BARLOW CLOWES INTERNATIONAL LIMITED and SIX OTHERS v. SPICER AND PEGLER, BARLOW CLOWES AND PARTNERS S.A. and CHARNWOOD COMPANY S.A.

SUPREME COURT (Kneller, C.J.): April 19th, 1993

Companies—auditors—professional negligence—auditors liable for negligent audit report if made knowing to be relied on by recipient and economic loss results—constructive trustees of lost funds only if gave knowing assistance by ignoring suspected fraudulent dealings

Conflict of Laws—parallel foreign proceedings—injunction against foreign proceedings—no injunction unless foreign proceedings vexatious and oppressive, i.e. likely to result in injustice—normally foreign court best placed to decide whether just and equitable to stay proceedings there

Conflict of Laws—parallel foreign proceedings—injunction against foreign proceedings—no injunction to prevent trial together of claims against associated audit firms if claims arose from same events, same law applicable to both, and Gibraltar proceedings abandoned before writ served

Injunctions—Crown proceedings—injunction against Crown—no power to grant injunction against Crown or its officers—no declaration in lieu of injunction upon interlocutory application

The plaintiffs brought proceedings against the defendants to recover damages for, *inter alia*, breach of contract, negligent misstatement and breach of trust.

The first plaintiff, BCI, was a Gibraltar company and was part of the Barlow Clowes Group of investment management companies. The first defendant, Spicer Gibraltar, was an accountancy firm appointed to audit BCI's accounts prior to a take-over by JFH, an English company controlled by Mr. Clowes. Spicer Gibraltar planned a review of investment portfolios, to be transferred from the second and third defendant companies, for which BCI would assume responsibility. Ultimately, however, the funds were not transferred and a full audit did not take place. Spicer Gibraltar also advised on client accounts managed by companies within the Group and worked with its UK branch, Spicer UK, which had been appointed auditor of BCGM and other BCI affiliated entities to be acquired by JFH.

Following the revelation of fraudulent dealings by Mr. Clowes, the Supreme Court ordered the winding up of BCI and gave the receivers

leave to pursue any proceedings necessary to recover damages for the benefit of investors. At the same time BCGM went into liquidation.

The liquidators of BCI and BCGM, the receivers of the BCI investment funds, and HM Treasury (as successor of the rights of investors already compensated from public funds), issued writs in Gibraltar against the defendants and in England against Spicer UK and two former partners in Spicer Gibraltar. They alleged that by not performing a proper audit of investors' funds, Spicer Gibraltar and UK had failed to identify the concealment of large scale theft from onshore funds by the transfer of moneys from offshore funds.

The writ issued in the Supreme Court was not served, but the defendants served a notice of intention to defend the proceedings here. The plaintiffs later obtained leave from the English High Court to issue concurrent writs and serve them in Gibraltar. The first defendant sought an injunction to restrain the liquidators from pursuing the English proceedings.

They submitted that (a) Gibraltar was the proper and convenient forum for the trial of the claims against Spicer Gibraltar, since (i) BCI was a Gibraltar company, whose liquidators and receivers had been appointed by the Supreme Court, (ii) the claims for breach of contract and breach of fiduciary duty arose from a contract made in Gibraltar or under the Companies Ordinance, (iii) Spicer Gibraltar had never exercised any control over the funds in question and could not be a constructive trustee of them for BCI, and (iv) any evidence to support the claims must be found in Spicer Gibraltar's files; (b) no juridical advantage would be gained by suing in England, since the proceedings would cost much more and take longer to come to trial; (c) accordingly, it would be vexatious and oppressive for the English proceedings to continue, and Spicer Gibraltar was entitled to an injunction under the Companies Ordinance, s.178(5) as a person aggrieved by an act of the liquidators; and (d) since R.S.C. O.12 enabled it to acknowledge service of the Gibraltar writ even though it had not been served, and it intended to defend the proceedings, the plaintiffs should proceed here.

The plaintiffs submitted in reply that (a) England was the natural forum for the trial of the claims against the defendants, since (i) Spicer Gibraltar had worked together with Spicer UK on the audits of the Barlow Clowes entities, (ii) the work had been performed to UK professional standards and in preparation for BCI's acquisition by an English company, (iii) most of the investment funds belonged to English investors and losses arising from their misappropriation were incurred in England; (b) the claims against the Gibraltar and English defendants should be heard together, since they arose from the same events and the same law applied to both; (c) the cost of proceedings in either jurisdiction would undoubtedly be covered by professional insurance; (d) the defendants' application was premature, since they had not been served with proceedings in Gibraltar (the writ having been issued only as a safeguard), and the plaintiffs could not be forced to proceed here by a

gratuitous notice of intention to defend; (e) the court had no power to grant an injunction against the Crown, *i.e.* HM Treasury or the Treasury Solicitor; and (f) the English court's sovereignty would be infringed by such an order.

Held, dismissing the application:

(1) The plaintiffs had an arguable claim against Spicer Gibraltar. An auditor could be held liable for economic loss sustained as a result of negligent misstatement contained in an audit report made in the knowledge that the recipient would rely on it. The two partners, as agents of Spicer Gibraltar, owed a duty of care to BCI under the contract with their firm. Their duty of care was to the shareholders of their client company. To hold Spicer Gibraltar and its agents liable as constructive trustees for knowing assistance in the fraud, the plaintiffs would have to prove that they had been dishonest, namely, that they had known that something was wrong but turned a blind eye to it. On balance, the plaintiffs' claims were not so absurd that they could not succeed nor had they been brought in England to secure some fanciful advantage (page 58, lines 3–12; lines 21–30; lines 38–42).

(2) The plaintiffs were not obliged to serve their writ or statement of claim on the defendants in Gibraltar merely because the defendants had entered an appearance *gratis*. The writ was not deemed to have been served by virtue of the defendants' acknowledgements of service if the contrary were shown. Spicer Gibraltar could apply for an interlocutory injunction only after a proper acknowledgement of service had been given. Accordingly, its application was premature (page 56, lines 39–45; page 57, lines 9–12; page 58, lines 31–34).

(3) As an injunction would be directed to the parties to the English proceedings rather than the court itself, there would be no infringement of the English court's sovereignty by an order such as that sought. However, under the Crown Proceedings Ordinance, s.14, the court had no power to grant an injunction against the Crown or its officials in any proceedings and, since no declaration against either could be made on an interlocutory application, Spicer Gibraltar were not entitled to relief against HM Treasury or the Treasury Solicitor (page 57, lines 13–20; page 58, lines 35–36).

(4) Different principles applied in deciding whether to restrain a plaintiff from commencing an action in a foreign jurisdiction from those applicable when staying local proceedings on the ground of *forum conveniens*. An order restraining proceedings would be granted only if it would be vexatious and oppressive to pursue the proceedings and the injunction was necessary to enable justice to be done in Gibraltar. The Supreme Court could therefore grant an injunction if, for example, Gibraltar were the natural forum for the proceedings and the plaintiffs were attempting to relitigate issues already decided here, but otherwise

the English court was the best arbiter of whether the proceedings there should be stayed (page 57, line 21 – page 58, line 2).

(5) The English proceedings were not unjust or oppressive, and Gibraltar was not the *forum conveniens* for the trial of the issues. The Supreme Court had given the receivers of the BCI funds leave to issue proceedings for the benefit of investors in any jurisdiction. The allegations against Spicer Gibraltar were bound up with those against Spicer UK, since they arose from the same events, and the relevant law to be applied was the same in England as in Gibraltar. If they were tried in separate jurisdictions, the plaintiffs would be deprived of the advantage of suing both firms together. There would be no multiplicity of proceedings, as they did not intend to pursue the existing proceedings in Gibraltar further. Spicer Gibraltar would therefore not be granted an injunction under s.178(5) of the Companies Ordinance or otherwise (page 58, line 43 – page 59, line 28).

Cases cited:

(1) *Abu Dhabi Helicopters Ltd.* v. *International Aeradio PLC*, [1986] 1 W.L.R. 312; [1986] 1 All E.R. 395, considered.
(2) *Agip (Africa) Ltd.* v. *Jackson*, [1991] Ch. 547; [1992] 4 All E.R. 451, applied.
(3) *Arab Monetary Fund* v. *Hashim (No. 6)*, [1992] T.L.R. 372, applied.
(4) *Bank of Tokyo Ltd.* v. *Karoon*, [1987] A.C. 45n; [1986] 3 All E.R. 468, followed.
(5) *Caparo Indus. PLC* v. *Dickman*, [1990] 2 A.C. 605; [1990] 1 All E.R. 568.
(6) *General Acc. Fire & Life Assur. Corp. Ltd.* v. *Tanter*, *The Zephyr*, [1984] 1 W.L.R. 100; [1984] 1 All E.R. 35; [1984] 1 Lloyd's Rep. 58.
(7) *Gniezno*, *The*, [1968] P. 418; [1967] 2 All E.R. 738, not followed.
(8) *Golden Ocean Assur. Ltd.* v. *Martin*, *The Golden Mariner*, [1990] 2 Lloyd's Rep. 215.
(9) *Laker Airways Ltd.* v. *Sabena Belgian World Airlines* (1984), 731 F. 2d 909, followed.
(10) *Morgan Crucible Co. PLC* v. *Hill Samuel & Co. Ltd.*, [1991] Ch. 295; [1991] 1 All E.R. 148, considered.
(11) *Peruvian Guano Co.* v. *Bockwoldt* (1882), 23 Ch. D. 225, applied.
(12) *Punjab National Bank* v. *de Boinville*, [1992] 1 W.L.R. 1138; [1992] 3 All E.R. 104, considered.
(13) *Sargant* v. *Read* (1876), 1 Ch. D. 600; 45 L.J. Ch. 206.
(14) *Société Nationale Indus. Aérospatiale* v. *Lee Kui Jak*, [1987] A.C. 871; [1987] 3 All E.R. 510, applied.
(15) *Somportex Ltd.* v. *Philadelphia Chewing Gum Corp.*, [1968] 3 All E.R. 26; (1968), 112 Sol. Jo. 216.

(16) *Spiliada Maritime Corp.* v. *Cansulex Ltd.*, *The Spiliada*, [1987] A.C. 460; [1986] 3 All E.R. 843, distinguished.
(17) *Towers* v. *Morley*, [1992] 1 W.L.R. 511; [1992] 2 All E.R. 762, applied.
(18) *Underhill* v. *Ministry of Food*, [1950] W.N. 133; [1950] 1 All E.R. 591, applied.

Legislation construed:

Companies Ordinance (1984 Edition), s.178(5):

> "If any person is aggrieved by any act or decision of the liquidator, that person may apply to the court, and the court may confirm, reverse or modify the act or decision complained of, and make such order in the premises as it thinks just."

Crown Proceedings Ordinance (1984 Edition), s.14:

> "(1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Ordinance, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require;
>
> Provided that—
>
> (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties…
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against any officer of the Crown if the effect of granting the injunction or making the order would be to give relief against the Crown which could not have been obtained in proceedings against the Crown."

Supreme Court Rules (1984 Edition), r.8: The relevant terms of this rule are set out at page 56, lines 35–36.

Rules of the Supreme Court, O.10, r.1(5):

> "Subject to Order 12, rule 7, where a writ is not duly served on a defendant but he acknowledges service of it, the writ shall be deemed, unless the contrary is shown, to have been duly served on him and to have been so served on the date on which he acknowledges service."

O.18, r.1: "…[T]he plaintiff must serve a statement of claim on the defendant … and must do so either when the writ is served on that defendant or at any time after service of the writ but before the expiration of 14 days after that defendant gives notice of intention to defend."

K.W. Harris, Q.C. and *I.S. Marrache* for the first to fourth plaintiffs;
A.W.H. Charles, Treasury Counsel, for the fifth, sixth and seventh plaintiffs;
J.E. Triay, Q.C. and *S.P.C. Triay* for the first defendant.

KNELLER, C.J.: Spicer & Pegler asks this court to restrain the plaintiffs, namely, Barlow Clowes International Ltd. ("BCI"), Barlow Clowes Gilt Managers Ltd. ("BCGM"), Mr. N.J. Hamilton, Mr. M.A. Jordan, HM Treasury, the Treasury Solicitor and Mrs. A.J. Murray from proceeding against it or its partners, Mr. R.A.J. Hooper and/or Mr. M.J.R. Morris, in an action in the High Court of Justice, Chancery Division (1992 B No. 8660) or in any other action or proceeding outside the jurisdiction of the Supreme Court of Gibraltar.

The grounds on which the order is sought are:

1. Gibraltar is the proper and convenient forum for any such action.

2. The action in the Chancery Division constitutes a multiplicity of proceedings, which is vexatious and oppressive.

3. Spicer & Pegler is entitled to relief against BCI under s.178(5) of the Companies Ordinance.

The plaintiffs unite in opposing the granting of such an order.

Mr. Hooper, aged 47, is a Rhodesian Fellow of the Institute of Chartered Accountants who has lived and worked in Gibraltar for the past 13 years and is domiciled here. He was employed by Spicer & Pegler in Gibraltar in 1980, which in those days was a partnership made up of the resident partner, Mr. Morris, and the partners of Spicer & Pegler in the United Kingdom. Mr. Hooper and a Mr. Beckett also became partners of Spicer & Pegler, resident in Gibraltar in 1981.

There was a sea-change in 1983 for Spicer & Pegler in Gibraltar because the partners who lived in the United Kingdom resigned and Mr. Hooper, Mr. Morris and Mr. Beckett became the partners in a new firm, namely, Spicer & Pegler in Gibraltar, and in this matter it is called Spicer Gibraltar. Mr. Beckett ceased to be a partner in April 1986. Spicer Gibraltar merged with Coopers & Lybrand, Gibraltar at the end of February 1991 and Mr. Hooper and Mr. Morris became consultants to the new firm. Mr. Morris resigned in August 1991, left Gibraltar and went to live in England.

Spicer Gibraltar had only one office and that was in Gibraltar. The majority of its clients lived in Gibraltar or were based here so Mr. Hooper's professional work was done here, although from time to time he would leave the jurisdiction and do some work abroad for Spicer Gibraltar clients.

How do Spicer Gibraltar, Mr. Hooper and Mr. Morris come to be involved in the action in the Chancery Division and another in this court? Mr. Hooper's answer is this: The actions follow the 1988 collapse of the Barlow Clowes fund management operation, which was based in England

because the English partnership Barlow Clowes & Partners ("Partners S.A.") and the English company BCGM conducted their business there, though their funds were also managed from Jersey and Geneva.

BCI is a shell company incorporated under the Gibraltar Companies Ordinance and all its business was conducted here. Some time in February 1986, BCI asked Mr. Hooper, as a partner of Spicer Gibraltar, for Spicer Gibraltar to become BCI's auditor and on May 2nd, Spicer Gibraltar was appointed.

This court, however, on June 8th, 1988 in its action 1988 B No. 104, ordered the winding up of BCI and appointed Mr. Kenneth Robinson and Mr. Nigel Hamilton (the third plaintiff) liquidators of BCI. Two days later this court substituted Mr. Michael Jordan (the fourth plaintiff) for Mr. Hamilton, so I will refer to Mr. Jordan and Mr. Robinson as "the liquidators" in future. Mr. Robinson and Mr. Hamilton are accountants in the firm of Ernst & Whinney in Gibraltar. Mr. Jordan is an accountant with Cork Gully in Noble Street, London.

On the same date, in action 1988 B No. 104, Mr. David Gray, a creditor of BCI, was added as a petitioner and given leave to issue proceedings against BCI in this court notwithstanding the earlier order to wind up. Mr. Gray duly instituted proceedings which became action 1988 G No. 108 and, again on June 10th, 1988, this court appointed Mr. Hamilton of Gibraltar and Mr. Jordan of London as joint receivers and managers of the BCI funds known as Portfolios 28, 68, 33 and 39 and any other such funds promoted by it. They were given leave to issue and prosecute, in the name of or on behalf of BCI or Mr. Gray, any proceedings they thought necessary or desirable for the recovery of damages for the benefit of investors in BCI.

Mr. Hooper claims that as BCI's auditor from February 1986 to November 1987, a period of 21 months, he advised BCI in Gibraltar on these matters:

1. Gibraltar company law and taxation; work which was all done in Gibraltar.

2. The "start-up" accounts to September 30th, 1986, which led to his signed audit opinion of February 25th, 1987 that BCI was not trading during that period. Again, all that work was done here.

3. The planning of a review of the offshore funds which at that time were expected to be transferred to and then managed from Gibraltar. Those offshore funds had no connection with BCI when he did this work but he wanted to make sure that they had been properly managed before they were sent here to BCI. This did not have any relevance to the audit of BCI's accounts up to September 30th, 1986. Those funds never came to BCI here and so were never managed by BCI. He was told about this change of policy before he signed the audit opinion on February 25th, 1987.

Mr. Hooper declares that in the planning of his review of those offshore funds he performed these tasks:

(a) He went to London in August 1986 on other business but paid a courtesy call on the London office of Barlow Clowes where he met a director of BCI, Mr. Naylor, and the man in charge of marketing the offshore funds in Geneva, Mr. Posey.

(b) He visited the office of Barlow Clowes in Geneva in September 1986 and arranged for the offshore funds investors to be sent a statement of their account with an invitation to tell him if they queried it.

(c) He asked Mr. Andrew Gibson of Spicer & Pegler UK ("Spicer UK") to look at the computer records in Geneva of the offshore funds transactions and judge whether the "systems" or "compliance" approach was justified or whether it was necessary to adopt the "substantive" approach which called for the substantiation of each transaction and the consequent balance. On another visit to England on other business he accepted Mr. Gibson's conclusion that the "substantive" approach was required.

(d) He met Mr. Clowes in Poynton, Cheshire on another visit to England on January 7th, 1987. They discussed—

(i) the date on which the offshore management funds would be sent to BCI, that they would be managed by BCI and the management fees that would accrue to BCI;

(ii) Mr. Hooper's suggestion that someone from Spicer Gibraltar should go to Geneva to sort out the offshore funds before they were transferred to BCI here after September 30th, 1986.

4. Back in Gibraltar after January 7th, 1987, Mr. Hooper arranged for various banks to give him information about offshore funds in accounts with them maintained by Partners S.A., Jersey.

5. Mr. Hooper sent a letter on February 27th, 1987 to Mr. Harvey of Grangewoods, Harley St., London, solicitors for Mr. Clowes as vendor of BCI to James Ferguson Holding PLC ("JFH"). He was not asked to advise anyone on the acquisition, he maintains, and he did not do so. All he did was give Gibraltar references and terminology to substitute for the English ones in the draft acquisition agreement.

6. He opened Spicer Gibraltar BCI files to inspection by Touche Ross, reporting accountants to JFH. He made enquiries, mostly in Gibraltar, when Barlow Clowes collapsed, in a bid to help those investigating its causes.

7. He called a meeting in Gibraltar on April 25th, 1987 with Mr. James Levy of J.A. Hassan & Partners, acting for BCI, and Mr. John Perez, BCI's managing director, to advise BCI on its proposed service agreement with Partners S.A.

Mr. Hooper points out that in the main his services to BCI were performed in Gibraltar. The audit of its accounts up to September 30th, 1986 was done here. Spicer Gibraltar work was done on BCI's instructions. His other services for it, including the August 27th, 1986 and January 7th, 1987 meetings in England, were what he calls "peripheral."

The junior clerks of Spicer Gibraltar who helped Mr. Hooper in his work for BCI are Gibraltarians who live here. Mr. Morris, his partner, did no substantial work for BCI.

Mr. Hooper underlines the fact that as auditor to the Gibraltar company BCI, he had a statutory and professional obligation to help the liquidators and, in this case, the receivers, as officers of this court, with any information and assistance they demanded. He sent copies of his BCI files to Mr. Robinson. He submitted to an interview by Mr. Hamilton and the liquidators' representatives in his Gibraltar office on November 17th, 1989, by the Secretary of State's inspectors appointed under s.432 of the Companies Act 1985 and, on several occasions, by the representatives of the UK Serious Fraud Office in his office in Gibraltar. Finally, he gave evidence in the trial of Mr. Clowes in London.

Despite all that, Mr. Hooper continued, BCI's liquidators and receivers and the other plaintiffs have simultaneously on October 28th, 1992 (a) issued a writ in this court (1992 B No. 304) against Spicer Gibraltar, Partners S.A. and Charnwood Co. S.A.; and (b) issued a writ in the High Court of England and Wales (1992 B No. 8660) in which the plaintiffs are the same but the defendants are Spicer UK, Mr. Hooper, Mr. Morris, Mr. Beckett, Partners S.A. and Charnwood Co. S.A. The writs are generally endorsed in the same terms but had not been served by December 23rd, 1992 and Mr. Hooper had not seen any statement of claim by then.

Spicer Gibraltar is said to have had these retainers:

1. To audit BCI's accounts for, among other purposes, the proposed acquisition by JFH of BCGM, BCI and other related entities in the Barlow Clowes Group ("BCG").

2. To advise and work on client accounts managed or operated by entities in BCG.

3. To advise and work with Spicer UK in connection with its retainer by Partners S.A. or BCGM.

Arising out of those retainers, BCGM and/or BCI claim against Spicer UK and/or Spicer Gibraltar damages and interest for breach of contract and/or duty and/or negligence. The other plaintiffs claim equitable compensation or an enquiry as to damages for breach of constructive trust.

Mr. Hooper asserts, first, that there is no merit in any of those claims against Spicer Gibraltar or himself and, secondly, that they should be pursued in the Gibraltar action and not in the English one. He contends that the natural and appropriate forum for the trial of the claims in the writs is Gibraltar. They are brought by the liquidators and receivers of a Gibraltar company appointed by an order of the Gibraltar court against a Gibraltar firm in respect of acts by residents of Gibraltar which took place mainly in Gibraltar.

The contract which Spicer Gibraltar, Mr. Hooper and Mr. Morris are said to have broken was made in Gibraltar between two Gibraltar resident

accountants and a firm in Gibraltar for auditing and ancillary services in Gibraltar to BCI, a company established, resident and governed by Gibraltar law, so the contract is governed by Gibraltar law. A claim for breach of duty against Spicer Gibraltar is governed by the law of Gibraltar too because the duty arises either under the Gibraltar contract or under the Companies Ordinance of Gibraltar.

Mr. Hooper, by December 23rd, 1992, could only point out that so far as the constructive trust claim was concerned, Spicer Gibraltar never possessed, controlled, had power over or access to any BCI or BCG clients' funds. Spicer Gibraltar, Mr. Morris and Mr. Hooper had not done any act, failed in any duty or otherwise participated in or assisted in any misappropriation or breach of trust.

Furthermore, Mr. Hooper averred, there are no practical considerations that displace the natural and appropriate forum. Indeed, some strengthen it. The evidence to support the claims must be found in Spicer Gibraltar's files and documents. Mr. Morris and Mr. Pilkington (of Spicer UK), though living in England, would be Spicer Gibraltar's witnesses, not the plaintiffs'. The relevant events took place here. Liability, which is denied, is governed by Gibraltar law.

So it would be vexatious and oppressive, according to Mr. Hooper, for the proceedings in England to continue because the liquidators and receivers, who are officers of this court and subject to its directions, should have made Gibraltar their first choice of forum. They have obtained the benefit of Mr. Hooper's disclosures given under Gibraltar law. He is the only partner in Spicer Gibraltar resident here and he and Mr. Morris have limited resources.

The liquidators and receivers gain no juridical advantage from making their claims in England and suffer no disadvantage by litigating in Gibraltar. They do not need to join Spicer UK and Spicer Gibraltar in one action because they have no connection and the facts alleged against each are different. It will lead to confusion and therefore prejudice to have the claims tried together.

The Gibraltar action, Mr. Hooper is advised, will come to trial more quickly and economically. The forecast for England is $2\frac{1}{2}$ years before trial and then it would last 3 months, whereas here it would be $1\frac{1}{2}$ years and 6–8 weeks respectively. Spicer Gibraltar would have to spend up to £$1\frac{1}{2}$m. for a team of lawyers in England to defend it until judgment, whereas in Gibraltar the equivalent figure would be up to £200,000.

Spicer Gibraltar, Mr. Morris and Mr. Hooper are so aggrieved by the liquidators and receivers of BCI bringing an action against them in England that they invoke the provisions of s.178(5) of the Companies Ordinance to restrain them from going any further because to do so would be unreasonable, vexatious and oppressive.

When it comes to the claim in constructive trust by the other plaintiffs, Spicer Gibraltar, Mr. Morris and Mr. Hooper categorize that as doomed

because those other plaintiffs had no work done for them by Spicer Gibraltar, Mr. Morris and Mr. Hooper. They have had the advantage of the discovery and disclosure made by Spicer Gibraltar and its partners under Gibraltar law and contract, so they too should litigate here.

Mr. Hooper filed a *gratis* notice of intention to defend the Gibraltar action on December 7th, 1992 because the plaintiffs' solicitors here warned him that their writ was in existence. He also demanded they deliver their statement of claim so he could see how they alleged that Spicer Gibraltar was liable.

On February 2nd, 1993, BCGM, BCI, Mr. Hamilton, Mr. Jordan, HM Treasury, the Treasury Solicitor and Mrs. Murray, the plaintiffs, applied *ex parte* in the Chancery Division of the High Court in London in 1992 B No. 8660 for leave to issue concurrent writs for service out of that jurisdiction and for leave to serve such writs on Mr. Hooper and Partners S.A. This was some 42 days after Spicer Gibraltar's summons to restrain them from proceeding against it, Mr. Hooper or Mr. Morris.

The defendants in the UK action also included Spicer UK, Mr. Beckett and the Charnwood Co. S.A. Mr. Morris and Spicer UK were resident in the United Kingdom and had been served with the generally endorsed writ on January 30th and February 1st, 1993 respectively. The plaintiffs included a copy of the summons of Mr. Hooper and Mr. Morris in this court with its supporting affidavit and its exhibits. The application to serve out against Mr. Beckett was dropped because he was not a partner in Spicer Gibraltar at the material time.

The background to the action in England included these revelations. It was one of a number brought there to recover compensation for substantial losses suffered by the public as a result of the Barlow Clowes fraud. The Treasury and the Treasury Solicitor are indirect transferees of the rights of the investors who were compensated for their losses as part of an *ex gratia* scheme devised by the UK Government which paid out £15m. among the investors.

The English publicly-listed company JFH proclaimed in July 1986 that it had agreed in principle to acquire the shares in a number of companies and other entities controlled by Mr. Clowes and his associates known as BCG. Two of these were BCGM and BCI, and by February 2nd, 1993 BCGM was in liquidation under the supervision of the High Court of England and BCI was in liquidation under the supervision of the Supreme Court of Gibraltar.

Mr. Clowes used BCGM from July 1985 to market and manage his investment portfolios. BCI had not traded before the takeover was announced but the plan was for it to take over Mr. Clowes's offshore investment business portfolios from Partners S.A. and/or Charnwood Co. S.A. which carried on business in Geneva. The former was a Liberian company and the latter a Swiss one.

Mr. Clowes was JFH's chairman and had a substantial holding in it.

The proposed terms for JFH's acquiring BCG from him and his associates amounted to a "reverse take-over." The listing rules of the London Stock Exchange required an accountant's report on BCG's business to be made to JFH's shareholders and then, in a general meeting, their consent to this take-over. JFH's reporting accountant was Touche Ross. BCI had no audited accounts and those of BCGM and of Partners S.A. were out of date, so they had to produce them up to September 30th, 1986 if the Stock Exchange was to bless the take-over. Spicer UK audited BCGM's and Partners S.A.'s accounts for this reverse take-over.

The plaintiffs complain that Spicer UK and Spicer Gibraltar failed to complete properly their audit of investors' funds and to identify the liabilities of Partners S.A., BCGM and BCI as a result of deficiencies in the funds. Simply put, Spicer UK knew that the onshore funds held for onshore investors had been mixed with offshore funds held for offshore investors, so both funds should have been audited for a proper audit of the accounts of Partners S.A. and BCGM by Spicer UK. It was started by Spicer UK with Spicer Gibraltar's Mr. Hooper but never finished. Had they completed this task, they would have discovered that large sums had been stolen from the onshore funds and covered up by the transfer of huge sums from the offshore funds, and must have suspected that investors' funds would be at risk from the fraudulent actions of Mr. Clowes and his associates in the reverse take-over.

By not "blowing the whistle," Spicer UK assisted Mr. Clowes and his cronies in their nefarious schemes. BCGM asserts, therefore, that Spicer UK was in breach of contract and/or negligent. Additionally, BCGM and BCI (as trustees for the investors) and HM Treasury and the Treasury Solicitor (as assignees of the rights of investors) bring a constructive trust claim against Spicer UK.

The plaintiffs in their statement of claim mount the constructive trust claim against Spicer Gibraltar on the basis of the same assistance to Mr. Clowes and his team in the reverse take-over because Mr. Hooper knew of the same circumstances and took no step to warn the authorities. BCI pleads that Spicer Gibraltar should have carried out a "post-balance sheet events" review in relation to BCI's accounts and if Mr. Hooper had done it he would have discovered that £2m. of investors' funds entrusted to BCI had been transferred to Geneva, which was where the offshore funds were administered. It was then used as part of a deposit with a bank in Gibraltar to secure a "back-to-back" £12.5m. loan to JFH made by the Bank of Credit & Commerce International in London. BCI calls that failure by Spicer Gibraltar a breach of contract and a breach of duty and calls for compensation from Spicer Gibraltar.

Not content with all that, BCI claims against Spicer UK, and BCGM claims against Spicer Gibraltar in tort because they collaborated in the work on the offshore funds but not to its proper conclusion.

The plaintiffs instructed chartered accountants Grant Thornton to

express a view on whether or not their allegations of impropriety and professional incompetence by each Spicer firm were supported by the documents the plaintiffs had and Grant Thornton's partner, Mr. Kabraji, said they did. The plaintiffs claim that they have a good arguable case against each firm on each claim.

On what do the plaintiffs base their claims in constructive trust against both Spicers? It is, in particular, on a memorandum dated September 29th, 1986 by Mr. Hooper as a result of his visit to Geneva. He notes in it that—

> "cash required to fund the Geneva office is routinely taken from the clients' funds in round sum transfers… The summary of account 53 shows gross receipts from clients of £33m. but only £5m. being transferred to the dealing payment account… How can we be sure that there is no switching of assets out of other funds to 'balance the books' for audit purposes at September 30th, 1986?"

All that shows Mr. Hooper was on the scent, say the plaintiffs, and Mr. Pilkington (the Spicer UK partner doing the audits for BCGM and Partners S.A.) is tainted by all that because that memorandum was sent to him twice by Mr. Hooper.

Mindful of their duty to the court in England, the plaintiffs informed it that Mr. Pilkington and Mr. Hooper had given evidence to BCI's joint liquidators during their investigations into the Barlow Clowes fraud and in the criminal trial of Mr. Clowes and others in 1991 to 1992, to the effect that neither had suspected that the investors' funds were being misapplied or placed at risk. The audit of the offshore funds, Mr. Pilkington and Mr. Hooper insist, was only abandoned because at the last minute BCI did not, as part of the reverse take-over, receive the offshore business of BCG managed from Geneva.

The plaintiffs' allegations, they admit, are based on inference and both Spicers deny the allegations but the plaintiffs and Mr. Kabraji consider that the explanations of Mr. Pilkington and Mr. Hooper ring hollow because, as experienced accountants, they would have recognized that those investors' funds were probably being misapplied.

The plaintiffs relied on the Rules of the Supreme Court, O.11, r.1(1)(*c*) when they asked the court in England for leave to serve Mr. Hooper out of the jurisdiction, not only because his partner Mr. Morris had been served within it but also because Mr. Hooper was a necessary and proper party to the plaintiffs' claims against Spicer UK, which are the foundation of real issues which it was reasonable to ask that court to try. Spicer Gibraltar was, for the same reasons, a necessary or proper party to the plaintiffs' claims against Spicer UK. Much of the work for the JFH reverse take-over was done by both Spicer firms in collaboration, so the plaintiffs' claims against each firm in constructive trust spring from that work, as did BCI's claim in tort against Spicer UK and in contract against Spicer Gibraltar.

The plaintiffs did not need to rely upon any other grounds, but for good measure flung in those in O.11, r.1(1)(*f*) and (*t*). BCGM's claim in tort against Spicer Gibraltar falls within O.11, r.1(1)(*f*) because BCGM's liabilities as a result were damages sustained in the United Kingdom. The plaintiffs' constructive trust claim for relief by way of equitable compensation against Spicer Gibraltar as constructive trustee is based on that partnership's assistance, with the requisite degree of knowledge, in the fraudulent acts of Mr. Clowes and his associates which were committed in the United Kingdom, all of which is covered by O.11, r.1(1)(*t*).

As for Partners S.A., the plaintiffs joined it in the proceedings to have it bound by the English court's ruling. It was one of the companies that managed the investors' funds so it was probably a trustee of some of the misapplied funds for which equitable compensation was claimed against Spicer UK, Mr. Hooper and Mr. Morris, but no "active relief" was sought by the plaintiffs. It was a necessary or proper party to the claim against Spicer UK and Mr. Morris, which was caught by O.11, r.1(1)(*c*).

Alternatively, since the investors signed printed forms when subscribing their money for investment and most of that money came from members of the public in England, those forms ought to have been executed according to the UK law of trusts, and Partners S.A. would be a trustee of the funds and so it was within the provisions of O.11, r.1(1)(*j*). Charnwood Co. S.A. was domiciled in Switzerland but otherwise is in the same position as Partners S.A. of Liberia.

The plaintiffs told the English court that Spicer Gibraltar carried on its business here in Gibraltar and that its brief was to audit the accounts here of BCI, a Gibraltar company. Then they cast into the pot, for the purpose of persuading the English court that it was the natural forum in which their case could be most suitably tried, the following considerations:

1. Spicer Gibraltar was hired by BCI to audit its accounts so that JFH, an English company, could take it over together with BCG, most of which were UK entities. Mr. Hooper, in a letter dated October 17th, 1986 to Dr. Naylor of Partners S.A., recognized that his audit was for "Stock Exchange purposes" and, in another of January 23rd, 1987 to Mr. Perez of BCI in Gibraltar, that it was for JFH's take-over. This meant that the professional standards required of Mr. Hooper in his work were those laid down in the UK *Statement of Standard Accounting Practice* ("SSAP") and in particular SSAP 17; the need to carry out a "post-balance sheet events" review. Spicer Gibraltar's work, according to the plaintiffs, was governed by more than its contract with BCI.

2. The offshore funds are the crux of the plaintiffs' claims against both Spicers and most of them were subscribed by investors in England to offshore portfolios and those investors suffered their losses in England when those funds were misappropriated. The offshore funds were not managed from Gibraltar but from Geneva when Mr. Hooper audited BCI's accounts. His memorandum of September 29th, 1986 was the

consequence of his journey to Geneva. He told an accountant there to send a circular to the investors who sent their money there for that portfolio.

3. His BCI contract took in work he had to do in England, such as a check on the securities in London held on behalf of the investors. Mr. Hooper relied on Mr. Pilkington to do that but Mr. Pilkington never got around to doing it. Mr. Hooper said in his letter of January 23rd, 1987 to Mr. Perez of BCI in Gibraltar that the reconciliation work on the offshore funds by Spicer Gibraltar was best done in England even if the computer was in England. He went to England for meetings about this.

4. Mr. Pilkington of Spicer UK was its supervising partner of Spicer Gibraltar's work. The two firms worked in tandem for the audit of the offshore funds. The claims against both Spicers and Mr. Hooper are intertwined. The plaintiffs announce that very soon claims against Touche Ross, the reporting accountants for the reverse take-over, will be launched and since Touche Ross worked with Spicer Gibraltar, the auditors of BCI, allegations against each will also overlap.

5. The plaintiffs submit that England is the real "centre of gravity" for these disputes and that the issues should be determined there in the interests of justice and not in Gibraltar because then there would be a multiplicity of proceedings in different jurisdictions arising out the same events.

6. When the plaintiffs applied in England for leave to issue and to serve concurrent writs outside the jurisdiction their intention was not to serve the Gibraltar one but later they believed that the limitation period might be held to have expired at the end of October 1992, so to protect their position they issued a parallel writ in Gibraltar on October 28th, 1992 and told Mr. Hooper and Spicer Gibraltar's lawyers that they had done so. They would take it up if the English court refused leave to serve the English writ out of its jurisdiction or upheld a challenge to its decision to give such leave.

7. The Gibraltar writ remained unserved despite Spicer Gibraltar's "gratuitous" notice of intention to defend and its call to the plaintiffs to serve their statement of claim. They submit that that notice is a nullity.

8. There is no material difference in the relevant law of the United Kingdom and Gibraltar for the trial of the issues or the standard accounting practice for work done for Stock Exchange purposes.

9. The complaints against Spicer Gibraltar and/or Mr. Hooper are not confined to their work in Gibraltar.

10. Mr. Hooper and Mr. Morris, according to the plaintiffs, and Spicer Gibraltar were bound to be insured against professional liabilities and their policy would cover the cost of proceedings in the United Kingdom or Gibraltar.

11. The plaintiffs rounded off by reminding this court it had no power to grant injunctions against HM Treasury or the Treasury Solicitor. In

addition, by February 4th, 1993 the English court had granted leave to the plaintiffs to serve the proceedings in that court on Mr. Hooper and Partners S.A. because it had determined it had jurisdiction over the claims against them in those proceedings, so an order by this court in Gibraltar to restrain those proceedings would infringe upon the sovereignty of the English court.

Mr. Harris, Q.C. for the plaintiffs, other than HM Treasury, the Treasury Solicitor and Mrs. Murray, submitted that the Spicer Gibraltar application was premature because the plaintiffs had not attempted to serve it by any method in the Gibraltar action or undertaken to do so. Spicer Gibraltar had given notice of its intention to defend but it was invalid. Then he underlined the fact that the English court had given the plaintiffs leave under O.11 to serve Mr. Hooper and Partners S.A. in Gibraltar and Mr. Morris had been served in England.

So far as the systems of justice were concerned, there was no hardship for any party since they were the same.

The cross-claims of the plaintiffs against the two Spicers, in the plaintiffs' submission, reinforced the view that the English court was the correct forum in which they should be litigated, though that is not the correct test, and, in any event, the defendants could not show that Gibraltar was the *forum conveniens.*

The joint liquidators and receivers were appointed by this court but the receivers were given power by this court on December 12th, 1988 to issue and prosecute proceedings in their own name or that of BCI in any jurisdiction they thought expedient or desirable. It has not been suggested by anyone that the plaintiffs' proceedings against Spicer UK should be tried in Gibraltar. The allegations against Mr. Hooper and Spicer Gibraltar are so bound up with those against Spicer UK and future actions there against other professional advisers that Gibraltar clearly is displaced as the *forum conveniens*.

The proceedings in England cannot be vexatious or oppressive because England is not so convenient for Spicer Gibraltar or Mr. Howser.

Counsel for HM Treasury and the Treasury Solicitor asked for Spicer Gibraltar's application to be dismissed with costs to be taxed and paid forthwith, a certificate for two counsel and liberty to all parties to apply. He reminded the court that the Crown could not be injuncted and no declarations could be made in an interlocutory application.

There was also the preliminary point that Spicer Gibraltar could only obtain originating relief by originating process and then only against Gibraltar residents, namely, BCI and its office-holders appointed by this court. The English court in these circumstances is a foreign court and not amenable to the orders of this court.

Expanding on part of this, he explained that the plaintiffs' litigation in England is led by the Crown and it has begun there. Usually, if the Crown's co-plaintiffs are injuncted the Crown will voluntarily act as if it

were also injuncted but it will probably not do so this time because the plaintiffs were entitled to choose the forum and after anxious thought had selected England.

They had taken into account the fact that BCI and Spicer Gibraltar were "locals" and the serious allegations against these professional men were important to them, but in the end the plaintiffs relied on material which showed that the two Spicers communicated and took part in the reverse take-over. The orders of this court and the Court of Appeal for Gibraltar, with the reasons for them, would be taken into account.

The other plaintiffs would approve of the Crown's determination to proceed against Mr. Hooper and Mr. Morris in England with these arguable claims.

They all submitted, however, that Spicer Gibraltar would fail with its anti-suit injunction because it was exceptional to grant such relief and it had the uphill task of persuading this court that it is the natural forum for their action and in choosing England for it they are acting oppressively, vexatiously and necessarily unjustly. It would be unfortunate if there were two similar actions proceeding at the same time and in different jurisdictions.

Mr. Hooper and Mr. Morris should have gone straight to the English court and applied for the leave to serve out to be set aside, and it was only if that failed that they and Spicer Gibraltar could come to this court for this anti-suit injunction.

Spicer Gibraltar's counsel replied that all this exemplified the heavy-handed oppressive approach of the plaintiffs to this litigation, and their application for costs exacerbated it. The Crown was a plaintiff in the Gibraltar action only as the assignee of the investors' rights. Mr. Harper and Mr. Morris had their complaints against the Crown and so they could not leave the Crown out when applying for this relief though they recognized they could not obtain it. The Crown's claim that it led the litigation in England against them was a matter for this Court to ponder upon when it came to consider the application to exercise its jurisdiction and control BCI's liquidators and receivers, for it went to show that they had not properly considered their duty in the matter. The Crown was not only hiding behind its privilege but instead of observing a standstill while Spicer Gibraltar's application was being considered, it had altered the background to it by applying successfully to the English court for leave to serve out.

Mr. Hooper denies there is any or sufficient evidence to support the charge that he was a constructive trustee of the investors' funds. He had no power over them or authority to sign for any account. He never participated in any BCI transaction for the investors or otherwise. He was a stranger to all the entities in BCG and only visited its premises twice. He was, as he admits, BCI's auditor for a while and was interested in the offshore funds which were to be transferred to it here on some unfixed date after September 30th, 1986.

He never saw the JFH circular for the take-over and did not know and had no cause to suspect the reverse take-over of JFH was a fraud on the part of Mr. Clowes. It was subject to the London Stock Exchange's criteria and well-known English accountants were employed in it, so he presumed all would be properly done.

He did not overstate the income of BCI when he audited them at £3,011 by way of interest. It came from the directors' report which stated that BCI's activities had been confined to preparatory work for acquiring a portfolio of clients' funds for management, including the setting-up of offices and the engagement and training of staff, culminating in the official launch of BCI on September 18th, 1986. Offshore income was not received by BCI and it would be the concern of those who audited the other entities in BCG.

When he audited BCI's accounts he was satisfied that it owed nothing to investors because it received nothing from any of them. He knew nothing of the accounts of the other bodies in BCG so he had no information or indication that their income was overstated. When he certified BCI's accounts of February 27th, 1987 he could not conclude reasonably that investors' funds were being misapplied.

This memorandum of September 29th, 1986 set out questions he expected would be answered when records elsewhere were examined. It was just the groundwork for an audit and it did not set out provisional or final conclusions. Thus, when the records in Geneva showed that only £5m. had been invested out of £33m. received from clients, he did not state that the rest had been misappropriated. Geneva received the funds, subtracted its expenses and paid the balance into bank accounts in England under the control of Mr. Clowes. Geneva did not manage their investment.

The Geneva office dealt with the clients' files and monthly statements of their accounts. He saw their print-outs, which simply indicated the movements of the funds, but not their investment which he thought was being done in England. Mr. Pilkington of Spicer UK would deal with those records.

When he met Mr. Posey, the man from Geneva, in London on August 27th, 1986, he was not told that the funds were not being put to the purchase of gilts but deposited with institutions until they were. Whereas Mr. Hooper has never seen an account of what Mr. Posey said at that meeting, he has his own notes of it. Mr. Posey marketed the offshore funds at that time and he never suggested or hinted that they were being misused. He knew Mr. Hooper was to audit BCI, so he wanted to know if he would be looking into the position of the offshore funds going to BCI and he was relieved when Mr. Hooper assured him he would be. Mr. Posey knew that at that time the BCG arrangement for their management did not provide for an independent person to check them. The notes of their meeting record Mr. Posey's suggestions for Mr. Hooper's independent review of them.

The fact that the review of the computer controls in Geneva, which he commissioned from Gibraltar, indicated they could not be relied on for audit verification purposes did not lead Mr. Hooper to conclude a mammoth fraud was in train. BCG employed so few staff in Geneva that he expected the very result that the review of their controls yielded. Geneva was one administrative centre for BCG's operations and Mr. Hooper had not been introduced to the others and that was one reason for going to Poynton.

Mr. Hooper checked with banks mentioned in BCI board resolutions and confirmed from them that no clients' funds had been put in any BCI account with them. He knew that up to September 30th, 1986, they continued to be paid into other BCG companies' accounts. BCI's directors, Mr. Clowes and Mr. Perez, assured him that this was so.

Turning to the plaintiffs' allegations that Spicer Gibraltar and Spicer UK had access to Spicer Gibraltar's work and Spicer UK took an interest in Spicer Gibraltar bank audits, Mr. Hooper stressed that the members of each formation were professionals and did not pass over their clients' confidences. Spicer UK referred BCI to Spicer Gibraltar and gave it some background about BCG but Mr. Pilkington did not relay the conversations he had with Mr. Clowes or Mr. Tree or any information which he discovered in his work for BCGM or Partners S.A. It was wrong for the plaintiffs to suggest that Mr. Hooper knew all that Spicer UK knew.

Touche Ross confirmed that BCI was acquired by JFH as a small company with a flurry of pre-launch activity but without clients' funds up to September 30th, 1986. Mr. Hooper and Mr. Pilkington spoke of BCI's affairs and the offshore funds while Mr. Hooper was concerned with them but this concern faded when Mr. Pilkington told him they would not be transferred to BCI.

Spicer Gibraltar did not work on the accounts of Partners S.A., BCGM, BCG, the inshore or offshore funds. The JFH take-over merely changed the date of the audit by Spicer Gibraltar from June 30th to September 30th, 1986. Mr. Hooper cannot repeat often enough that Spicer Gibraltar did not know of the JFH take-over at either date and that the planned review of the offshore funds was to make sure that those that were to be transferred to BCI were in proper order before they were received by it, which they never were.

Mr. Hooper tackled the complaint by the plaintiff that he failed to check post-balance sheet events in this way. The statutory requirements to do so emerged in s.13 of the Companies Act 1981 and today are to be found in s.235(3), Schedule 4, para. 12 and Schedule 7, para. 1 of the Companies Act 1985. Here in Gibraltar there is no such requirement in any local legislation and Spicer Gibraltar's retainer was to audit BCI's accounts according to the Companies Ordinance.

Nevertheless, Mr. Hooper is confident that Spicer Gibraltar complied with the standard set out in s.235(3) of the Companies Act. He adds that

on September 30th, 1986 BCI was a dormant company, so there were no events after he had prepared the balance sheet which could have led him to amend any figures in it. The directors' report formed part of his audit and in it some activity was mentioned which did not necessitate any adjustment to BCI's accounts.

Anyway, Mr. Hooper submits, a review of post-balance-sheet events should consist of an examination of the client's management accounts, a consideration of its minutes and a discussion with its board of directors. He has exhibited a letter from BCI's directors dated February 24th, 1987 signed by Mr. Perez, but not Mr. Clowes, which reflects the fact that post-balance sheet events were covered by them.

He denies all knowledge of the intermingling of clients' funds in an account opened by BC S.A. (Geneva) or BC S.A. (Liberia). They were not audited by him.

Spicer Gibraltar has professional indemnity insurance for £500,000 and a further amount which under the policy cannot be disclosed. The first £500,000 is the subject of a default by underwriters up to 6.3% and the balance is unplaced as to 6.7%, and the subject of a default in respect of a further 12.3%.

Much was made of the following facts. Spicer Gibraltar audited BCI, a Gibraltar company. Spicer UK audited BCGM, a UK company. Two different jurisdictions. BCI had no funds to manage when Spicer Gibraltar did the audit. The offshore funds were not sent here and soon became of no interest to Spicer Gibraltar. The defaults in the audit (if any) of each firm of accountants do not constitute defaults by the other in a separate audit. The joinder of BCGM's and BCI's claims against the firm that did not audit their separate accounts is prejudicial to both companies.

Moreover, the defendants assert, when the duty of care owed by the two Spicers in their audits and reports are studied, the cross-claims by BCI and BCGM are unarguable. The directors will not succeed. Any allegation of collaboration between Spicer Gibraltar and Spicer UK in their audits and reports will not help the plaintiffs.

There is also, Mr. Triay emphasized, a matter of great public importance here: Gibraltar is a financial centre and its court must adjudicate on disputes between Gibraltar companies, receivers and auditors all subject to its jurisdiction. Add to that the factor of the public interest in the outcome and even the convenience of BCGM in suing Spicer Gibraltar in England will be overcome.

The receiver should not be allowed to sue in such matters outside Gibraltar and professionals resident here under Gibraltar law have every right to be heard in their defence under local law and not in foreign courts, especially if their contracts were made here subject to Gibraltar law. The evidence for and against them is here.

The plaintiffs' service on Mr. Morris in England was of no weight, in the defendant's submission, because he was not the partner actively

involved in the BCI work. Mr. Morris just happens to be living in England now. Spicer UK has been served there, it is true, but it is not a party to the action in Gibraltar. BCI and BCGM should sue their auditors separately in Gibraltar and England respectively because it is not necessary to do so together in the same jurisdiction. Order 11, r.1(1)(*c*)'s provisions are incorrectly invoked here.

So are those of O.11, r.1(1)(*f*), because the alleged tort, namely, the failure to audit the clients' funds, is something that should have been done in Gibraltar. Spicer Gibraltar audited BCI's accounts here, issued its auditors' report here, but did not audit the clients' portfolios here. Did Spicer Gibraltar knowingly assist in the fraud? If it did, it was in Gibraltar that such assistance was given.

Mr. Triay conceded that Spicer Gibraltar's appearance *gratis* did not compel the plaintiff to serve a statement of claim within 14 days under O.18, r.1. The right for a defendant to acknowledge service of a writ that has not been served is, however, conferred by O.12. He prayed in aid the provisions of O.2, r.1 to save any procedural irregularity and submitted that as the parties were before the court and no prejudice would be suffered by the plaintiffs, the court should consider the matters before the court.

He was at pains to persuade the court to apply the principles as to *forum conveniens* set out in *Spiliada Maritime Corp.* v. *Cansulex Ltd., The Spiliada* (16) and to this end he underlined the fact that BCI was a Gibraltar company being wound up by this court in Gibraltar and so was subject to this court's supervision and directions under s.178(5) of the Companies Ordinance. Mr. Hamilton and Mr. Jordan were appointed by this court as receivers of its Gibraltar assets and their status in England was dependent on this connection.

The English court will not recognize the title of a foreign receiver to assets in the United Kingdom if it is not satisfied they have a proper connection with the foreign jurisdiction and the assets of Spicer Gibraltar. Consequently, Mr. Triay argued, the proper forum for the trial of issues relating to BCI, its assets and its receivers is Gibraltar.

It is time to turn to the law on all this. According to r.8 of Gibraltar's Supreme Court Rules, the English Rules of the Supreme Court apply to original civil litigation in Gibraltar "where no other provision is made by these rules or by any Ordinance, rule or regulation in force in Gibraltar." English practice and procedure has to be followed save for one matter of time which is immaterial in this case: see r.9.

A defendant cannot oblige a plaintiff to serve a writ or statement of claim on him by entering appearance *gratis*, since a change in the wording of the relevant rules of court (O.10, r.1(5)). Acknowledgement of service was substituted for entry of appearance and a writ is not deemed as duly served if the contrary is shown. The decision of Brandon, J. in *The Gniezno* (7) no longer applies: see *Abu Dhabi Helicopters Ltd.* v. *International Aeradio PLC* (1) and *Towers* v. *Morley* (17).

Withdrawal of an acknowledgement of service in the action may be made *ex parte* on production of the consent of the plaintiff or his solicitor or with leave if the consent is withheld, and that leave may be given if the entry of appearance was made by mistake or without authority: see *Somportex Ltd.* v. *Philadelphia Chewing Gum Corp.* (15) ([1968] 3 All E.R. at 28 and 31). Under the Rules of the Supreme Court, O.2, r.1, however, a failure to comply with the requirements of the rules in any respect is to be treated as an irregularity and not a nullity.

A defendant may apply for an interlocutory injunction after he has given proper notice of acknowledgement of service: see *Sargant* v. *Read* (13) and *Golden Ocean Assur. Ltd.* v. *Martin, The Golden Mariner* (8) ([1990] 2 Lloyd's Rep. at 223).

The position of HM Treasury and the Treasury Solicitor in the English action is governed by s.21 of the Crown Proceedings Act 1947, and in the Gibraltar action by s.14 of the Crown Proceedings Ordinance, which is in the same terms, including that the court shall not grant an injunction against it in any proceedings but may instead make an order declaratory of the rights of the parties, and the same goes for an officer of the Crown. A declaration may not be made in an interlocutory application against the Crown or its officers: see *Underhill* v. *Ministry of Food* (18).

The Privy Council in *Société Nationale Indus. Aérospatiale* v. *Lee Kui Jak* (14), in an appeal from the Court of Appeal of Brunei Darussalam, held that in considering whether an injunction should be granted to restrain a plaintiff starting or continuing an action in another jurisdiction, the court did not apply the same principles when granting a stay on the grounds of *forum non conveniens*.

In England, the order is not directed to the foreign court but works *in personam* against the persons subject to the jurisdiction of that court. Such an order will be granted only if the continuance of the proceedings appears to be "vexatious or oppressive": see *Société Nationale Indus. Aérospatiale* v. *Lee Kui Jak.*

"Vexatious or oppressive" has been given a restrictive interpretation. It is more than "vexatious and oppressive" in the sense that the action may be summarily struck out under the rules of court because that is left to the court before which the proceedings are pending. There must be a good reason why the Gibraltar court should make the decision, *e.g.* the creditors set out to evade the Gibraltar jurisdiction in bankruptcy and the policy of rateable division among creditors, by trying to grab foreign assets for themselves only, or attempts to relitigate abroad issues that the Gibraltar court has decided. The circumstances in which the anti-suit injunction should be granted cannot be categorized. The test is whether the Gibraltar court is satisfied that the foreign proceedings are vexatious and oppressive in a sense which is likely to result in injustice unless the court grants the injunction rather than leaving the matter to the foreign court: see *Société Nationale Indus. Aérospatiale* v. *Lee Kui Jak* (14)

([1987] A.C. at 849, *per* Goff, L.J.); *Bank of Tokyo Ltd.* v. *Karoon* (4); and *Laker Airways Ltd.* v. *Sabena Belgian World Airlines* (9).

Liability for economic loss as a result of negligent misstatement is confined to cases where the statement or advice has been given to someone whom the giver of the statement or advice knew would rely on it. Thus for the audit and report required within the terms of ss. 236 and 237 of the Companies Act 1985, for public companies the auditor's duty of care was only to the shareholders so that they might exercise their class rights in general meetings. The auditor has no duty to provide information to assist shareholders or others as to investment in the company in future even if he knows the company's affairs make it ripe for an attempted take-over: see *Caparo Indus. PLC* v. *Dickman* (5).

A duty of care can be owed, however, to the possible acquirer of a company in a take-over bid by the company's auditors and bankers even though they acted for the company which was fighting off the attempt to acquire it: see *Morgan Crucible Co. PLC* v. *Hill Samuel & Co. Ltd.* (10) ([1991] Ch. at 319–321). See also *Punjab National Bank* v. *de Boinville* (12) for the duty of care owed by an insurance broker to a third party bank which the insurer knew was considering taking an assignment of an insurance policy the broker was negotiating for his client.

A servant or agent of a contracting party owes a duty of care to the other party to the contract should he take part in performing his principal's obligations under the contract: see *General Acc. Fire & Life Assur. Corp. Ltd.* v. *Tanter, The Zephyr* (6). And if two people take part in any action aimed at a common end and one of them, in furtherance of that, commits a tort, then both are liable as joint tortfeasors.

So far as the law relating to constructive trusts is concerned, the relevant principles are that it must be shown that the auditor was dishonest because he suspected something wrong was going or and turned a blind eye to it: see *Agip (Africa) Ltd.* v. *Jackson* (2).

Standing back from the evidence, the law and the submissions on both sides, I find that Spicer Gibraltar's application was premature at the outset of the hearing. The parties have all been before the court and had their day in it so I will press on to deal with the other issues.

No restraint or declaratory orders may be made against HM Treasury or the Treasury Solicitor. Mrs. Murray, the seventh plaintiff, is not amenable to such orders because she is not within this jurisdiction.

The proceedings in England may in the end exonerate Spicer Gibraltar and Mr. Hooper but at this point I do not consider them so utterly absurd that they cannot possibly succeed and nor do I think they are brought by the plaintiffs there for some fanciful advantage: see Jessel, M.R. in *Peruvian Guano Co.* v. *Bockwoldt* (11) (23 Ch. D. at 230).

Mr. Hamilton and Mr. Jordan were given leave by this court on December 12th, 1988 to issue such proceedings in any jurisdiction they thought fit. They have, with the other plaintiffs, chosen England and for

their purpose the law relating to the issues between the parties is the same as it is in Gibraltar. It is true that they were appointed by this court, BCI is a Gibraltar company in liquidation under the supervision of this court and both Spicer Gibraltar and Mr. Hooper have their businesses here.

Nevertheless, the other factors in the scales include these: The plaintiffs have been granted leave to issue and serve out their writ on Spicer Gibraltar. The allegations against it are bound up with those against Spicer UK and overlap with proceedings which BCI will launch soon in England against other professionals. The proceedings in England will clearly be inconvenient and more expensive for Spicer Gibraltar but the plaintiffs will be deprived of the advantage of suing both Spicers together if they are made to sue Spicer Gibraltar alone here, so it would be unjust to deprive them of it.

The claims against the Spicer firms as framed are very closely interconnected and should not, in my view, be tried separately in two different jurisdictions. On the contrary, since they arose out of the same events they should be heard in one forum, and then Spicer Gibraltar's liability (if any) in relation to the plaintiffs' claims can be assessed.

In conclusion, I do not accept that Gibraltar is the proper and convenient forum for the action. At the moment, the plaintiffs do not intend to proceed with their action in Gibraltar so there will not be a multiplicity of proceedings. Nor do Spicer Gibraltar's pleas for relief under s.178(5) of the Companies Ordinance against BCI or its officers appointed by this court move me to accede to them. Spicer Gibraltar, in my view, has failed to prove that the pursuit of proceedings outside Gibraltar is vexatious or oppressive and will result in an injustice to it. Accordingly, its application must be and is dismissed. Costs are to be paid by the first defendant.

Leave is granted, if necessary, to appeal and there is liberty to each party to apply.

Application dismissed.
