DEURUNEFT LIMITED and DEURUNEFT DEUTSCHE-RUSSISCHE MINERALÖL HANDELS GmbH v. NERONIA TRADING LIMITED and FOUR OTHERS

COURT OF APPEAL (Fieldsend, P., Davis and O'Connor, JJ.A.): September 24th, 1996

Civil Procedure—service of process—service out of jurisdiction—"necessary or proper party"—for purposes of Rules of Supreme Court, O.11, r.1(c), person sued in derivative action by minority shareholders is principal defendant, not merely "necessary or proper party" to claim against "person duly served" if company itself joined only as nominal defendant

Companies—minority shareholders—right to bring action—under Rules of Supreme Court, O.15, r.12A, leave of court required to bring derivative action—minority shareholders to show company has arguable case in own right

Civil Procedure—pleading—amendment—no amendment of writ to introduce new cause of action following defendant's application to set aside service out of jurisdiction—may allow amendment and service of amended writ if unamended writ not yet served

The respondents brought proceedings in the Supreme Court against the appellants to recover damages for breach of contract and breach of trust.

The third and fourth respondents, the Bullen brothers, entered into an agreement with the owners and directors of the second appellant, DNT Germany, to provide expertise, equipment and services in connection with a contract to develop oil wells in Russia. The services were provided through the first appellant, DNT Gib, a company which operated with DNT Germany from Hamburg, its subsidiary, DNT Canada, and the fifth respondent, Valens Consultants Ltd., owned by the Bullen brothers. The directors of DNT Germany held a majority shareholding in DNT Gib. The remainder of its shares were held by the Bullen brothers through the first and second respondent companies, Neronia Trading Ltd. and Bartolo Enterprises Ltd.

The respondents commenced proceedings against DNT Gib alleging, *inter alia*, breach of trust by DNT Germany in failing to account to DNT Gib for moneys received under the contract, in respect of which the majority shareholders of DNT Gib refused to bring proceedings on its behalf. The respondents, with the leave of the court, served a concurrent writ on DNT Germany in Germany and on DNT Canada in Canada

The Supreme Court refused DNT Germany's application to set aside the concurrent writ and service of it out of the jurisdiction, ruling that there was sufficient evidence in respect of each head of claim to meet the requirements of the Rules of the Supreme Court, O.11, r.1(1), and granted leave to the respondents to amend the writ to include claims against DNT Germany's directors and to serve them outside the jurisdiction.

On appeal, DNT Germany submitted that (a) the Supreme Court had wrongly exercised its discretion to allow service of the writ upon it, since the respondents had failed to adduce evidence either to support an arguable claim against DNT Gib as "a person duly served," to which DNT Germany, as a person outside the jurisdiction, was a necessary or proper party, or a contractual claim which was governed by Gibraltar law, as required by O.11, r.1(1)(c) and (d) respectively; (b) for the purpose of identifying "a person duly served" the court should ignore the respondent's claims against DNT Germany's directors, since they had not yet been served with the writ and the respondents should not have been given leave to amend the writ to include new causes of action against them after the unamended writ had been served out of the jurisdiction; (c) DNT Gib was not a true defendant to the claim alleging DNT Germany's breach of trust, since that claim was brought by the respondents as minority shareholders on behalf of the company, as a derivative action, which would require the leave of the court under O.15, r.12A, and the need to join the company by reason of the majority shareholders' refusal to bring proceedings was not significant for the purpose of O.11, r.1(1)(c); and (d) accordingly, leave should not have been granted to allow service of the writ upon DNT Germany.

The respondents submitted in reply that (a) since there were serious issues to be tried with regard to the liability of DNT Gib under the various heads of claim and since it was likely that DNT Gib would contend that DNT Germany was liable instead, the Supreme Court had properly given leave to serve the writ on DNT Germany; (b) for the purposes of O.11, r.1(1), the court was entitled to consider whether the respondents had a claim against DNT Gib or DNT Germany's directors, since the Supreme Court was at liberty to grant leave to amend the writ to include claims against the directors after leave had been given to serve the unamended writ on DNT Germany; (c) furthermore, DNT Germany was clearly a necessary and proper party to the respondents' claim for breach of trust, which fell within O.11, r.1(1)(c) since the refusal by the majority shareholders of DNT Gib to bring proceedings in the company name rendered it necessary to join the company as a defendant; and (d) DNT Gib was also liable to pay the respondents as its agents in those proceedings an indemnity in respect of costs.

Held, setting aside service of the writ on DNT Germany:

(1) The Supreme Court had erred in granting leave under O.11, r.1(1) to serve the writ outside the jurisdiction on DNT Germany, since the respondents had provided insufficient evidence that DNT Gib was liable

to them in damages under the heads of claim set out in the unamended writ, or that if such liability existed, DNT Germany was a necessary and proper party to those claims. Nor had they adduced clear evidence of contractual claims against DNT Germany governed by Gibraltar law (page 369, line 35 – page 370, line 10; page 370, lines 19–23; page 374, lines 32–38; page 375, lines 18–34).

(2) In respect of the claim for breach of trust, the respondents had failed to show that DNT Gib was "a person duly served" at all, since the joinder of the company was a mere procedural device necessitated by the refusal by the majority shareholders, who also owned DNT Germany, to bring proceedings against that company. The true defendant was DNT Germany, and the plaintiff was DNT Gib, represented by the respondents as minority shareholders. Furthermore, the respondents would require the court's leave under O.15, r.12A to bring such an action, and since DNT Gib itself had no claim against DNT Germany under any provision of O.11, r.1(1), the court did not consider it to have any better claim by means of a derivative action (page 373, lines 28–42; page 374, lines 15–32).

(3) There was some evidence that the respondents might succeed in an action against DNT Germany's directors. However, since the Supreme Court had no power to give leave to amend the writ to include new causes of action against them after the unamended writ had been served out of the jurisdiction, it should not have taken those claims into account following DNT Germany's application, when deciding whether the respondents had a claim against "a person duly served" for the purposes of O.11, r.1(1)(c) (page 368, lines 22–32; page 373, line 43 – page 374, line 3; page 375, lines 27–29).

Cases cited:

(1) *Burland* v. *Earle*, [1902] A.C. 83, *dictum* of Lord Davey applied.
(2) *Edwards* v. *Halliwell*, [1950] W.N. 537; [1950] 2 All E.R. 1064.
(3) *Estmanco (Kilner House) Ltd.* v. *Greater London Council*, [1982] 1 W.L.R. 2; [1982] 1 All E.R. 437.
(4) *Grupo Torras S.A.* v. *Al Sabah*, [1995] 1 Lloyd's Rep. 374.
(5) *Metall & Rohstoff A.G.* v. *Donaldson Lufkin & Jenrette Inc.*, [1990] 1 Q.B. 391; [1989] 3 All E.R. 14.
(6) *Prudential Assur. Co. Ltd.* v. *Newman Indus. Ltd. (No. 2)*, [1982] Ch. 204; [1982] 1 All E.R. 354.
(7) *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhouri Islami Iran*, [1994] 1 A.C. 483; [1993] 4 All E.R. 456, applied.
(8) *Smith* v. *Croft (No. 2)*, [1988] Ch. 114; [1987] 3 All E.R. 909, considered.
(9) *Taylor* v. *National Union of Mineworkers (Derbyshire)*, [1985] BCLC 237; [1985] I.R.L.R. 99.
(10) *Wallersteiner* v. *Moir (No. 2)*, [1975] Q.B. 373; [1975] 1 All E.R. 849, *dicta* of Lord Denning, M.R. applied.

Legislation construed:
Rules of the Supreme Court, O.11, r.1(1): The relevant terms of this paragraph are set out at page 368, lines 1–8.
O.15, r.12A: The relevant terms of this rule are set out at page 371, lines 18–21; page 372, lines 4–6; lines 26–28; lines 30–32; lines 33–35; page 373, lines 8–11; lines 13–14.

A. Glennie, Q.C. and *G. Licudi* for the appellants;
J. Wadsworth, Q.C. and *D. Whitmore* for the respondents.

FIELDSEND, P.:

Background

The background to this appeal is a complex one. It was dealt with comprehensively in the judgment of the then Chief Justice in the court below. This has not been said by either party to have been inaccurate, and for present purposes I therefore accept the detail there set out. I shall content myself with what I hope will be a brief summary of the essential facts.

The case revolves around the development of a number of closed-down oilwells in northern Russia being controlled by a Russian company, "VNG." On September 16th, 1992, a German company, "DNT Germany," concluded a contract with VNG for the development of these oilwells, said to be worth about US$114m. DNT Germany is a company concerned with oil trading and financing. Its shares are held in equal proportions in effect by two of its directors: Grunewald, a German, and a Russian oil man, Oruzhev. Its other director is a Mr. Muller-Hagen.

The Bullens, father and son, Canadians, have wide experience of operating and servicing oilfields in conditions of extreme cold and it was from their contact with Oruzhev that the contract emerged. Their expertise was employed in providing equipment, material and services for the VNG contract. This was to be done through "DNT Gib," a company formed in January 1993, its subsidiary, "DNT Canada," and Valens Consultants Ltd. ("Valens"), a company of the Bullens in Canada. DNT Gib was formed for tax efficiency purposes. One-third of its shares are owned by the Bullens (through "Neronia" and "Bartolo," companies owned by them), one-third by Grunewald (through "Rose Oil") and Muller-Hagen (through "Vincent"), and one-third by Oruzhev (through "Sudoimport"). Its directors are the Bullens, Grunewald, Muller-Hagen and Oruzhev.

In March 1993, DNT Germany is said to have assigned its interest right and title in the VNG contract to DNT Gib. Both DNT Gib and DNT Germany shared offices in Hamburg, and activities were undertaken for the servicing and administration of the VNG contract from that office and from DNT Canada in Canada. There is a schedule attached to a proposed amended statement of claim. It appears from a numbered series of invoices from "DNT Ltd." (DNT Gib) that from about April 1993 work started on servicing the VNG contract. Differences arose between the

parties and in 1994 there were discussions about the Bullens selling their shares in DNT Gib and so withdrawing from the undertaking.

In September 1994 the respondents, in effect the Bullens, served a writ on DNT Gib, obtained leave under the Supreme Court Rules, O.11, r.1(1) to issue and serve a concurrent writ on the present appellants, DNT Germany, in Germany, and on DNT Canada in Canada, and was granted *Mareva*-type relief against DNT Gib and DNT Germany. DNT Germany applied to set aside the concurrent writ and the service of it and for a declaration that the court had no jurisdiction over it. There were four claims in the writ. They related to the following issues:

(1) An indemnity in respect of debts and liabilities incurred for the benefit of DNT Gib and/or DNT Canada relating to services and equipment supplied for the VNG contract.

(2) The alleged failure by DNT Gib to pay management fees and expenses in respect of the Bullen's work in respect of the VNG contract.

(3) The alleged failure by DNT Gib to keep proper books and records in relation to activities connected with the VNG contract.

(4) DNT Germany's alleged breach of trust in failing to pay all moneys received from the VNG contract to DNT Gib.

During the hearing of the proceedings in the Supreme Court, an application was made to amend the writ in certain respects and this was granted. Among the amendments was an application to join and to serve the writ on Grunewald, Muller-Hagen and Oruzhev. Leave was given to serve on these parties. Leave was also granted to serve the amended writ on the present appellant, DNT Germany, though this did not find its way into the formal order drawn up after argument before the new Chief Justice on July 30th, 1996.

Having set out the facts and the contentions of the parties, when the former learned Chief Justice came to the question whether the court was satisfied that leave to serve should have been given and should not be revoked, he said: "There was and is adequate evidence, sufficient indication of each claim made by each plaintiff against each defendant to qualify for one or other provision of O.11, r.1(1) and for the exercise of the discretion." It is against that decision that the second appellant, DNT Germany, now appeals.

The other parties, DNT Gib and DNT Canada have not appealed and DNT Canada is, in fact, in liquidation. The individuals, Grunewald, Muller-Hagen and Oruzhev were, of course, not before the court in this appeal as they had not then been served following the grant of the amendment and of leave to serve on them.

General approach

The respondents now base their case for service out of the jurisdiction on DNT Germany on sub-paras. (c) and (d) of O.11, r.1(1). This permits service of a writ out of the jurisdiction where—

> "(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;
> (d) the claim is brought to enforce . . . or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract which—
> (iii) is by its terms, or by implication, governed by [Gibraltar] law . . . ."

Mr. Wadsworth, for the respondents, relied primarily on sub-para. (c)—"necessary or proper party"—to establish the plaintiff's claim to serve on DNT Germany. But he also contended that the plaintiffs could support their claim to serve under sub-para. (d)—a claim based on a contract governed by Gibraltar law. The alternative submission, of course, depends upon the plaintiffs having a cause of action in contract against DNT Germany, a question to be considered separately in relation to each cause of action. On his primary argument Mr. Wadsworth contends that, in regard to the first and second causes of action, DNT Germany is a proper party, as DNT Gib may well contend that it is DNT Germany that is liable and not DNT Gib itself. With regard to the third and fourth causes of action, however, he contends that DNT Germany is a necessary party as being the party that is indebted to DNT Gib.

Mr. Glennie, for the appellant, submits, on the basis of *Metall & Rohstoff AG* v. *Donaldson Lufkin & Jenrette Inc.* (5) and *Grupo Torras S.A.* v. *Al Sabah* (4), that it is not open to a plaintiff during the course of a challenge to the jurisdiction in proceedings served with leave out of the jurisdiction to make any amendment which would involve a new cause of action. This, in my view, is a sound submission despite the reliance placed by Mr. Wadsworth on 1 *The Supreme Court Practice 1995,* para. 11/4/9, at 99 which implies that such an amendment can be made after leave has been given to serve out, since it does not imply that a new cause of action can be relied on once the writ has been served. Therefore it is necessary to consider this appeal on the basis of the unamended writ.

It was common ground that each cause of action must be examined separately to see whether it falls within a relevant paragraph of r.1(1). And in order that a cause of action may fall within either of sub-paras. (c) or (d), it must be shown that that cause of action is one on which the appellant can be held liable. Under sub-para. (c) it is also necessary that it be established that there is a cause of action against a person who has been duly served to which cause of action the person out of the jurisdiction is a necessary or proper party.

The parties are also at one on the proper approach that has to be adopted. It is that laid down by the House of Lords in *Seaconsar Far East Ltd.* v. *Bank Makrazi Jomhouri Islami Iran* (7). The plaintiff must show a good arguable case that the requirements of the particular head of O.11, r.1(1) relied upon are satisfied. Then a separate question may arise,

namely: Is there a serious issue to be tried? There is then a residual discretion in the court to decide whether to grant leave to serve, depending upon factors such as the closeness of real links with Gibraltar.

With those preliminary indications, I turn to the four separate causes of action set out in the original writ.

First cause of action

The substance of this cause of action depends first on those paragraphs of the original writ which read:

> "1. DNT Canada, DNT Gib and DNT Germany at all times, either expressly or impliedly (and as evidenced by art. 35 of the articles of association of DNT Gib) agreed with the plaintiffs to indemnify and to hold the plaintiffs harmless for any and all debts and liabilities incurred on behalf of and for the benefit of DNT Gib and/or DNT Canada in respect of the supply of equipment, labour and services for the purposes of the VNG contract.
>
> 2. Further, DNT Gib and the directors either expressly or impliedly represented to the plaintiffs that they would cause DNT Gib and/or DNT Germany to put DNT Canada in sufficient funds to honour all and any of its contractual obligations pursuant to the sub-contracts."

The relevant parts of art. 35 of the articles of association of DNT Gib, which are in standard form, read:

> "The directors, managers, secretary and other officers or servants . . . of the company acting in relation to any of the affairs of the company shall be indemnified . . . out of the assets of the company against all actions . . . losses, damages and expenses they may incur or sustain by reason of any contract entered into or act done about the execution of their duty."

Mr. Glennie submitted that there was no serious issue raised on the affidavits, which were silent on the point of there being any express agreement with DNT Germany, and there were no facts alleged from which an implied agreement with DNT Germany could be drawn. Nothing but art. 35 was relied on and it cannot be inferred from this that DNT Germany had any involvement. So far as para. 2 is concerned, there is no evidence of express or implied representation that DNT Gib and/or DNT Germany would put DNT Canada in sufficient funds to honour any sub-contract liabilities, so as to bring in DNT Germany. Indeed there is no allegation of any representation, express or implied, by or on behalf of DNT Germany.

In any case, it is clear from the pleaded case that what contracts were concluded were concluded by DNT Canada (either by the Bullens or Valens) and not by DNT Gib. The Bullens and Valens would therefore have been acting as officers of DNT Canada and not of DNT Gib, and so would not be entitled to an indemnity which had been given to them in

respect of their activities as officers of DNT Gib. Further, Eggerton's affidavit refers only to the probability that the plaintiffs may have to meet DNT Canada's unpaid debts, it now being in liquidation. This, it is said, is insufficient to found a cause of action.

On the basis of each of these contentions it cannot, in my view, be said that on this first cause of action there is any serious issue that has been raised upon which leave to serve out on DNT Germany should be granted. There is no serious issue to be tried either in regard to DNT Germany's liability to the plaintiffs, or to DNT Gib's liability to the plaintiffs.

Second cause of action

The second cause of action is based on "an oral agreement (as evidenced by a board of directors or alternatively a shareholder's written resolution of DNT Gib dated September 4th, 1993) between DNT Gib" and the Bullens. Its effect was that the Bullens would be paid monthly management fees and expenses, clearly in respect of work done in relation to DNT Gib. A total claim for unpaid fees and expenses of US$230,000 was made. Here there is no arguable case that there is any basis for granting leave to serve out on DNT Germany. The original writ does not make any allegation that DNT Germany has any liability to pay these fees or expenses. The matter is solely between DNT Gib and the Bullens.

Third cause of action

There has been some confusion in the argument before this court because of the way both the original writ and the amended writ have been drawn. In each writ the third cause of action is based on breaches of the unanimous shareholders' agreement of November 3rd, 1992 in relation to the keeping of proper accounts by DNT Gib, but the prayer based on it comes at the very end of the writ. The fourth cause of action is based on DNT Germany's wrongful failure to pay to DNT Gib what it had to pay from what it received from the VNG contract. The consequent prayer precedes the prayer flowing from the third cause of action. It is apparent from Mr. Glennie's skeleton argument that he was misled as we were by the order of the prayers. His substantive argument starts with the "true derivative" claim, said by him in his skeleton to be the third cause of action, whereas to go by the substantive paragraphs of the writs, it is really the fourth.

Fourth cause of action

The basis of the fourth cause of action is that DNT Germany has failed to account to DNT Gib for money said to be due by it to DNT Gib, and that the majority shareholders in DNT Gib (in effect Grunewald, Muller-Hagen and Oruzhev) wrongfully decline to sue DNT Germany. As

minority shareholders in DNT Gib, the plaintiffs (in effect the Bullens) are said to be entitled to bring action on behalf of DNT Gib against DNT Germany for relief and payment of what may be due. Such an action is what has come to be recognized as a "derivative action."

It is common ground that to succeed on its claim to serve DNT Germany out of the jurisdiction, the respondent must establish that it has a claim against a party served within the jurisdiction to which DNT Germany is a necessary or proper party under O.11, r.1(1)(c). Mr. Glennie's contention is that, even assuming the plaintiffs have an action against DNT Germany, they have no claim against a person duly served within the jurisdiction to which DNT Germany is a necessary or proper party. This argument depends upon a proper analysis of the nature and technicalities of a derivative action.

Perhaps the best starting point is O.15, r.12A, to be found in the 4th Cumulative Supplement to *The Supreme Court Practice 1995*, at 20–21, where the procedure in regard to derivative actions is set out, based on the decisions and *dicta* in a number of decided cases. Paragraph (1) provides:

> "This rule applies to every action begun by writ by one or more shareholders of a company where the cause of action is vested in the company and relief is accordingly sought on its behalf (referred to in this rule as a 'derivative action')."

This is the classic case discussed in such a decision as *Wallersteiner* v. *Moir (No.2)* (10), where Lord Denning, M.R. said ([1975] Q.B. at 390): "Yet the company is the one person who is damnified. It is the person who should sue. In one way or another some means must be found for the company to sue." He continued (*ibid.*, at 391):

> "Stripped of mere procedure, the principle is that, where the wrongdoers themselves control the company, an action can be brought on behalf of the company by the minority shareholders, on the footing that they are its representatives, to obtain redress on its behalf."

And (*ibid.*) he approved the following passage from Gower, *The Principles of Modern Company Law*, 3rd ed., at 587 (1969):

> "Where such an action is allowed the member is not really suing on his own behalf nor on behalf of the members generally, but on behalf of the company itself. Although . . . he will have to frame his action as a representative one on behalf of himself and all the members other than the wrongdoers, this gives a misleading impression of what really occurs. The plaintiff shareholder is not acting as a representative of the other shareholders but as a representative of the company . . . ."

See also *Estmanco (Kilner House) Ltd.* v. *Greater London Council* (3) and *Prudential Assur. Co. Ltd.* v. *Newman Indus. Ltd. (No. 2)* (6). An important consequence, as Lord Denning said in the *Wallersteiner* case ([1975] Q.B. at 391), was that the minority shareholder, being an agent

acting on behalf of the company, would be "entitled to be indemnified by the company against all costs and expenses reasonably incurred by him" in the name of the company.

Paragraph (2) of O.15, r.12A provides: "Where a defendant in a derivative action has given notice of intention to defend, the plaintiff must apply to the Court for leave to continue the action." The fact that both the company and the defendant from whom relief is sought on behalf of the company should have an opportunity to be heard before a plaintiff in a derivative action can sue is apparent from what Megarry, V.-C. said in *Estmanco* ([1982] 1 W.L.R. at 9), namely, that it was highly desirable for all concerned that the company and the shareholders should be separately represented and that the latter should serve a notice of motion which would enable all concerned to know exactly what the shareholder was seeking. As a result, the company was joined as a defendant and the action was permitted to proceed in the applicant's name as a derivative action.

The facts were different in the *Prudential* case (6). There the minority shareholder brought an action against the majority shareholders for damages which it and the company had suffered from the action of the majority, apparently citing the company as one of the defendants. The defendants by summons brought before the court the question whether the plaintiff was entitled to maintain the claim against them. The case shows, however, that a proper preliminary issue is whether the plaintiff is entitled to bring a derivative action. In *Smith* v. *Croft (No. 2)* (8) the company was joined as a defendant but there was as an additional basis for the claims made—an allegation that the company had acted *ultra vires*.

Paragraph (3) provides: "The application must be supported by an affidavit verifying the facts on which the claim and the entitlement to sue on behalf of the company are based."

Paragraph (4) provides for the time within which all papers in the application are to be served "on all defendants who have given notice of intention to defend; any defendant so served may show cause against the application . . . ."

Paragraph (7) provides that "O.18, r.2(1) [time for service of defence] . . . shall have effect as if it required the defendant to serve a defence within 14 days after the order giving leave to continue" the action.

Paragraph (8) gives the court a discretion as to whether or not to grant leave to continue the action, and gives the court a continuing power to control the action. It is apparent from the quotation in *Smith* v. *Croft (No. 2)* from the judgment of Vinelott, J. in *Taylor* v. *National Union of Mineworkers* (9) ([1985] BCLC at 254) that there is a need for a discretion ([1988] Ch. at 180):

> ". . . [I]t is open to a majority of the members, if they think it is right in the interests of the corporate body to do so, to resolve that no action should be taken to remedy the wrong done to the corporate body and such a resolution, if made in good faith and in what they

> considered to be for the benefit of the corporate body, will bind the minority. The majority of the members of a trading company, for instance, might properly take the view that the publicity, costs, and the inevitable loss, let us say, of the services of a managing director, who would be the defendant, would outweigh the benefit to the company of successfully prosecuting an action and might properly decide not to pursue it."

Paragraph (12) allows "any defendant who has given notice of intention to defend" to make application, if there is any material charge in the circumstances "requiring the plaintiff to show cause why the Court should not dismiss the action."

Paragraph (13) allows the plaintiff to apply in an application under para. (2) "for an indemnity out of the assets of the company in respect of costs incurred or to be incurred . . . ." This was foreshadowed by Lord Denning in the passage already quoted from *Wallersteiner* v. *Moir* (10) ([1975] Q.B. at 391). Mr. Glennie contends that in a true derivative action case, the plaintiff is the company that has suffered from not being able to recover from a defendant which owes it money because a majority of the shareholders refuse to bring action on its behalf. The cases certainly support the contention that *prima facie* it is the company that should bring any action to recover what is due to it, and that the minority shareholders, if they have to sue, are suing on behalf of or as agent for the company. Knox, J. in *Smith* v. *Croft (No. 2)* (8) ([1988] Ch. at 167) cited with apparent approval the words of Lord Davey in *Burland* v. *Earle* (1) ([1902] A.C. at 93): ". . . [I]t is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff."

Mr. Glennie argues that here the company DNT Gib itself would have no cause of action against DNT Germany under any of the sub-paragraphs of O.11, r.1(1), and it cannot be in a better position where the action is a derivative one taken on its behalf by the plaintiffs. I agree with this argument. On a proper analysis of the law as it emerges from the cases, it appears that in a derivative action, whatever procedural device is adopted to get the action off the ground, the true plaintiff is the company and the real defendant is the person from whom the company is claiming recompense. If for some procedural convenience, as for example in *Estmanco* (3), the company is joined as a defendant, that does not make it a defendant on the merits of the company's claim against the real defendant. There is therefore, in my view, no cause of action in the plaintiffs against the company, DNT Gib, to which it can be said that DNT Germany is a necessary and proper party, as DNT Germany cannot be a necessary or proper party to a non-existent action.

I leave out of consideration whether, had we been concerned with the plaintiffs' claims against Grunewald, Muller-Hagen and Oruzhev, DNT Germany could be said to be a necessary or proper party, because the case

against DNT Germany must be considered only on the basis of the unamended writ, and those directors are brought in only by the amended writ and have not as yet been served.

I have not lost sight of Mr. Wadsworth's argument that in fact the plaintiffs are claiming as against the company not only that it should do something the company does not want done, but also an indemnity for costs and an indemnity for what the plaintiffs may be ordered to pay others. It is true that there are claims made in the prayer, but they are really issues to be determined prior to and separately from the substantive claim by DNT Gib against DNT Germany. These matters were really for determination, if r.12A had been followed meticulously, before and separately from the application to serve out on DNT Germany. That they were all dealt with together does not in my view affect the principles applicable.

Mr. Wadsworth also points to para. (4) of r.12A where there is a reference to "all defendants who have given notice of intention to defend" as indicative of the fact that the paragraph envisages the company being a defendant. Reading the rule as a whole, I cannot draw that inference from the wording. The scheme of the rule is that the likely defendants in a derivative action are the person who owes the company money and/or any other directors who are said to have acted improperly in relation to the affairs of the company. It is only in cases where it is claimed that the company has acted *ultra vires* that the company is likely to be a proper defendant, but then the plaintiff will be acting either in a personal capacity or as a representative of other shareholders. That will not be a true derivative action, but leave may still be required for the minority shareholder to continue the action.

In conclusion, I am of the view that DNT Gib is not a defendant within the jurisdiction. Accordingly, DNT Germany cannot be served outside the jurisdiction under O.11, r.1(1)(c) on the basis that it is a necessary or proper party to an action against a defendant served within the jurisdiction. Further, I am not persuaded that in regard to the fourth cause of action, there is any basis on which it can be successfully argued that the cause of action rests on a contractual claim by the plaintiffs against DNT Germany. Accordingly, on the fourth cause of action, I am satisfied that there is no basis for service out on DNT Germany. This conclusion makes it unnecessary to deal with the argument that on the facts there is no serious issue to be tried as to DNT Germany's liability to DNT Gib.

I should say, however, that, as Mr. Wadsworth so powerfully submitted, one is left with a very uneasy feeling that DNT Gib, the company in which the Bullens have a substantial interest, albeit a minority shareholding, has been dealt with in an unsatisfactory manner giving rise to considerable suspicion. The Bullens were originally brought into the picture through their expertise which was known to Oruzhev, but the VNG contract was concluded by DNT Germany, a

company in which they had no stake. The Bullens had little control over the administration of the VNG contract which was dealt with in Hamburg where the affairs of both companies were controlled in the joint office. The assignment of the VNG contract from DNT Germany to DNT Gib was signed only in March 1993, and then by Grunewald acting for both companies. There certainly seem to be profits due to DNT Gib from the VNG contract that are not accounted for and there has been considerable prevarication over certain payments, particularly since the question of the value of the Bullens' shares in DNT Gib arose as an issue. These factors are, however, perhaps of more significance in any claims against Grunewald, Muller-Hagen and Oruzhev, and in relation to the third cause of action.

Third cause of action

This cause of action differs from the fourth in that the default alleged is that DNT Gib failed to keep proper records of the activities of the company in relation to the VNG contract. This is a cause of action related only to DNT Gib. It may be that this cause of action is not a true derivative action, but is one more properly characterized as a personal action by the minority shareholders against DNT Gib for the proper performance of its obligations. It is more akin to the type of action brought in *Edwards* v. *Halliwell* (2). In that event it seems that DNT Gib can correctly be described as a defendant. Having been properly served within the jurisdiction it would seem that in appropriate circumstances a foreign defendant could have a writ served out upon it as a necessary or proper party. But, as I have set out above, there is no basis set out in the writ for any claim against DNT Germany. On the amended writ there may well be a case for serving it out on Grunewald, Muller-Hagen and Oruzhev, but we are not concerned with that issue in this appeal.

In my view, even on the basis that DNT Gib is a defendant on the personal cause of action relied on by the plaintiffs, there is no cause of action pleaded against DNT Germany to warrant leave to serve out on DNT Germany, either under a contractual claim or as a necessary or proper party to the action against DNT Gib.

Conclusion

Looking separately at each cause of action in the writ issued against DNT Germany, as it is necessary to do, I do not consider that the respondents have shown that in any case there is justification for service out on DNT Germany. I would allow the second appellant's appeal.

DAVIS and **O'CONNOR, JJ.A.** concurred.

Appeal allowed.