction clause or an agreement to arbitrate. The cases include: Aggeliki Charis Compania Maritima SA v Pagnan SpA. (The 'Angelic Grace') [1995] 1 Lloyd's Rep 87 , Bankers Trust Co v PT Jakarta International Hotels & Development [1999] 1 Lloyd's Rep 910 , XL Insurance Ltd v Owens Corning [2000] 2 Lloyd's Rep 500 , Donohoe v Armco Inc [2001] UKHL 64, [2002] 1 Lloyd's Rep 425 and Welex AG v Rosa Maritime Ltd (The 'Epsilon Rosa') [2003] EWCA Civ 938; [2003] 2 Lloyd's Rep 509 .

68. The rationale of the cases on exclusive jurisdiction clauses can be seen from these passages in the speeches of Lord Bingham and Lord Hobhouse in Donohoe v Armco Inc , which were quoted by the judge in paragraphs 27 and 28 of his judgment. Lord Bingham said at page 433 (paragraph 24):

> "If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion

> (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case."

Lord Hobhouse said at page 439 (paragraph 45):

> "The position of a party who has an exclusive English jurisdiction clause is very different from one who does not. The former has a contractual right to have the contract enforced. The latter has no such right. The former's right specifically to enforce his contract can only be displaced by strong reasons being shown by the opposite party why an injunction should *not* be granted The latter has to show that justice requires that he should be granted an injunction."

69. Almost identical principles have been applied in the case of arbitration clauses. As the judge observed in paragraph 29, in The Epsilon Rosa Tuckey LJ, having referred to the passage in the speech of Lord Bingham cited above, said at page 518 (paragraph 48):

> "… the starting point is, as the judge said, that the party suing in the non-contractual forum must show strong reasons for doing so or he faces the prospect of an injunction being granted against him. I accept that the court should take into account how serious the breach is. In other words a defendant

> who cynically flouts a jurisdiction clause which he has freely negotiated is more likely to be enjoined than one who has had the clause imposed upon him and has acted in good faith. But I do not think this leads to a sliding scale of enforcement. The parties to a contract, however it is made, should abide by its terms. If they have agreed to resolve their disputes in a particular way they should be kept to their bargain unless there are strong reasons for not doing so."

70. The judge essentially applied those principles to the facts of the instant case. He rejected Mr Smith's submissions that this case is to be distinguished from the ordinary case. He accepted that New India was not cynically flouting the clause but said that that did not take the matter very far once it was established that the claim is subject to the arbitration clause and the Club had made it clear that it wanted the matter decided in arbitration.

71. The judge rejected the submission that the Club should be left to apply for a stay in Finland, on the basis that there is now a strong line of authority that the mere fact that an application for a stay of the foreign proceedings for the purposes of arbitration can be made to the court in which they are pending is not a ground for refusing to grant injunctive relief. The judge took account of the delay in making the application and the fact that the Club had made an unsuccessful challenge to the jurisdiction of the District Court in Kotka before making the application but (in the latter case) expressed the view that it was not a factor which carried great weight.

72. As to Mr Smith's submission based on comity, the judge said in paragraph 34:

> "I need hardly say that this court attaches the greatest importance to judicial comity and is very conscious of the respect due to the courts of other countries. It is for that reason that it cannot be emphasised too strongly that orders made in support of agreements to refer disputes to arbitration are directed at the defendant and not in any sense at the court in which he has chosen to commence proceedings. The question for the court in the present case is whether it should make an order preventing New India from disregarding the arbitration clause or whether it should allow it to do so and leave the Club to resist enforcement and pursue any remedy it may have for its breach."

We return to this point below in the context of the decision of the ECJ in Turner v Grovit , which was not of course decided until after the judgment in this case.

73. A key aspect of the judge's reasoning was this. He recognised (in paragraph 35) that if the proceedings continue in Finland, subject to any possible defences on the merits, it is likely that the claim will succeed because the pay to be paid clause in the Club Rules will not be effective because of section 3 of the Finnish Act , whereas if the claim proceeds by way of arbitration in London the claim will fail because the pay to be paid clause will be held to be effective in accordance with the decision of the House of Lords in The Fanti and The Padre Island (No 2) .

74. In support of his conclusion the judge relied upon the decision of Thomas J in Akai Pty Ltd v People's Insurance Ltd [1998] 1 Lloyd's Rep 90 , where Akai brought an action in England under a credit insurance policy which contained both a choice of English law and jurisdiction clause and a clause barring any action arising out of the policy unless commenced within 12 months of the relevant events. The action was brought after the expiry of the 12 months and the insurer counterclaimed for a declaration that the action was time barred. Akai also commenced proceedings in Australia, where the High Court of Australia held that, by reason of section 8 of the Australian Insurance Contracts Act 1984 , the clause providing for English law and jurisdiction was void.

75. As a result, the position was that, if the action was tried in England the claim would be time barred, whereas if it was tried in Australia the time bar would be ineffective as a matter of Australian law and policy. Thomas J held that the court should give effect to the parties' choice of law and jurisdiction clause unless it would be contrary to public policy to do so. He held that considerations of comity did not require the courts of this country to give effect to the decisions of a foreign court that would override the parties' choice of law and jurisdiction. He therefore allowed the counterclaim to proceed.

76. All the cases to which the judge referred (and to which we have been referred) are cases in which the parties to the litigation or their privies had agreed the jurisdiction or arbitration clause. That includes the Akai case. Mr Smith submitted to the judge that this case is different but the judge said this in paragraph 39:

> "In reaching that conclusion the judge [ie Thomas J] relied heavily on the fact that the terms of the policy had been freely agreed between the parties. Mr Smith submitted that the present case is different because New India was not an original party to the contract and had no opportunity to influence its terms. I accept that the two cases differ in this respect, but this ground of distinction does not undermine the conclusion that New India should be held to the clause. There is a strong presumption that in commercial contracts of this kind parties should be free to make their own bargains and having done so should be held to them. By parity of reasoning those who by agreement or operation of law become entitled to enforce the bargain should equally be bound by all the terms of the contract."

The judge thus rejected the distinction between this case and the decided cases identified above on the footing that "by parity of reasoning" the same considerations apply to both.

77. Finally the judge rejected a submission based on the evidence that the Finnish courts would not recognise or give effect to an injunction. He did so on the basis that the injunction would not be addressed to the Finnish court but to New India.

78. Mr Smith submitted to us that the judge was wrong not to distinguish the ordinary case where a party to a contract brings proceedings in breach of contract and this case in two key respects. First, he submitted that, even in a case where such proceedings are a breach of contract, an anti-suit injunction should not be granted to restrain proceedings in the courts of a country to which the Regulation applies. It is in this regard that he relied upon the decision of the ECJ in Turner v Grovit . Second, he submitted that this case is markedly different from any of the previous cases and submitted that, whatever the state of English law, there was no good reason to restrain New India from using a Finnish statute in Finland for the purposes for which it was intended, namely to provide third parties with rights against liability insurers free of artificial shackles such as pay to be paid clauses. We will consider each of those submissions in turn.

79. As to the first submission, the judge in effect left the point open. He noted in paragraph 26 that in Turner v Grovit (which had been referred to the ECJ by the House of Lords [2001] UKHL 65 , [2002] 1 WLR 107) Advocate General Ruiz-Jarabo Colomer expressed

the view that it was inconsistent with the Brussels Convention for the judicial authorities of one contracting state to restrain litigants from commencing or continuing proceedings before the judicial authorities of another contracting state. However, the judge said that until the ECJ itself delivered a ruling he considered that he had no alternative but to regard himself as bound by the existing law and practice in this country.

80. In Turner v Grovit the Court of Appeal granted an injunction restraining the defendant from continuing proceedings in Spain or commencing proceedings there or elsewhere against Mr Turner on the ground that such proceedings were or would be vexatious and oppressive and brought in bad faith in order to vex Mr Turner in the pursuit of his application in England before an Employment Tribunal. The question referred by the House of Lords was answered in this way by the ECJ at paragraph 31:

> "Consequently, the answer to be given to the national court must be that the Brussels Convention is to be interpreted as precluding the grant of an injunction whereby a court of a contracting state prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another contracting state, even where that party is acting in bad faith with a view to frustrating the existing proceedings."

81. Before answering the question in that way the ECJ emphasised in paragraphs 24 and 25 the mutual trust which contracting states accord to one another's legal systems and judicial institutions and said that it was implicit in that principle that the rules on jurisdiction, which are common to all, may be interpreted and applied with the same authority by each of them. The court also stressed in paragraph 26 that, save in a few cases, the Convention does not permit the jurisdiction of a court to be reviewed by a court in another contracting state. The court then said this:

> "27. However, a prohibition imposed by the court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Brussels Convention .

28. Notwithstanding the explanations given by the referring court and contrary to the view put forward by Mr Turner and the United Kingdom government, such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum state. In so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another member state, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another member state. Such an assessment runs counter to the principle of mutual trust which, as pointed out in paras 24 to 26 of this judgment, underpins the Brussels Convention and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another member state.

29. Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Brussels Convention (see Kongress Agentur Hagen GmbH v Zeehaghe BV case C-365/88 [1990] ECR I-1845 (para 20). However, that result would follow from the grant of an injunction of the kind at issue which, as has been established in para 27 of this judgment, has the effect of limiting the application of the rules on jurisdiction laid down by the Brussels Convention .

30. The argument that the grant of injunctions may contribute to attainment of the objective of the convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings, cannot be accepted. First, recourse to such measures renders ineffective the specific mechanisms provided for by the convention for cases of lis alibi pendens and of related actions. Second, it is liable to give rise to situations involving conflicts for which the convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one contracting state, a decision might nevertheless be given by a court of another contracting state. Similarly, the possibility cannot be excluded that the courts of two contracting states that allowed such measures might issue contradictory injunctions."

82. Mr Smith submitted that this case is stronger than that because in Turner v Grovit the defendant was guilty of abusing the process of the court and acting in bad faith, whereas no such suggestion is or can be made against New India. That is so but, as we see it, this case is different from Turner v Grovit and indeed Gasser in a very important respect. In both Turner v Grovit and Gasser both sets of proceedings were what may be called Convention proceedings. Thus in Gasser the proceedings in both Italy and Austria were within the Convention, just as they were in England and Spain in Turner v Grovit . Each court had or potentially had jurisdiction under the Convention.

83. In the exclusive jurisdiction clause type of case like Gasser , there is as we see it no room for an anti-suit injunction because the court first seised must decide issues of jurisdiction including the jurisdiction of the court second seised. Although it was not said that Article 27 or 28 applied, Turner v Grovit was also a case in which both sets of proceedings were within the Convention. The position is different in a case where one set of proceedings is outside the Convention, as here. In a case where two parties to a contract which includes an arbitration clause bring proceedings in different contracting states and there is an issue as to whether one of those sets of proceedings is within the arbitration exception and thus outside the Convention, we have already expressed our view that the court in which that dispute arises has jurisdiction to determine that dispute and that Articles 27 and 28 do not apply to them. If that were wrong, the same principles would apply as in Gasser and no injunction could be granted.

84. However, if that view is correct, the underlying rationale of Gasser does not apply directly to such a case. Moreover, the considerations in paragraphs 26 to 30 of the judgment in Turner v Grovit quoted above do not seem to us to apply directly. Thus, as we see it, there is nothing in the Convention to prevent the courts of a contracting state from granting an injunction to restrain a claimant from beginning proceedings in a contracting state which would be in breach of an arbitration clause. As the ECJ put it in paragraph 18 of its judgment in The Atlantic Emperor (quoted in paragraph 45 above), the contracting parties “intended to exclude arbitration in its entirety”, so that arbitration must be treated as entirely outside the Convention.

85. Once it is held (as it was for example in The Ivan Zagubanski) that proceedings in the court of a contracting state for (i) a declaration that arbitration clauses bound the defendants and (ii) an injunction to restrain proceedings in the court of another contracting state in breach (or threatened breach) of binding arbitration agreements fall within the exception in Article 1.2(d) of the Regulation and are thus outside the Convention so that Articles 27 and 28 do not apply to them, the question arises whether, in the light of the underlying reasoning in Turner v Grovit , an injunction should not be granted restraining the person in breach from bringing such proceedings.

86. The competing considerations seem to us to be these. It might be said in the light of the reasoning in Turner v Grovit that an injunction should never be granted to restrain a claimant from proceeding in the courts of a contracting state in breach of an English arbitration clause because to do so interferes with the exercise by that court of the jurisdiction conferred on it by the Regulation. There is certainly some support for that view in Turner v Grovit , with its emphasis on mutual trust and the opinion expressed in paragraphs 27 and 28 (quoted above) that such an injunction interferes with the jurisdiction of the foreign court and that such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum state.

87. The question is whether that view should be preferred in this context to what has come to be the settled approach in England to proceedings brought in breach of an arbitration clause in a contract between the parties which was set out by the judge and is referred to above. In this regard the approach to actions in breach of contracts containing arbitration clauses is most clearly stated in the judgments of Rix J at first instance and in the judgments of Leggatt, Millett and Neill LJJ in this court in The Angelic Grace [1994] 1 Lloyd's Rep 168 and [1995] 1 Lloyd's Rep 87 . It may be recalled that, although The Angelic Grace was itself concerned with an arbitration clause, by the time the case reached this court, the court had recently considered the correct approach to the grant of anti-suit injunctions in cases where proceedings were brought in breach of an exclusive jurisdiction clause in Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR.588 . It was in those circumstances that in The Angelic Grace the court discussed both arbitration clauses and exclusive jurisdiction clauses.

88. The essential reasoning of the all judgments, expressed in robust form, can be seen in these paragraphs in the judgment of Millett LJ at page 96:

"In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.

The Courts in countries like Italy, which is a party to the Brussels and Lugano Conventions as well as the New York Convention , are accustomed to the concept that they may be under a duty to decline jurisdiction in a particular case because of the existence of an exclusive jurisdiction or arbitration clause. I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.

…

In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in Continental Bank N.A. v. Aeakos Compania Naviera S.A., [1994] 1 W.L.R. 588 . The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction, is,

> of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."

89. In considering the propositions advanced by Millett LJ in those paragraphs, it is important to note that, as we have seen from the decision of the ECJ in Gasser , so far as proceedings within the Regulation are concerned, the approach to contracts containing exclusive jurisdiction clauses is not now the same as that advocated by the English courts. That is because the court first seised must decide whether any relevant court, including the court second seised, has jurisdiction under an exclusive jurisdiction clause within Article 23 , so that there is no room for an anti-suit injunction. However, we see no reason why the principles in The Angelic Grace should not continue to apply to the circumstances in which claimants may be restrained from bringing proceedings in courts of non-contracting states in breach of agreements to arbitrate.

90. As to proceedings brought in the courts of a contracting state, in the first of the paragraphs quoted above Millett LJ in our view drew an important distinction between proceedings brought in breach of an arbitration clause and proceedings said to be vexatious or oppressive but where no breach of contract is involved. He said that the question whether proceedings are vexatious or oppressive was primarily for the court before which it was pending, whereas in the case of proceedings brought in breach of contract there was no good reason for diffidence in granting an injunction on the clear and simple ground that the claimant had promised not to bring them.

91. It appears to us that that distinction is consistent with the reasoning in Turner v Grovit , which was of course a case in which the ground on which the injunction had been granted was that the proceedings in Spain were vexatious and oppressive. There is nothing in Turner v Grovit which in our opinion contradicts the reasoning in the second or third of the paragraphs quoted from the judgment of Millett LJ, in so far as it relates to arbitration clauses. As to the second paragraph, there is no reason why any court should be offended by an injunction granted to restrain a party from invoking a jurisdiction in breach of a contractual promise that the dispute would be referred to arbitration in England. The English court would not be offended if a claimant were enjoined from commencing or continuing proceedings in England in breach of an agreement to arbitrate in another contracting state.

As to the third paragraph, it remains the position that damages would be an inadequate remedy.

92. For these reasons we agree with the conclusions expressed by the judge in paragraph 34 of his judgment (quoted in paragraph 72 above) which seem to us to remain applicable in a case of this kind. We do not accept Mr Smith's submission that the court should not grant an anti-suit injunction in a case where a party to an arbitration agreement begins proceedings in the courts of a contracting state in breach of an arbitration clause in a contract.

93. That is not, however, this case. We therefore turn finally to Mr Smith's submission that the judge should not have granted an injunction in this case, where the highest that it can be put against New India is that the only reason that it can be said in England that New India should not be permitted to proceed in Finland is that, because of English principles of conflict of laws, the claim is classified as a claim under the contract so that New India is bound to bring any claim against the Club in arbitration in London. Mr Smith submitted that in these circumstances there is no parity of reasoning between this case and the principles relied upon by the judge and set out above.

94. We accept that submission. This claim is brought in Finland under a Finnish statute conferring rights on third parties against liability insurers in circumstances in which the insured is insolvent. The statute was no doubt passed because, as a matter of public policy in Finland, it was thought that liability insurers should be directly liable to third parties who had suffered loss in respect of which the insured was liable. The public policy behind the Finnish Act was the same as or very similar to the public policy behind the Third Parties (Rights Against Insurers) Act 1930 . It appears that the only difference of importance between them is that in England the anti-avoidance provision does not defeat the pay to be paid clause, whereas it may be that section 3 of the Finnish Act will do so, although it is right to say that that is a matter yet to be determined by the Finnish courts. It may also be observed that by section 3(3) section 3(1) and (2) do not apply to “marine or transport insurance taken out by businesses”. There is, as we understand it, an issue between the parties as to whether the liability insurance provided by the Club is within the exception. The court in Kotka appears to have been of the view that it was not, but was liability insurance outside the exception. However, it is not entirely clear to us whether the court has made a final decision to that effect in its decision on jurisdiction.

95. The question is whether in all the circumstances the English court should grant an injunction restraining New India from bringing its claim under the Finnish Act in Finland. It is always a strong step to take to prevent a person from commencing proceedings in the courts of a contracting state which has jurisdiction to entertain them. The ECJ has either held or in effect held that no such injunction should be granted in the case of an exclusive jurisdiction clause (Gasser) or on the ground that the proceedings are vexatious and oppressive (Turner v Grovit). New India is not in breach of contract in bringing these proceedings in Finland, so that the principles in cases like The Angelic Grace do not apply directly. In this regard we accept Mr Smith's submission that, while such cases may provide some assistance by analogy, they do not apply by parity of reasoning, as the judge thought. None of the cases to which we were referred, including Akai , was considering a case quite like this.

96. Further, this is not a case in which it can fairly be said that the proceedings in Finland are vexatious or oppressive. New India is simply proceeding in Finland under a Finnish statute which gives it the right to do so. The question is whether the English court should restrain it from doing so.

97. Given our view that the principles in the decided cases cannot be applied by parity of reasoning and given the further fact that the judge did not have the assistance of either Gasser or Turner v Grovit , both of which have made an important contribution to the jurisprudence in this area, this court is in our opinion free to form its own conclusion on the question whether to grant an anti-suit injunction on the facts of this case. We have reached the conclusion that, having regard to all the circumstances of the case, including those set out above and the reasoning underlying the approach of the ECJ in Turner v Grovit , this was not a case in which, in the language of section 37(1) of the Supreme Court Act 1981 , it was or would be just and convenient to grant an injunction restraining New India from pursuing a claim under the Finnish Act in Finland.

Conclusions

98. For the reasons set out above, we answer the questions posed in paragraph 21 above as follows:

- i) No, the court should not decline jurisdiction or stay the proceedings under the Regulation (see paragraphs 22 to 51). In particular, the question whether the claim in England was within the arbitration exception was not a matter for the Finnish court as the court first seised (paragraphs 22 to 37) and the judge was right to hold that the

claim in England was within the arbitration exception and thus outside the Regulation (paragraphs 38 to 51).

• ii) Yes, the judge was right to hold that, under English principles of conflicts of laws, New India was bound to pursue its claim under the Finnish Act by arbitration in England (paragraphs 52 to 60).

• iii) No, the permission to serve the claim form should not be set aside and the proceedings should not be stayed as a matter of discretion (paragraphs 61 and 62).

• iv) The judge was right to grant the first declaration, namely that New India was bound to refer any claims against the Club in respect of the consignment to arbitration in England. However, the second declaration, namely that the Kotka proceedings, were and are in breach of the arbitration clause should be set aside because New India was not in breach of contract in bringing them (paragraphs 63 to 65).

• v) No, the judge should not have granted the anti-suit injunction, which should be set aside (paragraphs 66 to 97).

It follows that the appeal is allowed in part. If there should be questions as to the recognition or enforcement of judgments under Articles 32 to 36 of the Regulation, they must be determined when and if they arise.

99. Finally we would like to thank counsel for all their assistance in this interesting case.

ORDER: Appeal allowed in part; agreed order; respondent to have 50% of costs in court below; appellant to have 25% of costs in appeal

2004 WL 2714108

TAB 67

1999 Folio No 536

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Before:

The Hon. Mr. Justice Aikens

B E T W E E N:

(1) JOHN RICHARD LUDBROOKE YOUELL
(Suing as a representative Underwriter for and on behalf of the members of Syndicate 79 at Lloyd's and on behalf of all other members at Lloyd's subscribing to policy no. HO478394)

and others

Claimants

-and-

(1) KARA MARA SHIPPING COMPANY LIMITED
and others

Defendants

Jonathan Gaisman QC and Rebecca Sabben-Clare instructed by Hill Taylor Dickinson appeared on behalf of the Claimants.

Stewart Boyd QC and Claire Blanchard instructed by Ince & Co. appeared on behalf of the Defendants.

I direct pursuant to CPR Part 39 P.D. 6.1. that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

The Hon. Mr. Justice Aikens
13 March 2000

JOHN RICHARD LUDBROOKE YOUEEL and others

Claimants

and

KARA MARA SHIPPING COMPANY LIMITED and others

First to Fifth Defendants

and

WORLD TANKER CARRIERS CORPORATION

Sixth Defendant

JUDGMENT

1. At about midnight on 20/21 December 1994 a collision took place between the bulk carrier ***"Ya Mawlaya"*** and the motor tanker ***"New World"***. It occurred in the Atlantic some 250 miles of Portugal in good visibility. ***"Ya Mawlaya"*** had loaded a cargo of soyabeans at Destrahan, Louisiana and was destined for Ancona and Porto Marghera. ***"New World"*** had loaded a cargo of West African crude oil in Gabon and was bound for Dunkerque. There may be argument about the precise sequence of events leading up to the collision but it is clear that the vessels were on *"crossing courses"*. Under the Collision Regulations ***"Ya Mawlaya"*** was the *"give way"* vessel. Although the vessels remained on a steady bearing, it appears that ***"Ya Mawlaya"*** did not take any action as the *"give way"* vessel until too late. As a result of the collision there was a fire on board ***"New World"*** . In the fire eight crewmen were killed and others were injured. Both vessels and their cargo suffered extensive damage. This collision and the subsequent loss of life and damage has resulted in much litigation in the USA, particularly in Louisiana. There has also been litigation in Hong Kong, India and England. The present proceedings, begun when some of the Hull & Machinery insurers of the ***"Ya Mawlaya"*** issued an Originating Summons on 20 April 1999, constitute the latest episode in this worldwide litigation.

2. There are three principal applications before the court. First the Sixth Defendant, the owning company of the ***"New World"***, applies[i] under ***CPR Part 11 (I)*** to set aside the permission I gave to the Claimants on 14 June 1999, (without notice) to serve proceedings on them out of the jurisdiction. Those proceedings sought declaratory relief. Secondly the Claimants apply[ii] for an interim - suit injunction to restrain the Sixth Defendant from pursuing three sets of proceedings in Louisiana, in which the Claimants in this action are directly or indirectly interested. Thirdly the Claimants apply[iii] for permission to put in evidence to cure any procedural irregularity there may have been in their original application, (without notice), for permission to serve out of the jurisdiction and also to rely on a further paragraph ***Order 11 Rule 1(1) (paragraph (d))*** as the basis for permission to serve the original proceedings out of the jurisdiction. As an alternative in the same application, the Claimants seek an order that they have permission to issue and serve a Part 8 Claim Form on the Sixth Defendant containing the requested declaratory relief. The Claimants say they intend to rely on ***Order 11 Rule 1(1)© and/or (d) (i) to (iv)*** for the permission to serve the new Part 8 Claim Form on the Sixth Defendants out of the jurisdiction.

3. In the course of the hearing before me the Claimants also sought permission to amend the terms of their Originating Summons to claim, as additional relief, a permanent anti - suit injunction. They also sought permission to amend the terms of their Application for an interim anti - suit injunction. These applications were not set out in separate Application Forms. Both those applications were opposed.

A. The Parties

4. **The Claimants**. The First Claimant is a representative Lloyd's underwriter for syndicate 79 and other Lloyd's underwriters who subscribed to a Hull & Machinery policy H0478394 on the ***"Ya Mawlaya"***. That policy covered 15% of the risk. Cover ran from 19 April 1994 for one year, thus including the date of the collision. The Second to Fifteenth Claimants are ILU companies that wrote a further Hull & Machinery policy H0478294 covering 45% of the risk for the same period and on materially the same terms. I will refer to these two policies as "the H&M Policies". The balance of 40% of the risk was insured with Italian and Belgian insurers who have taken no part in this action. The total insured value of the vessel under the policies was US$ 4.5 million. The H&M Policies were written on the standard MAR 91 form and incorporated the 1983 Institute Time Clauses, Hulls (***"the ITC"***). Thus the policies contained an exclusive jurisdiction clause ("EJC") in favour of the English Courts and a clause that the insurance "*is subject to English law and practice"*. The policy terms provided cover for "Three Fourths Collision Liability" on the terms set out under Clause 8.1 of the ITC[iv] They also provided cover for three - fourths of the legal costs incurred by the Assured or which the Assured may be compelled to pay in contesting liability or taking proceedings to limit liability, but only where the Assured had obtained the *"prior written consent of the Underwriters"*[v]. At the hearing before me Mr Gaisman QC and Miss Sabben - Clare represented the Claimants who I shall call ***"the "YM Insurers".***

5. **The Defendants.** The First to Fifth Defendants are companies that are or might be interested in the policies as assureds. The First Defendant was the demise charterer of ***"Ya Mawlaya"*** at the time of the collision. The Second to Fourth Defendants acted as her managers. The Fifth Defendant is or was a mortgagee of the vessel. These five defendants have not played any part in the hearing before me. However I shall have to refer to the First Defendant and will call it ***Kara Mara*** and will refer to the First to Fifth Defendants collectively as the ***"Ya Mawlaya** interests"* .

6. The Sixth Defendant is the company that owned ***"New World"***. It is a Liberian company. It was represented at the hearing before me by Mr Boyd QC and Miss Blanchard. I will refer to the Sixth Defendants as ***"World Tanker***."

B. Proceedings in various jurisdictions

7. On 30 December 1994 World Tanker began proceedings in a US Federal Court, which was the United States District Court for the Eastern District of Louisiana in New Orleans. The claim was for damages against ***"Ya Mawlaya"*** interests, including the present First to Fifth Defendants. I will call these ***the Louisiana liability proceedings***, to distinguish them from the later Louisiana actions which have given rise to the present English proceedings.

8. Following action to arrest sister vessels of ***"Ya Mawlaya"***, her P&I Club, the Newcastle, gave World Tanker security of US$20 million for potential claims against ***"Ya Mawlaya"***. On 20 December 1995 the Newcastle P&I Club stated to World Tanker that it would pay USS$15 million in respect of ***"Ya Mawlaya's"*** liability, plus a figure of proceedings in Hong Kong to which I refer below

9. On 28 January 1995 Kara Mara began limitation proceedings (on behalf of

9. On 28 January 1995 Kara Mara began limitation proceedings (on behalf of ***"Ya Mawlaya"*** interests) in Hong Kong. On 8 February 1995 Kara Mara began liability proceedings against World Tanker in Hong Kong. Subsequently, in September 1995, the Hong Kong court stayed all proceedings there on the ground that Louisiana was clearly the more appropriate forum.

10. On 12 May 1995 the managers of ***"Ya Mawlaya"*** began proceedings against World Tanker in India, claiming limitation of liability, an indemnity from the owners of the vessel and an anti -suit injunction to stop the Louisiana proceedings. In November 1995 the YM Insurers disavowed all interest in the Indian proceedings. They were dismissed by the Indian Supreme Court in April 1998.

11. On 19 June 1995 Kara Mara started limitation proceedings in Louisiana. But Kara Mara stated that this was a protective measure only and it contested jurisdiction.

12. On 26 February 1999 Kara Mara began *"in personam"* proceedings in the English Admiralty Court and sought leave to serve those proceedings out of the jurisdiction on World Tanker. Master Miller granted permission to do so on 4 March 1999. In that claim Kara Mara sought a declaration that any Louisiana

judgment was unenforceable; it also claimed a right to limit liability under the Merchant Shipping Act 1979. World Tanker applied to Judge Lemmon in the Louisiana court for an anti - suit injunction to stop Kara Mara proceeding with this limitation action. But on 8 April 1999 Judge Lemmon refused World Tanker's application on the ground that it had not been shown that the Louisiana judgment on liability (referred to below), which had been handed down on 3 March 1999, would not be shown proper respect.

C. The progress of the Louisiana Liability Proceedings by World Tanker

13. Kara Mara and the other ***"Ya Mawlaya"*** interests entered appearances in the Louisiana proceedings, but contested jurisdiction, venue and forum. The US District Court ordered discovery and interrogatories against those parties, but only in relation to jurisdiction issues. Ultimately the ***"Ya Mawlaya"*** interests decided not to give the discovery ordered and dismissed their attorneys. On 14 May 1997 the Louisiana court dismissed the jurisdiction challenges of Kara Mara because of its refusal to comply with the discovery orders the court had made. The Court held that Kara Mara's failure to respond to enquiries about its business dealings in the USA meant that it was admitting that it was doing business in the USA. The court also stated that the failure of Kara Mara to comply with court orders could lead to further sanctions against it.

14. On 23 July 1998 the Judge in charge of the Louisiana liability proceedings, Judge Lemmon, ordered sanctions against Kara Mara, holding that it was now clear that Kara Mara had made a conscious decision to ignore the court. The sanctions included an order that Kara Mara should post security for the claim of US$45 million. If it failed to do so then the Judge ordered that the Hull & Machinery underwriters of ***"Ya Mawlaya"*** would be required to shew cause why they should not put up security up to the limit of the insurance policies. It is possible, although this was not the reason expressed, that the basis for the Judge's order against the YM insurers was that Louisiana has a statute, known as the ***"Direct Action Statute***",[vi1] that enables claims to be made directly by an *"injured person"* against a liability insurer in certain circumstances. The Judge may have contemplated that World Tanker might be able to utilise this statutory provision at a later stage in the proceedings.

15. Kara Mara did not post security. The H&M underwriters of ***"Ya Mawlaya"*** protested to the Louisiana Court that they were not then party to any Louisiana proceedings and that the ***Direct Action Statute*** had no application in the present case[vii]. Despite this, Judge Lemmon ordered, on 16 September 1998, that the H&M underwriters should shew cause why they should not put up security to the limits of the policy.

16. On 3 March 1999 Summary Judgment was entered in the Louisiana Liability Proceedings against Kara Mara for US$21.4 million, including pre-judgment interest.[viii] In the judgment it was also held that Kara Mara was not entitled to limit its liability. The findings of fact and law[ix] included the following:

    (1) ***"Ya Mawlaya"*** was unseaworthy with the privity of Kara Mara upon departure from New Orleans;

    (2) no or inadequate repairs were made to the bridge equipment of ***"Ya Mawlaya"*** including the radar and HVF radios, before her departure;

    (3) her officers were incompetent;

    (4) a "one man watch system", which was not permissible, was in operation on board ***"Ya Mawlaya"***;

    (5) ***"Ya Mawlaya"*** failed to comply with the Collision Regulations;

    (6) Kara Mara, whilst *"thumbing their noses"* at the Louisiana court, had embarked on a *"forum shopping spree"* in India and Hong Kong. Because Kara Mara had acted in bad faith, the court would exercise its power to assess attorneys' fees.[x]

D. The aftermath of the judgment in the Louisiana liability action

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17. On 1 April 1999 World Tanker's New York lawyers, Haight Gardner, wrote to the London solicitors for the YM Insurers (Hill Taylor Dickinson - "HTD") and informed them that as Louisiana was a "direct action" jurisdiction, World Tanker could now claim directly from the YM Insurers for *"some proportion and perhaps all of the judgment"*. Haight Gardner said that the YM Insurers could avoid any litigation by *"paying off the judgment on their own"*. HTD's response to this was to issue the current proceedings on 20 April 1999.

18. **The Originating Summons in the current proceedings**

As originally framed the Originating Summons named Kara Mara as the First Defendant and World Tanker as the Second Defendant.[xi] The YM Insurers sought only declaratory relief against both defendants. In the form for which permission was sought to serve the proceedings on World Tanker out of the jurisdiction, the relief claimed was as follows:

(1) That, in accordance with Clauses 8.1 and 8.2 of the ITC[xii] the YM Insurers were not liable to pay any sum to the assureds under the H&M policies until the assureds, had actually made payments to another person in consequence of any collision liability;[xiii]

(2) That the limit of liability of the YM Insurers under the three - fourths collision clause was no greater than their proportion (ie. 60%) of three - quarters of the insured value of the vessel, ie. US$4.5 million, less sums already paid;

(3) That the YM Insurers were not liable to the assureds to pay legal costs (under Clause 8.3 of the ITC) unless they had been incurred with the prior written consent of the YM Insurers or they had been incurred or were payable under compulsion in contesting or limiting liability and that the YM Insurers were not liable to pay the sum of US$5,317,882.05 in respect of legal costs in India and Hong Kong which Kara Mara had been ordered by Judge Lemmon to pay to World Tanker in the Louisiana Liability proceedings;

(4) That the YM Insurers were not liable under the H&M policies to indemnify the assured against any liability for loss of life and personal injury; liability for loss of or damage to cargo laden on board ***"Ya Mawlaya"***; or liability for the removal or disposal of cargo from ***"Ya Mawlaya"***.

19. The Kara Mara interests, which are represented by Clyde & Co, acknowledge service of the proceedings on 27 May 1999. The acknowledgement of service stated that the claims would be contested *"in part"*.

20. The YM Insurers then sought permission to serve the Originating Summons on the Fifth Defendant[xiv] and World Tanker out of the jurisdiction on the basis that it was a *"necessary or proper party"* to the proceedings (ie. under ***RSC Order 11 Rule 1 (1)()).*** At that stage it was not suggested that World Tanker could be served out of the jurisdiction on the basis of ***RSC Order 11 Rule 1(1)(d)***, ie. that the claim was one *"brought to enforce...or otherwise effect a contract...which - (iii) is.... governed by English law; or (iv) contains a terms to the effect that the High Court shall have jurisdiction to hear and determine any claim in respect of the contract"*. I granted permission, without notice, on 14 June 1999. The evidence before me was an affidavit of Mr CS Zavos, a partner of HTD, together with an exhibit CSZ1. It is now accepted that in his affidavit Mr Zavos did not formally and specifically depose to the fact that there is a real issue which the court may reasonably be asked to try as between the Claimants and the First to Fourth Defendants, as he should have done in accordance with ***Order 11 Rule 4(1)(d)***.[xv]

21. On 20 August 1999 World Tanker issued an Application Notice, stating that it would apply to set aside the order giving permission to serve the Originating Summons on World Tanker out of the jurisdiction. The grounds given were: first that World Tanker is not a necessary or property party to the action against the First to Fourth Defendants; and secondly that there is no *"real issue"* as between the Claimants and the First to Fourth Defendants.

22. **The Enforcement Proceedings in Louisiana**

On 17 September 1999 World Tanker filed a claim against the YM Insurers in the Louisiana Federal Court: Action No 99 - 2861.[xvi] This claim is made under the ***"Direct Action statute"*** of Louisiana. I shall

refer to it as the ***"Direct Action Claim".*** The Complaint asserts that all the YM Insurers (and the remaining insurers not involved in the current English proceedings) do business in Louisiana or the USA. It pleads the judgment in the Louisiana liability proceedings, in particular the finding of fact that the casualty was the result of negligence of ***"Ya Mawlaya"*** and her unseaworthiness "*in Louisiana"*.[xvii] It alleges that these facts gave rise to a cause of action pursuant to the ***Direct Action Statute.*** The Complaint says that by virtue of the H&M policies and their terms there is a cause of action against the insurers to the extent of coverage under the policies. There is a reference to the insurers being obliged to pay the damages pursuant to the judgment in favour of World Tanker in the Louisiana liability proceedings. The prayer claims: *"a decree directly against the Defendants, jointly, severally and in solido, for amounts due under [the insurers'] policies for the judgment against their insureds"*.[xviii]

23. The YM Insurers made two responses to the Direct Action Claim. First, in the Direct Action Claim the YM Insurers filed an answer in which they took issue with jurisdiction, *forum conveniens* and service of the proceedings. They also pleaded defences under the Direct Action statute and under the terms of the H&M Policies.[xix] After this World Tanker served interrogatories and requests for documents on the issue of jurisdiction.

24. Secondly, in the current proceedings, the YM Insurers issued an application on 12 January 2000 for an interim anti - suit injunction. This claimed an injunction to restrain World Tanker from continuing or prosecuting any claim or application in the US Courts for direct payment to World Tanker of any sum allegedly payable under the H&M policies until the determination of the matters raised in the Originating Summons seeking declaratory relief.

25. Two further enforcement proceedings have been started by World Tanker in Louisiana. First, on 14 December 1999 Judge Lemmon approved the citation of the YM Insurers as garnishees of sums due from the H&M policy insurers to the assureds under those policies. That led to World Tanker filing a Supplementary Complaint in the original liability action in the Federal Court *"in aid of execution of judgment"*,[xx] seeking to garnish debts *"owed"* by all the H&M Insurers (who are specifically named in the Supplementary Complaint) to the judgment debtors, ie. Kara Mara.[xxi]The relief sought includes *"orders adjudicating all sums owed by the judgment debtors....to be turned over to the Plaintiff"*.[xxii] I will refer to these proceedings as the *"**garnishee proceedings**"*.

26. Secondly World Tanker began a further action (No 99 - 2056) in the New Orleans Civil District Court (a State Court), against the insurers under the H&M Policies. World Tanker brought this claim in response to the challenge to the jurisdiction of the Federal Court by the insurers. In this action World Tanker claims declarations on what sums are due and payable by the insurers to the assureds under the H&M policies. World Tanker pleads that such declarations will *"serve the salutary purpose of terminating the present and actual controversies between these parties and enable the insurers to pay proceeds found due and owing pursuant to a definitive judgment of a court of competent jurisdiction"*.[xxiii] The prayer asks for declaratory orders including *"the determination and quantifying with specificity the insurance proceeds due and payable as a result of the tort giving rise to such liability under each applicable policy of insurance"*. [xxiv] I will refer to these proceedings as the ***"State Court action"***.

27. Interlocutory proceedings in the Direct Action Claim have continued. World Tanker has taken depositions from thirteen insurers on the issue of jurisdiction. It has also pressed for answers to the interrogatories it has served and for discovery on the issue of jurisdiction to be given by the insurer defendants.

E. The Current state of the English Originating Summons Proceedings

28. As I have already mentioned, in the course of the two day hearing before me (on 8 and 9 February 2000) the YM Insurers applied orally to amend both the Originating Summons and the Application for an interim anti - suit injunction.

29. **The proposed amendments to the Originating Summons**

The claim that the YM Insurers wish to make in the Originating Summons now falls into two parts. The original claim for declaratory relief on the proper effect of the H&M Policies is still pursued. But it has really taken second place to the proposed additional claim. This is for a permanent anti - suit injunction

against World Tanker. The drafting of the new claim went through several editions, but in the final version the claim is for an injunction to restrain World Tanker from pursuing in any court, other than the English court, any proceedings for relief which is connected to any liability of the YM Insurers under the H&M Policies in respect of the collision between ***"Ya Mawlaya"*** and "***World Tanker***". The grounds for this relief are stated to be that the H&M Policies contain an Exclusive Jurisdiction Clause in favour of the English Courts and an English proper law clause. Therefore the YM Insurers have an equitable right not to be the subject of any proceedings of any nature in relation to which World Tanker seeks any relief based upon those H&M Policies that is connected with the collision, except proceedings in the English Courts.

30. The alternative basis stated is that the YM Insurers have an equitable right not to be subjected to *"vexatious, oppressive and unconscionable proceedings"* in any courts other than those of England and Wales which seek any relief based on the H&M Policies that is connected with the collision. The Louisiana Enforcement Proceedings are alleged to be vexatious, oppressive and unconscionable.

31. **The proposed amendments to the Application Notice of an interim anti - suit injunction**

There were two main changes in the proposed amendment to the Application Notice. The first was that World Tanker should be enjoyed from pursuing any proceedings anywhere in the world other than the Courts of England and Wales from pursuing any relief in relation to the liability of the YM Insurers on the H&M Policies in respect of the collision.[xxv] The second is that the interim injunction now sought should continue *"until further order"* instead of until the determination (by the English Courts) of the issues on which the YM Insurers sought declaratory relief under the terms of the Originating Summons as it originally stood. The first version of the Application Notice had stated the grounds (which continued to be relied upon by the YM Insurers) for the interim injunction. They were that the Louisiana enforcement proceedings ignored the EJC in the H&M Policies or that the Louisiana enforcement proceedings were vexatious and oppressive.

32. The final version of the re-re-amendments of the Originating Summons was only available to those advising World Tanker at the very end of the oral hearing before me. It was agreed that any submissions of both parties on the proposed re-re-amendments and the application to issue and serve this version on World Tanker should be made in writing. The submissions of World Tanker[xxvi]are that the proposed relief of a permanent anti - suit injunction is misconceived in principle Therefore permission for the re-re-amendment should be refused. Further World Tanker submits that the proposed relief for a permanent anti - suit injunction cannot be the subject of an application for leave to serve out of the jurisdiction under what is now ***CPR Schedule 1 Rule 11.1 (1)(c) or (d).*** World Tanker also submitted that there ought to be a fresh application for permission to serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction. World Tanker says that such an application would be bound to fail because the YM Insurers would not be able to depose to a belief that they had a good cause of action for a permanent anti - suit injunction. Further, even if the court were prepared to treat that application as having been made and the necessary formal evidence as having been provided, then World Tanker asked the court to treat the application for leave to serve out of the jurisdiction as being without notice. Therefore, even if it were granted World Tanker would be able to renew its challenge to this court "on notice", rather than the Court of Appeal.

33. In relation to the proposed amendment to the Application Notice for an interim anti - suit injunction, World Tanker objected to the fact that the injunction now sought was much wider, a it sought to enjoin any proceedings throughout the world, rather than just in the USA or Louisiana. World Tanker said that the YM Insurers should not be permitted to "ambush" them with this new and much wider application.

34. The YM Insurers' responses[xxvii] to these submissions are that: (i) there is no need for a party to obtain permission to issue and serve out of the jurisdiction an amendment to any originating process which claims a new cause of action; but (ii) if there is then the court can either rely on the existing evidence or the YM Insurers would undertaken to file any necessary formal evidence, in particular stating that the YM Insurers believed that they had a good cause of action in respect of the claim for a permanent anti - suit injunction; (iii) the claim for a permanent anti - suit injunction is a cause of action which could be the subject matter of originating process; (iv) although the interim injunction now sought is in wider terms, the points were all argued at the hearing and as there is no suggestion of prejudice to World Tanker (in the sense that it has not had the chance to argue a point or put in evidence), then the Court should deal with the

new relief claimed. The YM Insurers accepted that if they failed in their submission that World Tanker was bound by the EJC, then any interim anti - suit injunction could only be limited to the current Louisiana enforcement proceedings.

F. The Issues that have to be determine

35. **A Threshold Question**. The YM Insurers' claim for an anti - suit injunction is now clearly the more important of the two claims made in the Originating Summons as re-re-amended. World Tanker submits that such a claim cannot be the subject of originating process where the relevant defendant is outside the jurisdiction. Therefore leave to re-re-amend the Originating Summons should not be granted nor should the Court entertain an application for leave to issue and serve the re-re-amended Originating Summons out of the jurisdiction. So I think that the first, threshold question is whether an anti - suit injunction can be the subject of a claim by the YM Insurers when the defendant sought to be enjoined has to be served outside the jurisdiction. Because the YM Insurers claims that they are entitled to an anti - suit jurisdiction on the basis of either (i) the existence of the EJC in the H&M Policies; or (ii) the existence of the English proper law clause in the H&M Policies, both these potential claims against World Tanker have to be considered.

36. **Permission for leave to re-re-amend and to issue and serve the claim for an anti - suit injunction out of the jurisdiction.** If either one of those claims for an anti - suit injunction can be the subject of an Originating |Summons when the defendant has to be served outside the jurisdiction, then the next issues must be: (i) whether the Court should grant permission to re-re-amend the Originating Summons; and (ii) grant permission to issue and serve the re-re-amended Originating Summons on World Tanker outside the jurisdiction. The points are inextricably bound up. The Court will not grant leave to re-re-amend unless it is satisfied that the new claim is one for which ***Rule 11.l1 (1)*** leave would be granted. That question therefore involves three sub - issues. They are:

    (1) Whether the YM Insurers can bring themselves within ***R11.1 (1) paragraph (d) sub paragraph (iii) or (iv)***in ***Schedule 1*** to the ***CPR***. Although paragraph six of the proposed re-re-amended Originating Summons claimed an anti - suit injunction generally against "*the Defendants*" this relief is clearly aimed only at the Sixth Defendants, World Tanker. Therefore ***paragraph (c)*** *("necessary or proper party")* is irrelevant for this particular application, because no similar claim is brought against a party within or outside the jurisdiction;

    (2) If the YM Insurers can rely on ***paragraph (d) (iii) or (iv)*** in relation to the claim for an "anti - suit" injunction against World Tanker, then can the YM Insurers also satisfy the Court that this is a proper case to permit service out of the jurisdiction under ***Rule 11.4(2);***

    (3) If the YM Insurers can do so in principle, then should permission be refused on the ground that the application was made by re-re-amendment and there has been no formal submission of evidence in support of this new application so as to satisfy ***Rule 11.4(1) and (2)***. Alternatively if the Court grants permission, should it be on the basis that the application was "without notice", so that World Tanker could reapply to set the permission aside.

37. **Should the original permission to issue and serve the declaratory proceedings on the Sixth Defendant be set aside.** Whether or not the application to issue and serve the claim for an anti - suit injunction on World Tanker is refused, the next question must be whether the permission I gave to serve out of the jurisdiction the unamended Originating Summons, claiming the declaratory relief in respect of the points on the H&M Policies, should be set aside. That involves the following issues:

    (1) Whether the YM Insurers can show that the declaration claim comes within either ***Rule 11.1 (1) paragraph (c) or (d);***

    (2) If the YM Insurers can only rely on ***paragraph (c)***[xxviii], then is there a *"real issue to be tried"* between the YM Insurers and the First to Fourth Defendants. If there is then is the formal defect in Mr Zavos' first affidavit (which is admitted) fatal to this application or not;[xxix]

(3) If the YM Insurers have got a good cause of action against the First to Fourth Defendants on which they can rely, then have they got a *"good cause of action"* against World Tanker in respect of the claims for Declarations;

(4) If they have then is this a case where the Court ought to exercise its discretion to serve out under ***Rule 11.4 (2).***

38. **The Application for an interim anti - suit injunction.** Mr Gaisman accepts that if he loses on the issue of whether leave should be given to serve World Tanker out of the jurisdiction (on the basis of either the original claim or the new claim for a permanent anti - suit injunction), then the issue of whether there should be an interim anti - suit injunction becomes irrelevant. However if the YM Insurers should win on the issue of leave to serve out on either basis, then the Court has to consider whether an interim injunction should be granted. The YM Insurers claim an injunction on two grounds, which are:

(1) That World Tanker is bound by the EJC in favour of the English Courts in the H&M Policies; or

(2) That World Tanker is not bound by the EJC but is attempting to make a claim on the basis of the H&M Policies that are expressly governed by English law.

G. The YM Insurers application for leave to serve out of the jurisdiction for an "anti - suit" injunction against World Tanker.

39. **The parties' arguments.**

The arguments of the YM Insurers are as follows:

(1) In the Direct Action claim in Louisiana World Tanker asserts a right to make a claim under the H&M Policies directly against the YM Insurers World Tanker claims that it can do so under Louisiana law by virtue of a statutory right of action conferred on it by the Louisiana ***Direct Action Statute.***

(2) Once World Tanker claims that the ***Direct Action Statute***, confers on it rights to make claims under the H&M Policies, then, so far as the English Court is concerned, World Tanker must be regarded as being subject to all the bundle of rights and obligations that are contained in those contracts. Those include the ECJ in favour of the English Courts and there is not *"good reason"*[xxx] why World Tanker should not be bound by it.

(3) Alternatively, World Tanker has accepted in these proceedings that if the Louisiana Federal Court has to deal with a claim by World Tanker to rely on its statutory rights under the ***Direct Action Statute,*** then the Court must, in the first place, construe the H&M Policies for the purpose of seeing whether there would be any right by the Kara Mara interests to make claims under the policies as assureds. World Tanker has also accepted that the H&M Policies are governed by English law. It has further accepted that this exercise of construction will be done by the Louisiana Court in accordance with English law.[xxxi] If the Louisiana Court does so, then it would be bound to conclude that the H&M Policies contain EJCs in favour of the English Courts. Although it is possible (or even likely[xxxii]) that the Louisiana Courts would strike down the EJC as being *"unlawful"* within the meaning of ***paragraph (C)***of the ***Direct Action Statute §655***, that is irrelevant to an English Court when considering whether World Tanker should be treated as being bound by the EJC.

(4) Once it is shown that World Tanker is attempting to make claim on the H&M Policies by means of the ***Direct Action Statute*** and the H&M Policies contain an EJC in favour of the English Courts and they are governed by English law, then that means that World Tanker is trying to rely upon contractual rights but is also evading compliance with terms of the contracts that govern the law and forum by which those claims should be determined.

(5) The YM Insurers, being a party to the H&M Policies, are entitled not to be subjected to proceedings of any nature in any Courts other than those of England or Wales where a party

claims relief connected with alleged liability of the YM Insurers to their assureds under those polices in relation to the collision If World Tanker made any claim under the H&M Policies, then it should be bound by all the terms, including the EJC.

(6) The fact that the Louisiana Court might hold the EJCs *"unlawful"* for the purposes of deciding whether World Tanker could enforce a claim against the YM Insurers under the ***Direct Action Statute***, is not a good reason to hold that World Tanker can evade being subject to the EJC in the H&M Policies.

(7) Accordingly the YM Insurers can show that they have a claim to enforce an equitable right,[xxxiii]which is based upon an EJC so that it falls within ***paragraph (d)(iv)*** of the ***Rule 11.1 (1).***

(8) Alternatively, if the YM Insurers cannot rely on the EJC the fact remains that World Tanker wishes to make a claim based upon the H&M Policies that are subject to English law, so the case falls within ***paragraph (d)(iii).*** In all the circumstances, particularly where the Louisiana Court may not give effect to the terms of the policies in relation to the provisions concerning *"pay to be paid"* and the *"prior consent of underwriters"* to legal costs, then it would be vexatious and oppressive to permit World Tanker to pursue the claim under the ***Direct Action Statute*** in the Louisiana Courts.

(9) The action by World Tanker claiming a right to garnish any proceeds from the H&M Policies payable by the YM Insurers to their assured also concerns the issue of what sums (if any) are due to the assureds under the policies. That is a contractual issue under a contract governed by English law and containing an EJC in favour of the English Courts. The State Action raises broadly the same issues, but in that case directly against the YM Insurers. The only reason for those proceedings is so that ultimately, World Tanker can benefit from contractual rights under the H&M Policies. Therefore the same considerations apply to all three types of enforcement proceedings in the Louisiana Courts.

40. The arguments of World Tanker are as follows:

(1) For the purposes of obtaining leave to serve proceedings on a party out of the jurisdiction under ***Rule 11.1*** there must be an underlying cause of action. A claim by the YM Insurers for a permanent anti - suit injunction is not a "cause of action" for the purposes of ***Rule 11.1(1)***. An injunction is only a remedy.

(2) If, in principle, an anti - suit injunction can be regarded as a cause of action in itself, World Tanker is not a party to the H&M Policies and therefore is not bound by the EJC. Nor is it bound by the EJC just because it is asserting *"a right of direct action against the insurer within the terms of the policy"*[xxxiv] in the Louisiana Court under the ***Direct Action Statute.***

(3) Even if the English Court should regard the Louisiana Enforcement Proceedings by World Tanker as effectively making claims on the H&M Policies which are subject to an EJC, nonetheless the English Court must place itself in the position of the Louisiana Court and consider whether, in the context of the ***Direct Action Statute***, the EJC would be enforced. It obviously would not because that would defeat the whole object of the statute as the rights granted by the Louisiana statute could not be enforced in any other court.

(4) Therefore the YM Insurers could not bring themselves within ***Rule 11.1(1) paragraph (d)*** because there is no claim either to *"enforce* the ECJs in the H&M Policies, nor is there a claim *"otherwise to effect"* those contracts.

(5) Alternatively there should be no leave to serve out because it would not be a proper case to permit it under ***Rule 11.4(2).***

(6) In any event the YM Insurers did not claim an anti - suit injunction in their Originating Summons for which they obtained leave without notice. It is an entirely new "cause of action" for which the

Claimants must obtain fresh leave, on the principle established in ***Parker v Schuller (1901) 17 TLR 299*** and many cases subsequently.[xxxv] The Claimants have not put the proper evidence before the Court in support of this new "cause of action". They should not be allowed to rely on the existing evidence (in support of leave to serve out in relation to the Declaratory relief originally sought in the Originating Summons) to support the new claim. Even if permission were to be granted, World Tanker must be entitled to treat it as an application "without notice" and could apply to set it aside again.

41. Anti - suit injunctions: the Basic Principles

Mr Boyd is obviously correct in submitting that an injunction is not, in itself, a cause of action. It is a remedy which the English court has power to grant when it is *"just and convenient to do so"* within the wording of ***section 37(1)*** of the ***Supreme Court Act 1981***. The right to obtain an injunction depends on there being a pre-existing cause of action against a defendant. That has to arise out of *"an invasion, actual or threatened [by the defendant] of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court":* ***per Lord Diplock in Siskina (Owners of Cargo lately laden on board) v Distos Compania Naviera SA [1979] AC 210 at 256.***

42. Lord Diplock applied that analysis (used in ***The Siskina*** in relation to ***"Mareva"*** injunctions) to the question of the juridical basis on which a claimant could obtain an anti - suit injunction in ***British Airways Board v Laker Airways Ltd [1985] AC 58 at 81B-D***. He held that there could be a legal or equitable right not to be sued in a foreign court if the action of the defendant in suing there was *"unconscionable"*. Lord Scarman applied the same analysis in his speech in the same case: ***see page 95D-H.*** In ***South Carolina Insurance Co v Assurantie Maatschappij "de Zeven Provincien" NV [1987] AC 24***, Lord Brandon of Oakbrook said that the English Courts had power to grant an anti - suit injunction even in cases where no legal or equitable right had been infringed or was threatened and even when the actions of the party bringing the foreign proceedings was not "unconscionable": ***see page 40F[xxxvi].***

43. In subsequent cases in which the House of Lords or the Privy Council has considered the juridical basis for the grant of anti - suit injunctions, they have made it clear that the remedy of an injunction is available because some legal or equitable right is or may be infringed by the foreign proceedings that the claimant wishes to restrain. The court can invoke the jurisdiction when *"the ends of justice require it",*[xxxvii] although certain other criteria must be fulfilled as well. I think that this is the effect of the analysis in the ***Aerospatiale case (see footnote below); Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 335 at B-D per Lord Mustill;***[xxxviii] ***Mercedes - Benz AG v Leiduck [1996] 1 AC 284 at 310G-H per Lord Nicholls;***[xxxix] and ***Airbus Industrie GIE v Patel [1999] 1 AC 119 at 133E and 134F per Lord Goff of Chieveley.***

44. So I am quite satisfied that a claim for an anti - suit injunction could be the sole relief sought in the YM Insurers' Originating Summons and that it would be a legitimate claim. There can be two bases for the relief sought. The first is that there had been a breach of a contractual provision which binds the defendant and by which the parties have agreed that claims falling within the provision should be pursued exclusively in the English Courts[xl] or an arbitration tribunal.[xli] In those cases the prosecution of proceedings in a foreign court is an actual infringement of a legal right of the claimant for an anti - suit injunction. The English courts' general approach is to enforce those contractual provisions unless there is good reason not to do so.

45. The second basis is that the prosecution of the foreign proceedings is, in the circumstances, unjust. If the English court finds it is unjust, then that will amount to the actual (or if proceedings are threatened) a potential invasion of an equitable right not to be the subject of unjust or "unconscionable" action. In the most recent statement of the principles upon which the English courts will grant anti - suit injunctions, the House of Lords' decision in ***Airbus Industrie GIE v Patel [1999] 1 AC 119,*** Lord Goff of Chieveley drew a distinction between "alternative forum" cases and "single forum" cases. In the former he said the anti - suit injunction jurisdiction will be exercised where the pursuit of the relevant proceedings is *"vexatious and oppressive".*[xlii] In the case of "single forum" cases the jurisdiction will be exercised by the English court where the pursuit of proceedings overseas is *"unconscionable".*[xliii] But in both cases the court has to focus on *"the character of the defendant's conduct, as befits an equitable remedy such as an injunction".*[xliv]

46. Anti - suit injunctions and Rule 11.1(1)

Rule 11.1 (1) (as scheduled to the ***CPR***) provides that a *claim form may be served out of the jurisdiction with the permission of the court if"* the *"claim"* comes within one of the lettered paragraphs of ***Rule 11.1(1).*** The *"claim"* will usually be framed in terms of a remedy that the claimant wishes the court to grant because the defendant has infringed the legal or equitable rights of the claimant, in the manner set out in the Claim Form. The remedy sought could be damages or it could be a final injunction. Once it is accepted, as I think it must be, that a claim for an anti - suit injunction is based on the actual or threatened invasion of legal or equitable rights, then it is clear, contrary to Mr Boyd's submission, that such a *"claim"* can be the subject of proceedings which the claimant intends to seek permission to serve on a defendant out of the jurisdiction.

47. In cases where the foundation for anti - suit injunction is that the defendant has brought foreign proceedings in breach of an EJC in favour of the English courts by which he is bound, the Claimant can say that, for the purposes of ***Rule 11.1(1),*** the *"claim"* falls within ***paragraph (d)***. It will be a *"claim"* to *"enforce...or otherwise affect a contract...being a contract which ...(iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine any claim in respect of the contract"*. That was the analysis and conclusion of the Court of Appeal in relation to an English arbitration clause in ***Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 2 Lloyd's Rep 279;***[xlv] see particularly the judgment of Hobhouse LJ at ***page 287*** and Sir Richard Scott V-C at ***page 291***. I note that in that case it does not seem to have occurred to anyone that there were any difficulties in making a claim for an injunction to restrain the Brazilian proceedings the subject of an action for which leave to serve out of the jurisdiction under ***RSC Order 11 Rule 1*** was needed.

48. In my view the analysis of the Court of Appeal in ***DVA v Voest*** must apply also in relation to an EJC. That is equally a contractual agreement that disputes will be resolved by a tribunal that has been chosen by the parties. A claim for an injunction to restrain a defendant who, it is said, is bound by the terms of the English EJC, must therefore be a claim to *enforce* the relevant contract; alternatively it is one that *otherwise affects* the relevant contract.

49. Where there is no English EJC or English arbitration clause, the claimant may have more difficulty in persuading the English court that his *"claim"* comes within one of the paragraphs of ***Rule 11.1(1).*** But I think that Mr Gaisman is correct in submitting that if the claim for an anti - suit injunction is in connection with a contract that is expressly governed by English law, then in principle the *"claim"* for an anti - suit injunction will be one *"brought to...otherwise affect a contract...which (iii) is by its terms, or by implication, governed by English law"*. In ***Gulf Bank KSC v Mitsubishi Heavy Industries Ltd [1994] 1 Lloyd's Rep 323*** Hobhouse J emphasised that the wording of the first part of ***paragraph (d)*** was intended to cover every possible category of contractual claim. He said that a claim for a declaration that a claimant was not bound by a contract (eg. because it has been frustrated) *"affects the contract"*. He continued: *"A claim for a negative declaration cannot be described as a claim to enforce a contract; it is the converse of that. It is a claim which affects a contract":* ***see page 327 RHS.***

50. In my opinion Hobhouse J's analysis[xlvi] must meant that a claim for an anti - suit injunction which is made in connection with a contract that is governed by English law, is a claim *"which affects a contract"*. Thus, provided that the claimant can demonstrate that the relevant contract satisfies one or other of the criteria set out in the sub - paragraphs (i) to (iv) of ***paragraph (d)***, the claim for an anti - suit injunction in connection with a contract is capable of falling within ***paragraph (d)(iii) of Rule 11.1(1).***

51. However it is important to emphasise that, whether the claim for an anti - suit injunction is based upon an EJC or the fact that the contract is governed by |English law and the prosecution of the foreign proceedings would be *"unjust"*, there are three further hurdles that the claimant must surmount before it could obtain permission to serve the claim for an anti - suit injunction out of the jurisdiction. First the claimant must show that there is a *"good arguable case"* that (i) there is a contract; and (ii) the intended defendant is, by some means, ***bound*** by the contract, in particular the EJC. Otherwise the claim would not fall within ***paragraph (d)(iv)*** at all. I think that this is clear from the speech of Lord Goff of Chieveley in ***Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438; see particularly at 455A and 457A***. Secondly it must show that there is a serious question to be tried on whether there should be an anti - suit injunction. Thirdly it must demonstrate, in accordance with ***Rule 11.4(2)*** that it has been

made *"sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order"*.[xlvii]

52. **Can the YM Insurers show that they have a "*good arguable case*" that the claim comes within *paragraph (d)(iv)?***

There is a fundamental division between the parties on this issue. Mr Gaisman for the YM Insurers submits that once World Tanker asserts, in the Direct Action Claim, that it has statutory rights under the ***Direct Action Statute*** to bring claims on the H&M Policies, then, by the terms of the statute itself, World Tanker is asserting *"a right of direct action against the insurer within the terms and limits of the policy"*. This is a contractual claim, he says, and it does not matter that World Tanker was not originally a party to the H&M Policies with the YM Insurers. He submits that World Tanker's position is no different from a person suing as an assignee of a contract[xlviii] or a person making a claim under ***section 1*** of the ***Third Parties (Rights against Insurers) Act 1930***.[xlix] Both types of claimant have been held to be bound by arbitration clauses concluded between the original parties to the contracts. Mr Gaisman says that the same principle should apply to World Tanker and the EJC in the H&M Policies. Therefore as far as an English court is concerned a person who claims on a contract by a statute that grants him a *"right of direct action against the insurer within the terms and limits of the policy"*[l] must be bound by all its terms, including the EJC. So the claim by the YM Insurers for an anti - suit injunction is one to *"enforce"* the terms of the H&M Policies, including the EJC or is one that *"otherwise affects"* those contracts. In either case there is sufficient of a contract nexus between the YM Insurers (who have always been a party to those contracts) and World Tanker, the claimants pursuant to the ***Direct Action Statute***, to say that there is a good arguable case that the claim comes within ***paragraph (d)(iv).***

53. Mr Boyd for World Tanker accepts that, in the Direct Action Claim, the Louisiana Court would be bound to construe the H&M Policies according to English law principles in the first place, but he submits that this does not mean that World Tanker would, in the eyes of the Louisiana courts, be bound by the EJC. He relies upon ***paragraph C*** of the provisions of ***§ 655***, which state that *"any action brought under the provisions of this Section shall be subject to all of the **lawful** conditions of the policy or contract and the defenses which could be urged by the insurer to a direct actin brought by the assured, **provided the terms and conditions of such policy or contract are not in violation of the laws of this State".***[li] Mr Boyd submits that if the Louisiana Courts were to give effect to the EJC then it would defeat the whole object of the ***Direct Action Statute***, therefore it would not do so. The English Court should put itself in the same position as the Louisiana Court which was enforcing the ***Direct Action Statute*** and so hold that World Tanker would not be bound by the EJC.

54. Although the claim for an anti - suit injunction relates to all three Louisiana Enforcement Proceedings, I think it is sensible to concentrate first on the Direct Action Claim in which World Tanker directly asserts rights against the YM Insurers. In my view there are two stages to the exercise of seeing whether there is a good arguable case that the claim by the YM Insurers for an anti - suit injunction is one *"to enforce"* or *"otherwise affects"* a contract within the four sub - paragraphs of ***Rule 11.1 (1) paragraph (d)(iv)***. The first stage is to see whether the claim by World Tanker against the YM Insurers in the Louisiana Enforcement Proceedings under the ***Direct Action Statute*** is contractual in nature. If it appears to be so, then the second stage must be to see if it there is a good arguable case that the claim by the YM Insurers in the English proceedings for an anti - suit injunction is one *"to enforce"* or *"otherwise effects"* a contract within ***paragraph (d)(iv).***

55. When the English court is considering each stage it has to decide on the nature of the claim: is it contractual or not. In doing this the English Court must, I think, perform the analysis from the viewpoint of English law concepts of a "contractual" claim. It must do so because ultimately the question is whether the claimant has a *"good arguable case"* that the type of claim comes within a procedural rule of the English Court: viz. ***Rule 11.1(1)(d)***. The English procedural rule is obviously framed with English law concepts of contract and contractual claims in mind. There is thus every practical reason for performing the analysis according to English concepts rather than those of the law of another jurisdiction where claims might be brought or are being brought. So in principle I would reject Mr Boyd's submission that I should consider the nature of the claim by World Tanker under the ***Direct Action Statute*** through "Louisiana law spectacles".

56. I also think that this was the approach of the Court of Appeal in ***DVA v Voest***. It is particularly clear in the judgment of Hobhouse LJ. The facts of the case are complicated. A ship, the ***"Jay Bola"***, had been time chartered then sub - voyage chartered. Both the time and voyage charter contained an English arbitration clause. The cargo was damaged on a voyage from Brazil to Bangkok. The Brazilian cargo insurers indemnified the voyage charterers. In return the voyage charterers gave the insurers a "subrogation receipt" that assigned to the insurers all rights of action arising out of the damage to the cargo. The Brazilian insurers then sued the shipowners and time charterers in Brazilian proceedings, doing so in their own name as statutory assignees (by Brazilian law) of the rights of the assured cargo owners. Hobhouse J held[lii] that the action of the insurers against the shipowners was irrelevant. But he held that, as against the time charterers, the rights being asserted by the Brazilian insurers were derived from the voyage charterers. He further held [liii] that, as the rights of the parties to the time charter were governed by English law, then the Brazilian insurers, as statutory assignees of the voyage charterers' rights, acquired those rights subject to the English arbitration clause. The time charterers wished to claim an injunction to restrain the Brazilian insurers from pursuing the Brazilian proceedings on the basis that they were bound by the English arbitration clause and so should arbitrate disputes in English arbitration proceedings.

57. Having held that the Brazilian insurers took their rights under the time charter subject to the arbitration clause, Hobhouse LJ then considered whether the time charterers' claim for an injunction fell within ***RSC Order 11 Rule 1 (1)(d).*** He held that it did. As I understand his reasoning, (at ***pages 285 to 288***), it was as follows: (i) the English Court is entitled to analyse, using English law concepts, the nature of the claim being brought by the Brazilian insurers in Brazil; (ii) the claim asserted by the Brazilian insurers is that of a statutory assignee (under Brazilian law) of the rights of the voyage charterers; (iii) the claim is made against the time charterers under the voyage charter; (iv) because that contract is governed by English law the question of whether the statutory assignee is bound by the arbitration clause is also governed by English law, at least so far as an English Court is concerned; (iv) as a matter of English law the statutory assignee is bound by the arbitration clause in that English law contract; (vi) the time charterers wish to prevent the statutory assignees from pursuing Brazilian proceedings in breach of the English arbitration clause; (vii) therefore the time charterers are *"enforcing"* an English law contract, so (viii) the case comes within ***paragraph (d)(iv).***

58. The position in the present case is that World Tanker has asserted a claim on the H&M Policies by virtue of the ***Direct Action Statute*** in the Direct Action Claim. It is true that World Tanker have not become a party to the policies by a mechanism of statutory novation or of statutory assignment.[liv] But in my view the nature of the rights that the ***Direct Action Statute*** confers to World Tanker is contractual; it confers a statutory right to make a claim on a contract to which World Tanker was not originally a party. And (subject to paragraph C of the Statute) the rights are confined to the *"terms and limits of the policy"*.

59. If the statutory claim by World Tanker (in the Direct Action Claim) is based on the H&M Policies and is to be characterised as contractual, then the next question is, following Hobhouse LJ's analysis in ***DVA v Voest;*** what are the terms of that contact on which World Tanker wishes to rely in order to make its claim against the YM Insurers? World Tanker accepts that the H&M Policies contain an English proper law clause and an EJC in favour of the English Courts. If World Tanker wishes to rely on some contract terms then, to an English lawyer, it must at least be highly arguable that it is subject to all the terms of that contract. So the YM Insurers would be entitled to say that if World Tanker wishes to make a claim based on the H&M Policies terms, it must be subject to all the bundle of rights and obligations contained in that contact, including the EJC.

60. It would seem that if this analysis is correct in English law, then this would also have to be the conclusion of the Louisiana courts, at least at this first stage. This is because it was accepted by Mr Boyd for World Tanker that the Louisiana court would, in the first place, construe the H&M Policies according to English law.[lv] The only reason that the Louisiana court might subsequently strike down the EJC is if it declared that it was not "*lawful*" or that it was *"in violation of the laws of this State"*.[lvi] But in my view, contrary to the submission of Mr Boyd, there is no reason why the English court should have regard to the Louisiana law concept of whether an EJC in favour of the English courts is lawful, at least when, upon an English conflicts of laws analysis, the contract is governed by English law. Hence in ***Aggeliki Charis Compania Maritima SA v Pagnan Sp (The "Angelic Grace") [1995] 1 Lloyd's Rep 87*** the Court of Appeal held that it need not have regard to the fact that the Italian court might not give effect to the English arbitration clause.[lvii] And in ***Akai v People's Insurance Co [1998] 1 Lloyd's Rep 90***, Thomas J disregarded the fact that the Australian High Court would not have given effect to the EJC in the insurance contract.

61. Therefore I conclude that the nature of the claim by World Tanker against the YM Insurers in the Direct Action Claim is contractual and the terms of that contract would include the English proper law clause and the EJC.

62. The next question must be: is the contractual nexus between World Tanker and the YM Insurers sufficient to enable the YM Insurers to say that their claim for an anti - suit injunction is one to *"enforce"* a contract that contains an EJC. In my view it is. Mr Boyd submitted that ***Finnish Maritime v Protective National Insurance Co [1989] 2 Lloyd's Rep 99*** established that for the purposes of obtaining permission to serve out of the jurisdiction under ***paragraph (d)***, the claimant and the defendant had to be parties (*"in the fullest sense"*)[lviii] to the contract upon which the claim was made. I think that the position is more subtle than that, as Hobhouse LJ makes clear in ***DVA v Voest: see page 287***.

63. In the ***Finnish Maritime case*** the claimant sought a declaration that it was ***not*** a party to a contract with the defendant and obtained leave (without notice) under ***RSC Order 11 Rule 1 (1)(d)(ii)*** to serve the proceedings on the defendant. Mr Adrian Hamilton QC, sitting as a Deputy High Court Judge, held that a claim for a declaration that there was no contract between the claimant and the defendant could not be within ***Order 11 Rule 1 (1) (d)***. So he set the leave aside. In ***DVA v Voest*** Hobhouse LJ accepted that analysis, holding that for the purposes of ***paragraphs (d) and (e) of Order 11 Rule 1(1)*** *"it is necessary to assert that there is a contract"*.[lix] But he went on to hold that if the Claimant in the English proceedings ***does*** assert, for the purposes of the English proceedings, that there ***is*** a contract by which the defendant is bound and the Claimant wishes to enforce an arbitration clause in that contract, then it does not matter that one or other of parties has become bound because it is an assignee or by virtue of some other legal mechanism.

64. That is the position in this case in the Direct Statute Action. There World Tanker asserts that it has a statutory right to enforce contractual rights against the YM Insurers under the H&M Policies. The YM Insurers accept that this may be so for the purpose of the present English proceedings. The YM Insurers then say that, if that claim based on the H&M Policies is made in Louisiana, then World Tanker must be bound by all the terms, including the EJC in favour of the English Courts. And it is because the YM Insurers wish to enforce the English EJC that they bring the English proceedings for an anti - suit injunction.

65. For the purposes of seeing whether a claim fell within ***paragraph (d)***, Hobhouse LJ posed two questions in ***DVA v Voest at page 287***: *"Is there a contract? Is the [claimant] seeking to enforce that contract against the defendant?"* In the present case, in relation to the Direct Action Claim I think that the two relevant questions can be expanded to: "does the Claimant in the English proceedings rely on a contract on which the proposed defendant asserts claims in the foreign proceedings; if so is it seeking to enforce that contract against the defendant?" The answer to both question is "yes". Alternatively the claim for an anti - suit injunction against the Direct Action Claim is one that *"otherwise effects"* the H&M Policies that are governed by English law and have an EJC in favour of the English Courts. Therefore I have concluded that there is a sufficient contractual nexus between the claimant and the defendant to come within ***paragraph (d)(iv).***

66. The next issue is: does the claim for an anti - suit injunction against the Garnishee Proceedings and the State Action also fall within ***paragraph (d)(iv)***. Mr Boyd submitted generally that none of the Louisiana Enforcement Proceedings were contractual in nature. He did not advance any additional arguments on this point in relation to the Garnishee Proceedings and the State Action. But he did suggest that the nature of those two actions was so well known to the English Courts that it could not be argued that World Tanker's action in bringing them to aid enforcement was *"unconscionable"*.[lx] In argument Mr Boyd did accept that all three sets of proceedings were brought to enforce the judgment in the Louisiana Liability Proceedings. Mr Gaisman submitted that all three actions in the Louisiana Enforcement Proceedings raised the same question: what is the scope of the H&M Policies underwriters' contractual obligations under the H&M Policies. In the Garnishee Action World Tanker seeks a direct payment of sums due under the policies to the assured; in the State Action World Tanker seeks declaration of rights under the H&M Policies.

67. It seems to me that once the YM Insurers have satisfied the Court that they have a good arguable case that they can rely on a contract (the H&M Policies); that they are seeking to enforce it or that it otherwise

affects it; and that it contains an EJC in favour of the English Courts, then that must be enough to satisfy the first requirement for obtaining permission to serve out of the jurisdiction, ie. by coming within ***Rule 11.1 paragraph (d)(iv).*** The issue of whether the permission should extend to a claim for an anti - suit injunction against all the Louisiana Enforcement Proceedings, including the Garnishee Proceedings and the State Action must, I think, depend on the answers to the next two questions: is there a serious issue to be tried on the merits of the claim for an anti - suit injunction against one or more of the foreign proceedings and, if so, is this a proper case for permission to serve out of the jurisdiction.

68. But if necessary I would hold that the claims for an anti -suit injunction against those two proceedings also come directly within ***paragraph (d)(iv)***. The three Louisiana Enforcement Proceedings are all closely related. The ultimate aim of all of them is to enforce the judgment in the Louisiana Liability Proceedings. And they all seek relief (against the YM Insurers amongst others) concerning contractual rights under the H&M Policies. In the current proceedings, in relation to all the Louisiana Enforcement Proceedings, the YM Insurers rely upon the H&M Policies and say that they wish to enforce one of the terms: that is the EJC. I appreciate that, in the Garnishee and State Action proceedings, World Tanker is not asserting a direct statutory right to claim on the HP against the YM Insurers under the ***Direct Action Statute***. But I think that fact is not crucial to this issue. ***Paragraph (d)(iv)*** and the cases do not state that, in order to come within the paragraph the proposed defendant must for all purposes be bound by the EJC in the English law sense of being in privity of contract with the Claimant. Indeed ***DVA v Voest*** holds that this is not necessary. I think it is enough that for the YM Insurers to satisfy the Court that they have a good arguable case that, in relation to each of the foreign proceedings (i) they can rely on a contract (the H&M Policies); and (ii) they can *"enforce"* the EJC in relation to those proceedings; alternatively (iii) that the claim for an anti - suit injunction in relation to those proceedings is one that *"otherwise affects"* the H&M Policies.

69. Accordingly I hold that the YM Insurers have a good arguable case that the claim that the YM Insurers makes for an anti - suit injunction comes within ***paragraph (d)(iv)***. If I had concluded that there was not a good arguable case that the claim for an anti - suit injunction based on the EJC came within ***paragraph (d)(iv)***, then the same result must obtain if the claim were based on ***paragraph (d)(iii)***, relying on the English proper law clause in the H&M Policies. This is because the same issues are involved in both instances. The first is whether the claim of World Tanker is sufficiently contractual; the second is whether there a sufficiently close contractual nexus between the claimant and the defendant to come within ***paragraph (d)(iii) or (iv)***. Therefore in practice the YM Insurers can only advance their claim for an anti - suit injunction on the basis that there is an arguable case under ***paragraph (d)(iv).***

70. Are there *"serious issues to be tried"* on the YM Insurers claim on the merits for an anti - suit injunction?

Again I consider the point first in relation to the claim for an anti - suit injunction against the Direct Action Claim. The issues here will be: is World Tanker bound by the EJC; if so should it be held to that contractual provision? On both points the answer to this question must be "yes" in the light of the approach of the CA in ***Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 588*** and ***Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87***. Mr Boyd advanced arguments that there were good reasons under ***Louisiana law*** why World Tanker should not be held bound by the EJC in the H&M Policies. But I am satisfied that the basic position, so far as the English Court is concerned, is that if someone asserts rights under a contract which contains an EJC, then that person has to show good reason why it should not be bound by that clause. Therefore there must be *"serious issues to be tried"* on the question of whether or not World Tanker should not be bound by the EJC. I would go further and say that the YM Insurers have a good arguable case that World Tanker should be bound and so the YM Insurers are entitled to the anti - suit injunction that they seek.

71. Mr Body did not suggest that, in relation to this particular point, there were distinctions in the position of World Tanker on each of the three Enforcement proceedings in Louisiana. He was right in this. They are all proceedings to enforce the Louisiana Liability judgment. All three of the actions are based on World Tanker's assertion of rights to declaratory relief or payment under the H&M Policies. Therefore there must be serious issues to be tried on the issue of whether the YM Insurers are entitled to an anti - suit injunction in relation to all three of the Louisiana Enforcement Proceedings.

72. **Has it been demonstrated that a proper case for permission to serve out: *Rule 4(2)***

Mr Boyd's arguments under this heading were, broadly, as follows. First he said that permission should not be granted because it would effectively enable the English Courts to decide on whether the Louisiana ***Direct Action Statute*** could be used when there is an EJC in the policy of insurance relied upon by the claimant in Louisiana. He said that this is a decision that should be left to the Louisiana Courts and if the English Courts did interfere it would be contrary to accepted notions of judicia comity. Secondly, he submitted that it would be wrong, by giving permission to serve out, to deprive World Tanker of its juridical advantage in Louisiana, being the right to claim under the ***Direct Action Statute*** and obtain the relief sought in the other two Enforcement Proceedings. Thirdly he submitted that the YM Insurers had agreed, by the H&M Policies, to meet liabilities of their insureds arising out of a collision and that the effect of the ***Direct Action Statute*** was to enable the insurers' liability to be enforced directly; this was a laudable policy which the English proceedings would only subvert.

73. I cannot accept these submissions. The fundamental position is that World Tanker wishes to take advantage of insurance policies that are governed by English law. The original parties to those policies agreed that disputes under them should be determined by the English Courts. If World Tanker wishes to assert claims under those policies, using a statutory right or otherwise, then I think that the English Courts' view must be that World Tanker has to accept all the terms of those policies, including the EJC, unless it can show a good reason why it should not be bound by it. I think that it is not contrary to accepted notions of comity to hold that English Court will give permission to serve proceedings on a party outside the jurisdiction when the contract relied upon in foreign proceedings contains a clause giving the English Court jurisdiction over claims arising under the contract.

74. I accept that the effect of granting permission to serve out could be, ultimately, to deprive World Tanker of the juridical advantage of the right to claim under the Direct Action Statute or other relief in the Enforcement Proceedings. But when the claim is made on a contract that contains an EJC in favour of the English Courts, it must be questionable whether that advantage is a legitimate one. I think it is certainly not so powerful an argument to be sufficient reason to refuse permission to serve out.

75. The third argument of Mr Boyd is another way of saying that the English Court should do nothing to prevent the Louisiana Courts from enforcing the ***Direct Action Statute*** That would be a powerful argument if there were no EJC in favour of the English Courts. But as there is one in the contracts on which World Tanker relies, I conclude that it is not a good reason to refuse permission to serve out.

76. **Leave to make the re-re-amendment of the Originating Summons to claim the anti - suit injunction**

The overall conclusion that emerges from the discussions above is that, in my view: (i) the YM Insurers have a good arguable claim for an anti - suit injunction against World Tanker; and (ii) subject to any deficiencies in the formalities, it is a claim for which the Court would grant permission to issue and serve proceedings out of the jurisdiction on World Tanker under ***Rule 11.1(1)(d)(iv) and Rule 11.4.*** But, logically, the prior issue is whether the YM Insurers should have leave to make the re-re-amendment to claim the anti - suit injunction. As all the relevant arguments were made at the oral hearing before me and i the written submissions afterwards, I should deal with that issue. There are two tests that the YM Insurers must satisfy. First, is the claim properly arguable and secondly, is it one for which permission to serve the claim out of the jurisdiction on World Tanker would be granted? I have concluded (for reasons set out above) that the claim is readily arguable. I have also concluded that permission to issue and serve the proceedings on World Tanker could be given, although in this particular case it is subject to the formalities point. Therefore I think that permission to make the re-re-amendment to the Originating Summons should be granted and I do so.

77. However that still leaves two further points taken by Mr Boyd, which he says are obstacles to the YM Insurers' pursuit of the claim for a permanent anti - suit injunction. They are: (i) that the YM Insurers require further permission to issue and serve the new claim on World Tanker out of the jurisdiction; and (ii) if permission is needed, the YM Insurers' failure to make any formal application or serve formal evidence before the hearing before me is fatal to the YM Insurers' application.

78. **The *"Parker v Schuller"* point**

The claim for an anti - suit injunction simply did not appear in the Originating Summons that was issued by the YM Insurers on 20 April 1999. So the first affidavit of Mr Zavos that was sworn in support of the application for permission to serve the Originating Summons out of the jurisdiction on World Tanker did not deal with this claim for an anti - suit injunction at all. The affidavit did not verify a cause of action for an anti - suit injunction or say that this was a proper case for the exercise of the English Court's powers under ***Order 11*** to grant permission to serve the proceedings on World Tanker in respect of an anti - suit injunction claim.[lxi] When the YM Insurers were granted permission (without notice) to serve the Originating Summons claiming declaratory relief upon World Tanker, the Court was not claiming to exercise jurisdiction over a person beyond the jurisdiction in respect of a claim for a permanent anti - suit injunction.

79. It is very established that if a claimant in English proceedings needs permission to serve those proceedings on a potential defendant out of the jurisdiction, then the claimant must take care to include all the causes of action on which he relies in the originating process for which he seeks leave to be served on the foreign defendant. That is the basis on which the court decides whether it will exercise this "exorbitant" jurisdiction on the foreign defendant. It is also the basis on which a foreign defendant can decide whether to take part in the English proceedings or to challenge them. This strict rule was recently reconfirmed by the Court of Appeal in ***DVA v Voest: see page 290 per Hobhouse LJ.***

80. If permission to serve a defendant outside the jurisdiction is granted under ***Order 11***, and the defendant then submits to the jurisdiction, a claimant will often wish to amend the proceedings against the defendant to expand the nature of the claim. The formal position is that the English Court will not give permission to amend unless it is satisfied that the new claim is one for which permission to serve out of the jurisdiction under ***Rule 11.1 and 4*** would be granted. A recent example of this is ***Credit Suisse First Boston (Europe) Ltd v. MLC (Bermuda) Ltd [1999] 1 Lloyd's Rep 767***, where the Claim Form was amended to add two new claimants and to add a claim for an anti - suit injunction after the original proceedings had been served within the jurisdiction.[lxii] Rix J permitted the two new claimants and the claim for an anti - suit injunction to be added, as he was satisfied that the new claimants would come within ***RSC Order 11 Rule 1(1)(d)(iii) or (iv).***[lxiii] Thus in circumstances where a foreign defendant ***has submitted to the jurisdiction*** and the claimant wishes to amend his claim to add a new cause of action, I accept that Mr Gaisman is correct in stating[lxiv]that it is not the law that *"upon a claimant applying for leave to amend existing proceedings brought against a foreign defendant a fresh application for leave must be made and fresh service out of the jurisdiction actually affected".*

81. I think a good way of testing the position is to ash what would have happened if permission to serve the Originating Summons (containing only the claim for declaratory relief) had been obtained without notice, but before World Tanker had acknowledged service the YM Insurers had decided that they wished to amend the Originating Summons to claim a permanent anti - suit injunction. I am sure that in those circumstances the YM Insurers would have had to obtain permission to amend and to issue and serve the amended Originating Summons on World Tankers out of the jurisdiction. To obtain that permission they would have had to serve evidence verifying the claim; stating that they had a good cause of action and also saying which paragraph of ***Rule 11.1(1)*** they relied on and why it was a proper case for service out of the jurisdiction.

83. I think that the same analysis ought to apply to the current situation, with some modification to take account of the unusual circumstances in this case. This is because I think that, in principle, when a foreign defendant has not already submitted to the jurisdiction of the English Court, it should not have to be subjected to a claim unless the English Court has decided that the claim is one that can and should be served on the foreign defendant under ***Rule 11.1.*** But, for the reasons that I have already given at length above, I have concluded that the anti - suit injunction claimed by the YM Insurers is a claim for which permission to serve out of the jurisdiction on World Tanker ought, in principle, to be granted. Therefore the question is what should be done in view of the fact that the YM Insurers have not complied with the formalities.

84. The failures to observe the formalities are very serious. The formalities involved are: (i) the requirement that the claimant must seek and obtain permission to issue and serve the claim on the defendant out of the jurisdiction; and (ii) the requirement that the claimant should file evidence supporting its belief that the claimant has a good cause of action in respect of the particular claim made (in this case the relief claimed

in paragraph 6 of the re-re-amended Originating Summons) and that it is a suitable case for service out of the jurisdiction.

85. However, in practice World Tanker knew from 12 January 2000 that the YM Insurers were seeking an injunction to restrain World Tanker from prosecuting any Louisiana proceedings until determination of the issues raised by the Originating Summons seeking the declaratory relief. World Tanker also knew of all the facts on which the YM Insurers relied in support of the anti - suit injunction. They had been set out in the second and third affidavits and the three witness statements of Mr Zavos that were served prior to the hearing before me in support of maintaining the permission to issue and serve the Originating Summons and in support of the interim anti - suit injunction. World Tanker also knew, at the latest from the first morning of the hearing before me, that the YM Insurers wished to re-re-amend the Originating Summons so as to claim a permanent anti - suit injunction. Therefore World Tanker could not say, nor did Mr Boyd submit, that there was any prejudice to it because there had been no formal application to obtain permission to issue and serve the claim for an anti - suit injunction on World Tanker out of the jurisdiction.

86. Further, in the course of argument all the points in favour of the YM Insurers' claim that it had a good cause of action for an anti - suit injunction and that it was a proper case for service out of the jurisdiction were canvassed by Mr Gaisman. Mr Boyd for World Tanker had the opportunity to deal with all the points and he did so comprehensively in his oral and written submissions.

87. In these circumstances it seems to me that ***in practice*** the hearing before me ought to be treated as if it were an application on notice for leave to issue and serve out of the jurisdiction a claim for a permanent anti - suit injunction at which the court had all the relevant evidence. But because there has been a failure to comply with the CPR (incorporating the old ***RSC Order 11***), then I have to consider whether I should exercise the powers I have under ***CPR 3.10*** to waive the irregularities in the formalities. ***CPR 3.10*** provides:

> *"Where there has been an error of procedure such as a failure to comply with a rule or practice direction-*
>
> *(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and*
>
> *(b) the court may make an order to remedy the error".*

88. Unless the regime of the ***RSC*** the Court of Appeal has said that the judges should exercise great care and caution when being asked to waive irregularities in procedure when it concerns an application to issue and serve proceedings out of the jurisdiction.[lxv] But Staughton LJ pointed out in ***Kuwait Oil Tanker Co SAR v Al Bader [1997] 1 WLR 1410 at 1418 - 9*** that the attitude of the Court of Appeal seemed to have been modified by the majority judgments[lxvi] in ***Golden Ocean Assurance Ltd v Martin (The "Goldean Mariner") [1990] 2 Lloyd's Rep 215.*** In the ***Kuwait Oil Tanker*** case Staughton LJ said at ***page 1419G***, that the majority in ***The "Goldean Mariner"*** concluded[lxvii] that the test should be whether there was *"good reason"* or *"good cause"* for the exercise of the discretion to waive the irregularity where service out of the jurisdiction is involved. Waite and Aldous LJ agreed with him.

89. In this case there has been very serious failures to observe the formalities. But in practical terms World Tanker has suffered no prejudice at all. I see no point in treating the hearing before me as an application by the YM Insurers, without notice, for permission to re-re-amend the Originating Summons and for leave to issue and serve the re-re-amended Originating Summons on World Tanker outside the jurisdiction. That would only lead to a repeat of the hearing before me if World Tanker wished to try to set the leave aside again.

90. I therefore conclude that there is *"good reason"* or *"good cause"* to make an order remedying the irregularities of the YM Insurers in relation to the application to re-re-amend the Originating Summons and the application to issue and serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction. In so far as this necessitates granting permission to extend the validity of the Originating Summons I will grant it. But this must be on conditions,[lxviii] which are:

(1) That the YM Insurers undertake that within 7 days of this judgment being handed down, they will file evidence that: (i) verifies their belief that the Claimants have a good cause of action in respect of the claim for a permanent anti - suit injunction as claimed in paragraph 6 of the re-re-amended Originating Summons; (ii) verifiys which paragraph of ***Rule 11.1 (1)*** the YM Insurers rely upon and why; and (iii) states why there are good reasons that the court should exercise its discretion to grant permission to issue and serve out of the jurisdiction the claim for a permanent anti - suit injunction.

(2) That World Tanker have permission (if so advised) to amend its existing Application Notice[lxix] to include an application to set aside the leave to re-re-amend the Originating Summons and the leave that I will be giving to issue and serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction.

(3) That the issue of costs be left open for argument.

91. On the assumption that the undertaking in (1) is to be given, I give permission to issue and serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction.

H. The Claim for an interim anti - suit injunction

92. It is sensible to deal with this issue at this point, having concluded that the YM Insurers have a good arguable case for an anti - suit injunction against World Tanker for the purposes of the application for leave to serve out of the jurisdiction on World Tanker. The points that were made by Mr Boyd in opposition to the application for leave were repeated in the context of the claim for an interim anti - suit injunction. I cannot accept them in that context either.

93. No specific additional points were raised on the issue of *"balance of convenience"*. In my view the balance of convenience lies in preserving the present position. By that I mean that the rights of the YM Insurers to have any claims upon them under the H&M Policies determined by the English Courts and by English law should be preserved. This does not prejudice World Tanker except that its Louisiana Enforcement Proceedings will have to be suspended until there is a trial of the issue of whether a permanent anti - suit injunction should be granted. (I deal with the declaratory relief issue below). If there is to be a trial on the anti - suit injunction issue then it should be expedited.

I. Application to set aside the permissions to serve out in relation to the declaratory relief

94. The arguments raised by Mr Boyd for World Tanker on this aspect of the case were as follows:

(1) The YM Insurers have no right to claim declaratory relief of the nature set out in the Originating Summons against World Tanker. Just as World Tanker could not sue the YM Insurers for declarations as to the scope of the H&M policy cover, so the reverse must be true. This is because, in the words of Lord Diplock in ***Gouriet v Union of Post Office Workers [1978] AC 435 at 501,*** there is no issue on *"contested legal rights, subsisting or future, of the parties represented in the litigation before it and not of anyone else"*. World Tanker particularly relies upon the Court of Appeal decision in ***Meadows Indemnity Co Ltd v The Insurance Corporation of Ireland PLC [1989] 2 Lloyd's Rep 298***. Mr Boyd submits that the effect of this is that there is no *"serious issue to be tried"* between the YM Insurers and World Tanker.

(2) The YM Insurers cannot satisfy the test that there should be a *"good arguable case"* that the claim falls within ***Rule 11.1(1)(c)***. World Tanker is not a *"necessary"* party to the claims for declaratory relief; nor can it be said to be a *"proper"* party. This is because there is no right to claim the declaratory relief against World Tanker.

(3) Because the YM Insurers have no right to obtain declaratory relief against World Tanker, they cannot satisfy the test that there is *"a serious issue to be tried"* between the parties, even if there is a *"good arguable case"* that World Tanker is a *"proper"* party;

(4) The YM Insurers cannot rely upon ***Rule 11.1(1)(d)*** because there is an insufficiently close contractual nexus between the YM Insurers and World Tanker. Also, as against World Tanker,

it is not a claim to *"enforce"* the H&M Policies nor is it one that *"otherwise affects"* those contracts.

(5) Further the claims for declarations would serve no useful purpose as World Tanker is not pursuing any claims against the YM Insurers here in England. The Louisiana Courts can deal with any issues of English law and any questions of the application of the ***Direct Action Statute*** should be left to the Louisiana Courts. Therefore this is a case of a claimant using the mechanism of a claim for a "negative declaration" to found jurisdiction in a non - natural form. Thus this is not a proper case for leave to serve the Originating Summons out of the jurisdiction under ***Rule 11.4(2).***

95. In the Application Notice and at the start of the hearing it appeared that Mr Boyd was also taking a further point that there was not a serious issue to be tried as between the YM Insurers and the First to Fourth Defendants who had been served with the proceedings within the jurisdiction.[lxx] The suggestion was that there might be some "collusion" between the assureds under the H&M Policies and the YM Insurers. But in the course of the hearing Mr Boyd did not rely on this point and I will assume that it is not being pursued.

96. **Are the YM Insurers entitled to pursue the claim for declaratory relief against World Tanker?**

Mr Boyd submits that there are no contested legal rights in issue between World Tanker and the YM Insurers. The position is, he says, the same as that between the insured and the reinsurers in the ***Meadows Indemnity case***. There the Court of Appeal struck out a claim by the ***reinsurers*** who claim a declaration as against the ***insured*** that the ***insurers*** were entitled to avoid the insurance contact, when no claim had yet been made on the ***reinsurance*** contract. Mr Boyd submitted that as there is no contract as between the YM Insurers and World Tanker, then there cannot be any contested legal right between the two parties that can give rise to a right by the YM Insurers to claim declaratory relief, as against World Tanker, on the scope of the H&M Policies. He relies particularly on the statement of May LJ in the ***Meadows Indemnity case at page 309.***

97. I cannot accept that the position in the present case is analogous to that in the ***Meadows Indemnity case***. World Tanker has brought three sets of proceedings in Louisiana in which it claims, either directly or indirectly, to be entitled to assert rights under the H&M Policies by virtue of the Louisiana ***Direct Action Statute*** or claims for declaratory relief. All those rights are challenged by the YM Insurers in two ways. They say that World Tanker has no right to make claims concerning the H&M Policies in any court other than the English Courts and also that World Tanker would have no rights or restricted rights on the proper construction of the policy terms in any case. To my mind that demonstrates that there are contested rights between the YM Insurers and World Tanker. In particular in the Direct Action Claim, although there is no direct contact between the parties, World Tanker is relying on a statutory right to claim under the H&M Policies. SO I think that there is a sufficiently direct issue between the parties to gives the YM Insurers the right to claim declaratory relief.

98. **Can the YM Insurers shows that they have a good arguable case that the claim falls within *Rule 11.1(1)(c)*?**

Mr Gaisman accepts that World Tanker is not a *"necessary"* party to the proceedings for declaratory relief. But he asserts that World Tanker is a *"proper"* party. I accept that submission. For the reasons I have already given I conclude that the YM Insurers are entitled to claim declaratory relief as to the scope of the H&M Policies as against World Tanker. Therefore World Tanker is a *"proper"* party in the sense that there is a right to claim the relief sought against it. Further, in view of the fact that the First to Fourth Defendants have stated that they will contest the claims for declarations "in part", it seems to me that there is a *"real issue"* to be tried as between the YM Insurers and the defendants who have been served within the jurisdiction. I appreciate that, as yet, the assured under the H&M Policies have made no claim against the YM Insurers for any liability arising out of the collision. But that does not preclude the insurer from obtaining declaratory relief as against his assured if it would serve a useful purpose. In my view it would do so for two reason. First there obviously is some dispute between the YM Insurers and the assureds on the H&M Policies' terms. Secondly because the same points will arise, as a matter of English law, in the Louisiana Enforcement proceedings.

99. **Can the YM Insurers show that they have a *"good arguable case"* that the claim for declaratory relief, as against World Tanker, comes within *Rule 11.1(1)(d)?***

In my view they can do so. I have already concluded, in the section above dealing with the issue of permission to serve out of the jurisdiction on the claim for an anti - suit jurisdiction, that because of the claims by World Tanker in the Louisiana Enforcement Proceedings, there is a sufficient contractual nexus between the YM Insurers and World Tanker. I also note that in the proceedings in the Orleans District (State) Court, World Tanker is itself claiming declaratory relief as to the proceeds *"due"* under the policies. It does so as a *"person interested..or whose rights.. or legal relations are affected by ... contract"* within the meaning of Article 1872 of the Louisiana Code of Civil Procedure.[lxxi]

100. IN my view the declaratory relief claimed by the YM Insurers on the scope of the H&M Policies constitutes a claim which *"otherwise effects"* the contract on which World Tanker is basing its claims in the Louisiana Enforcement proceedings. It is also, I think, a claim to *"enforce"* the contract in the sense that the YM Insurers wish to have a declaration of who the contract terms are to be enforced. Either way the claim comes within the wording of ***paragraph (d)*** as explained by Hobhouse J in ***Gulf Bank KSC v Mitsubishi Heavy Industries Ltd [1994] 1 Lloyd's Rep 323 at 329.***

101. **The procedural difficulty for the YM Insurers.**

There is a procedural difficulty for the YM Insurers in basing their claim for permissions to serve out of the jurisdiction in respect of the declaratory relief claim on ***paragraph(d)***. This paragraph was not relied on, as against World Tanker, when the application was made without notice in June 1999. But a further Application Notice was issued by the YM Insurers on 1 February 2000 in which they sought permission to serve the re-amended Originating Summons[lxxii] on the basis that the claim came within ***paragraph (d) (i), (ii), (iii) or (iv).*** Mr Gaisman submits that the procedural failure to base the original application on ***paragraph (d)*** should be remedied by the Court, exercising its powers under ***CPR 3.10.***

102. The same test of *"good reason"* or *"good cause*" to remedy these procedural irregularities must apply to this issue as it did to the procedural failures of the YM Insurers in relation to the claim for an anti - suit injunction. World Tanker has not suffered any prejudice. It had notice of the amended application and all the evidence that the YM Insurers relied on. It would be pointless to teat the hearing before me as an application without notice. Therefore I think there is *"good reason"* or *"good cause"* to remedy the procedural irregularities. The proceedings before me will be treated as the hearing on notice. World Tanker will be permitted to amend its Application Notice under ***CPR Part 11.1*** so as to challenge this ground as well. All questions on costs must be reserved.

103. **Is this a proper case for permitting service out of the jurisdiction in accordance with Rule 11.4(2)?**

Mr Boyd has two principal arguments under the hearing of "discretion". First he says that the English proceedings for a declaration will serve no useful purpose, because World Tanker is not pursuing its claims under the ***Direct Action Statute*** or the Garnishee or State Action in England, but in Louisiana. The Courts there are perfectly capable of dealing with issues of English law and the proper construction of English law contracts. The real issues will arise in the Louisiana courts once the questions of English law raised in the declaratory proceedings have been determined. Then (for example) an issue will arise in the Direct Action Claim on whether the *"pay to be paid"* clause in Clause 8.1 of the ITC (Hulls) is a *"lawful condition of the policy"* within the meaning of ***paragraph C*** of the Direct Action Statute, *§ 655.*[lxxiii]

104. I agree with Mr Boyd that if the only question was whether the English Court or the Louisiana Court should decide on the proper construction of an English law contract, then it might not be a proper case to exercise discretion to permit proceedings to be served out of the jurisdiction in relation to the declaration relief. But that is not the only issue. I cannot consider the claim for the declaratory relief in isolation. The YM Insurers have now also sought a permanent anti - suit injunction and I have held that they are entitled to serve proceedings out of the jurisdiction in respect of that claim. I have also held that they are entitled to an interim injunction. So I have held that, on the face of it, the YM Insurers are entitled to have any issues on the policies decided by the English Courts by virtue of the EJC. The YM Insurers do wish the English Courts to decide issues of construction of the H&M Policies that will bind World Tanker. Therefore the balance must be in favour of permitting service out of the jurisdiction of the claim for the declaratory relief sought on the issues of construction.

105. Mr Boyd's second point is that this is yet another case of a claimant using proceedings to obtain a "negative declaration" to found jurisdiction in the English Courts when they are not the natural forum for the resolution of the dispute between the parties. Mr Boyd submits that the Louisiana Courts must be the natural forum for the resolution of claims for enforcement of the Louisiana Liability judgment and in particular for claims under the Direct Action Statute. He relies on the well - known decisions of ***Saipem SpA v Dredging VO2BV and Geosite Surveys Ltd (The "Volvox Hollandia") [1988] 2 Lloyd's Rep 361;***[74] ***Sohio Supply Co v Gatoil (USA) Inc [1989] 1 Lloyd's Rep 588;*** and ***First National Bank of Boston v Union Bank of Switzerland [1990] 1 Lloyd's Rep 32.***[75] However my attention was drawn, after the conclusion of the oral argument, to a new recent decision of the Court of Appeal in ***Messier - Dowty Ltd v Sabena SA (21 February 2000),*** in which Lord Woolf MR stated, at ***paragraph 36*** of his judgment, that the observations of Kerr LJ in the first and last of the cases referred to above should be *"treated with reserve"* because the use of negative declarations domestically had expanded over recent years. He said *"In the appropriate case their use can be valuable and constructive"*.

106. Once again I think that the problem with Mr Boyd's submission is that it ignores the facts that (i) World Tanker is asserting a claim in Louisiana under the ***Direct Action Statute*** on the H&M Policies asserts other claims concerning the H&M Policies in the other Enforcement Proceedings; and (ii) that I have held that the YM Insurers have a good arguable case for enforcing the EJC by means of an anti - suit injunction. If those conclusions are correct then the English Courts are the proper forum to claim the EJC and they are also the proper forum for the resolution of any issues on the proper construction of the policy terms. Mr Boyd was unable to rely on any case in which the Court has refused permission to serve out of the jurisdiction under ***Order 11 Rule 1***(or the new CPR) where there is an enforceable EJC in favour of the English Courts and the claimant seeks a negative declaration in the English proceedings. But there are two cases where the English Courts have held that it is proper to claim negative declaratory relief where the contract concerned was expressly governed by English law: ***HIB Ltd v Guardian Insurance Co Inc [1997] 1 Lloyd's Rep 412 at 417 per Longmore J;*** and ***Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90 at 106 per Thomas J.*** In the former case Longmore J also held that although a "negative declaration" was sought he would still exercise his discretion to permit service of the proceedings out of the jurisdiction under ***Order 11 Rule 1 (1) (d) and Rule 4 (2).***

107. It seems to me that if, in addition to being expressly governed by English law, the relevant contract is one containing an EJC in favour of the English Courts then there can be no objection to a claimant using the mechanism of a "negative declaration" if that is the only means by which the relevant issue can be brought before the English courts. So I conclude that the fact that the YM Insurers claim "negative declarations" is not, of itself, a good reason to set aside the permission to serve out of the jurisdiction the Originating Summons for declaratory relief.

J. Conclusions

108. I will summarise my conclusions. They are:

(1) A claim for an anti - suit injunction is a legitimate type of claim that can be made in an originating process for which permission is needed to serve it out of the jurisdiction under ***Rule 11.1*** on a proposed defendant;

(2) If the basis of the claim for an anti - suit injunction is that the potential defendant is attempting to rely on contractual rights, whether directly or indirectly, eg. under a statutory right of action, then the claim can, in principle, come within ***Rule 11.1 (1) (d);***

(3) In this case World Tanker is relying on the Louisiana ***Direct Action Statute*** to make claims under the H&M Policies against the YM Insurers. World Tanker's reliance on the H&M Policies, through the ***Direct Action Statute,*** establishes a sufficiently close contractual nexus between the parties for the purpose of ***Rule 11.1 (1) paragraph (d);***

(4) Because the H&M Policies contain an EJC in favour of the English Courts, the YM Insurers' claim for an anti - suit injunction is a claim to *"enforce"* the EJC in the H&M Policies within ***paragraph (d)(iv)***. It is also a claim that *"otherwise affects"* that contract;

(5) That is enough to bring the claim for an anti - suit injunction against all three Louisiana Enforcement Proceedings within ***paragraph (d).*** But, if necessary, I would hold that the claim for an anti- suit injunction against the Garnishee Proceedings and the State Action also come directly within ***paragraph (d)(iv);***

(6) Therefore the YM Insurers have a *"good arguable case*" that they bring their claim for an anti - suit injunction within ***Rule 11.1 (1) (d)(iv).***

(7) If I had concluded that there was not a good arguable case that the claim for an anti - suit injunction came within ***paragraph (d)(iv)***, then I would have reached the same conclusion in relation to ***paragraph (d)(iii)***, if the YM Insurers relied on the English proper law clause, because the same issues arise in relation to that sub - paragraph;

(8) Because World Tanker is claiming rights (under the ***Direct Action Statute*** and otherwise) to make claims concerning the H&M Policies which contains an EJC in favour of the English Courts, there is a *"serious issue to be tried"* as between World Tanker and the YM Insurers on whether an anti - suit injunction (based on the EJC) should be granted. On the facts of this case the YM Insurers have a good arguable case that they should have an anti - suit injunction;

(9) As a matter of discretion if there had been no problems of procedural irregularities I would have exercised a discretion to permit service out of the jurisdiction of a claim for an anti - suit injunction;

(10) Therefore the YM Insurers have satisfied me that they should have leave to re-re-amend the Originating Summons to claim a permanent anti - suit injunction because: (a) the claim is arguable; and (b) it is one for which permission to serve out of the jurisdiction can and should (in principle) be granted;

(11) There have been serious procedural irregularities because there had been no original claim for an anti - suit injunction and even by the time of the oral hearing the formal requirements were not completed by the YM Insurers. However World Tanker has suffered no prejudice. Therefore, exercising the Court's powers to cure irregularities under ***CPR 3.10*** I would permit the YM Insurers to make the application for permission to re-re-amend the Originating Summons and to serve it out of the jurisdiction, upon certain conditions being fulfilled.

(12) The application of the YM Insurers for an interim anti - suit injunction will be granted;

(13) The application by World Tanker to set aside the permission to serve the original claim for declaratory relief on the basis of ***Order 11 Rule 1 (1) (c)*** will be rejected;

(14) The application by the YM Insurers for permission to serve the original claim for declaration relief on the further basis of ***Rule 11.1 (1) (d)*** would be permitted, despite the formal irregularities, which I cure exercising the Court's powers under ***CPR 3.10.***

109. A great many points were raised in the course of the two days of argument and in the written submissions that were made after the oral hearing. I am very grateful to counsel for the clear and exceptionally interesting arguments put forward on all the points. As arranged at the end of the oral hearing, the parties should attempt to agree what the consequences of my conclusions should be so that an order can be prepared.

Endnotes

1. The Application Notice is dated 20 August 1999: ***Bundle 1/Tab 2***. Although the Originating Summons of the Claimants was issued under the old procedure, it has been accepted by both sides that I should use the CPR to determine the present applications.

2. The Application Notice, as originally framed, is dated 12 January 2000: ***Bundle 1/Tab 1/pages 1-2.*** During the course of the hearing before me an amended version was issued for which permission was sought: ***Bundle 1/Tab 1/pages 7A-7C***.

3. The Application Notice is dated 1 February 2000: ***Bundle 1/Tab 1/pages 5-7.***

4. The ITC terms are: *"The Underwriters agree to indemnify the Assured for three-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for: 8.1.1. loss of or damage to any other vessel or property on any other vessel..."* [The emphasis on ***"paid"*** is mind]. ***Bundle 2/page 45.***

5. See: ***ITC clause 8.3: Bundle 2/page 45***

6. The statute was passed as Act 55 of 1930, ie. in the same year as the ***Third Parties (Rights against Insurers) Act 1930.*** The Louisiana statute was subsequently amended and was re-enacted in 1958 and again in 1988. It is now known as ***Louisiana Revised Statute 22§655.***

7. The ***Direct Action Statute*** states that an *"injured person"* has a *"right of action against the insurer"* whether or not the policy of insurance sued upon was written or delivered in the state of Louisiana and whether or not such policy contains a provision forbidding such direction action, *"provided the accident or injury occurred within the state of Louisiana"*: ***§ 655 B(2): Bundle 3/page 539*** . As I have stated, the collision was about 250 miles off Portugal.

8. The full claim, as found by the court, was for damages of US$ 29.4 million plus US$5.3 million interest. But the court gave credit for US$ 12,262,000 that the Newcastle P&I Club had paid World Tanker in respect of ***"Ya Mawalay's"*** liability for the collision. There is a dispute on the nature of the payment by the Newcastle P&I Club which is referred to in paragraph 8 above. But it is agreed that the balance of the judgment is US$21.4 million.

9. In accordance with Louisiana procedure, World Tanker's lawyers had submitted draft findings of fact and law to the Judge. The judgment followed the draft findings almost to the letter.

10. **See judgment of Judge Lemmon at para 30 of the Conclusions of Law: Bundle 2/page 252.**

11 The other Kara Mara interests were added as defendants by amendment permitted by Cresswell J on 21 May 1999. He also permitted amendments to the terms of the relief sought in the Originating Summons. **Order at *Bundle 1/Tab 4/page 24***

12 That is the "three-fourths" collision liability clause.

13 This is commonly called the "pay to be paid" provision and it was dubbed the "pay to be paid" point at the hearing.

14 Sperex Shipping Company Limited was thought to be a mortgagee of the vessel and so, possibly, an assured under the H&M Policies. **Zavos Aff 1: Bundle 1/Tab 7/page 41 para 11**

15 Para 33.1 of the affidavit simply said: *"The Plaintiffs have a good arguable case in relation to each of the declarations which they seek..."* without identifying either the First to Fourth Defendants specifically or ***Rule 4(1)(d).*** **Zavos Aff.1: Bundle 1/Tab 7/page 51**

16 The Complaint is at: ***Bundle 3/page 341***

17 **Direct Action Complaint: Section VI:** ***Bundle 3/page 346.***

18 ***Bundle 3/page 347***

19 It seems that the Italian insurers participating in the two H&M policies did not plead to the merits of the claim at this stage but are contesting jurisdiction and *forum conveniens* in the Direct Action Claim: **Marsh 3:** ***Bundle 1/Tab 14/page 123 para 9***. Four Lloyd's syndicates have subsequently accepted that the Louisiana Court has jurisdiction because they have to accept that they have sufficient *"business contacts"* in Louisiana as they write insurance in favour of Louisiana insureds and/or on property situated in Louisiana: **Zavos Aff.3:** ***Bundle 1/Tab 13/page 117 para 35***

20 Heading of the ***"Supplemental Complaint": Bundle 3/page 388.***

21 See: ***Bundle 3/page 388.***

22 See: ***Bundle 3/page 391.***

23 **Para 5 of the Petition: Bundle 3/page 399.** The purpose is thus similar to that of the Declaratory relief sought by the YM insurers in the present action.

24 See: ***Bundle 3/page 403.***

25 The original version of the Application Notice had only sought to restrain World Tanker from pursuing their claims *"in the Courts of the USA"* generally and then specifically identified the three Louisiana proceedings.

26 Set out in the letter from Mr Boyd QC and Miss Blanchard dated 10 February 2000.

27 Set out in the letter from Mr Gaisman QC and Miss Sabben - Clare dated 10 February 2000.

28 That is the *"necessary or proper party"* paragraph.

29 The second Application Notice of the YM Insurers dated 12 February 2000 **(Bundle 1/Tab 1/pages 5-7)** for leave to waive any formal defects or for fresh leave to serve the Originating Summons can be dealt with under this heading.

30 Relying on the phrase of Millett LJ in ***"Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87 at 96.***

31 Second witness statement of Mr Marsh, filed on behalf of World Tankers: Bundle 1/Tab 15/page 123 para 7.

32 It was in fact Mr Boyd's submission that it was inevitable that the Louisiana Court would strike down the English EJC, because if it upheld the clause it would defeat the purpose of the ***Direct Action Statute***.

33 That is a right not to be sued in a Court contrary to the terms of the EJC.

34 The wording of §**655 B (1)** of the *Direct Action Statute:* ***Bundle 3/page 539***

35 See: ***"The Eras EIL Actions" [1992] 1 Lloyd's Rep 570 at 612 RHS, per Mustill LJ; Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 2 Lloyd's rep 279 at 290 per Hobhouse LJ.***

36 The other members of the House of Lords agreed with Lord Brandon, although Lord Goff of Chieveley preferred to regard the grant of an anti - suit injunction as *"one example of circumstances in which, in the interests of justice, the power to grant an injunction may be exercised":***see page 44H**

37 ***See Societe Nationale Industrielle Aerosaptiale v Lee Kui Jak [1987] AC 871 at 892B per Lord Goff of Chieveley***

38 That case was dealing with the power of the court to grant an interlocutory injunction in the context of a dispute that fell within an arbitration clause. But Lord Mustill dealt generally with the juridical basis on which the remedy of an injunction could be sought: *"...the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action":* **at 362C.**

39 This was a dissenting Advice in which he advised that the Hong Kong court could grant leave to serve a writ out of the jurisdiction where the only claim was for an interim ***"Mareva"*** injunction. But Lord Nicholls relied on the ***Laker case*** to make the point, in relation to claims for injunctions to restrain foreign proceedings, that the *"underlying right, if sought to be identified, can only be defined along the lines that a party has a right not to be sued abroad when that would be unconscionable":***see 310H**.

40 *As in* **Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 589:** ***see particularly at 589E-F per Steyn LJ***

41 As in ***Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87; see particularly at 96 per Millett LJ***

42 ***See page 134D.*** In that case the House of Lords emphasised that the English courts would not interfere if the English courts had no interest in the matter. Where they do, because England is a possible alternative forum, then the court will not usually interfere unless it is established that England is ***the*** natural forum: see the ***Aerospatiale case at page at 896G***

43 *See page 134E.*

44 ***Ibid.***

45 Hereafter ***"DVA v Voest"***.

46 Which was adopted and approved by the Court of Appeal in ***DVA v Voest: see*** the judgment of Hobhouse LJ at ***page 287***.

47 The second and third points are also dealt with in ***the Seaconsar case: see pages 455E and 457A, per Lord Goff of Chieveley.***

48 As in ***DVA v Voest (supra)*** where the claim in the Brazilian courts was made by the Brazilian insurers who were, by Brazilian law, the assignees of the claims of their assured against the shipowners and the time charterers. The assignees were held to be bound by the arbitration clause: see ***pages 283-4***

49 As in ***The "Padre Island" No 1 [1984] 2 Lloyd's Rep 408***, where Leggatt J held that third party cargo interests making a claim under the ***1930 Act*** were bound by the arbitration clause in the P&I Club Rules to

submit their claim for an indemnity from the Club to arbitration. Leggatt J's decision was approved in the second stage of that litigation ***sub non: Firma C-Trade SA v Newcastle P&I Association [1991] 2 AC 1 at page 33B per Lord Goff of Chieveley.***

50 The wording of ***para B(1) of the Direct Action Statute: §655: Bundle 3/page 539***

51 My emphasis.

52 See: ***page 284.***

53 See: ***pages 285-6***

54 Compare the English ***Third Parties (Rights against Insurers) Act 1930 section 1(1).*** It is often said that this section gives third parties a "statutory assignment" of rights under policies if the preconditions are fulfilled.

55 Outline Submissions of World Tanker: ***para 25.***

56 That is the wording of ***paragraph C of §655.***

57 See: ***page 94 per Leggatt LJ; page 96 per Millett LJ; page 97 per Neill LJ.***

58 The phrase used by Hobhouse LJ to characterise the same argument in ***DVA v Voest: page 287.***

59 See: ***page 287 RHS***.

60 World Tanker's Outline Argument: ***paras 47 and 48***

61 So the requirements of ***Order 11 Rule 4(1)***were not complied with.

62 Service within the jurisdiction was possible because of an express provision for a place of service in the contract between the original claimant and the defendant. But the proposed two additional claimants could not rely on that clause as they were not party to that contract.

63 See: ***page 775***

64 As he does in para 2 of the Written Submissions made by the YM Insurers on the issue of the proposed re-re-re-amendment of the Originating Summons that I invited from the parties at the close of the oral hearing before me.

65 See: ***Leal v Dunlop Bio - Processes International Ltd [1984] 1 WLR 874; Camera Care Ltd v Victor Hasselblad Aktiebolag [1986] 1 FTLR 348.***

6 Those of McCowan LJ and Sir John Megaw; Lloyd LJ dissented.

67 Their analysis had relied, by analogy, upon the restatement of the test for renewing writs under ***Order 6 Rule 8*** as stated by Lord Brandon in the House of Lords' decision in: ***Kleinwort Benson Ltd v Barbrak Ltd (The "Myrto" No 3) [1987] AC 597 at 619E.***

68 In the Written Submissions of the YM Insurers they undertook to fulfil conditions if required: ***see para 3.***

69 This was issued on 20 August 1999: ***Bundle 1/Tab 2***

70 As already noted the first affidavit of Mr Zavos had failed specifically to verify that there was a "*real issue*" to be tried between the YM insurers, as claimants, and the First to Fourth Defendants, as required by ***Rule 11.4(1)(d).*** But World Tanker's Application Notice to set aside the leave to serve the Originating Summons out of the jurisdiction did not take this technical point. It was not relied upon in argument by Mr Boyd.

71 See: para 3 of the ***"Petition for Damages in Contract and in Tort With a Request for Declaratory Judgment and Trial by Jury": Bundle 3/page 399***

72 That did not contain the claim for an anti-suit injunction at that stage.

73 ***See: Bundle /page 539.***

74 In particular the comments of Kerr LJ at ***page 371.***

75 In particular the comments of Sir Michael Kerr at ***page 38***.

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[i] The Application Notice is dated 20 August 1999: ***Bundle 1/Tab 2***. Although the Originating Sumons of the Claimants was issued under the old procedure, it has been accepted by both sdies that I shuold use the CPR to determine the present application.

[ii] The Application Notice, as originally framed, is dated 12 January 2000: ***Bundle 1/Tab 1/pages 102.*** During the course of the hearing before me an amended version was issued for which permission was sought: ***Bundle 1/Tab 1/pages 7A-7C.***

[iii] The Application Notice is dated 1 February 2000: ***Bundle 1/Tab 1/pages 5-7***.

[iv] The ITC terms are: *"The Underwriters agree to indemnify the Assured for three-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for: 8.1.1: loss of or damage to any other vessel or property on any other vessel...."* [The emphasis on ***"paid"*** is mine]. ***Bundle 2/page 45***.

[v] See: *ITC clause 8.3: Bundle 2/page 45*

[vi] The statute was passed as Act 55 of 1930, ie. in the same year as the ***Third Parties (Rights against Insurers) Act 1930***. The Louisiana statute was subsequently amended and was re-enacted in 1958 and again in 1988. It is now known as ***Louisiana Revised Statute22§655.***

[vii] The ***Direct Action Statute*** states that an *"injured person"* has a *"right of action against the insurer"* whether or not the policy of insurance sued upon was written or delivered in the state of Louisiana and whether or not such policy contains a provision forbidding such direction action, *"provided the accident or injury occurred within the state of Louisiana"*: ***§655 B (2): Bundle 3/page 539***. As I have stated, the collision was about 250 miles off Portugal.

[viii] The full claim, as found by the court, was for damages of US$29.4 million plus US$5.3 million interest. But the court gave credit for US$ 12,262,000 that the Newcastle P&I Club had paid World Tanker in respect of ***"Ya Mawlaya's"*** liability for the collision. There is a dispute on the nature of the payment by the Newcastle P&I Club which is referred to in paragraph 8 above. But it is agreed that the balance of the judgment is US$21.4 million.

[ix] In accordance with Louisiana procedure, World Tanker's lawyers had submitted draft findings of fact and law to the Judge. The judgment followed the draft findings almost to the letter.

[x] **See judgment of Judge Lemmon at para 30 of the Conclusions of Law: Bundle 2/page252.**

[xi] The other Kara Mara interests were added as defendants by amendment permitted by Cresswell J on 21 May 1999. He also permitted amendments to the terms of the relief sought in the Originating Summons. **Order at *Bundle 1/Tab 4/page 24***

[xii] That is the "three - fourths" collision liabilty clause.

[xiii] This is commonly called the "pay to be paid" provision and it was dubbed the "pay to be paid" point at the hearing.

[xiv] Sperex Shipping Compnay Limited was thought to be a mortgagee of the vessel and so, possibly, an assured under the H&M policies. **Zavos Aff 1: Bundle 1/Tab 7/page 41 para 11**

[xv] Para 33.1 of the affidavit simply said: *"The Plaintniffs have a good arguable case in relatino to each of th declarations which they seek...."* without identifying either the First to Fourth Defendants specifically or ***Rule 4(1)(d).*** **Zavos Aff.1: Bundle 1/Tab 7/page 51**

[xvi] The Complaint is at: ***Bhundle 3/page 341***

[xvii] **Direct Action Complaint: Section VI:** ***Bundle 3/page 346.***

[xviii] ***Bundle 3/page 347.***

[xix] It seems that the Italian insurers participating in the two H&M policies did not plead to the merits of the claim at this stage but are contesting jurisdiction and *forum conveniens* in the Direct Action Claim: **Marsh 3:** ***Bundle 1/Tab 14/page 123 para 9***. Four Lloyd's syndicates have subsequently accepted that the Louisiana Court has jurisdiction becuase they ahve to accept that they ahve sufficient *"business contacts"* in Louisiana as they write insurance in favour of Louisiana insureds and/on proerty situated in Louisiana: **Zavos Aff.3:** ***Bundle 1/Tab 13/page 117 para 35***

[xx] Heading of the ***"Supplemental Complaint": Bundle 3/page 388***.

[xxi] See: ***Bundle 3/page 388.***

[xxii] See: ***Bundle 3/page 391.***

[xxiii] **Para 5 of the Petition: Bundle 3/page 399**. The purpose is thus similar to that of the Declaratory relief sought by the YM Insurers in the present action.

[xxiv] See: ***Bundle 3/page 403***.

[xxv] The original version of the Applicatoin Notice had only sought to restrain World Tanker from pursuing their claims *"in the Courts of the USA"* generally and then specifically identified the three Louisiana proceedings.

[xxvi] Set out in the letter from Mr Boyd QC and Miss Blanchard dated 10 February 2000.

[xxvii] Set out in the letter from Mr Gaisman QC and Miss Sabben - Clare dated 10 February 2000.

[xxviii] That is the *"necessary or proper party"* paragraph.

[xxix] The second Application Notice of the YM Insurers dated 12 February 2000 **(Bundle 1/Tab 1/pages 5-7)** for leave to waive any forma defects or for fresh leave to serve the Originating Summons can be daelt with under this heading.

[xxx] Relyong in the phrase of Millet LJ in ***"Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87 at 96.***

[xxxi] **Second witness statement of Mr Marsh, filed on behalf of World Tanker: Bundle 1/Tab 15/page 123 para 7.**

[xxxii] It was in fact Mr Boyd's submission that it was inevitable that the Louisiana Court would strike down the English EJC, because if it upheld the clause it would defeat the purpose of the ***Direct Action Statute.***

[xxxiii] That is a right not to be sued in a Court contrary to the terms of the EJC.

[xxxiv] The wording of *§655 B (1) of the Direct Action Statute: Bundle 3/page 539*

[xxxv] See: ***"The Eras EIL Actions" [1992] 1 Lloyd's Rep 570 at 613 RHS, per Mustill LJ; Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 2 Lloyd's rep 279 at 290 per Hobhouse LJ.***

[xxxvi] The other members of the Huose of Lords agreed with Lord Brandon, althuogh Lord Goff of Chieveley preferred to regard the grant of an anti - suit injunction as *"one example of circumstances in which, in the interests of justice, the power to grant an injunction may be exercised":* ***see page 44H***.

[xxxvii] ***See Société Nationale Industrielle Aerosaptiale v Lee Kui Jak [1987] AC 871 at 892B per Lord Goff of Chieveley***

[xxxviii] That case was dealing with the power of the court to grant an interlocutory injunction in the context of a dispute that fell within an arbitration clause. But Lord Mustill dealt generally with the juridical bassi on which the remedy of an injunction could be sought: *"...the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action":* ***at 362C.***

[xxxix] This was a dissenting Advice in which he advised that the Hong Kong court could grant leave to serve a writ out of the jurisdiction where the only claim was for an interim ***"Mareva"*** injunction. But Lord Nicholls relied on the ***Laker*** case to make the point, in relatoin to claims for injunctions to restrain foreign proceedings, that the *"underlying right, if sought to be identified, can only be defined along the lines that a party has a right not to be sued abroad when that would be unconscionable":* ***see 310H.***

[xl] As in ***Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 589; see particularly at 59E-F per Steyn LJ***

[xli] As in ***Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87; see particulary at 96 per Millett LJ***

[xlii] ***See page 134D***. In that case the Huose of Lords emphasised that the English courts would not interfere if the English courts had no interest in the matter. Where they do, because England is a possible alternative forum, then the court will not usually interfere unless it is established that England is ***the*** natural forum see the ***Aerospatiale case at page at 896G***.

[xliii] ***See page 134E***.

[xliv] ***Ibid.***

[xlv] Hereafter ***"DVA v Voest".***

[xlvi] Which was adopted and approved by the Court of Appeal in *DVA v Voest: see* the judgment of Hobhouse LJ at *page 287*.

[xlvii] The second and third points are also dealt with in ***the Seaconsar case: see pages 455E and 457A, per Lord Goff of Chieveley.***

[xlviii] As in ***DVA v Voest (supra)*** where the claim in the Brazillian courts was made by the Brazillian insurers who were, by Brazillian law, the assignees of the claims of their assured against the shipowners and the time charterers. The assignees were held to be bound by the arbitration clause: see pages 283-4

[xlix] As in ***The "Padre Island" No 1 [1984] 2 Lloyd's Rep 308,*** where Leggatt J held that third party cargo interests making a claim under the ***1930 Act*** were bound by the arbitration claus ein the P&I Club Rules to submit their claim for an indemnity from the Club to arbitration. Leggatt J's deciion was approved in the second stage of that litigation ***sum nom: Firma C-Trade SA v Newcastle P&I Association [1991] 2 AC 1 at page 33B per Lord Goff of Chieveley.***

[l] The wording of ***para B(1) of the Direct Action Statute: §655: Bundle 3/page 539***

[li] My emphasis.

[lii] See: ***page 284.***

[liii] See: *pages 285 - 6.*

[liv] Compare the English ***Third Parties (Rights against Insurers) Act 1930 section 1(1).*** It is often said that this section gives third parties a "statutory assignement" of rights uner policies if the preconditoins are fulfilled.

[lv] Outline Submissions of World Tanker: ***para 25.***

[lvi] That is the wording of ***paragraph C of § 655.***

[lvii] See: ***page 94 per Leggatt LJ: page 96 per Millett LJ; page 97 per Neill LJ.***

[lviii] The phrase used by Hobhouse LJ to characterise the same argument in ***DVA v Voest: page 287.***

[lix] See: ***page 287 RHS.***

[lx] World Tanker's Outline Argument: ***paras 47 and 48.***

[lxi] So the requirements of ***Order 11 Rule 4(1)*** were not complied with.

[lxii] Service within the jurisdiction was psosible because of an express provison for a place of service in the contract between the original claimant and the defendant But the proposed two additional claimants could not rely on that clause as they were not party to that contract.

[lxiii] See: page 775.

[lxiv] As he does in para 2 of the Written Submissions made by the YM Insurers on the issue of the proposed re-re-re-amendment of the Originating Summons that I invited from the parties at the close of the oral hearing before me.

[lxv] See: ***Leal v Dunlop Bio - Processes Internatial Ltd [1984] 1 WLR 874; Camera Care Ltd v Victor Hasselblad Aktiebolag [1986[1 FTLR 348.***

[lxvi] Those of McCowan LJ and Sir John Megaw; Lloyd LJ dissented.

[lxvii] Their analysis had relied, by analogy, upon the restatement of the test for renewing writs under ***Order 6 Rule 8*** as stated by Lord Barndon in the House of Lords' decision in ***Kleinwort Benson Ltd v Barbrak Ltd (The "Myrto" No 3) [1987] AC 597 at 619E.***

[lxviii] In the Written Submissions of the YM Insurers they undertook to fulfil conditios if required: see ***para 3.***

[lxix] This was issued on 20 August 1999: ***Bundle 1/Tab 2***

[lxx] As already noted the first affidavit of Mr Zavos had failed specifically to verify that there was a *"real issue"* to be tried between the YM Insurers, as caimatns, and the First to Fourth Defenadnts, a required by ***Rule 11.4(1)(d)***. But World Tanker's Applicaiotn Notice to set aside the leave to serve the Originating Summons out of the jurisdiction did not take this technical point. It was not relied upon in argument by Mr Boyd.

[lxxi] See: para 3 of the ***"Petitoin for Damage in Contract and in Tort with a Request for Declaratory Judgment and Trial by Jury": Bundle 3/page 399***

[lxxii] That did not contain the claim for an anti - suit injunction at that stage.

[lxxiii] See: ***Bundle/page 539.***