HYDRO ALUMINIUM A.S. v EURO-CONTINENTAL ENTERPRISES LIMITED and FOUR OTHERS

SUPREME COURT (Kneller, C.J.): June 30th, 1993

Contract—misrepresentation—fraudulent misrepresentation—positive statement of fact without qualification, silence on important matter, or failure to correct wrong impression before acted upon

Civil Procedure—service of process—service out of jurisdiction—tort—for purposes of Rules of Supreme Court, O.11, r.1(1)(f), may rely on series of events to show negligent misrepresentation, provided cause of action arose substantially in Gibraltar

Civil Procedure—service of process—service out of jurisdiction—applicant to show good arguable case on merits (not high chance of success), strong probability that claim satisfies Rules of Supreme Court, O.11, r.1(1), and Gibraltar most suitable forum

Civil Procedure—service of process—service out of jurisdiction—action properly brought against defendant duly served in Gibraltar unless bound to fail on merits—bona fides insufficient, since test objective—no service out if action commenced purely in order to obtain leave

The plaintiff applied for leave to serve the first three defendants out of the jurisdiction.

A Norwegian aluminium company, H Co., entered a number of contracts with the first defendant, E Co., a Liberian-registered financial and economic consultancy operating from Guernsey and Switzerland and trading in metals on behalf of clients. E Co. defaulted on some of its contracts. It disputed the accuracy of H Co.'s records and suggested a meeting with E Co.'s accountants.

E Co. had run into financial difficulties. A Swiss court made an order freezing its assets at the request of a supplier. The shareholders allegedly resolved to dissolve the company the same day. Unaware of this, H Co.

was informed that E Co. was moving its offices to Gibraltar. Meetings took place at the Gibraltar office of a Guernsey company providing administration services to E Co., which itself never registered or traded here. H Co. was assured that notwithstanding a temporary attachment of E Co.'s assets, all its liabilities and future commitments would be met. It alleged that these meetings were attended by the third and fifth defendants (directors of E Co. and also, respectively, a trader and a partner in the Guernsey company), and the fourth defendant, an employee of the Guernsey company. Within weeks, E Co. went into receivership.

The plaintiff, as assignee of H Co., commenced proceedings in Switzerland to recover, *inter alia*, sums due under contracts with E Co., interest thereon, and substantial consequential losses resulting from E Co.'s failure to honour the contracts. The plaintiff also commenced the present proceedings alleging fraudulent or negligent misrepresentation by the second to fifth defendants in respect of their failure to alert H Co. to E Co.'s insolvency at the meeting thus denying it the opportunity to mitigate its loss. The fourth and fifth defendants were served within Gibraltar and acknowledged service.

The plaintiff applied for leave to serve the other defendants outside the jurisdiction under O.11, r.1(1) of the Rules of the Supreme Court. It submitted that (a) even though the court had no jurisdiction to hear the contractual claims against E Co., for the purposes of r.1(1)(*f*), the meetings in Gibraltar gave rise to claims in tort against the others, for which no other jurisdiction was the *forum conveniens*; (b) the fourth and fifth defendants were persons duly served within the jurisdiction and the others were necessary and proper parties to the action; (c) neither Switzerland, Guernsey nor England were appropriate *fori* for the trial of claims against the fourth and fifth defendants; and (d) Gibraltar had the juridical advantages of a longer limitation period for tort actions than in Switzerland, and since most of the documents were in English, so too should be the proceedings.

The fourth and fifth defendants applied for a stay of the proceedings. They submitted that (a) they had committed no tortious act in Gibraltar, since (i) although they had known that E Co.'s bank account in Switzerland had been frozen, they were not metals traders and knew nothing of the company's trading and financial position, and (ii) they had not represented to H Co. that E Co. was moving to Gibraltar or that its contracts would be honoured, and had attended meetings only as witnesses; and (b) if the plaintiff wished to sue them, it should proceed in Switzerland, where E Co.'s business was carried out and where proceedings against it been commenced, or in Guernsey, where their office and records were located, or London, where they and their solicitors resided.

Held, granting leave to serve the first three defendants out of the jurisdiction:

(1) On the evidence, there were issues of fact and of law between the plaintiff and all five defendants which should be investigated. To prove

fraudulent misrepresentation in the circumstances pleaded, the plaintiff would have to show that the relevant defendants made an absolute statement of fact, unaccompanied by material qualification, or that they failed to state matters of such importance that their absence could be inferred from silence. They would also be liable if they failed to correct a wrong impression (which may have been true when given) before it was acted upon. In the alternative, if the plaintiff proved that statements of fact had been made negligently, it could rely on a series of events constituting negligence, provided that in substance the cause of action arose in Gibraltar. The defendants, if company directors, had a duty not to exploit the company to the detriment of its creditors (page 88, lines 6–26; page 88, line 40 – page 89, line 3; page 90, lines 33–35).

(2) Leave would be granted under O.11, r.1(1), since the plaintiff had shown a good arguable case on the merits of its claims. It was not required to show a strong probability of success. The plaintiff had also shown a strong probability that the claims fell within one or more of the sub-paragraphs of r.1(1). Since the action against the defendants served within the jurisdiction was not bound to fail it was properly brought for the purposes of r.1(1)(*c*) and the first three defendants were necessary and proper parties to it. Since the criterion was objective, *bona fides* alone was insufficient, although an action could be properly brought notwithstanding that a defendant here could not satisfy judgment against it. Leave would not have been granted if the present application was the main reason for commencing proceedings against the fourth and fifth defendants here. The plaintiff's claims against those defendants would not be struck out (page 89, line 17 – page 90, line 6; page 90, line 35 – page 91, line 8).

(3) The application for a stay of the Gibraltar proceedings was dismissed. The court was satisfied that it was the most suitable forum. Since the plaintiff had the right to bring proceedings here, the court would stay them on the grounds of *forum non conveniens* only if the defendants could show that some other forum having competent jurisdiction was appropriate. The defendants had not discharged this burden of proof. The domicile or place of residence of the parties and the place of incident were not always decisive. Guernsey had no factor in its favour; the plaintiff had no connection with Switzerland, no tortious act had occurred there and it was unclear whether the Swiss court would accept jurisdiction; and other than the existence of the over-burdened Companies Court in London, no factor recommended England. If an alternative forum had existed, the onus would have rested with the plaintiff to show that justice required that the trial should nevertheless take place in Gibraltar due to special circumstances. In view of the above, this was unnecessary (page 90, lines 7–32; page 91, lines 9–30).

Cases cited:

(1) *Aldington Shipping Ltd.* v. *Bradstock Shipping Corp., The Waylink & The Brady Maria*, [1988] 1 Lloyd's Rep. 475; *sub nom. Bradstock*

Shipping Corp. v. *Aldington Shipping Ltd.*, [1988] LRC (Comm) 99.
(2) *Briess* v. *Woolley*, [1954] A.C. 333; [1954] 1 All E.R. 909.
(3) *City Equitable Fire Ins. Co. Ltd*., *In re*, [1925] Ch. 407; (1924), 94 L.J. Ch. 445.
(4) *Dialdas* v. *Fidelity Bank*, C.A., May 26th, 1987, Civ. App. No. 16 of 1986, unreported.
(5) *Distillers Co. (Biochemicals) Ltd.* v. *Thompson*, [1971] A.C. 458; [1971] 1 All E.R. 694.
(6) *The Hagen*, [1908] P. 189; (1908), 77 L.J.P. 124.
(7) *Hutton (E.F.) & Co. (London) Ltd.* v. *Mofarrij*, [1989] 1 W.L.R. 488; [1989] 2 All E.R. 633.
(8) *Multinational Gas & Petrochemical Co.* v. *Multinational Gas & Petrochemical Servs. Ltd.*, [1983] Ch. 258; [1983] 2 All E.R. 563.
(9) *Overseas Union Ins. Ltd.* v. *Incorporated Gen. Ins. Ltd.*, [1992] 1 Lloyd's Rep. 439; [1991] T.L.R. 570.
(10) *Sharples* v. *Eason & Son*, [1911] 2 I.R. 436; (1911), 45 I.L.T 204.
(11) *Spiliada Maritime Corp.* v. *Cansulex Ltd., The Spiliada*, [1987] A.C. 460; [1986] 3 All E.R. 843.
(12) *Tyne Improvement Commrs.* v. *Armement Anversois S.A., The Brabo*, [1949] A.C. 326; [1949] 1 All E.R. 294.
(13) *Vitkovice Horni A Hutni Tezirstvo* v. *Korner*, [1951] A.C. 869; [1951] 2 All E.R. 334.
(14) *Winkworth* v. *Edward Baron Dev. Co. Ltd.*, [1986] 1 W.L.R. 1512; [1987] 1 All E.R. 114.
(15) *Witted* v. *Galbraith*, [1893] 1 Q.B. 577; (1893), 62 L.J.Q.B. 248; *sub nom. Witted* v. *Pembroke, Galbraith & Co.*, 68 L.T. 421.

Legislation construed:
Rules of the Supreme Court, O.11, r.1(1)(*a*): The relevant terms of this sub-paragraph are set out at page 89, lines 5–6.
r.1(1)(*c*): The relevant terms of this sub-paragraph are set out at page 89, lines 8–10.
(*f*): The relevant terms of this sub-paragraph are set out at page 89, lines 12–13.
r.4(2): The relevant terms of this paragraph are set out at page 89, lines 14–16.

D.J.V. Dumas for the plaintiff;
A.A. Vasquez for the fourth and fifth defendants.

KNELLER, C.J.: Hydro Aluminium A.S. ("H.A") issued a writ from the registry of this court against Euro-Continental Enterprises Ltd. ("Euro-Continental") of Monrovia, Liberia; Brightsea Developments S.A. ("Brightsea") of Panama; Mr. Rainer Glaser of Worms, West Germany; Mr. Andrew Tucker of Witham's Road, Gibraltar; and Mr. Roydon Tucker of Corral Road, Gibraltar.

H.A.'s claim against Euro-Continental is for payment due under various contracts, damages for breach of contract, and a declaration and damages for breach of trust. Its claim against all the defendants including Euro-Continental is for damages for fraudulent and/or negligent misrepresentation.

The Tuckers were served here in Gibraltar and they filed their acknowledgements of service. H.A. issued a summons for leave to serve a writ on Euro-Continental, Brightsea and Mr. Glaser. The Tuckers issued a summons for H.A.'s action in Gibraltar to be stayed because, they submit, Gibraltar is not the *forum conveniens*.

H.A. is part of a group of which Norsk Hydro A.S. ("Norsk Hydro") is the parent company and, besides being a holding company, it is an industrial conglomerate involved in the fertilizer, oil, gas, hydro-electric power, petrochemicals, pharmaceuticals, aluminium and magnesium businesses. H.A. is the main subsidiary in Norsk Hydro's aluminium and magnesium businesses.

The next part of the background to the summonses is hard going. Norsk Hydro, the parent company, merged its aluminium assets with those of another Norwegian company, Ardal og Sunndal Werk ("Ardal"), receiving in return 70% of the enlarged issued share capital of Ardal, while the remaining 30% was owned by the Norwegian government. The name of the companies that were merged became H.A. and in 1989 Norsk Hydro acquired the balance of H.A.'s shares from the Norwegian government.

Norsk Hydro had a Swiss trading subsidiary called Norsk Hydro Trading S.A. ("Norsk Hydro Trading") with aluminium assets and it was incorporated in the autumn of 1985, but Norsk Hydro Trading had its name changed to Hydro Trading S.A. ("Hydro") in October 1986 shortly after the merger, and Hydro's shares are now held by H.A.

Hydro suffered substantial trading losses in the second and third quarters of 1988 so it was decided that nearly all its assets would be transferred to H.A., and Hydro would be put into liquidation in Switzerland. Hydro and H.A. signed an agreement on March 15th, 1989 effecting the transfer which was to take effect from April 1st, 1989. The agreement reveals that H.A. acquired from Hydro not only its trading business but also Hydro's claims against, among others, Euro-Continental, arising out of its trading with Euro-Continental, all of which explains why H.A. and not Hydro is the plaintiff.

Euro-Continental also began life with a different name. It was called Globe Trust Corporation and was incorporated in Liberia on December 15th, 1980, changing its name to Euro-Continental on August 26th, 1981. Its principal objects were to carry on business as financial and economic consultants, advisers and investment counsellors for individuals, trusts, pension funds, clubs, charities, associations, societies and other bodies.

It was authorized to issue 500 bearer shares and Mr. Goweh and Mr.

Tugbe took up one share each and became its two directors. The civil war in Liberia shattered its judicial system, so H.A. has been unable to find out much more about Euro-Continental. The available records do not reveal the identity of its other shareholders or what its financial position was before February 29th, 1988.

H.A.'s claims in the writ are based on Hydro's business dealings with Euro-Continental in late 1987 and early 1988, so I turn to those.

Before the autumn of 1985 Norsk Hydro conducted its metal trading through its own department in Oslo on the London Metal Exchange. Norsk Hydro opened offices in Lausanne and transferred its trading functions from Oslo to Lausanne.

Mr. Glaser, among other things, is a pundit among metal traders. He and some of the staff of Acli Metals (London) Ltd. ("Acli") were said to have defrauded Mr. Glaser's employer, Metall Rohstoff A.G. ("Metall Rohstoff"), of millions of pounds in complex schemes based on aluminium futures transactions. Metall Rohstoff were awarded over £50m. damages and interest against Acli in an action in the Commercial Court in London.

There is an annual London Metal Exchange dinner in London and at the 1985 one, Mr. Tolfsby, one of Norsk Hydro Trading's two representatives, met Mr. Glaser, with whom he had done business before. Mr. Glaser introduced Mr. Roydon Tucker as one of his business associates, adding that Mr. Tucker's businesses were based in the Channel Island of Guernsey. He went on to say that Mr. Tucker represented potential investors and others interested in the aluminium business. Mr. Tolfsby and Mr. Glaser discussed the possibility of doing some metal trading business and Mr. Glaser handed over a Euro-Continental card, describing himself as a director of it. Mr. Glaser also handed over a CMM—Consolidated Metalle & Mineralen A.G.—card. He declared that CMM was a small Swiss operation that acted as an agent for parties interested in metal trading. Mr. Tolfsby gained the impression that Mr. Roydon Tucker was not directly involved in Euro-Continental but was in some way connected with it and exercised significant influence over its affairs. Nothing came of that meeting.

Later in 1989 Mr. Glaser, Mr. Roydon Tucker and Mr. Odd Neilsen approached Mr. Odegard of Ardal in Oslo about Euro-Continental doing business with it. Euro-Continental was said to act as agent or consultant to clients who did not have the staff capable of doing metals trading. Its clients were known to Ardal. Mr. Glaser and Mr. Roydon Tucker flourished Euro-Continental cards which showed they were directors but Mr. Odegard knew all about Metall Rohstoff and the Acli case so he did not take up Mr. Glaser's offer.

Norsk Hydro Trading and Euro-Continental entered into a small number of business deals in mid-October 1986. Mr. Tolfsby effected them with Mr. Glaser and persuaded Norsk Hydro Trading to employ an

additional aluminium trader called Mr. Liam Keane who had done business with Mr. Glaser, so he became responsible for Norsk Hydro Trading and, after early March 1987, Hydro's business with Mr. Glaser and Euro-Continental, because Mr. Tolfsby concentrated on Hydro's business with Eastern Europe. Hydro's commercial relationship with Euro-Continental ended in May 1988.

H.A. claims that Mr. Glaser knew what Euro-Continental's commitments to Hydro were because he knew all about the transactions it entered into with Hydro, as can be seen from the correspondence and trading he did on behalf of Euro-Continental with Hydro.

Telexes are significant clues in H.A.'s application to this court for leave to serve the writ out of the jurisdiction. The telexes that came from or went to Euro-Continental have, at the outset of Hydro's dealings with Euro-Continental, a number in Guernsey (4191500 IMPROD G) or a number in Switzerland (865497 ALLI CH). Later on, Mr. Glaser's telexes were headed "FM Euro-Continental Enterprises Ltd., Zug" and were sent from CMM's, Zug (Switzerland) telex number (868401 CMM CH), or the one in Switzerland (865497 ALLI CH).

Mr. Roydon Tucker sent one telex headed Euro-Continental International Inc. and another one headed Euro-Continental from the same Guernsey telex number during the relevant period.

Mr. Andrew Tucker is the son of Mr. Roydon Tucker and he worked in March, April, May and December 1987 at CMM's offices in Zug, where Mr. Glaser also worked and H.A. asserts that Mr. Andrew Tucker knew all about Euro-Continental's "accounting position." His telexes bear the name Euro-Continental and CMM's number. Telexes for him from Hydro went to the usual Swiss number (865497 ALLI CH). Mr. Andrew Tucker moved to Gibraltar at some point but, according to H.A., remained in close touch with Mr. Glaser and the businesses.

Hydro received a letter signed for and on behalf of Euro-Continental by Mr. Glaser in Gibraltar on March 14th, 1988, stating that it had moved its offices and administration to Gibraltar on January 1st, 1988 and all its "activities" would be handled from Suite 204, Neptune House, Marina Bay, Gibraltar. The letter also gave Euro-Continental's Gibraltar telephone and fax numbers, together with its Guernsey address featured on Mr. Glaser's business card and its Guernsey telex number.

Hydro's claims against Euro-Continental are manifold. There are three for liquidated amounts due and payable to it on the dates of the invoices set out in the writ. The sums are net figures payable to Hydro after calculating the sums payable to each party on the maturity (prompt) date of a pair of contracts entered into with Euro-Continental for the purchase and sale of aluminium. Euro-Continental has never denied its liability to pay Hydro those sums but has never paid them.

Hydro paid the German V.A.T. authorities all the V.A.T. charged to Euro-Continental and now H.A. claims that Euro-Continental should

reimburse H.A., but Euro-Continental has not done so because it argues that Hydro was not registered for V.A.T. in Germany. The correspondence on this came mostly from Mr. Glaser on behalf of Euro-Continental and was copied or directly addressed to the Tuckers. Hydro sent a telex to Mr. Glaser in Zug on March 22nd, 1988 and a copy of it by fax to Mr. Andrew Tucker in Gibraltar, asking for an immediate reply. The German authorities have confirmed that Hydro was obliged to charge V.A.T. in its invoices to Euro-Continental.

Euro-Continental has been overpaid some sums by Hydro and Euro-Continental has not disputed this but again has not repaid them to H.A. These were for delivery for what is called "physical metal" against a London Metal Exchange contract payment.

Hydro has been underpaid by Euro-Continental through the London Metal Exchange clearing system arising from the maturing of transactions between them. So far there has been no contest on the liability of Euro-Continental to pay them but it is the same old story: no payment of the amount due has been made.

Hydro suffered losses on May 17th, 19th and 25th, 1988 because of Euro-Continental's failure to honour its obligation to sell agreed amounts of aluminium on those contract maturity dates to Hydro. Euro-Continental denies none of that but fails to meet demands for payment of those losses.

Euro-Continental will not meet Hydro's demands for interest on late payment of amounts due on purchases of aluminium by Euro-Continental, although it is bound to do so according to well-established and accepted market practice.

H.A. alleges that Euro-Continental was credited by Hydro with a large sum of US dollars twice against one delivery under a mistake of fact. Thus H.A. maintains Euro-Continental holds the second payment on trust for it and Euro-Continental's refusal to repay it is a breach of that trust.

Those are, in my very simple terms, Hydro Trading's claims against Euro-Continental, acquired by H.A. and set out in its writ.

Now I turn to those against Euro-Continental, Brightsea, Mr. Glaser, Mr. Andrew Tucker and Mr. Roydon Tucker, which are for financial loss suffered by Hydro as a result of their misrepresentations in the three contracts of May 17th, 19th and 25th, 1988 to sell aluminium to Hydro and on which Euro-Continental defaulted.

Mr. Glaser is a director of Euro-Continental and, in a telex to Hydro's staff which was copied to Mr. Roydon Tucker, he claimed that the accounting position between Euro-Continental and Hydro was so confused that the management of each must meet or their business relationship would collapse. He blamed Hydro's administration department.

Mr. Glaser proposed "a summit meeting" between Hydro's management, Mr. Glaser and Mr. Roydon Tucker in the offices in Gibraltar in the

first fortnight of February 1988. Euro-Continental told Mr. Keane to postpone performance of many of the contracts between them to mid-February after the Gibraltar meeting. According to Mr. Glaser, the reasonable costs of all these were to be borne by Euro-Continental.

H.A. draws attention to the significance of Mr. Glaser's wish to bring Mr. Roydon Tucker to this important meeting and the latter's likely knowledge of the Euro-Continental financial affairs, together with the fact that its office in Gibraltar and not Guernsey or Switzerland was chosen for this important event.

Hydro made its stance clear in a telex of January 19th to Mr. Glaser. It would only agree to the meeting in early February and delay Euro-Continental's delivery obligations by "moving forward" the outstanding January contracts if Euro-Continental paid Hydro what it already owed on January 20th. Mr. Keane and Mr. Glaser then renegotiated three contracts by which Euro-Continental sold metal to Hydro.

A telex to Hydro in early February 1988 signed by Euro-Continental in Gibraltar had this postscript: "Please note Euro-Continental, Zug is not in existence. There is Euro-Continental, Guernsey; Euro-Continental, Gibraltar; and CMM-Consolidated Metals & Minerals A.G. in Zug."

A telex to Hydro from CMM's number in Zug, signed by Mr. Glaser and copied by Euro-Continental to Mr. Roydon Tucker, dealt with various issues in the dispute and suggested that both parties should check their positions in their relationship over the last six months and extend by one month their contracts that were maturing in the near future. Prices for aluminium increased during February to early June, so Hydro extended the open purchase contract by three months, to late May 1988.

Hydro suggested a meeting between its accountants and those of Euro-Continental in the last week of February at some place convenient to Euro-Continental.

On February 29th, 1988 the board of directors of Euro-Continental held a meeting at its Guernsey administrative office when Mr. Tucker was elected Chairman, Brightsea was made an additional director and President and Mr. Tucker resigned at the end of the meeting. Immediately after that the company's shareholders had a meeting and passed a resolution to dissolve Euro-Continental with effect from the date the Articles of Dissolution were filed with the Ministry of Foreign Affairs in Liberia. The resolution was signed by Mr. Tucker for and on behalf of the director and President of Euro-Continental and by Mr. Glaser as Secretary of Euro-Continental.

W. & O. Bergmann G.m.b.H. & Co. K.G. ("Bergmann") obtained an attachment order from the Zug court on February 29th, freezing Euro-Continental's accounts at the Swiss Bank Corporation with effect from March 2nd. The foundation of the attachment order was a claim for breach of contract by Euro-Continental in not paying for aluminium and not delivering it in August and October 1987.

H.A. maintains that Mr. Glaser, Mr. Roydon Tucker and Mr. Andrew Tucker knew all about this Bergmann attachment by March 2nd, but never told Hydro until March 23rd when Mr. Glaser announced it at a meeting with its representatives in Gibraltar.

Details in another application to attach Euro-Continental's branch accounts in Zug revealed that Euro-Continental was a subsidiary or associated company of Channel Trust Ltd. ("Channel Trust"), of which Mr. Roydon Tucker is a director. Channel Trust offices have the same address as Euro-Continental's administrative offices.

Throughout the last week in February and the first three weeks of March, the staff of Hydro tried again and again to find out why Euro-Continental's people said that Hydro's records were incorrect. Mr. Glaser and Mr. Andrew Tucker said it was a complex matter and work was being done on it and they would return to Hydro with an answer soon but, they explained, the physical move of much of Euro-Continental's business and administration to Gibraltar was disruptive and time-consuming.

On March 22nd, 1988 Mr. Hauge of Hydro contacted Mr. Roydon Tucker in Gibraltar by telephone, who told him that Mr. Glaser was now dealing with the Hydro and Euro-Continental problems and would be in the latter's offices on the following day. No mention was made of the Bergmann attachment order of March 2nd. Mr. Hauge, Mr. Davis and Miss Saxer of Hydro flew to Gibraltar the next day and reached Euro-Continental's offices at Neptune House at 8.30 a.m. Mr. Glaser and the two Mr. Tuckers were there. Mr. Glaser and Mr. Andrew Tucker took part in a series of meetings with the Hydro team on March 23rd and 24th.

It was only then that Mr. Glaser disclosed that Bergmann had attached Euro-Continental's Swiss bank accounts so Euro-Continental could not pay Hydro any money for some time because it would have to come to terms with its more pressing creditors or "go into Chapter 11," which sounded like some form of liquidation or receivership. Mr. Glaser stressed, however, that Euro-Continental had sufficient assets to cover all its liabilities and would meet all its future commitments as they fell due. He suggested transferring to Hydro some of Euro-Continental's purchase contracts which, on a rising market, would become increasingly more profitable. Euro-Continental owned some metal held to its order in warehouses which could be released to Hydro in part satisfaction of its obligations. No agreement was reached because Mr. Glaser tacked and said he had no authority to bind Euro-Continental. The next day, March 25th, Mr. Glaser and the Tuckers would not meet Mr. Hauge, who went back to Switzerland a worried man.

It seemed to Hydro's Mr. Davis and Mr. Hauge that Euro-Continental had only a temporary problem and needed time to deal with its cash-flow troubles. Mr. Glaser was applying for the Bergmann attachment order to be lifted and suing Bergmann. They waited for Euro-Continental's

proposals. There was a swirl of telephoning, telexing and faxing between lawyers for each of the parties.

Mr. Roydon Tucker, on behalf of Brightsea, executed Euro-Continental's Articles of Dissolution and filed them with the Ministry of Foreign Affairs in Liberia on April 27th. No more proposals came from Euro-Continental. A receiver was appointed over its assets in Liberia.

H.A. avers that Euro-Continental, acting through Brightsea, Mr. Glaser, the Tuckers and its lawyer, Mr. Banks, was fraudulent and/or negligent when it represented to Hydro during the meetings in Gibraltar that there was a prospect of Euro-Continental performing its obligations to Hydro, when it knew or ought to have known that (i) its shareholders had resolved on February 28th, 1988 to dissolve Euro-Continental, (ii) Bergmann and other creditors had very substantial unfulfilled claims against or contracts with Euro-Continental which it would never be able to meet, (iii) Bergmann's attachment made it impossible for Euro-Continental to perform its contracts, despite assurances to the contrary, (iv) Euro-Continental had insufficient purchase contracts with third parties which could be transferred to Hydro, (v) no steps had been taken to lift the Bergmann attachment and if they were they would fail, and (vi) in all, Euro-Continental was resoundingly insolvent by the end of March 1988.

The consequence was that Hydro continued to seek a commercial solution rather than bring its contracts with Euro-Continental to an end, demand payment for sums due and mitigate its losses.

H.A. declares it was fraudulent and/or negligent of Mr. Glaser to tell Hydro's officers at the Gibraltar meetings that there was any prospect of Euro-Continental performing any of its obligations to Hydro or that proposals to resolve the position would follow, the debt would be repaid and the metal deliveries would be made, when he knew or ought to have known of all those matters set out in the preceding paragraph and when attachment orders in addition to the Bergmann one had been made against Euro-Continental assets.

The same allegations are made against Brightsea and both the Tuckers.

H.A. submits that its claim against all the defendants based on their misrepresenting to Hydro the financial position of Euro-Continental is a tort committed within the jurisdiction at meetings held here on March 23rd and 24th, 1988. These representations, either by commission or omission, are at the heart of the proceedings in this action, whereas others made outside have little or no bearing on the questions of either tortious liability or appropriate forum.

Brightsea, the President and a director of Euro-Continental, signed the Articles of Dissolution of Euro-Continental and its agent in Gibraltar, Mr. Roydon Tucker, never informed Hydro's representative at the Gibraltar meetings of this nor took any steps to see it was informed of Euro-Continental's true position.

The Tuckers have been served with H.A.'s writ here because they acted in concert with Euro-Continental, Brightsea and Mr. Glaser in the fraud perpetrated on Hydro Trading. There are real issues to be tried between H.A. and the Tuckers and it is necessary in the interests of justice that Euro-Continental, Brightsea and Mr. Glaser should join the Tuckers as parties to these proceedings. It would also be a great advantage to H.A. if they were.

H.A. admits that for its contractual claims against Euro-Continental it cannot assert that this court has jurisdiction. H.A. began proceedings against Euro-Continental and Mr. Glaser in Zug, Switzerland on June 25th, 1991 but not against Brightsea or the Tuckers because the Zug court would have no jurisdiction so far as they were concerned.

The Tuckers, it will be recalled, want H.A.'s action against them to be stayed because Gibraltar is not the *forum conveniens* for it. Gibraltar, they submit, is not the proper jurisdiction for the hearing of the matters set out in the writ of summons. The real dispute is between H.A., a Norwegian company, Euro-Continental, a Liberian company, and Mr. Glaser, a German living in Germany, and they are locked in battle over commercial contracts undertaken in Switzerland. Moreover, their troubles are already the subject of civil proceedings in Switzerland. H.A.'s contractual claims have no connection with Gibraltar because the contracts were not made here and do not concern Gibraltar.

Mr. Roydon Tucker is a director of Channel Trust, a well-established Guernsey company which, together with a group of subsidiary and associated companies, provides trust and company management services in Guernsey and in other jurisdictions. Channel Trust of Gibraltar changed its name to Chalbridge Management Ltd. and Mr. Roydon Tucker is associated with it as a director of Channel Trust and comes out to Gibraltar several times a year to deal with its business but he is not a resident of Gibraltar.

A firm of accountants, Chandler & Co., introduced Mr. Glaser to Mr. Roydon Tucker in 1981, who asked Channel Trust in 1982 to provide secretarial and "back-up administration" services for Euro-Continental and Mr. Roydon Tucker to be a director of Euro-Continental. Mr. Roydon Tucker agreed to all of this because he knew Mr. Glaser was a metal trader of considerable ability and Mr. Glaser would deal with that part of Euro-Continental's business while Mr. Roydon Tucker saw to its administration, accounting and tax-planning work. Mr. Glaser did Euro-Continental's trading from CMM's offices in Zug with their permission and Euro-Continental flourished in the early and mid-1980s.

Mr. Roydon Tucker knew nothing of metal trading but he soon discovered it required mammoth methodical records of trading positions and much work on maintaining accounting records. Channel Trust on occasions sent clerks to Zug to assist Euro-Continental and Mr. Andrew Tucker was one of them. He went for a period in 1986 and three months or so in 1987.

Mr. Andrew Tucker remained an employee of Channel Trust and never became an officer or employee of Euro-Continental and so he had no executive responsibility in Euro-Continental and no say in its business affairs. He never made any representations about its business affairs or position to any third party. He was sent to manage Channel Trust (Gibraltar) Ltd. in 1987. He did not remain in close contact with Mr. Glaser or Euro-Continental thereafter. At the meetings in Gibraltar on March 23rd and 24th, 1988 he represented Channel Trust and he made no representation of any sort during them, as the notes of the meeting reveal. He denies sending a telex dated December 30th, 1987 from Zug to Hydro, because at that time he was working in Gibraltar, not Zug, and he was on holiday in Portugal.

Euro-Continental traded with an intensity and speed which made it difficult for Channel Trust to produce accounts because they could not get full trading details. The tax advantages of trading in Guernsey became irrelevant as the volume of business increased. Switzerland was considered as an alternative but abandoned. Mr. Roydon Tucker became uncomfortable with his ignorance of Euro-Continental's records and told Mr. Glaser in June 1986 that he wished to resign as one of its directors. He points out that H.A. says that Mr. Glaser did all Euro-Continental's trading and conducted the vast majority of its correspondence. Only two documents of the large number produced by H.A. come from Mr. Roydon Tucker for Euro-Continental and they are innocuous and not relevant to Hydro's losses.

Mr. Roydon Tucker denies that Euro-Continental moved its offices and administration to Gibraltar, as Mr. Glaser alleged in his letter of March 10th, 1988. The Gibraltar address which Mr. Glaser mentions is that of Channel Trust (Gibraltar) Ltd., but it never agreed to provide Euro-Continental with any services and none was ever given. Euro-Continental was never registered under Part IX of the local Companies Ordinance and never traded here or opened a bank account here. Euro-Continental's administrative office was Channel Trust's office in Guernsey, as its writing paper shows.

He knew nothing of the meeting to be held in Gibraltar in February 1988 between Hydro and Euro-Continental's management. Indeed, he believes he was not even in Gibraltar then and, since he was ignorant of Euro-Continental's Swiss trading, he could have contributed nothing to such a meeting.

Mr. Roydon Tucker knew that Euro-Continental's business prospered until March 1988 but then its Swiss bank accounts were frozen by an injunction obtained by Bergmann. This launched a claim against Euro-Continental in a German regional court alleging that Euro-Continental had delivered to it metal of an inferior quality, but Euro-Continental had a defence to that which was prepared by a Liberian firm called Tubman after Euro-Continental went into Chapter 11 receivership. Bergmann,

according to Mr. Roydon Tucker, had behaved badly over this by making Euro-Continental believe that their troubles would be referred to arbitration. Instead it crept away to obtain judgment against Euro-Continental in default of filing a defence in the German proceedings of which Euro-Continental had no inkling.

It was just before this that Mr. Roydon Tucker had decided to retire from the board of Euro-Continental but he agreed to stay on and do what he could to help Mr. Glaser when the Bergmann bolt struck Euro-Continental. Lawyers in Germany and Switzerland advised Euro-Continental that the injunction could be raised within a month because it had been obtained deceitfully, but until it was raised Euro-Continental decided to cease trading to save itself from claims by other parties. In the meantime, it would "roll over its positions" to ease it round the immediate difficulties caused by that injunction which was starving it of cash.

This plan was wrecked when Bergmann told Euro-Continental's other clients of its injunction, which propelled the others into filing proceedings in Switzerland and obtaining their own injunctions against Euro-Continental. Then Euro-Continental's Swiss and Liberian lawyers advised it to retire into "Chapter 11 receivership" for the sake of all its creditors and shareholders. The Liberian receiver would instruct lawyers in Germany and Switzerland to raise Bergmann's injunction, sue Bergmann for damages for loss of business and then pay out to the creditors what they were owed from the damages they obtained. Mr. Glaser was walking a tight-rope because he had to prevent the market from discovering Euro-Continental's troubles, keep its trading positions and take care that it did not enter into new contracts.

Mr. Roydon Tucker denies that Euro-Continental's directors and shareholders decided on February 29th, 1988 to dissolve Euro-Continental. The resolution was passed on April 23rd and thus the defendants did not and could not act fraudulently in March when they did not tell Hydro's representatives that Euro-Continental's shareholders had decided to dissolve it. They were not clairvoyants. His resignation from Euro-Continental's board was noted at the February 29th meeting. He signed the April 27th certificate prepared by Euro-Continental's Liberian lawyers in support of the filing of its Articles of Dissolution, but although that refers to the shareholders' meeting on February 29th it was a mistake. The correct date for the resolution is in the petition for the liquidation of Euro-Continental and is April 23rd. Mr. Glaser signed a certificate dated April 27th which set out that the resolution was passed on April 29th, and that is also wrong.

Doctor Emmanuel Wureh produced a bond for US$200,000 and was appointed the receiver for Euro-Continental on May 20th in Monrovia. He then instructed Dr. Faber, a Swiss lawyer, to have the Bergmann injunction lifted but there were insufficient funds to do so and in the end

Dr. Wureh found he had no assets of Euro-Continental to distribute to anybody.

Both the Tuckers knew shortly after March 2nd that Euro-Continental's Swiss bank account had been injuncted and Euro-Continental could not touch its assets in that bank. They did not know what assets and liabilities Euro-Continental had; they were not metal traders and they were not numbered among its officers. Telexes and telephone calls poured into Channel Trust (Gibraltar) Ltd.'s offices in Marina Bay and callers were told to repeat them to Mr. Glaser in Zug because here in Gibraltar they had no answers to such conundrums and Gibraltar was not Euro-Continental's administrative centre.

Mr. Andrew Tucker did not tell Mr. Davis that Euro-Continental was moving to Gibraltar. They did not make reassuring noises about Euro-Continental's affairs. Mr. Roydon Tucker is certain he never told any Hydro director that Mr. Glaser would be in Euro-Continental's office the next day because Euro-Continental did not have an office here. Mr. Roydon Tucker was in Gibraltar dealing with Chalbridge's business and Mr. Glaser came to see him about some matters (including the Euro-Continental saga) and he told Hydro's officers this and then they all said they would come to Gibraltar as well. He did not tell Hydro's people anything about the Bergmann injunction because he did not know what Euro-Continental would do about it.

When Hydro's team came to Chalbridge's offices at the Marina on March 23rd they were shown to a director's flat because they had no appointment and Euro-Continental did not have an office there or anywhere else in Gibraltar. Mr. Roydon Tucker refused to meet them because he was not a director of Euro-Continental and knew nothing about its trading and for some time Channel Trust had not provided any managerial or other services. Mr. Andrew Tucker attended the meeting between Mr. Glaser and Hydro's group as a witness only and that was because Mr. Glaser did not trust the other side. It was made quite clear that Mr. Andrew Tucker was there only as a witness.

The two Tuckers considered that Mr. Glaser was forthright about Euro-Continental's inability to settle Hydro's claims because its assets in the Swiss bank were embargoed and it was considering petitioning under Chapter 11. Catastrophe loomed but the Tuckers' view was that it might be averted because they were led to believe this was so and knew nothing of its trading and financial position or outstanding debts. So no misrepresentations were made by the Tuckers or Mr. Glaser to Hydro's delegates.

Hydro made a mistake in trying to work out a commercial solution instead of bringing their contracts to an end and mitigating their losses as did others, *e.g.* Prudential Bache Futures Ltd. Their own traders were charged with criminal offences and Hydro Trading sued them as well and the Tuckers believe this may account for their foolish decision to carry on negotiations with Mr. Glaser and Euro-Continental.

Hydro's men became so desperate that they offered £1m. to Mr. Glaser to transfer Euro-Continental's "long positions" to Hydro which it certainly had not only in Switzerland but also in the United States, but Mr. Glaser pointed out that he had no authority to do that; the lawyers were dealing with such matters and if he had done so it would amount to a fraudulent preference over the other creditors. Euro-Continental's "physical metal" would have settled Euro-Continental's outstanding obligations to Hydro at that time but not their "forward positions," which is what H.A.'s present application before the court concerns.

In short, Mr. Glaser represented Euro-Continental's situation clearly and truthfully to Hydro, while the Tuckers made no representations at all at the meeting or after it. Brightsea and Mr. Banks, the lawyer, were absent. None of them knew that Hydro awaited settlement proposals from Euro-Continental or Mr. Glaser in Zug.

When it comes to Brightsea's part in all this, Mr. Roydon Tucker points out that Brightsea was a director of Euro-Continental for only a very short time and never played an executive role in it, so Hydro cannot say that Brightsea has been negligent. His own position in Brightsea was that he had its limited power of attorney to sign Euro-Continental's Articles of Dissolution, which came about because Brightsea is a client of Channel Trust in Guernsey (of which he is a director) but he has never been an officer of Brightsea and never told anyone that he was.

He pooh-poohed the submission that the Gibraltar meeting is the nub of H.A.'s claims against Euro-Continental. They are really based on contracts which have no connection with Gibraltar. Also, at that meeting, no representations were made by anybody (as he had said several times before). He submits that Gibraltar does not constitute the proper jurisdiction because H.A.'s claims are not connected with it.

H.A. has no sound claim against the Tuckers. Mr. Roydon Tucker does not reside here. If H.A. intends to pursue him for damages it should join him in its proceedings in Switzerland against Euro-Continental and Mr. Glaser. If Euro-Continental, which is a foreign corporation, can be served by H.A. in the Swiss action so can the Tuckers be served there. It would be more appropriate to sue the Tuckers in Guernsey because their Channel Trust or Chalbridge offices and records are all there and Mr. Roydon Tucker's residence is also there. London would be even more appropriate because the Tuckers' solicitors are there and so are the Tuckers themselves. They do not have any confidence in this court's ability to deal with this complex tangled important claim whereas in London the Commercial Court would find it an ordinary case, aided as it is by members of the commercial bar and very experienced solicitors. It would be quicker and cheaper to have it heard there.

H.A.'s lawyers in Switzerland declare that for the Zug court to have jurisdiction over claims in tort against the Tuckers, H.A. would have to show that they are either domiciled, habitually resident or have a business

in Zug or that their tortious acts took place in the Canton of Zug or the resulting damage occurred there. H.A. cannot prove any of that against the Tuckers, so it cannot join them in the Zug proceedings against the other defendants or begin separate new proceedings against them.

But suppose that the Tuckers submitted to the jurisdiction of the Zug court? They would have to sign a written agreement by which they did so and, together with all the other parties, consent to their dispute being governed by Swiss law. All that would give the Zug court the choice of accepting or declining jurisdiction and the Swiss lawyers say that in practice it would decline it because it already has grave difficulties in dealing with the large number of actions before it.

H.A. has the genuine juridical advantage in this jurisdiction of a longer limitation period than in Switzerland, which is one year from the date when the plaintiff comes to know of the damage and who is liable. The point is not available to the other defendants in the Swiss proceedings but it would be to the Tuckers if H.A. tried to join them or begin separate proceedings against them there.

What about London as the *forum conveniens*? Mr. Andrew Tucker is not domiciled there. Mr. Roydon Tucker claims he is resident there and in Guernsey and under English law that does not constitute "domiciled within the jurisdiction" for the purposes of the Rules of the Supreme Court, O.11, r.1(1)(*a*). There are no grounds for claiming that any court in London would have jurisdiction over the other three defendants. It cannot be said that the Tuckers are necessary and proper parties to English proceedings against other defendants properly served.

Then there is Guernsey. The position is the same as for London because the rules for service are in fact the same. Euro-Continental had an administrative office there for a short time but that was not a significant part of its trading life and would not be a sufficient reason for the Guernsey court to assume jurisdiction over H.A.'s claims against Euro-Continental and the Tuckers. The claims in tort must be founded on one that was committed, or the damage resulted from it, in Guernsey according to O.11, r.1(1)(*f*). The tortious acts in this action happened in Gibraltar, not in Zug and not in Guernsey.

H.A. is confident that the Tuckers have not shown that there is any other available forum. If that is incorrect, H.A. goes on, they have not demonstrated that it is the more appropriate one and that H.A. should be deprived of its right to sue in Gibraltar.

The law governing the issues would be the statute law of Gibraltar and the English common law. The Tuckers would be here part of the time. When it comes to the speedy disposal of the action and the expense involved, Gibraltar would probably compare favourably with the other *fori*. The proceedings would be in English here and not in German as they would in Zug. Nearly all the relevant documents are in English and those taking part in the vital meetings spoke in English. Mr. Roydon Tucker may

visit Guernsey and London regularly but none of the other parties or their representatives do. Guernsey is not an easy place to reach. H.A. is content with the competence of this court to deal with this action which, in any event, is not a principle governing the question of *forum conveniens.*

H.A. asserts that Mr. Roydon Tucker was involved in Brightsea's business sufficiently closely to telex Dr. Emmanuel Wureh assuring him that it would pay Euro-Continental's German lawyers' fees and to instruct Euro-Continental's Swiss lawyers to contest its creditors' claims. Mr. Roydon Tucker is said to have traded in coffee at one time and has been employed by trading companies so he would know more about trading than he cares to admit.

H.A.'s Mr. Davis refutes the suggestion that Mr. Andrew Tucker knew nothing of Euro-Continental's accounting and trading position because Mr. Glaser put him in touch with Mr. Andrew Tucker in Gibraltar as Euro-Continental's accountant working on the December accounts and in telephone conversations from Gibraltar Mr. Andrew Tucker revealed that he had detailed knowledge of those matters. Other creditors of Euro-Continental will say the same. The author of several telexes from Euro-Continental is Mr. Andrew Tucker.

Bergmann referred its dispute with Euro-Continental to arbitration at the London Metal Exchange. The arbitrators rejected Euro-Continental's defence on the principal claim and awarded Bergmann US$1m. damages together with interest and costs. Euro-Continental challenged the jurisdiction of the arbitrators in the court in Dusseldorf but, just as the arbitrators did, the court repelled Euro-Continental's defence and awarded Bergmann substantial damages which have not yet been paid. Bergmann then attached Euro-Continental's Swiss bank account and Euro-Continental has only itself to blame for it.

Far from limiting its exposure until the injunction was lifted, Euro-Continental increased its short position by 16,850 tonnes between mid-February and the end of March 1988, according to the trading records of its major creditors collected by H.A. Details of these losses were sent not only to Mr. Glaser in Zug but also to the Guernsey telex number of Channel Trust and Brightsea, at a time when Mr. Glaser and Mr. Roydon Tucker were travelling together in North Africa.

Mr. Andrew Tucker is recorded as being from Channel Trust at the Gibraltar meeting because his business card said so. No one said he was there as a witness and Hydro's account staff thought he was there as Euro-Continental's man dealing with the exercise in reconciling their accounts. He was silent because the discussion turned to Euro-Continental's open positions and he did not deal with them.

H.A.'s complaint is that Mr. Glaser and the Tuckers did not tell its accountants that Euro-Continental's short position had risen to 45,100 tonnes, which at market value was a loss of US$41m. Obviously, Euro-Continental could not fulfil its obligations without a dramatic drop in the

market price or matching long positions but, according to Mr. Davis and Mr. Hauge, Mr. Glaser was telling them that Euro-Continental had sufficient assets to cover its liabilities and meet its commitments and this was a misrepresentation that led Hydro not to terminate its outstanding contracts or to mitigate its losses.

None of this had anything to do with Hydro bringing proceedings against two of its former employees. Mr. Glaser suggested that Euro-Continental might transfer long positions with third parties to Hydro in return for compensation to Euro-Continental. This is reflected in Mr. Davis's note of the meeting. No money was offered to Mr. Glaser personally.

Mr. Rowe, Managing Director of Channel Trust, attended the same school as Mr. Roydon Tucker. They became business partners in 1978, giving fiduciary and financial advice and services through companies incorporated in Guernsey and elsewhere. Mr. Rowe acquired Euro-Continental in August 1981 for a French client to trade in commodity futures but he failed and he sold it to Channel Trust in November 1981. Mr. Roydon Tucker, a director of Channel Trust, sold it to Mr. Glaser in late 1982.

Mr. Rowe claims he was never an officer of Euro-Continental and never did any work for it or its officers but being in the same open-plan offices as Mr. Roydon Tucker, he knew the that latter managed Euro-Continental in Guernsey for Mr. Glaser; telephoning him in Switzerland most days and sometimes several times a day. When Euro-Continental's trading activities expanded in 1985, Mr. Roydon Tucker spent time with Mr. Glaser in Zug and travelled with him elsewhere on Euro-Continental business and thus knew its overall trading position.

Mr. Rowe went on to allege that Mr. Roydon Tucker delegated responsibility for the day-to-day administration of Euro-Continental to Mr. Andrew Tucker and Mr. Gust Nutz, an employee of Euro-Continental seconded from its Zug office. He asserts that Mr. Andrew Tucker handled Euro-Continental's office and kept its trading books.

Mr. Rowe and Mr. Roydon Tucker opened a Channel Trust office in Gibraltar and transferred some of its clients and business there. Euro-Continental and its business went there. Mr. Rowe ran Channel Trust's office in Guernsey and in early 1991, Mr. Roydon Tucker ended his involvement with the Guernsey office. They looked after their own clients and for some time Mr. Rowe was anxious about Mr. Roydon Tucker's clients, their business and his work for them.

Mr. Roydon Tucker went to Gibraltar and opened Channel Trust in Neptune House in July 1987. Mr. Andrew Tucker followed in the last quarter of 1987 to look after the affairs of their clients, including Euro-Continental. All telephone calls, telexes and correspondence for Euro-Continental in 1988 were relayed to the Tuckers and Mr. Nutz in Gibraltar. Mr. Roydon Tucker spent more time in Gibraltar than in

Guernsey in 1988, only 96 days in Guernsey in 1989 and in 1990 its fiscal authorities agreed he was a non-resident for tax purposes.

Mr. Rowe claims he has Brightsea's minute book, corporate seal and share register. The last does not record any shares having been issued. None of its share certificates has been used. It opened a bank account which was hardly used. It is and always has been dormant. Mr. Rowe knows why. It was acquired and allotted to a Channel Trust client on January 7th, 1987 for a transaction which was not carried out. Its shares are not held by a trust, as Mr. Roydon Tucker claimed.

What is Mr. Andrew Tucker's stand on all this? He declares that he was not an officer or an employee in Euro-Continental, so he could not make and never did make any representation as to the state of its business to any third party. He was first employed by Channel Trust as a clerk and bookkeeper in Guernsey in 1982. One of Channel Trust's clients was Euro-Continental, which traded in metals in Zug in Switzerland from the offices of a German Swiss company called CMM under their agency agreement of 1985. Mr. Glaser did the trading and used Exchange Investment Ltd. ("Exchange"), a subsidiary of Channel Trust in Guernsey for Euro-Continental's hedging. Exchange shared offices with Channel Trust. Managerial, secretarial and account services were provided by Channel Trust for Euro-Continental. The latter did only ten transactions a year.

When Euro-Continental's trading greatly prospered in 1985, Channel Trust sent Mr. Andrew Tucker to Zug to work for Mr. Glaser as a clerical assistant for three months. He did the same in 1986 but by July of that year he was back in Guernsey setting up a new investment data service for the Channel Trust group.

Mr. Andrew Tucker is at pains to disclaim that he had an overall view of Euro-Continental's standing in the market because although he knew that until 1985 a trading book for Euro-Continental was kept for its physical trading, it was secondary to Mr. Glaser's principal trading book in Zug and no book was kept in Guernsey for its hedging positions. The Guernsey trading book was moved to Mr. Glaser in Zug in 1985 because he did all the trading for Euro-Continental there. Euro-Continental's bank account in Guernsey also moved to Zug in 1985. Mr. Andrew Tucker has no accounting qualifications, as he confessed to Mr. Davis of Hydro.

He moved to Gibraltar in the autumn of 1987 to set up Channel Trust's office here. He asserts that the administration of Euro-Continental did not come to Gibraltar. Channel Trust in Guernsey and in Gibraltar in early 1988 were stormed by faxes, telexes and telephone calls for Euro-Continental because Mr. Glaser could not be found in Zug but all queries for Euro-Continental were redirected to Mr. Glaser in Zug.

At one point Mr. Glaser told Mr. Andrew Tucker that Euro-Continental's deals with Hydro were the subject of an internal reconciliation of their accounts and this was why Mr. Gust Nutz, a CMM

employee working with Euro-Continental in Zug, trailed out to Gibraltar with his records. His Swiss residence permit had petered out and he needed an office for a couple of weeks to finish his work. Channel Trust helped him for the sake of its client, Mr. Glaser. Mr. Andrew Tucker spoke to Mr. Davis of Hydro on the telephone sometimes during this period, but he could not help him because Mr. Nutz's work was for Mr. Glaser and Mr. Tucker was not involved in it.

The Tuckers deny Mr. Rowe's allegations right down to the one which described the Guernsey Channel Trust offices as "open-plan" ones. Mr. Roydon Tucker, Mr. Rowe and Mr. Rich were ensconced in separate rooms and the secretaries were corralled in another. Mr. Rowe was embroiled in the trading between CMM and Exchange and knew much about Mr. Glaser's dealings. It was incorrect for him to suggest that Mr. Roydon Tucker set up Channel Trust in Gibraltar to hive off his clients from Mr. Rowe and Channel Trust in Guernsey.

The Tuckers are vexed that they have been made defendants to H.A.'s claims for its losses in excess of US$9m. They have not been negligent. They made no representations to H.A.'s staff. They conclude they have been served with proceedings so as to establish a connection with Gibraltar. Euro-Continental has no records here. Mr. Glaser has them in Switzerland. Its business was not done here but in Switzerland. Witnesses as to the work the Tuckers did in Gibraltar are in Switzerland or Guernsey, not Gibraltar. Euro-Continental's lawyers are in Switzerland and by now are steeped in its history. It has never instructed a Gibraltar lawyer because it has had no need to do so.

H.A. is a Norwegian company. It has issued proceedings against Euro-Continental and Mr. Glaser in Switzerland. It can join Mr. Andrew Tucker in those proceedings if it continues to claim he is a Euro-Continental officer. Both Tuckers are willing to submit to the jurisdiction of the Swiss courts. Hydro would suffer no inconvenience if they did this. Instead, it has instructed London solicitors who in turn have instructed solicitors in Gibraltar to make this application here.

H.A.'s Mr. Nordtomme refutes Mr. Andrew Tucker's description of his role in Euro-Continental as clerical, secretarial and bookkeeping with a document called an "account registration and agreement" between Exchange and Euro-Continental dated January 23rd, 1986. It authorizes Exchange to act as Euro-Continental's brokers and to trade for it in "metals, commodities, currencies and financial instruments" on the instructions of Mr. Glaser and either Mr. Tucker at any time or certain other individuals if authorized by one of those three. The Tuckers did not have to seek or wait for further authority. Mr. Nordtomme points out that this unfettered broad authority is incompatible with Mr. Andrew Tucker's coy claim that he was only a menial in Euro-Continental's halls. It is more in keeping with both Tuckers having an active part to play in Euro-Continental's trading.

The Tuckers, for their part, deny they ever saw that agreement or acted on it. They point out that it is incomplete.

They add to their submission that Switzerland is the proper forum for H.A.'s action against each defendant these further facts: Mr. Glaser has submitted to the jurisdiction of the Zug court. His and the Tuckers' witnesses are all in Switzerland, including H.A.'s traders with Euro-Continental, namely, Mr. Liam Keane, Mr. Peter Cleave and Mr. Gjoen Forde. The last two have been charged with criminal offences in Switzerland as a consequence of their trading for H.A. Their illegal actions had much to do with Euro-Continental's collapse, according to Mr. Glaser. Those two were telephoned in Switzerland by Mr. Glaser and the H.A. team in Gibraltar during the meeting here.

Another resident of Switzerland who will have to be called is Dr. Faber, the Zurich lawyer who was instructed by Dr. Wureh, the receiver appointed by the court in Liberia for Euro-Continental. Dr. Faber represented Euro-Continental in the court actions in Zug against Bergmann and Hydro to lift the attachments. He will speak about their very inflated claims as creditors and how Hydro did not go ahead. Dr. Faber showed that Euro-Continental had substantial claims against it including outstanding V.A.T. payments, and anyway Hydro's claims were baseless. Dr. Faber's view is that the money due from Hydro to Euro-Continental would have been added to the latter's assets for distribution to its proven creditors. Hydro dropped its claims in Switzerland and Monrovia rather than pay up. The Tuckers and Mr. Glaser will also call the Chairman of CMM, Dr. Jenny, who resides in Switzerland.

Hydro's Swiss lawyers, Pestulozzi Gmuer & Heiz, are anxious to record just what has happened in the Swiss courts between Hydro and Euro-Continental. A request for conciliation has been filed before a justice of the peace in Zug. The court in Zug has to consider the question of jurisdiction and it may refuse it. It has not begun the substantive action.

Hydro believes that no witness with anything significant to contribute resides in the Canton of Zug. Those who do not live there cannot be compelled to give evidence before the Zug court because each Canton is treated as a separate country. H.A. or Euro-Continental would have to go through the process of applying for *lettres rogatoires* for those witnesses who do not live in the Zug Canton and would not make the journey there for a trial, and that is a lengthy process. Residence in Switzerland is not an important factor in determining whether it is the proper forum.

Proceedings against Mr. Cleave and Mr. Gjoen, Hydro's traders in Lausanne, are roundly dismissed as irrelevant to Euro-Continental's position. Hydro has not begun any action against Euro-Continental outside Zug, so Mr. Roydon Tucker and Mr. Glaser and anyone else who says it has are wrong.

And then we have an interesting allegation of minute detail from Hydro, equivalent to that of Channel Trust's office lay-out in Guernsey:

Mr. Roydon Tucker was absent from the Gibraltar Neptune House meeting between Euro-Continental and Hydro, it is admitted, but Mr. Glaser and Mr. Andrew Tucker had luncheon with Mr. Roydon Tucker and when they were not doing that Mr. Roydon Tucker was downstairs in Channel Trust's offices and being consulted, or perhaps cheering them on.

It is high time to turn to the law on these applications:

1. The tort of fraudulent misrepresentation may arise from silence if (a) an absolute statement is not accompanied by a known material qualification; or (b) certain matters should, in the circumstances, be stated and are not, so their absence may be inferred. The first is a travesty of the facts and the second is an adoption of another's misrepresentation or confirmation of error as truth.

2. It is not complete when the fraudulent misrepresentation is made but when it is acted upon and has not been corrected in the meantime. This is because the representation may have been false when made but true when acted upon: see *Briess* v. *Woolley* (2).

3.(a) A company's duty is to its creditors, present and future. Therefore, it must keep its assets available for the repayment of its debts. This does not mean that it must pay off every debt as it is incurred. It does not have to avoid all risky ventures.

(b) The directors of the company owe it and its creditors a duty to ensure that the affairs of the company are properly administered. They must see to it that its property is not dissipated. They must not exploit it for their own benefit to the detriment of the creditors: see *Winkworth* v. *Edward Baron Dev. Co. Ltd.* (14).

4. When the tort of negligence is considered, what are the tests to be applied to directors of companies? In law (a) in their duty to the company they act as trustees; they have a fiduciary relationship with it; (b) their duties depend on what the company's business is and how the company's work is marked out for the directors and the staff; (c) in carrying out those duties, the directors must (i) be honest, and (ii) bring to them the reasonable skill and care an ordinary man would bring in the circumstances to important matters in his own affairs; (d) they are not liable for errors of judgment; (e) they ought to attend board meetings and meetings of committees to which they have been appointed when able to do so; and (f) they are justified in assuming that the company's officials will perform their duties honestly unless there are grounds for suspecting otherwise: see *In re City Equitable Fire Ins. Co. Ltd.* (3) and *Multinational Gas & Petrochemical Co.* v. *Multinational Gas & Petrochemical Servs. Ltd.* (8).

5. If there is a series of events which are said to constitute the tort of negligence—*e.g.* speculative decisions falling outside the bounds of reasonable business judgment causing damage based on inadequate financial estimates and forecasts—the court should ask the question: "Where in substance did this cause of action arise?" The answer will be: Wherever the decisions are said to have been made: see *Distillers Co.*

(Biochemicals) Ltd. v. *Thompson* (5); and *Multinational Gas & Petrochemical Co.* v. *Multinational Gas & Petrochemical Servs. Ltd.* (8) ([1983] 2 All E.R. at 570).

6. The relevant parts of the Rules of the Supreme Court, O.11 are:

"1(1) …[S]ervice of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ—

…

(*c*) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto…

…

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

Rule 4(2) states: "No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."

7. A plaintiff relying on a sub-paragraph in O.11, r.1(1) in an application to a local court for leave to serve a concurrent writ out of the jurisdiction has to establish, in a case where there has to be investigation of issues of fact or mixed fact and law, that (a) he has a good arguable case on the merits (not a strong probability that he will succeed); (b) there is a strong probability that the claim falls within one of the paragraphs; and (c) the court is the most suitable forum, taking into account the interests of the parties and of justice: see *Overseas Union Ins. Ltd.* v. *Incorporated Gen. Ins. Ltd.* (9); *Vitkovice Horni A Hutni Tezirstvo* v. *Korner* (13); and *E.F. Hutton & Co. (London) Ltd.* v. *Mofarrij* (7).

8. If all the facts necessary for determining whether or not leave should be granted are uncontradicted, the court should decide whether the plaintiffs will succeed against the defendants within the jurisdiction and if it is clear the plaintiffs are bound to fail the court must conclude that the action is not "properly brought," as the rule specifies, and refuse leave to serve out: *Tyne Improvement Commrs.* v. *Armement Anversois S.A., The Brabo* (12).

9. The right to bring a foreigner before the local courts should be sparingly used. Care should be taken in interpreting the rule and in exercising this discretion: see *The Brabo.*

10. An action is not necessarily "properly brought" just because it is brought *bona fide*. The criterion is objective, not subjective: see *Witted* v. *Galbraith* (15) and *The Brabo* (12) ([1949] 1 All E.R. at 297).

(a) Forms of words used in earlier judgments should not be relied upon: see *The Brabo* (*ibid.*, at 299, *per* Lord Porter).

(b) The court should be exceedingly careful before it allows a writ to be served out of the jurisdiction: see *The Hagen* (6) ([1908] P. at 201, *per* Farwell, L.J.).

(c) Leave should not be given if the sole, or predominant, reason for beginning the action against a party duly served within the jurisdiction is

to enable an application to be made to serve parties outside the jurisdiction: see *Sharples* v. *Eason & Son* (10).

(d) The fact that the party within the jurisdiction will be unable to satisfy a judgment does not of itself mean that the action was not properly brought against that party: see *Multinational Gas & Petrochemical Co.* v. *Multinational Gas & Petrochemical Servs. Ltd.* (8).

11. (a) Where the plaintiff is entitled to begin his action in this jurisdiction, 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 appropriate: see *Spiliada Maritime Corp.* v. *Cansulex Ltd.* (11) ([1986] 3 All E.R. at 975, *per* Lord Templeman).

(b) Domicile and residence and place of incident are not always decisive (*ibid.*).

(c) 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 the parties and the ends of justice (*ibid.*, at 985–986, *per* Lord Goff of Chieveley).

(d) In general the burden of proving matters which the plaintiff or the defendant believes will assist him remains on him. The burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay.

(e) If the court is satisfied that there is another available forum which is *prima facie* clearly or distinctly a more 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: see *Spiliada Maritime Corp.* v. *Cansulex Ltd.* (*ibid.*, at 986–987, *per* Lord Goff of Chieveley); *Dialdas* v. *Fidelity Bank* (4); and *Aldington Shipping Ltd.* v. *Bradstock Shipping Corp., The Waylink & The Brady Maria* (1).

12. Each case depends on its own circumstances.

The circumstances in this case on the papers reveal that there are issues of fact and mixed fact and law between H.A., Euro-Continental, Brightsea, Mr. Glaser and the Tuckers which have to be investigated. The merits of H.A.'s case against each cannot be decided now but it also cannot be said that H.A.'s claims against them within the jurisdiction are bound to fail.

The events that H.A. says constitute the torts of fraudulent misrepresentation and negligence reveal that H.A.'s causes of action in substance arose here in Gibraltar. H.A.'s claims fall within the relevant subparagraph of O.11, r.1(1).

H.A. has made it appear sufficiently to this court that this case is a proper one for service out of the jurisdiction under O.11 on Euro-Continental, Brightsea and Mr. Glaser. Each will have the number of days

for acknowledgement of service provided for in r.11A of the Supreme Court Rules.

At this stage I do not accept that H.A. has no possibility of succeeding in its claims against either Mr. Roydon Tucker or Mr. Andrew Tucker, so I refuse to strike out H.A.'s claims against them. They were, in my finding, duly served within the jurisdiction with writs in this action which was properly brought here. (And Euro-Continental, Brightsea, Mr. Glaser and both the Tuckers are necessary or proper parties to it.)

The Tuckers ask the court to exercise its discretion to grant a stay. The burden of proof rests on them. Domicile, residence and the place of the events are not always decisive.

Guernsey? London? Zug? The Tuckers did not seriously advance Guernsey as an appropriate forum and it does not have an obvious appropriate factor in its favour. London, it is true, has a Commercial Court which is the envy of the world for its brisk, expert dealing in such cases, with the judges, counsel, solicitors and staff to offer a first-class service for trials such as this. Lately, however, there have been indications that it is overwhelmed by fraud actions and is still without enough judges to keep abreast of them. Moreover, I am not satisfied on any other ground that London would be an appropriate forum. Zug? H.A.'s causes of action did not arise there. It is not clear that the Cantonal court would accept jurisdiction, even if the parties united in submitting to its jurisdiction. H.A. and Hydro are not domiciled, habitually resident or possessed of any business there. The alleged tortious acts did not take place there. H.A. would be unable to prove any claim against the Tuckers there.

H.A. is entitled to bring its action in Gibraltar. The Tuckers have not satisfied this court that any other forum with competent jurisdiction is appropriate for the trial of this action. The action cannot be tried more suitably for the interests of the parties and the ends of justice in Guernsey, London or Zug. The Tuckers' application for a stay is repelled.

If the parties cannot agree on the appropriate order for costs the matter may be listed for an hour in chambers for submissions.

The fourth and fifth defendants' application to strike out or stay is dismissed.

Orders accordingly.