TIR-INN S.A. v. EDESSA (INTERNATIONAL) TRADING LIMITED

SUPREME COURT (Pizzarello, A.J.): April 15th, 1996

Conflict of Laws—jurisdiction—forum conveniens—burden of proof—burden on defendant to show foreign jurisdiction most appropriate forum in interests of justice, where plaintiff sues within jurisdiction as of right

The plaintiff brought an action in Gibraltar against the defendant for breach of contract.

The plaintiff, a Belgian company, entered into a contract with the defendant, a company incorporated in Gibraltar but apparently trading in Paris and Moscow, for the transport of goods from Belgium to Moscow and from France to Moscow. The contract was written in French and had been negotiated in Belgium between a Belgian national on behalf of the plaintiff and the owner and director of the defendant, who was French. It was disputed whether payment was to have been in Belgian francs or US dollars, and whether the contract was governed by Belgian or Russian law.

The plaintiff subsequently brought proceedings in the Supreme Court for payment under the contract. The defendant then made the present application for the proceedings to be stayed, submitting that Gibraltar was not the appropriate forum for the trial of the action, because the subject-matter of the contract, the law applicable, the language in which it was written and the nationalities of the parties to it all showed that it had no connection with Gibraltar, and either Belgium or Russia would clearly be a more appropriate forum; furthermore, the witnesses were all in either Belgium or Russia and it would be unduly costly for them to attend a trial in Gibraltar.

The plaintiff submitted in reply that where, as here, the plaintiff had chosen to sue in Gibraltar as of right, it was not sufficient that the defendant show that there were other forums available but rather he had the burden of showing that there was clearly a more appropriate forum; the mere fact that the contract had been negotiated elsewhere did not necessarily make that place more appropriate and since the defendant was incorporated here, Gibraltar had a sufficiently substantial connection with the dispute for the action to be allowed to continue.

Held, dismissing the application:

Although the defendant had demonstrated that both Belgium and Russia were convenient forums for the trial of the action, it had not met the burden of showing that they were more appropriate in the interests of justice. Whichever of these alternatives were chosen, there remained the possibility of arguing that the other was more appropriate and it was not clear which of the two was to be preferred. Moreover, witnesses would have to attend from outside the jurisdiction whichever was chosen. Because the defendant was incorporated here, Gibraltar clearly had a substantial connection with the dispute and in these circumstances, the plaintiff's action should be allowed to continue (page 263, line 26 – page 269, line 12; page 270, lines 1–27).

Cases cited:

(1) *Atlantic Star, The (Owners) v. The Bona Spes (Owners)*, [1974] A.C. 436; [1973] 2 All E.R. 175.

(2) *Rockware Glass Ltd*. v. *MacShannon*, [1978] A.C. 795; *sub nom. MacShannon* v. *Rockware Glass Ltd*., [1978] 1 All E.R. 625.

(3) *Spiliada Maritime Corp*. v. *Cansulex Ltd*., [1987] A.C. 460; [1986] 3 All E.R. 843, applied.

Miss S. Davidson and *D. Bossino* for the plaintiff;
K. Azopardi for the defendant.

PIZZARELLO, A.J.: The plaintiff in this action is a company carrying on business as a provider of transport services. The plaintiff carries on business from its address at 604 Avenue des Etats Unis, Gosselies, Belgium. The defendant is a company incorporated in Gibraltar and its registered office is in Gibraltar. In its correspondence, the defendant lists its addresses as an address at Ocean Heights, Gibraltar, an address in Paris and an address in Moscow.

The claim is for 1,356,864 Belgian francs and is in respect of the transport by the plaintiff at the defendant's request of five containers of alcohol from Belgium to Moscow and one lorryload of furniture from France to Moscow.

It is stated in the affidavit of Mr. David Tapiero, a director of the defendant company, that the Gibraltar office is not involved in any of the business of the company and the defendant does not trade in Gibraltar or

export goods from Gibraltar; that the principal owner of the company is one Jean-Luc Seban, a French national, who is the other director of the company; that the defendant's business is transacted through its Moscow and Paris addresses; that the contract was made between Mr. Jean-Luc Seban from Moscow with Mme. A.M. Chirico in Belgium; and that payment was to be provided in Belgian francs or US dollars.

The defendant applies for a stay of proceedings and relies on the authority of *Spiliada Maritime Corp*. v. *Cansulex Ltd*. (3). Counsel has helpfully set out 11 factors which demonstrate that Gibraltar is a *forum non conveniens*. These are as follows:

1. Nationality of parties: plaintiff—Belgian; defendant—Gibraltarian.
2. Trading addresses: plaintiff—Belgium; defendant—Paris and Moscow.
3. Persons who negotiated contract: plaintiff—Mme. A.M. Chirico (Belgian); defendant—Jean-Luc Seban (French).
4. Where parties are from: plaintiff—Belgium; defendant—Moscow.
5. Language of contract: French.
6. What contract was for: transport of (i) alcohol from Belgium to Moscow; and (ii) furniture from Paris to Moscow.
7. Consideration: payment to be effected in Belgian francs (according to the plaintiff) or US dollars (according to the defendant).
8. Place of formation of contract: Belgium.
9. Place of performance of contract: Moscow.
10. Location of witnesses: Belgium and Moscow.
11. Law governing transaction: Belgian or Russian.

The approach of the court where jurisdiction is founded as of right by service of proceedings on the defendant within the jurisdiction, as in this case, but where the defendant seeks a stay of proceedings on the ground of *forum non conveniens*, is governed by the considerations set out in the speech of Lord Goff in the *Spiliada* case ([1986] 3 All E.R. at 853–854):

> "In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called forum non conveniens. The principle has for long been recognised in Scots law; but it has only been recognised comparatively recently in this country. In *The Abidin Daver* [1984] 1 All E.R. 470 at 476, [1984] A.C. 398 at 411 Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in *Sim v. Robinow* (1892) 19 R. (Ct. of Sess.) 665 at 668 as expressing the principle now applicable in both jurisdictions. He said:
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> '. . . the plea can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction,

in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.'

For earlier statements of the principle, in similar terms, see *Longworth v. Hope* (1865) 3 Macph. (Ct. of Sess.) 1049 at 1053 per the Lord President (McNeill) and *Clements v. Macaulay* (1866) 4 Macph. (Ct. of Sess.) 583 at 592 per the Lord Justice-Clerk (Inglis), and for a later statement, also in similar terms, see *Société du Gaz de Paris v. SA de Navigation 'Les Armateurs Français'* 1926 S.C. (H.L.) 13 at 22 per Lord Sumner.

I feel bound to say that I doubt whether the Latin tag 'forum non conveniens' is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However, the Latin tag (sometimes expressed as forum non conveniens and sometimes as forum conveniens) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of 'mere practical convenience'. Such a suggestion was emphatically rejected by Lord Kinnear in *Sim v. Robinow* (1892) 19 R. (Ct. of Sess.) 665 at 668 and by Lord Dunedin, Lord Shaw and Lord Sumner in the *Société du Gaz* case 1926 S.C. (H.L.) 13 at 18, 19, and 22 respectively. Lord Dunedin said, with reference to the expressions forum non competens and forum non conveniens:

'In my view, "competent" is just as bad a translation for "*competens*" as "convenient" is for "*conveniens*". The proper translation for these Latin words, so far as this plea is concerned, is "appropriate".'

Lord Sumner referred to a phrase used by Lord Cowan in *Clements v. Macaulay* (1866) 4 Macph. (Ct. of Sess.) 583 at 594, viz 'more convenient and preferable for securing the ends of justice', and said:

'. . . one cannot think of convenience apart from the convenience of the pursuer or the defender or the Court, and the convenience of all these three, as the cases show, is of little, if any, importance. If you read it as "more convenient, that is to say, preferable, for securing the ends of justice," I think the true meaning of the doctrine is arrived at. The object, under the words "*forum non conveniens*" is to find that *forum* which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that *forum* is more likely to secure those ends.'

In the light of these authoritative statements of the Scottish doctrine, I cannot help thinking that it is wiser to avoid use of the word 'convenience' and to refer rather, as Lord Dunedin did, to the *appropriate* forum."

Lord Goff then proceeded to examine how the principle is applied in the case of stay of proceedings (*ibid*., at 854–855):

"When the principle was first recognised in England, as it was (after a breakthrough in *The Atlantic Star, Atlantic Star (owners) v. Bona Spes (owners)* [1973] 2 All E.R. 175, [1974] A.C. 436) in *MacShannon v. Rockware Glass Ltd*. [1978] 1 All E.R. 625, [1978] A.C. 795, it cannot be said that the members of this House spoke with one voice. This is not surprising; because the law on this topic was then in an early stage of a still continuing development. The leading speech was delivered by Lord Diplock. He put the matter as follows ([1978] l All E.R. 625 at 630, [1978] A.C. 795 at 812):

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

This passage has been quoted on a number of occasions in later cases in your Lordships' House. Even so, I do not think that Lord Diplock himself would have regarded this passage as constituting an immutable statement of the law, but rather as a tentative statement at an early stage of a period of development. I say this for three reasons. First, Lord Diplock himself subsequently recognised that the mere existence of 'a legitimate personal or juridical advantage' of the plaintiff in the English jurisdiction would not be decisive: see *The Abidin Daver* [1984] 1 All E.R. 470 at 475, [1984] A.C. 398 at 410, where he recognised that a balance must be struck. Second, Lord Diplock also subsequently recognised that no distinction is now to be drawn between Scottish and English law on this topic, and that it can now be said that English law has adopted the Scottish principle of forum non conveniens: see *The Abidin Daver* [1984] 1 All E.R. 470 at 476, [1984] A.C. 398 at 411. It is necessary therefore now to have regard to the Scottish authorities; and in this connection I refer in particular not only to statements of the fundamental principle, but also to the decision of your Lordships' House in the *Société du Gaz* case 1926 S.C. (H.L.) 13. Third, it is necessary to strike a note of caution regarding the prominence given to 'a legitimate personal or juridical advantage' of the plaintiff, having regard to the decision of your Lordships' House in *Trendtex Trading Corp v. Crédit Suisse* [1981] 3 All E.R. 520, [1982] A.C. 679, in which your Lordships unanimously

approved the decision of the trial judge ([1980] 3 All E.R. 721) to exercise his discretion to stay an action brought in this country where there existed another appropriate forum, i.e. Switzerland, for the trial of the action, even though by so doing he deprived the plaintiffs of an important advantage, viz. the more generous English procedure of discovery, in an action involving allegations of fraud against the defendants.

In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.

(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the *Société du Gaz* case 1926 S.C. (H.L.) 13 at 21 per Lord Sumner and Anton *Private International Law* (1967) p. 150). It is, however, of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see para. (f) below).

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where 'the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favour of the defendant' (see Scoles and Hay *Conflict of Laws* (1982) p. 366, and cases there cited); and also in Canada, where it has been stated that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed' (see Castel *Conflict of Laws* (3rd edn., 1974) p. 282). This is strong language. However, the United

States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff on which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions.

A more neutral position was adopted by Lord Sumner in the *Société du Gaz* case 1926 S.C. (H.L.) 13 at 21, where he said:

> 'All that has been arrived at so far is that the burden of proof is upon the defender to maintain that plea. I cannot see that there is any presumption in favour of the pursuer.'

However, I think it right to comment that that observation was made in the context of a case where jurisdiction had been founded by the pursuer by invoking the Scottish principle that, in actions in personam, exceptionally jurisdiction may be founded by arrest of the defender's goods within the Scottish jurisdiction. Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, e.g., *European Asian Bank A.G. v. Punjab and Sind Bank* [l982] 2 Lloyd's Rep. 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that in all the leading English cases where a stay has been granted there has been another clearly more appropriate forum: in *The Atlantic Star* [1973] 2 All E.R. 175, [1974] A.C. 436 (Belgium), in *MacShannon*'s case [1978] l All E.R. 625, [1978] A.C. 795 (Scotland), in *Trendtex Trading Corp. v. Crédit Suisse* [1981] 3 All E.R. 520, [1982] A.C. 679 (Switzerland) and in *The Abidin Daver* [1984] 1 All E.R. 470, [1984] A.C. 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see *MacShannon*'s case [1978] l All E.R. 625 at 636–637, [1978] A.C. 795 at 819–820 per Lord Salmon); and there is the further advantage that on a subject where comity is of importance it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas."

He continued (*ibid*., at 856):

"(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon*'s case [1978] 1 All E.R. 625 at 630, [1978] A.C. 795 at 812, as indicating that justice can be done in the other forum at 'substantially less inconvenience or expense'. Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz* case 1926 S.C. (H.L.) 13 concerning the use of the word 'convenience' in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by Lord Keith in *The Abidin Daver* [1984] 1 All E.R. 470 at 479, [1984] A.C. 398 at 415 when he referred to the 'natural forum' as being 'that with which the action has the most real and substantial connection'. So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Crédit Chimique v. James Scott Engineering Group Ltd.* 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay: see, e.g., the decision of the Court of Appeal in *European Asian Bank A.G. v. Punjab and Sind Bank* [1982] 2 Lloyd's Rep. 356. It is difficult to imagine circumstances when, in such a case, a stay may be granted.

(f) If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction: see *The Abidin Daver* [1984] 1 All E.R. 470 at 476, [1984] A.C. 398 at 411 per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage."

I highlight the following remarks: "I can see no reason why the English Court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that in all the leading English cases where a stay has been granted there has been another clearly more appropriate forum''. Lord Goff went on to cite *The Atlantic Star (Owners) v. The Bona Spes (Owners)* (1) and went on: "In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right . . ." and he quoted *Rockware Glass Ltd*. v. *MacShannon* (2).

Counsel for the defendant submits that the factual information concerning the identity of the parties, the terms of the contract, the language and the place of performance all indicate strong links with either Belgium or Moscow. The question of law which arises is what law governs this contract, and where was it formed when one party was in Belgium and the other in Moscow and when it was made on the telephone between two French-speaking persons. There is nothing to suggest that Gibraltar law governs the transaction. From the point of view of appropriateness, both Belgium or Moscow are more clearly appropriate forums than Gibraltar. Both these countries have a more substantial connection with the dispute than Gibraltar. The only connection with Gibraltar is that the plaintiff has a right to choose to take proceedings in Gibraltar. Counsel submits that he has discharged the burden on the defendant to show that these proceedings should be stayed and that the plaintiff has not demonstrated special reasons to persuade the court not to discontinue the action

For the plaintiff, it is argued that it is not sufficient for the defendant to show that there are other jurisdictions available. The defendant has not discharged its burden. It must suggest which is the more appropriate forum. The plaintiff has chosen to sue the defendant in the jurisdiction in which it has been incorporated and therefore proceedings have begun as of right. The contract was made by a director of a company and it is submitted that the mere fact that negotiations were entered into in a particular place does not necessarily make that location a more convenient forum to try an action for contract where the substantial party to the negotiation himself has a substantial connection with Gibraltar through his directorship and ownership of the defendant. For these reasons, the plaintiff submits that the defendant has not discharged the burden of showing that Gibraltar is not the proper forum. Alternatively, if, contrary to that submission, the defendant has discharged its burden, then there are special reasons why the action should not be stayed, principally because the plaintiff would be put in severe difficulties if it had to sue in Moscow.

In my judgment the defendant has not discharged its burden of proof. It has shown that the plaintiff has a choice of jurisdictions in which to sue and both Belgium and Russia appear to be more appropriate than Gibraltar. That means, however, that it is not clear which is the appropriate forum. Is the plaintiff to be forced to choose between two jurisdictions and, if so, which? One may not be as appropriate as the other and is the plaintiff to be met with the plea once again? Furthermore, it seems to me that witnesses from one jurisdiction will have to attend in another whichever it might be. Questions of law will have to be resolved by the court of one country in respect of the laws of another. These difficulties will be as real whichever jurisdiction is chosen, although not perhaps in the same degree as they would apply to Gibraltar if Gibraltar were the forum.

It is not clear to me which is the most appropriate forum in these circumstances, but what is clear is that there is a substantial connection with Gibraltar. Not only is Gibraltar the place where proceedings have commenced as of right, but Mr. Jean-Luc Seban himself is a director of the company and the principal force behind it. As I have said, all the problems which will occur in the action on either alternative will apply to a similar extent in Gibraltar. This seems to me a case where on its facts, the crucial factor is that the contracts were entered by Mr. Jean-Luc Seban, the director of the company. If Mr. Jean-Luc Seban chooses to conduct his affairs through the vehicle of a company and in the way he has, it ill becomes the defendant to complain if a plaintiff chooses the seat of his enterprise to seek redress. I have looked at the cases which have been cited to me and in none does there appear to be a similar overriding factor.

Application dismissed.