[1980–87 Gib LR 482]

DIALDAS v. FIDELITY BANK N.A.

COURT OF APPEAL (Spry, P., Fieldsend and Law, JJ.A.): May 21st, 1987

Conflict of Laws—forum conveniens—stay of Gibraltar proceedings—when deciding whether to stay Gibraltar proceedings as forum non conveniens, court first to decide "natural forum" with which case has most real and substantial connection—availability of witnesses and evidence, location of agreement and transactions, and connection of parties to jurisdiction to be considered

Conflict of Laws—forum conveniens—stay of Gibraltar proceedings—plaintiff's suffering juridical disadvantage through stay of Gibraltar proceedings not decisive if substantial justice still done in appropriate forum

The respondent brought proceedings in the Supreme Court against the appellant to recover sums allegedly due under a guarantee agreement.

The appellant and the respondent bank signed a contract in London agreeing that in return for the respondent providing credit and other facilities to a company, the appellant would guarantee all sums due to the bank from the company. The contract also stipulated in cl. 18 that it would be governed by and construed according to English law, and that the appellant submitted to the jurisdiction of the English courts. When a dispute arose over non-payment, the respondent brought proceedings against the company in London, and for the same sum against the appellant in Gibraltar, where the appellant was resident and where his assets were located. The appellant sought the stay of the proceedings in Gibraltar, as the English court was the more appropriate forum.

The Supreme Court (Alcantara, A.J.) refused the stay, holding that that an applicant for a stay on the ground of *forum non conveniens* had to show that there was another forum that was substantially less inconvenient and expensive, and that the other party would not be deprived of a legitimate personal or juridical advantage by the stay being granted. Though the English courts would be less inconvenient and expensive in this case, they would only be marginally so. The respondent would also be deprived of a juridical advantage in that the appellant's assets were in Gibraltar, so execution of a judgment would be easier there. The court also rejected the submission that cl. 18 of the contract gave the respondent no alternative but to bring proceedings in England.

On appeal, the appellant submitted that (a) the judge had attached insufficient weight to the fact that the relevant witnesses and evidence were all in England, pointing to that jurisdiction as most appropriate, and had assigned too much weight to the fact that the appellant's assets were in Gibraltar—given that the Judgments (Reciprocal Enforcement) Ordinance 1935 provided for enforcement in Gibraltar of an English judgment—and to the concept of juridical advantage in general, rather than taking an overall view of the relevant factors; and (b) the effect of cl. 18 of the contract was to subject both parties to the exclusive jurisdiction of the English courts.

The respondent submitted in reply that (a) the decision of the judge was made in the exercise of his judicial discretion, and so should only be interfered with if he had misdirected himself as to the relevant principles, or taken into account matters that he ought not to have done, or if his decision was plainly wrong; (b) that cl. 18 was drawn up with the interests of the respondent in mind, and bound only the appellant; and (c) hearing the proceedings in London would inevitably involve a delay in execution, and therefore hearing the case in Gibraltar was more appropriate.

Held, allowing the appeal:

(1) The application would be allowed and the proceedings in Gibraltar stayed. A court, when asked to stay proceedings on the ground of *forum non conveniens*, had first to determine which jurisdiction was the "natural forum" for the dispute—*i.e.* with which the case had the most real and substantial connection. In this case, the transactions between the bank and the company all took place in London, where the guarantee was signed; the records of both the bank and the company were in London; witnesses were available at greater convenience in London; and though the appellant was resident in Gibraltar, he was a frequent visitor to England and spent a lot of time there; these pointed to England being the natural forum (*per* Spry, P. and Fieldsend, J.A., para. 22; paras. 24–27; para. 30; para. 33).

(2) The judge erred in the weight he gave to the fact that the appellant's assets were in Gibraltar and to perceived "juridical disadvantage." The rule as to juridical advantage should be approached with caution; a court should not be deterred from granting a stay simply because the plaintiff would be deprived of such an advantage if substantial justice would still be done in the appropriate forum. Here, there was no real danger of justice not being done, despite a potential small increase in time and costs for the respondent if its action were to be successful (*per* Spry, P. and Fieldsend, J.A., para. 23; para. 31; para. 33).

(3) Delay was not a significant factor. Though it may have been true that proceedings could be brought on more quickly in Gibraltar than in London, there was no objective evidence that this was true; in addition, the provisions of the Judgments (Reciprocal Enforcement) Ordinance 1935 meant that any delay in execution of a judgment was unlikely to be unreasonable (*per* Spry, P. and Fieldsend, J.A., para. 28; para. 33).

(4) As a matter of construction, cl. 18 was a bare agreement on the part of the appellant to submit to the jurisdiction to the English courts. It did not bind the respondent bank, which was free to choose any appropriate jurisdiction in which to proceed (para. 19; para. 40).

(5) The court was entitled and obliged to interfere with the judge's exercise of discretion, as he had misdirected himself as to the relevant principles to be applied when he failed to determine whether there was a natural forum, and failed to apply the correct test for juridical disadvantage (paras. 30–32; para. 35; Law, J.A. dissenting, para. 43).

Cases cited:

(1) *Abidin Daver, The*, [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470; [1984] 1 Lloyd's Rep. 339, considered.
(2) *Aldington Shipping Ltd.* v. *Bradstock Shipping Corp.*, 1980–87 Gib LR 496; [1988] 1 Lloyd's Rep. 475, referred to.
(3) *El Amria & El Minia, The*, [1982] 2 Lloyd's Rep. 28, referred to.
(4) *MacShannon* v. *Rockware Glass Ltd.*, [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, considered.
(5) *Muduroglu Ltd.* v. *T.C. Ziraat Bankasi*, [1986] Q.B. 1225; [1986] 3 W.L.R. 606; [1986] 3 All E.R. 682, referred to.
(6) *Sim* v. *Robinow* (1892), 19 R. 665, referred to.
(7) *Spiliada Maritime Corp.* v. *Cansulex Ltd.*, [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843; [1987] 1 Lloyd's Rep. 1, *dictum* of Lord Goff applied.
(8) *Trendtex Trading Corp.* v. *Credit Suisse*, [1982] A.C. 679; [1981] 3 W.L.R. 766; [1981] 3 All E.R. 520, referred to.

A. Bueno for the appellant;
P.A. Isola for the defendant.

1 **SPRY, P.:** On November 25th, 1983, the parties entered into a contract in London whereby, in consideration of the respondent bank affording credit and other facilities to M. Dialdas & Sons (UK) Ltd. ("the company"), the appellant agreed to guarantee the payment of all amounts so becoming due. Advances were made and although payment has been demanded, no part of the amount alleged to be due has been repaid.

2 On September 5th, 1986, the respondent bank caused a writ to be issued out of the Queen's Bench Division of the High Court of Justice in London claiming US$128,259.78 and £237,417.92 from the company. Twelve days later it caused a writ to be issued out of the Supreme Court of Gibraltar, claiming those sums from the appellant. On October 28th, 1986, the appellant applied by summons to the Supreme Court for an order that the proceedings in that court be stayed, on the ground that the proper forum was the High Court. This was refused by Alcantara, A.J. on

November 27th, 1986, and he also refused an application for leave to appeal against his refusal of a stay.

3 On December 10th, 1986, a notice of motion for an appeal against the decision of Alcantara, A.J. was issued at the instance of the appellant. The motion was heard by Kneller, C.J. on January 30th, 1987, when he gave leave to appeal and at the same time ordered a stay. In the meantime the respondent bank had taken out a summons for summary judgment on December 30th, 1986, and the appellant had taken out a summons on January 16th, 1987 for an order for security for costs.

4 So much for the bare record of the proceedings that were before Alcantara, A.J. I now return to the summons for a stay of proceedings. This was supported by an affidavit dated November 4th, 1986, sworn by Mr. David Dumas. The main points contained in the affidavit were—

(a) that the issues were more complex than the statement of claim would suggest;

(b) that if the company were not liable or not immediately liable to the respondent bank, the appellant could not be liable under his guarantee;

(c) that the jurisdiction clause in the guarantee conferred exclusive jurisdiction on the English courts;

(d) that the appellant was prepared to accept service of proceedings in England;

(e) that the convenience of staying the Gibraltar proceedings in favour of proceedings in England was overwhelming; and

(f) that Gibraltar was *forum non conveniens*.

5 Letters were exhibited to the affidavit which particularized some of these matters. In an answering affidavit, Mr. Peter A. Isola argued that Gibraltar was the proper forum because the appellant was resident there and had his assets in the jurisdiction, and that hearing the proceedings in Gibraltar would involve no undue inconvenience or expense. The learned judge began by dealing with the second of Mr. Dumas's submissions—that the appellant could not be liable under the guarantee unless the company was liable to the respondent bank, which was the subject of the proceedings in London, and it would be anomalous that there should be separate and contested proceedings in different jurisdictions involving this same issue, but carrying with them risks of inconsistent findings by different tribunals, in circumstances where issue estoppel does not arise.

6 The judge rejected this submission. He accepted that if the principal was not liable then a guarantor could not be liable, but this did not, in his opinion, mean that the creditor was prevented from seeking recourse against the guarantor once there had been default. He saw no need for the

creditor to sue the principal debtor first or simultaneously. He saw nothing anomalous in taking separate proceedings against the principal debtor and the guarantor, provided that only one judgment was enforced.

7 Secondly, the learned judge considered and rejected the submission by the appellant that cl. 18 of the guarantee document had the effect of conferring exclusive jurisdiction on the English courts. Thirdly, the learned judge considered the submission that Gibraltar was *forum non conveniens*. On this issue, the judge relied on the case of *MacShannon* v. *Rockware Glass Ltd.* (4) and particularly on a passage in the speech of Lord Diplock, which reads as follows ([1978] A.C. at 812):

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

This is sometimes referred to as the *MacShannon* formula.

8 Applying that formula, the learned judge arrived at the following findings:

(a) that there was another forum to which the defendant was amenable and which would be less inconvenient or expensive, but only marginally so;

(b) that the case was not "simplicity itself" (although he declined to make a finding on the complexity of the case); and

(c) that the plaintiff would be deprived of a legitimate personal or juridical advantage, in that the appellant has all his assets in Gibraltar.

Therefore, a stay of the proceedings would not be justified.

9 Mr. A. Bueno, who appeared for the appellant, criticized the first of the learned judge's findings. He thought the judge had erred in treating this issue as the basis of the appellant's case, whereas it was only one of a number of factors on which the appellant relied, which should have been looked at together. More specifically, he argued that there was a clear distinction between cases where liability arises automatically under a guarantee, as where the principal debtor has covenanted to pay a sum certain on a particular day and has failed to do so, and a case such as the present, where the issue of liability and the amount of the liability, if any, are in dispute and the subject of legal proceedings.

10 As regards cl. 18 of the guarantee document, Mr. Bueno contended that the plain meaning of the clause is that the English courts alone are to have jurisdiction in the event of a dispute. Mr. Bueno attacked the finding of the learned judge on the issue of *forum non conveniens*, specifically for attaching too much importance to the fact that the appellant's assets were in Gibraltar. There would be no difficulty in obtaining execution against those assets if the respondent bank obtained judgment in England, having regard to the Judgments (Reciprocal Enforcement) Ordinance 1935. More generally, he complained that the judge had relied on the one factor of juridical advantage, by itself, instead of taking an overall view of all the relevant factors.

11 It was this general approach on which Mr. Bueno based his main argument. He submitted, relying particularly on *Spiliada Maritime Corp.* v. *Cansulex Ltd.* (7), that it was the duty of the judge to look at all the evidence to see whether there appeared to be a natural forum. This the learned judge had not done.

12 Mr. Isola, who appeared for the respondents, relied heavily on the well-established principles governing interference with exercises of judicial discretion. These are conveniently summarized in *The Abidin Daver* (1), as follows ([1984] A.C. at 420):

> "[T]he decision whether to allow or refuse an application for the stay of an action, even though the court has jurisdiction to try and determine it, it is a discretionary decision for the judge of first instance . . . [the court] can only interfere in three cases:
>
> (1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised;
>
> (2) where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or
>
> (3) where his decision is plainly wrong."

Mr. Isola submitted that none of these apply in the present case.

13 As regards cl. 18, Mr. Isola pointed out that the clause was drawn with the interests of the respondent bank in mind and that the clause binds the guarantor and not the bank. He submitted that, on the plain meaning of the words, the clause is not exclusive. On the issue of *forum non conveniens*, Mr. Isola placed great reliance on the factor of delay. He claimed that the appellant had been employing delaying tactics and that the hearing of the proceedings in London would necessarily involve delay in execution.

14 On the first issue, the learned judge did not refer to the fact that, as the appellant was relying on the defence that the amounts claimed were not due and payable by the company, the same evidence would have to be called in both proceedings. Also, in referring to the enforcement of only one judgment, he assumed that the two courts would arrive at similar decisions, an assumption that I do not think should be relied upon. I think the learned judge was wrong to give no weight to the difficulties inherent in the duplication of proceedings, although I would agree that undue weight should not be given to this factor. This is a subject on which the authorities are still somewhat conflicting.

15 The leading case is *The Abidin Daver* (1). Lord Diplock said (*ibid.*, at 411–12) that—

> "the additional inconvenience and expense which must result . . . can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or juridical advantage that . . . that is of such importance that it would cause injustice to deprive him of it [by ordering a stay]."

Later, he commented (*ibid.*, at 412) that—

> ". . . novel problems relating to estoppel per rem judicatam and issue estoppel, which have not hitherto been examined by any English court, might also arise. Comity demands that such a situation should not be permitted to occur as between courts of two civilised and friendly states. It is a recipe for confusion and injustice."

16 Lord Brandon of Oakbrook only touched on this subject, speaking of the particular difficulties of the case then before the House which he said was (*ibid.*, at 424) "not a case of mere disadvantage of multiplicity of suits." Lord Templeman commented (*Ibid.*, at page 425) that—

> "there was ample material from which Sheen, J. came to the conclusion that the Sariyer District Court of Turkey is a forum in which justice can be done between the parties at substantially less inconvenience and expense and that a stay of the English proceeding would not deprive the [plaintiffs] of a legitimate personal or jurisdictional advantage . . . In other cases, where these conditions are not satisfied, English proceedings will not be stayed merely because of the dangers and difficulties of concurrent actions."

17 In the *Spiliada* (7) case, Lord Goff of Chieveley made brief mention of the subject, when he said ([1987] A.C. at 485) that "if (as I think) the judge gave weight to this factor, he was, in my judgment, entitled to do so." On the question of delay, I am not satisfied that the appellant is seriously at fault or that the hearing of the proceedings would lead to unreasonable delay.

18 As regards the complexity of the matter, it was indicated in the correspondence exhibited to Mr. Dumas's affidavit and amplified from the Bar by Mr. Bueno that the company alleges that the respondent bank is impeding recovery by the company—which extends confirming facilities to its own customers—of sums due from the ultimate debtors, or from guarantors of those sums, or from the ECGD fund, by withholding bills of exchange necessary for any action to recover such sums, although it has already debited the amount of its claim to the company's account in its books. We are not concerned with the merits of these allegations and I mention them only to show that the matters which might fall to be adjudicated in two jurisdictions are by no means simple.

19 The second issue was the interpretation of cl. 18. This clause reads as follows: "The guarantee is to be governed by and construed according to English law and the guarantor submits to the jurisdiction of the English courts." I cannot see that a bare agreement to submit to the jurisdiction of the courts of one country can be construed to exclude the jurisdiction of the courts of another country, if proceedings may properly be instituted there. This is a matter which is not governed by authority and is a matter of construction. On this issue, I think the decision of the learned judge was right and should be upheld.

20 The remaining issues should, I think, be taken together. In England, the law has developed appreciably since the *MacShannon* (4) case as the result of a series of cases culminating in *Spiliada* (7). These cases are not strictly binding on the courts of Gibraltar but they are accorded the greatest possible respect and would normally be followed unless they are in any way incompatible with Gibraltar law. It is unfortunate that the earlier of these cases were not cited to the learned judge, while the reports of two of them, *Muduroglu Ltd.* v. *TC Ziraat Bankasi* (5) and *Spiliada*, had not been published when he made his order.

21 It is unnecessary to trace the development of English law in respect of stays of proceedings, since it is to be found in the speech of Lord Goff of Chieveley in *Spiliada* (7). Before I deal with that speech, it may be helpful to quote two sentences from the speech of Lord Templeman when he said ([1987] A.C. at 465):

> "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 . . . Domicile and residence and place of incident are not always decisive."

Lord Goff, following a classic statement by Lord Kinnear in *Sim* v. *Robinow* (6), summed up the basic principle in these words (*ibid.*, at 476):

> "[A] stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum 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 the ends of justice."

22 He went on to say that in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay, while the evidential burden of proving matters which a party believes will assist him remains on that party. If the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country. He expressed the opinion that the burden resting on the defendant was not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum.

23 He warned himself that, having regard to the decision in *Trendtex Trading Corp.* v. *Credit Suisse* (8), it was necessary to strike a note of caution regarding the prominence given in the *MacShannon* formula to "a legitimate personal or juridical advantage." Later, he developed the theme. He pointed out that an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant and that this was not consistent with the objective approach inherent in Lord Kinnear's statement of principle. He went on (*ibid.*, at 482):

> "The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried 'suitably for the interests of all the parties and for the ends of justice.' Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think the court should be deterred from granting a stay of proceedings . . . simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum."

24 It is quite clear that in the present case there is another forum available: the English court, to which the appellant expressed his submission in the guarantee document. It is necessary then to consider which forum, Gibraltar or England, should be regarded as the natural forum, that

is, the forum with which the action has the most real and substantial connection, to use the words of Lord Keith of Kinkel in *The Abidin Daver* (1).

25 Here, as Mr. Bueno stressed, liability under the guarantee depends on the liability of the principal debtor—that is, the company. The transactions between the respondent bank and the company all appear to have taken place in London, where the guarantee was signed. The records of both the bank and the company are kept in London.

26 It is necessary to consider also with which country each party is most closely connected. The respondent bank is established in the United States, with a branch in London from which the relevant transactions were conducted. The appellant is resident in, and has his assets in Gibraltar, but according to the affidavit sworn by Mr. Dumas on November 4th, 1986, he is a frequent visitor to London and spends much time there. This has not been rebutted. The company was incorporated in England and carries on business in London.

27 It would seem from the affidavit of Mr. Dumas and the correspondence exhibited that the bulk of the evidence is most readily available in England, a factor which was clearly brought out in the case of *The El Amria & El Minia* (3). Similarly, the convenience to and availability of witnesses favour London as the forum. The applicable law is not a material factor because the law and the practice of the courts of Gibraltar are largely derived from and are substantially similar to those of England.

28 The factor on which the respondent mainly relies is the possibility of delay. I have already dealt with this in relation to the first issue. Where the *forum conveniens* is concerned, Mr. Isola stated from the Bar that proceedings can be brought on more quickly in Gibraltar than in London. I do not doubt his statement but I do not think it would be proper for this court to rely on it: it is a matter for which there should be objective evidence. Execution of an English judgment presents no difficulty, as the matter is provided for in the Judgments (Reciprocal Enforcement) Ordinance 1935, but Mr. Isola argued that execution under that Ordinance would take longer than execution of a local judgment. I accept that, but I do not think the delay is likely to be enough to make this a significant factor, nor do I think the additional costs would be unreasonable.

29 Finally, I return to the question of whether this is a case where an appellate court ought to interfere, whatever its own views of the merits. This is not a case where the decision is "plainly wrong." I think the learned judge considered the proper factors and did not take into account any factor that was irrelevant. That leaves one question: was there such a misdirection with regard to the principles applicable as to vitiate the decision?

30 I think that two errors of principle may be found: First, in deciding whether Gibraltar was *forum non conveniens*, the learned judge examined each factor in detail but failed to take an overall view of the matter. What he should have done, and what I am sure he would have done had all the recent authorities been before him, was to consider whether there was a natural forum for the proceedings—that is, a country with which the cause of action was closely linked—and whether, if there were such a forum, it could be regarded as appropriate having regard to the circumstances of the parties, the availability of witnesses, and so on. Had the judge approached the matter in this way, he must, I think, have found that England is the natural and appropriate forum for the proceedings.

31 Secondly I think, with respect, that the learned judge erred in the weight he gave to the fact that the appellant's assets are in Gibraltar. He considered that this gave the respondent bank a juridical advantage which would be lost if the proceedings in Gibraltar are stayed. It appears to me that, on the recent authorities, this matter of juridical advantage will only be decisive if it is such that there will be a real danger that justice will not be done. Here it seems the only advantage would be a small saving in time and costs if the respondent bank succeeded in its action.

32 In my opinion, the natural forum for these proceedings is England and I do not think there is any factor that makes that forum inappropriate, or any juridical advantage that the respondent bank would lose, that is sufficiently weighty to justify proceeding in a forum other than the natural forum. I think the learned judge was in error in matters of principle, so that this court may, and should, interfere. I would allow the appeal, set aside the order of the learned judge, and order that the proceedings in the Supreme Court be stayed.

33 **FIELDSEND, J.A.:** I have had the advantage of reading the judgment of the learned President and I agree entirely with his conclusion and order. Whilst considering this case we have also had before us the appeal of *Aldington Shipping Ltd.* v. *Bradstock Shipping Corp.* (2). There, I examined the relevant authorities in some detail. I concluded that the proper enquiry in cases such as this should fall into two stages, namely:

(1) The first enquiry would be to determine which forum was the natural and appropriate forum, on the basis of it having the most real and substantial connection. This would take into account, among other things, the place where the cause of action arose; the availability of witnesses; and generally where justice might best be done.

(2) If the result of the enquiry was that England was the natural forum then the court should grant a stay of the Gibraltar action unless the plaintiff could show objectively, by cogent evidence, that there was some

juridical advantage of which they would be deprived by having to conduct proceedings in England.

34 I agree with the learned President that the learned judge *a quo* did not follow this two-stage enquiry. He did not properly examine whether there was a natural and appropriate forum. Nor did he, in my view, apply the proper test to the question of juridical disadvantage.

35 These errors of principle entitle and oblige this court to interfere with the learned judge's decision. Applying the proper tests I am satisfied that the natural and appropriate forum for this case is England, and that there is no sufficient juridical disadvantage which the plaintiff will suffer from the grant of a stay of the Gibraltar proceedings. For these reasons I would allow the appeal.

36 **LAW, J.A.:** There is a suit instituted in England by the respondent bank to recover sums of money allegedly due to it from M. Dialdas & Sons (UK) Ltd. and a suit instituted in Gibraltar, also by the respondent bank, claiming the same sums from the appellant, under a guarantee given by him whereby he agreed to pay to the respondent bank all sums due to it by the company. The position was summed up in the following words by Alcantara, A.J. in his order dismissing the application for a stay of the Gibraltar proceedings made by the appellant:

> "In a nutshell, what the plaintiffs have done in this case is to sue, more or less simultaneously, the principal debtor in England and the guarantor in Gibraltar. What I have to decide is whether there is any impropriety or anomaly in adopting such a course."

37 The learned judge held that there was nothing anomalous in taking separate proceedings against both the principal debtor and the guarantor, provided only one judgment was enforced, and *prima facie* that there was nothing anomalous in initiating proceedings in different jurisdictions, provided that they were proper jurisdictions. The two main submissions for the appellant in the court below were that Gibraltar was *forum non conveniens*, so that a stay of the Gibraltar proceedings should be ordered, and that the foreign jurisdiction clause contained in cl. 18 of the guarantee was an exclusive jurisdiction clause having the effect of depriving the Gibraltar court of jurisdiction. The jurisdiction clause in question reads as follows: "This guarantee is to be governed by and construed according to English law and the guarantor submits to the jurisdiction of the English courts."

38 The judge accepted the respondent's contention that the clause was not an exclusive jurisdiction clause, because although it binds the guarantor to submit to the English courts, the creditor is left at liberty to initiate

proceedings in any appropriate jurisdiction, whether in England or elsewhere. As regards the submission that Gibraltar was *forum non conveniens*, the judge was referred to the case of *MacShannon* v. *Rockware Glass Ltd.* (4) and to the principles enunciated in that case, as follows ([1978] A.C. at 812, *per* Lord Diplock):

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

39 Applying that statement to the application before him, the judge arrived at the following findings:

(a) that there was another forum to which the defendant was amenable and which would be less inconvenient or expensive, but only marginally so;

(b) that the case was not simplicity itself, as contended by the defendant; and

(c) that the plaintiff would be deprived of a legitimate personal and juridical advantage if a stay were ordered, in that the defendant had all his assets in Gibraltar.

In all these circumstances, the judge concluded that a stay of the Gibraltar proceedings would not be justified, and he refused the application for a stay.

40 On this appeal, Mr. Bueno for the appellant submitted that the effect of cl. 18 of the guarantee document was to confer by agreement exclusive jurisdiction on the English courts. I prefer the view taken by the learned judge, that the clause binds the guarantor and limits him to the jurisdiction of the English courts. It does not so bind the respondent bank, which remains free to select any available appropriate jurisdiction. The clause does not confer exclusive jurisdiction, binding on both parties, on the English courts. Mr. Bueno went on to criticize the judge's finding on the issue of *forum non conveniens*, (a) for not attaching sufficient weight to the fact that the witnesses and the documentary evidence were all situated in England, pointing to that country as the obvious appropriate forum; and (b) for attaching too much weight to the fact that the appellant's assets are in Gibraltar.

41 There would be no difficulty in executing against those assets, once judgment was obtained in England, under the Judgments (Reciprocal

Enforcement) Ordinance 1935, and he submitted that the judge had relied heavily on one factor—that of juridical advantage—instead of taking an overall view of all the relevant factors, and he relied on *Spiliada Maritime Corp.* v. *Cansulex Ltd.* (7) as indeed did Mr. Isola for the respondent company. That case re-states and consolidates the law relating to applications to serve writs outside the jurisdiction and to *forum non conveniens*. It had not been published when the learned judge made his order, but even if it had then been available to him I am unable to say that it must have affected his decision one way or the other.

42 Mr. Isola's main submission was that the learned judge's decision in this case represented an exercise of judicial discretion, and an appeal should not be entertained from an order which was within the discretion of the judge to make, unless it can be shown that the decision was clearly wrong, or that the discretion was exercised under a mistake of law. The court will assume that the judge correctly exercised his discretion, unless the contrary is shown. An appellate court should not substitute its own view of the weight to be attached to the various factors for that of the judge, without good reason.

43 There is no doubt in my mind that in dealing with the application the subject of this appeal, the learned judge had regard to the various factors set out in the affidavits submitted on behalf of the appellant and the respondent bank, and that he took an overall view of those factors in reaching his decision. This is not a case in which it can be said that the judge was plainly wrong, nor can it be said that he did not consider the proper factors or that he took into account irrelevant factors. I can see no justification for interfering with the learned judge's order refusing the appellant's application for a stay. For those reasons, I would dismiss this appeal.

Appeal allowed.