

### 3 Stone Buildings New York Seminar

#### Jurisdictional, Procedural and Substantive Collisions between US, UK and Caribbean courts

#### Fourth Session: Conflicts between US and overseas courts: comity and the anti-suit injunction

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1. In this presentation, I intend to address some recurring problems that face those of us that practise in the courts of more than one country whose legal system is founded on English law. You may come to think that the title of this presentation has been shown to be inapt. That is, I am afraid, a function of forward planning.
2. In a nutshell, the problems I am dealing with revolve around the approach of different courts to forum shopping.
3. But there are, of course, reasons, both good and bad, why litigants seek to engage in forum shopping, and the courts in different jurisdictions respond differently to both the attempts at forum shopping and the reasons given for it.
4. Perhaps interestingly, the earliest reference that I have found to forum shopping in English jurisprudence is in the famous case of Boys v. Chaplin concerning the (now superseded) need for double actionability in tort, where Lord Hodson said in 1969:- "*The respondent did not seek to argue that the American theory of the proper law of the tort should be adopted but he submitted, and I think submitted rightly, that the words "As a general rule" should be interpreted so as to leave some latitude in cases where it would be against public policy to admit or to exclude claims. I am conscious that to resort to public policy is to mount an "unruly horse". It appears to me, however, to be in the interests of public policy to discourage "**forum shopping**" expeditions by the inhabitants of other countries. As Lord Cooper said in *M'Elroy v. M'Allister*, [1949] S.C. 110, at p. 135: . . . Pursuers should not be encouraged to improve their position vis-a-vis their opponents by invoking some secondary forum in order to exact compensation for a type of loss which the primary forum would not regard as meriting reparation. .*"<sup>1</sup> (emphasis added)

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<sup>1</sup> [1971] AC 356 at page 378.

5. In the light of all that has occurred since 1969, one might be forgiven for thinking that the courts with which we are familiar have not been very successful in discouraging forum shopping.
6. With this in mind, the problems that I want to consider can be described as follows:-
  - (1) The problem (as we see it from the UK and the Caribbean) of US courts snatching jurisdiction in cases which might more properly be thought suitable for trial in an English law jurisdiction.
  - (2) The problem (as many US lawyers see it) of the absence of the full rigours of the US discovery process in English and (some) Caribbean litigation.
  - (3) The problem (as English lawyers see it) of the US requirement for jury trials even in the most complex of commercial cases.

#### The European principles

7. The European principles are enunciated in the 1968 Brussels Convention, the 1988 Lugano Convention, and now in the EC Council Regulation No 44/2001 of 22<sup>nd</sup> December 2000 (the 'Judgment Regulation').
8. In broad terms, the Brussels Convention and now the Judgment Regulation apply to EC member states, whereas the Lugano Convention applies to EC and EFTA states.
9. The principles in these Conventions can be summarised as follows:-
  - (1) A defendant is normally entitled to be sued in the place of his domicile.<sup>2</sup> Domicile, in this context, has a special meaning in England meaning residence associated with some substantial connection with the UK (section 41 of the Civil Jurisdiction and Judgments Act 1982, and paragraph 9 of Schedule 1 to the Civil Jurisdiction and Judgments Order 2001).
  - (2) A contractual dispute may be litigated in the place of performance of the obligation in question, which will be where

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<sup>2</sup> Article 2 of the Judgment Regulation.

the goods are delivered or the services rendered,<sup>3</sup> or where the parties have agreed there should be jurisdiction.<sup>4</sup>

- (3) A tortious claim may be litigated where the harmful event occurred.<sup>5</sup> This means either where the event giving rise to the damage or the damage itself occurred.

#### English principles where the Conventions do not apply

10. There will never be a problem initiating and serving English proceedings against an English resident defendant.
11. But a foreign defendant may be sued in England in similar (but not identical) situations to those described in the Judgment Regulation.
- (1) Disputes arising from a contract governed by English law, made in England, or breached in England will normally be capable of being litigated in England.<sup>6</sup>
- (2) Disputes arising from a tort where damage was sustained in England or where damage resulted from an act committed in England, may be litigated in England.<sup>7</sup>

#### English principles of forum non conveniens

12. The principles of forum non conveniens (originally a Scottish doctrine) are now well established in England. In the broadest outline, the basic principle is that stay of English proceedings will only be granted on this basis where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum

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<sup>3</sup> Article 5 of the Judgment Regulation. There are special rules for insurance contracts, consumer contracts and employment contracts.

<sup>4</sup> Article 23 of the Judgment Regulation on prorogation of jurisdiction.

<sup>5</sup> Article 5(3) of the Judgment Regulation.

<sup>6</sup> Part 6.20(5) and (6) of the English Civil Procedure Rules 1998 allow proceedings to be served out of the jurisdiction on a foreign defendant if a good arguable case as to any of these matters is established.

<sup>7</sup> Part 6.20(8) of the English Civil Procedure Rules 1998.

for the trial of the action: i.e. in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.<sup>8</sup>

13. These rules have the relatively frequent result of driving claimants from English and Caribbean forums.

#### The US principles – so far as English lawyers can understand them

14. On the other hand, the US courts take a significantly different view.
15. The US courts exercise personal jurisdiction over defendants where either general or specific jurisdiction exists.<sup>9</sup>
  - (1) General jurisdiction, at least in some states, requires “*systematic and continuous contacts*” with that state, amounting to the conduct of business in that state, so that a foreign defendant is subject to suit even on matters unrelated to its contacts in that forum.<sup>10</sup>
  - (2) Special jurisdiction arises where the foreign defendant’s less substantial contacts with the state gives rise in some way to the cause of action in the suit. The cause of action must ‘arise out of’ a purposeful contact with the state, and it must be reasonable to accept jurisdiction.<sup>11</sup> Purposeful contact can include engaging in contractual negotiations in a state, and sending letters before action to a state.
16. There seems to be no inhibition on the US courts accepting jurisdiction over disputes governed by foreign systems of law.
17. The US courts place great store by the claimant’s right to chose his forum.<sup>12</sup> The Seventh Circuit has referred to the federal courts’

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<sup>8</sup> Spiliada Maritime Corporation v. Cansulex Limited [1987] AC 460 per Lord Goff at page 476.

<sup>9</sup> Helicopteros Nacionales de Columbia SA v. Hall 466 U.S. 408 at 416 (1984).

<sup>10</sup> Doe v. Unocal Corp 248 F.3<sup>rd</sup>915 at 923 (9<sup>th</sup> circuit 2001).

<sup>11</sup> Hanson v. Denckla 357 U.S. 235, 250 (1958).

<sup>12</sup> See, for example, a line of authority in the Fifth Circuit, for example Polywell Intern Inc v. Hauppage Computer Works Inc (2002) WL 1477435: “It is well settled in the Fifth Circuit that “*a Plaintiff’s privilege to choose, or not to be ousted from, his choice of forum is highly esteemed*”.

“*virtually unflagging obligation*” to exercise the jurisdiction conferred on them by Congress, although a stay may be allowed in exceptional circumstances as a matter of “*wise judicial administration, giving regard to the conservatism of judicial resources and comprehensive disposition of litigation*”.<sup>13</sup>

18. In addition, the US courts place some weight on the precedence of the first action to be brought. At the end of the day, however, the jurisdiction to stay on these grounds is discretionary, and based on the abstention principles developed by the Supreme Court as a result of the parallel jurisdiction between state and federal courts.
19. From an English perspective, one observes a general reluctance of US Courts (particularly those in Texas) either to stay an action that has been commenced in the US or to give way to a more suitable jurisdiction.
20. In some cases, US courts are even content to allow the same issues to be tried in two forums, rather than relinquishing jurisdiction over what they see as a US connected matter.
21. This is not a criticism, but it is a fact that we, as litigators, have to work with and understand.

#### The anti-suit injunction

22. I have never come across a U.S. anti-suit injunction, but would be interested, in due course, to hear if such a thing exists. In England and the Caribbean, anti-suit injunctions against errant parties are much in vogue.
23. Notwithstanding protestations about how the grant of an anti-suit injunction will be rare to the point of non-existence, the cases seem to show them being granted more and more frequently. Their existence, of course, ‘ups the anti’ in terms of comity and good judicial relations generally.
24. The English principle is simply stated: “*If, exceptionally, the English Court takes the view that the pursuit of the action in the foreign court would be vexatious and oppressive and that the English court is the natural forum i.e. the more appropriate forum for the trial of the*

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<sup>13</sup> Finova Capital Corporation v. Ryan Helicopters citing Colorado River Water Conservation District v. United States 424 U.S. 800, 817 (1976).

*action, it can properly grant an injunction preventing the plaintiff from pursuing his action in the foreign court”.*<sup>14</sup>

### The problem manifests itself

25. The problem manifests itself in various commercial circumstances. I take only two very simple examples:-

- (1) Where each party to a dispute perceives that one or other jurisdiction is likely to be more favourable to their case, so that, commonly:-
  - (a) A, the US party, sues B the English defendant in the US;
  - (b) B, the English party, seeks a negative declaration against A in England

Or vice versa.

- (2) Where a group of companies has operated in both the US and the Caribbean (or England) and, in those companies' insolvencies, there are claims against third parties or professionals with offices in both US and UK.
  - (a) The common position is that the US operation ran the group, but that the finance company for the group is incorporated and audited in the offshore jurisdiction.
  - (b) In this situation, serious problems arise if the US liquidator of the offshore company seeks to sue offshore auditors in the US.

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<sup>14</sup> Barclay's Bank v. Homan [1993] BCLC 680 at page 701 per Glidewell LJ summarising the principles established by the House of Lords in Aerospatiale v Lee Kui Jak [1987] AC 871. See also Airbus Industrie v. Patel [1999] 1 AC 119.

### The conflict

26. The conflicts between the principles I have described can readily be seen.
  - (1) An English court will accept jurisdiction over a contract governed by English law, but so will a US court if there is personal jurisdiction over the Defendant.
  - (2) A claimant with claims against 2 firms of accountants in respect of the same group of companies can often sue the offshore firm in the US, and in its home jurisdiction.
27. In an exceptional case, the English law court may even see fit to grant an anti-suit injunction to prevent an English or Caribbean plaintiff seeking to sue in the US.

### Can the problem be resolved or simply used to advantage?

28. What is to be done about this problem depends on what one is trying to achieve.
29. The jurisdictional battles in the kinds of cases that I am describing can occupy months (and sometimes years) of litigation and distract attention from the real issues in dispute.
30. Thus, if you are acting for a defendant, you may well wish to extend the jurisdictional dispute to divert the claimant from resolving the real issues and reaching judgment. This is a legitimate litigation tactic that is made easier by the attitude of the US courts. It is one that should not be under-estimated. But as a claimant's lawyer, one should be astute to ensure that it is not used against you.
31. As Lord Templeman said in the leading English case of the Spiliada Maritime v. Cansulex: *"I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere."*
32. This has been the kind of judicial injunction that has been often cited and always totally ignored. Every case (at least every case I seem to be involved in) is regarded by the English law court as a 'special case' deserving days of argument at each level of appeal.

33. Yet the principles are easily stated. As Lord Templeman also said in his two page speech in the same case: *“Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the court, applying the doctrine of forum conveniens will only grant leave if the plaintiff satisfies the court that England is the most appropriate forum to try the action. But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere.”*
34. As a claimant, one is obviously looking to resolve the jurisdictional dispute and get to the point of judgment in some appropriate forum as quickly as possible. Yet even plaintiffs seem to me to spend much energy increasing the time taken by jurisdictional wrangles.
35. There are, of course, times when this is justified: when, for example, the claimant is really unlikely to achieve judgment in one of the possible forums. I believe this happens less frequently than claimants perceive. It is worth spending a little time examining what issues are most commonly regarded as crucial to the outcome of litigation.
36. US claimants tend to be very suspicious of the English judicial system on two primary grounds:-
- (1) The absence of US discovery procedures; and
  - (2) The absence of jury trials.
- I shall return to both these points.
37. Conversely, defendants from English law countries tend to be very suspicious of the US system, on three primary grounds:-
- (1) The unpredictability of the jury system in civil trials, particularly by reference to the size of the awards of damages.
  - (2) The extensive nature of the discovery process.
  - (3) The availability of punitive damages.
38. Are any of these suspicions justified?
39. For a US claimant, punitive damages are not available in any normal circumstances in the UK, and they are available in the US. There are certainly circumstances in which US juries have awarded punitive damages in what we would regard as a normal commercial case. But

in many cases, such extortionate awards are subject to appeal, and do not survive that process.

40. I believe that the quality of the decision-making in the US courts is generally satisfactory, even if it is more erratic in some States than in others.

#### The discovery process

41. It is an irony that, while the UK discovery procedures are becoming less rigorous so as to equiperate our system with that of mainland Europe, the discovery procedures in the US are as harsh as ever.
42. There are several things to say about this:-

#### The English discovery process

43. In England, standard disclosure is requires the disclosure of far fewer documents than used to be the case. The documents normally required to be produced are only:-
  - (1) Documents on which each party relies.
  - (2) Documents which adversely affect each party's own case.
  - (3) Documents which adversely affect another party's case.
  - (4) Documents which support another party's case.<sup>15</sup>
44. The old Peruvian Guano test (Brett LJ in The Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Company (1882) 11 QBD 55 at page 63) required the disclosure of *“every document [relating] to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary”*. The test was extremely inclusive. Brett LJ explained: *“I have put in the words “either directly or indirectly,” because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to*

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<sup>15</sup> Part 31.6 of the English Civil Procedure Rules 1998.

*damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences”.*

45. But in commercial cases, specific disclosure is still available by court order so that a claimant who thinks he needs extensive documentary discovery will still normally be able to obtain it.
46. No witness discovery is available in England.

#### The Caribbean discovery process

47. In most Caribbean jurisdictions, there is no witness deposition procedure, although Peruvian Guano document discovery survives for the time being. One suspects not for long.
48. The Cayman has, however, just introduced the right to depose one witness on each side. This originates from the influence of Canadian judges in the Cayman Islands. Effectively what they have introduced is a toned down version of what is available in most Canadian provinces.
49. But, in most Caribbean jurisdictions, full blown documentary discovery is generally still available, without specific court order.

#### The continental European position

50. Documentary discovery is not normally available in continental Europe, save in arbitration or in special circumstances.
51. This is because continental European systems have a different object from our common law systems. As a Swiss lawyer once famously reported: the English and U.S. common law systems are aimed at the pursuit of justice, whilst European systems are aimed only at achieving peace.

#### Discovery generally

52. So what conclusions can be drawn:-
  - (1) Far fewer cases are actually lost as a result of inadequate disclosure than most US lawyers may think.

- (2) But it is the threat of the witness discovery process, which causes many US cases to settle earlier than they would otherwise do.

### Jury trials

53. Everyone here from the US has more hands on experience of jury trials than I do. But I have gained some impressionistic experience. My perspective is that juries are unnecessarily regarded with horror by English lawyers.
54. This may be because, in the US, the trials are conducted in a very different way precisely because the jury is the tribunal deciding the facts. Many of the complexities in which we English lawyers luxuriate are avoided. The U.S. jury trial seems often to turn on the single smoking gun, or the single crucial fact.
55. But how many of us have stories of the most intelligent judges ignoring the complexity of the case so as to resolve it on the basis of one very simple factual determinative.
56. My feeling is that, provided the trial process is properly attuned to jury determination, there is no reason why an adequate result should not be achieved. The process, it is to be remembered, originated in England and was seen as quite satisfactory in England for hundreds of years.
57. The only real argument against it is complexity of modern commercial practice. But complexity is a vice of which lawyers are guilty – it is part of our protection racket.
58. Lawyers should, in fact, be making strenuous efforts to simplify every problem to its very basics, not so as to prevent a proper understanding of the transaction at issue, but so as to strip away irrelevant complexity, which masks a proper understanding of the transaction in issue.

### Conclusions

59. So, what conclusions can be drawn from this unstructured journey around some familiar territory?
60. I believe that we (or perhaps our clients) are generally too suspicious of foreign jurisdictions. The boot in this criticism is on both feet. English lawyers and clients are too suspicious of the quality of justice in the US. US lawyers are far too suspicious of the quality of justice in

England. And all are too suspicious of the quality of justice in the Caribbean. Whilst there are some notable abuses – of which the Thyssen litigation in Bermuda is probably the worst ever recorded – most Caribbean courts produce a good quality judicial service.

61. The obsession with jurisdictional battles assists only those who are seeking to delay the resolution of the real underlying issues. For those commonly in that position, such arguments are to be encouraged. But claimants should beware.
62. The US courts have (perhaps particularly in outlying states) some way to go in conquering their lack of understanding of foreign procedures and processes. But progress is ongoing, and much has already been achieved. We can all make some contribution to the process of education or, some might think, re-education.

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30<sup>th</sup> September 2004