[1999–00 Gib LR 251]

CREDIT SUISSE TRUST LIMITED v. M.I. HORNDAHL, V.M. HORNDAHL, LINDEN and C.J.P. HORNDAHL

SUPREME COURT (Schofield, C.J.): June 30th, 1999

Conflict of Laws—jurisdiction—personal jurisdiction—tracing action to recover proceeds of fraudulent breach of trust is claim in "delict" for purposes of Brussels and Lugano Conventions, art. 5(3), permitting proceedings in Gibraltar against persons domiciled in Contracting States—transfer of moneys overseas from Gibraltar trust account is "harmful event" occurring here, as place of event and resulting damage

Civil Procedure—service of process—service out of jurisdiction—whether service in Spain properly effected is matter for Gibraltar courts—may order substituted service if necessary to ensure other parties informed of proceedings

Civil Procedure—judgments and orders—default judgment—leave strictly required under Rules of Supreme Court, O.13, r.7B to enter judgment in default if writ served outside jurisdiction under O.11, r.1(2) as claim governed by Civil Jurisdiction and Judgments Ordinance, 1993

The plaintiff trustee brought proceedings to trace moneys paid from a Gibraltar trust to the defendants in pursuance of an alleged fraud.

The defendants allegedly procured the transfer by the plaintiff's predecessor of trust moneys in a Gibraltar bank to their accounts in Spain and Switzerland, by means of requests purporting to be signed by the beneficiary. The beneficiary was subsequently declared to be of unsound mind. Three of the defendants were resident in Spain, and one in Sweden. In a Spanish criminal investigation into the transactions, the first defendant claimed that they had received substantial gifts of money from the beneficiary, who was a close family friend and whom they had believed to be of sound mind.

As a condition of the settlement of proceedings by the beneficiary's guardian against the plaintiff trustee's predecessor, the plaintiff brought the present tracing action to recover the moneys. It obtained leave to serve the defendants outside the jurisdiction, orders for substituted service, and *Mareva* injunctions against the defendants. When the defendants failed to acknowledge service or file notice of their intention to defend the proceedings, judgment in default was entered.

The defendants subsequently acknowledged service and applied under

O.12, r.8 of the Rules of the Supreme Court for a declaration that the court lacked jurisdiction, and for orders to set aside service, discharge the injunctions and set aside the judgment in default.

They submitted that (a) the court had no jurisdiction over them under the Brussels and Lugano Conventions as persons domiciled in Spain and Sweden, since the allegations of fraud did not fall within the definition of "matters relating to tort, delict or quasi-delict" in art. 5(3) of both Conventions; (b) furthermore, the plaintiff had claimed damages for breach of trust, which was not a recognized cause of action, had not properly pleaded its claim in deceit, and had included restitutionary claims which clearly fell outside the scope of art. 5; (c) Gibraltar was not "the place where the harmful event[s] occurred," for the purposes of art. 5(3), since the moneys had been received in Spain and Switzerland and thus the damage to the trust had occurred there; (d) the plaintiff's attorneys had been guilty of misrepresentation and material non-disclosure in obtaining the orders by informing the court that the defendants had been charged in Spain with forgery and fraud, and that the first defendant had admitted to purchasing property in Spain with the trust funds and receiving laundered money; (e) the first three defendants had been served with the proceedings a week after the date claimed by the plaintiff and in a manner which did not accord with Spanish law; (f) the plaintiff had failed to obtain leave to enter judgment in default, as was required by the Rules of the Supreme Court, O.13, r.7B; and (g) in the absence of their acknowledgement of service, the court should have declared of its own motion under art. 20 of the Conventions that it lacked jurisdiction.

The plaintiff submitted in reply that (a) the court had special jurisdiction to hear the tracing claims under art. 5(3) of the Conventions; it was not bound by the strict categories of claim under English law in its interpretation of the phrase "tort, delict or quasi-delict," which could be construed as including fraudulent breach of trust; (b) the substance of the claims, rather than the form of pleading or the remedies sought, was crucial to the application of art. 5(3); (c) the place where "the harmful event" referred to in art. 5(3) had occurred was Gibraltar, as the place where the transfers had taken place and where the resulting loss had occurred; (d) its attorneys had informed the court of the charges against the defendants on the basis of its reasonable understanding from Spanish lawyers and from the oral and documentary evidence arising from the Spanish investigation; (e) it had served the writ and accompanying documents on the date stated, as shown by affidavit and other evidence; and (f) its failure to obtain leave to enter judgment in default was not a material irregularity, as the court had already examined the issue of jurisdiction and the defendants had suffered no prejudice.

Held, setting aside judgment in default:

(1) The court had jurisdiction under art. 5(3) of the Brussels and Lugano Conventions over the plaintiff's claims against the defendants, as

claims relating to delict. As a specific and limited derogation from the general rule in art. 2 that nationals of a Contracting State were to be sued in that state, art. 5(3) was not a catch-all provision conferring jurisdiction in respect of non-contractual claims. Nor was it to be construed according to the strict categories of claim in English law—although, as the claims were brought in Gibraltar, English law must be the starting point. The claims that the defendants had abused their position of trust, unduly influenced the beneficiary and fraudulently obtained money from her trust were not strictly tortious claims but, arguably, fell within the dictionary definition of a delict as a violation of law or right and were not simply breaches of equitable obligations. Since the nature of the cause of action determined whether or not the court had jurisdiction, the fact that restitutionary *remedies* were sought was not decisive. The plaintiff had a good arguable case for the return of the money obtained by fraud, and the defects in pleading complained of were not fundamental (paras. 16–25).

(2) The court was also satisfied that for the purposes of art. 5(3), Gibraltar was the place where the harmful event had occurred, since both the damage and the event giving rise to it had occurred here. The transfer of the money from the trust account was an act in Gibraltar which had resulted in damage here, not in Spain or Switzerland where the money had been received (paras. 26–27).

(3) The statements in the affidavit sworn by the plaintiff's attorney regarding the criminal investigation in Spain were not unreasonable interpretations of the first defendant's admissions. Although they were not necessarily correct, the court did not regard them as a material misrepresentation. Similarly, his statement that the defendants had been formally charged, though inaccurate, was not deliberately misleading and not sufficiently serious a misrepresentation to warrant setting aside the orders. There was no strict parallel between the course of Spanish proceedings and those in Gibraltar, and the Spanish judge's preliminary enquiries had led him to find that there was *prima facie* evidence that the defendants had committed offences (paras. 30–37).

(4) Service of the writ and other documents had been effected on the day stated in the plaintiff's affidavit of service and shown by facsimile evidence. Whether the proper procedure had been followed was a matter for the Gibraltar courts, and the substituted service which the court had authorized sufficed to inform the defendants of the plaintiff's action and the orders made. Since the Civil Jurisdiction and Judgments Ordinance, 1993 (applying the Conventions) applied to the plaintiff's claims, leave to serve the documents outside the jurisdiction was not required under O.11, r.1(2), and that order would be set aside (para. 15; paras. 38–41).

(5) However, the judgments in default against the defendants would be set aside on the ground of non-compliance with O.13, r.7B of the Rules of

the Supreme Court, requiring that leave be obtained to enter judgment if the writ had been served outside the jurisdiction under O.11, r.1(2). The failure was not a technicality that could be cured (paras. 42–44).

Cases cited:

(1) *Gibraltar Homes Ltd.* v. *Banco Español de Credito S.A.*, 1997–98 Gib LR 217.

(2) *Handelskwekerij G.J. Bier B.V.* v. *Mines de Potasse d'Alsace S.A. (Case 21/76)*, [1978] Q.B. 708; [1976] E.C.R. 1735, applied.

(3) *Kalfelis* v. *Bankhaus Schröder, Münchmeyer, Hengst & Co. (Case 189/87)*, [1988] E.C.R. 5565; [1989] E.C.C. 407, applied.

(4) *Kitechnology B.V.* v. *UNICOR G.m.b.H. Plastmaschinen*, [1995] F.S.R. 765; [1994] I.L. Pr. 568, *dicta* of Evans, L.J. applied.

(5) *Kleinwort Benson Ltd.* v. *Glasgow City Council*, [1996] Q.B. 678; [1996] 2 All E.R. 257; on appeal, [1999] 1 A.C. 153; [1997] 4 All E.R. 641, *dicta* of Lord Clyde applied.

Legislation construed:

Rules of the Supreme Court, O.11, r.1(2):

> "Service of a writ out of the jurisdiction on a defendant is permissible without the leave of the Court provided that each claim against that defendant made by the writ is either—
>
> (*a*) a claim which by virtue of the Civil Jurisdiction and Judgments Act 1982 the Court has power to hear and determine, made in proceedings to which the following conditions apply . . .
>
> or
>
> (*b*) a claim which by virtue of any other enactment the High Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction."

O.13, r.7B: The relevant terms of this rule are set out at para. 42.

European Community Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, September 27th, 1968; 1978 O.J. L304/77 and Lugano, September 16th, 1988; 1988 O.J. L319/9), art. 2: The relevant terms of this article are set out at para. 12.

art. 5(3): The relevant terms of this paragraph are set out at para. 14.

art. 20: The relevant terms of this article are set out at para. 43.

T.R. Mowschenson, Q.C. and *G. Licudi* for the plaintiff;
M.J. McParland and *C. Keightley-Pugh* for the defendants.

1 **SCHOFIELD, C.J.:** On March 31st, 1999 I granted, *ex parte*, worldwide *Mareva* injunctions and orders ancillary thereto against the

four defendants and orders for substituted service of the writ and service out of the jurisdiction. The return date of the *Mareva* injunction was May 4th, 1999 and, the defendants having been served with the orders but having failed to acknowledge service or attend on that day, I renewed the orders until judgment or further order. The defendants failed to file a notice to defend and on May 17th, 1999 judgment in default was entered against the first, second and third defendants for the amounts shown in the writ.

2 On May 20th, 1999 all four defendants acknowledged service. They now apply by summons dated June 3rd, 1999 for orders pursuant to O.12, r.8 of the Rules of the Supreme Court for a declaration that the court has no jurisdiction over the defendants in respect of the subject-matter of the suit, and orders discharging the orders I made on March 31st, 1999. The defendants' claim is that the court has no jurisdiction to entertain the action, that the writ was improperly served, that the default judgment was improperly entered and the *Mareva* injunctions were improperly granted, and that there was material non-disclosure by the plaintiff's counsel.

The facts

3 I granted the orders of March 31st, 1999 on the affidavit of Mr. Licudi and on sight of the writ. As briefly as I can state them, the facts alleged are these. The plaintiff is a company incorporated in Guernsey. It is the trustee of a trust known as the 44 Trust. Until February 12th, 1999 it was also the trustee of a trust known as the 43 Trust. These trusts were initially established by the plaintiff's sister company, Credit Suisse Fides Trust Ltd., a Gibraltar company, by two declarations of trust made on May 17th, 1991. The two trusts received funds held in two accounts at Credit Suisse (Gibraltar) Ltd. in the name of Mrs. Gunvor Mörner, a Swedish national living in Spain. The amounts were received in Swiss Francs and were the equivalent of approximately £137,000, in the case of the 43 Trust, and approximately £2,216,000, in the case of the 44 Trust. By two letters of wishes Mrs. Mörner appointed Credit Suisse Fides Trust Ltd. as trustee of the trusts.

4 In September 1993 and January 1994 the trustees received requests, purporting to be signed by Mrs. Mörner, for the transfer of substantial amounts of money from the 44 Trust to accounts in Marbella (Spain) and Zurich (Switzerland). It is the plaintiff's case that the signatures on these requests were wrongfully procured by the first and second defendants and that the money was transferred for their benefit and the benefit of the third defendant, who is the first defendant's daughter and who resides with them, and that of the fourth defendant, who is Mr. Horndahl's son and who resides in Sweden.

5 It is alleged by the plaintiff that the first and second defendants were employed by Mrs. Mörner during 1993 and until that time were in modest financial circumstances. In October 1993 they purchased a villa in Marbella for approximately £160,000, registered in the name of the third defendant, and showed other signs of affluence. In about March 1994 Mrs. Mörner was placed in an old persons' home in San Pedro de Alcantara, Spain, and in September 1996 she was declared by the Court of First Instance No. 5 of Marbella to be incapacitated due to a degenerative mental disorder.

6 Mrs. Anna Catherine Stromquist was appointed Mrs. Mörner's legal guardian. She had, as early as 1994, made a complaint to the Spanish police against the first and second defendants. Investigations have been ongoing in Spain since then and in a statement to the Spanish court in October 1996 the first defendant, initially at least, said that he and the second defendant had received various monetary gifts from Mrs. Mörner by way of bank transfers from foreign banks in 1993 and 1994.

7 On May 31st, 1995 Credit Suisse Fides Trust Ltd. retired as trustee of the 43 and 44 Trusts and the plaintiff was appointed in its place. On October 3rd, 1997 Mrs. Stromquist, as Mrs. Mörner's next friend, commenced proceedings against Credit Suisse Fides Trust Gibraltar, claiming damages for breach of trust, breach of contract, negligence and breach of fiduciary duty in respect of the transfers of funds from the 44 Trust made in 1993 and 1994. The proceedings were compromised by the parties on July 30th, 1998, which compromise was approved by this court. One clause of the compromise agreement provided that the plaintiff would take such steps as might reasonably be required, in consultation with Mrs. Stromquist, to trace and attempt to recover the substantial sums which were paid out of the 44 Trust.

8 Not only are criminal investigations ongoing in Spain, the Spanish court having placed an embargo over the villa purchased by the Horndahls in Marbella, but an application was made by the plaintiff against Jyske Bank (Gibraltar) Ltd., in which substantial information was obtained which the plaintiff says supports its claims against the defendants. Furthermore, proceedings have been commenced in Ireland, England, Switzerland and Luxembourg as part of the tracing exercise.

9 The first defendant has deposed that he and his wife settled in the Marbella area in July 1991 and were issued with a formal residence permit in February 1992. They were not employed by Mrs. Mörner but were given her name by an aunt and became firm and very close friends with her. He denies they have been involved in any wrongdoing and maintains that Mrs. Mörner gave them gifts of money out of what he believes was genuine love and affection, and for the care and attention he and his family had shown her. He claims there was nothing improper

about those gifts, although they were of substantial sums. They believed Mrs. Mörner to be very wealthy and that the sums came from her own funds. She told him of other gifts she had made to others. The first defendant also deposed that Mrs. Mörner was, to his knowledge and belief, fully of sound mind when she made the gifts to them.

10 I will say at once that in granting the orders I did on March 31st, 1999 I was satisfied that the plaintiff had made out a good arguable case that the first and second defendants had fraudulently obtained the transfers of funds from the 44 Trust in 1993 and 1994, and nothing I have seen in the affidavits filed by or on behalf of the defendants has caused me to alter my view. I should add that a medical report submitted by the plaintiff from a Dr. Naddaf, who treated Mrs. Mörner from April to November 1993, is to the effect that Mrs. Mörner was very poorly throughout the period of treatment and did not have "legal capacity."

11 In this connection it should be noted that on March 12th, 1999 the Spanish judge conducting the investigation into the allegations in Spain stated as follows:

> "The preliminary enquiries which have been made to date allow for the conclusion to be reached that there are rational indications of crimes having been committed in respect of falsification of a commercial document and fraud, the authors apparently being Magnus Invarsson Horndahl, Vera Margarethe Horndahl, Ewa Elisabeth Therese Linden and Carl Johan Peter Horndahl."

Jurisdiction

12 It is common ground between the parties that the exercise of the court's jurisdiction over the defendants to this action is governed by the Brussels and Lugano Conventions. These Conventions have the force of law in Gibraltar pursuant to the Civil Jurisdiction and Judgments Ordinance, 1993, which came into force on November 5th, 1998. Both Conventions contain the same general basic principle on jurisdiction in art. 2, which reads:

> "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.
>
> Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State."

13 Again it is common ground between the parties that none of the defendants is domiciled in Gibraltar—they are domiciled either in Spain, so as to come within the terms of the Brussels Convention, or Sweden, so as to come within the terms of the Lugano Convention. In other words,

Gibraltar is not given jurisdiction over these defendants by the general provisions contained in art. 2.

14 However, there are provisions in art. 5 of both Conventions for courts to exercise special jurisdiction. The plaintiffs claim that art. 5(3) applies. This reads:

> "A person domiciled in a Contracting State may, in another Contracting State, be sued:
>
> . . .
>
> 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred . . ."

The defendants maintain that the plaintiff does not have a good arguable case that the Gibraltar court has jurisdiction under this provision. In other words, that it cannot lay claim to the court's special jurisdiction under art. 5(3) of the Conventions.

15 I should mention here that because the claim is one to which the Civil Jurisdiction and Judgments Ordinance, 1993 applies, leave to serve out of the jurisdiction was not necessary (see O.11, r.1(2) of the Rules of the Supreme Court). The plaintiff's counsel was in error in making applications for such leave and I was in error in granting them. For that reason, I set aside the orders granting leave to serve out of the jurisdiction. This does not affect the order for substituted service. Nor does it have a bearing, error though it was, on any other aspect of these applications.

16 So far as jurisdiction is concerned, art. 5, under which the plaintiff says this court has jurisdiction, is a special jurisdiction. In *Kleinwort Benson Ltd.* v. *Glasgow City Council* (5), Lord Clyde had this to say ([1999] 1 A.C. at 179–180):

> "It seems to me that one clear principle is that it is article 2 of the Convention which sets out the basic rule on jurisdiction, namely that persons are to be sued in the courts of their domicile. It would seem that that should also be the basic rule for the interpretation of article 2 in Schedule 4. The provisions of article 5 then are to be seen as derogations from the basic rule, although of course both article 2 and article 5(1) may be equally available if their respective qualifications are met: *Bank of Scotland v. Seitz* . . . It is sufficient to refer in this connection to *Somafer S.A. v. Saar-Ferngas A.G.* . . . and to *Arcado S.P.R.L. v. Haviland S.A.* . . . It may also be noted that article 2 is in mandatory terms, while article 5 is permissive. It follows from all of this that the approach to the construction of article 5 should be narrow rather than generous. As the European Court put it in *Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co.* (Case 189/87) . . . :

> 'the "special jurisdictions" enumerated in articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the state where the defendant is domiciled and as such must be interpreted restrictively.'
>
> This approach has been recognised and followed in relation to article 5(3) of Schedule 4 in *Davenport v. Corinthian Motor Policies at Lloyd's* . . ."

17 Mr. McParland has taken me through the writ and statement of claim in support of his argument that the claim does not fall within art. 5(3). He points out, quite rightly, that the authorities do not support a proposition that any action which is not based on contract must come within the definition of "tort, delict or quasi-delict." To so hold would be to derogate from the basic principle on jurisdiction embodied in art. 2. However, it must be borne in mind that in determining whether an action falls within the definition of "tort, delict or quasi-delict," a court is not bound by the categories of claim defined in English law. As the European Court said in *Kalfelis* v. *Bankhaus Schröder, Münchmeyer, Hengst & Co. (Case 189/87)* (3) ([1988] E.C.R. at 5584–5585):

> "14. The second question submitted by the Bundesgerichtshof is intended essentially to ascertain, first, whether the phrase 'matters relating to tort, delict or quasi delict' used in Article 5 (3) of the Convention must be given an independent meaning or be defined in accordance with the applicable national law . . .
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> 15. With respect to the first part of the question, it must be observed that the concept of 'matters relating to tort, delict or quasi delict' serves as a criterion for defining the scope of one of the rules concerning the special jurisdictions available to the plaintiff. As the Court held with respect to the expression 'matters relating to a contract' used in Article 5 (1) (see the judgments of 22 March 1983 in Case 34/82 *Peters v ZNAV* . . . and of 8 March 1988 in Case 9/87 *SPRL Arcado and SA Haviland* . . .), having regard to the objectives and general scheme of the Convention, it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned, that concept should not be interpreted simply as referring to the national law of one or other of the States concerned.
>
> 16. Accordingly, the concept of matters relating to tort, delict or quasi-delict must be regarded as an autonomous concept which is to be interpreted, for the application of the Convention, principally by reference to the scheme and objectives of the Convention in order to ensure that the latter is given full effect."

18 So the basic principle is that art. 5(3) must be interpreted restrictively and is not to be considered to be a "catch-all" provision so as to give special jurisdiction in all claims which are not based on contract. On the other hand, in determining whether a claim falls within the term "tort, delict or quasi-delict," this court is not bound by the strict categories of claim in English law.

19 However, in classifying a claim, because the claim is brought in Gibraltar, the classification of claims in English law must at least be the starting point. In *Kitechnology B.V.* v. *UNICOR G.m.b.H. Plastmaschinen* (4), Evans, L.J. had this to say ([1995] F.S.R. at 777):

> "Understandably, therefore, it is common ground in the present case that Article 5(3) must be given what is described as an 'autonomous' or 'Convention' meaning and that the classification of the plaintiffs' claims in English law as tort or otherwise is therefore not decisive. Nevertheless, the claims are brought in England and they are formulated according to English principles of law, and so their classification under English law must be at least the starting point for consideration of whether they fall within Article 5(3) or not. The submissions before us have concentrated upon the non-contractual claims for injunctive and other relief in respect of breaches of confidence, and the defendants submit that these cannot properly be regarded as claims in 'tort, delict or quasi-delict' either in English law or for the purposes of the Convention. It is clear, in my view, that such claims do not arise in tort, and the remaining words 'delict or quasi-delict' have no separate meaning in English law. These claims are certainly non-contractual."

20 What is claimed against the defendants? That they abused a position of trust, unduly influenced Mrs. Mörner and fraudulently obtained money from her trust. Whilst these claims may not strictly come within the English classification of torts, I have been referred to no case where similar claims have been subjected to the Convention test—if I may put it that way—of "tort, delict or quasi-delict." The cases I have been referred to are far removed from the wrongdoing claimed against these defendants. Nor have I been referred to any definition of "delict or quasi-delict." For want of a better reference I have gone to the *Shorter Oxford English Dictionary* for a definition of "delict." It is defined as "a violation of law or right; an offence, a delinquency." It is interesting to note that in the Court of Appeal in *Kleinwort Benson Ltd.* v. *Glasgow City Council* (5), Millett, L.J. said ([1996] Q.B. at 701):

> ". . . [R]estitutionary claims for wrongs are delictual or quasi-delictual; a claim by the victim of fraud to trace and recover his money would not be classified by English law as either contractual or delictual, but in civilian systems which deny the possibility of

> restitutionary proprietary claims it would probably be classified as delictual."

21 Taking all the above into account, I am persuaded that the claims against the defendants relate to delict and I cannot accept a description of the claim as a breach of a mere equitable obligation. To put it another way, if I were to be asked to say that the wrongdoings alleged against these defendants were not delicts I would be unable to do so.

22 Mr. McParland has pointed out that in the writ and statement of claim there is a claim for damages for breach of trust which does not exist as a cause of action. He has also pointed out that the claim in deceit is not properly pleaded. These are matters of pleading and do not detract from the thrust and weight of the material before me, which satisfies me that, in basic terms, the plaintiff has a good arguable case for the return of money obtained by fraud.

23 There are other claims of a restitutionary nature which, Mr. McParland argues, cannot fall within the special jurisdiction of art. 5(3). Claims of a restitutionary nature do not, he argues, fall under either art. 5(3) or, indeed, art. 5(1), which relates to claims in contract. For this proposition he relies on the authority of the House of Lords decision in *Kleinwort Benson Ltd.*, where it was held that a claim in unjust enrichment did not fall within the special jurisdictions under art. 5.

24 However, a claim in unjust enrichment, neither a claim in contract nor in tort or delict, is a very different claim to the one before this court. The plaintiff may be seeking restitution but it is a remedy sought within the context of a claim in delict. As was stated by Millett, L.J. in the Court of Appeal in *Kleinwort Benson Ltd.* (*ibid.*, at 698):

> "It is to be observed that jurisdiction is not allocated according to the remedy sought. Provided that the matter relates to a contract, the jurisdiction conferred by article 5(1) is available whether the plaintiff seeks to enforce the contract, either specifically or by way of damages for breach, or to escape from it and recover money paid under it. Some restitutionary claims, at least, fall within article 5(1). Further, jurisdiction is not allocated by reference to the cause of action. The words 'matters relating to a contract' are intentionally indefinite. They are designed to get away from technical classifications of causes of action in national laws, which may well differ. The expression 'matters relating to a contract' is not, in my opinion, to be equated with 'contractual causes of action' or 'the enforcement of contractual obligations' or even 'claims based on contract.'"

Although there referring to jurisdiction under art. 5(1), I consider the principle applies equally to art. 5(3). It is the substance of the claim which determines jurisdiction, not the remedies sought under that claim.

25 Mr. McParland has pointed out that Millett, L.J.'s decision was overturned by the House of Lords, but it seems no direct reference was made to this part of his judgment. We must not lose sight of the fact that *Kleinwort Benson* was a case of unjust enrichment, a very different claim to the present claim, and the main focus in the case was on the provisions of art. 5(1).

26 For this court to exercise jurisdiction under art. 5(3) it is not sufficient for the claim to be in "tort, delict or quasi-delict". The court must also be "for the place where the harmful event occurred." On the European Court authority of *Handelskwekerij G.J. Bier B.V.* v. *Mines de Potasse d'Alsace S.A. (Case 21/76)* (2) ([1976] E.C.R. at 1735), the "place where the harmful event occurred" must be taken to be both the place where the damage occurred and the place of the event giving rise to it, and the plaintiff has the option to sue in either place.

27 Mr. McParland has manfully argued that the damage did not occur in Gibraltar and that the damage occurred when the payee's bank unconditionally accepted the money. Thus, he says, the damage occurred in Spain or Switzerland, where the money was received. For this proposition Mr. McParland has cited various passages from Cresswell, *Encyclopaedia of Banking Law*. However, these passages relate to the time when a transfer of funds occurs and do not assist us as to where damage occurs when a transfer of funds is unlawfully made. I remain unconvinced that in this case the alleged damage, which amounted to transfers of money from a bank account situated in Gibraltar, occurred other than in Gibraltar.

28 For all these reasons, I am satisfied that this court has jurisdiction over the claims of the plaintiff against the defendants.

Material non-disclosure

29 The defendants say that in his affidavit in support of the *ex parte* orders of March 31st, 1999, Mr. Licudi seriously misled the court in three important respects. First, he wrongly informed the court that the defendants had been formally charged with forgery and fraud in relation to the transfers of money complained of. Secondly, in the Spanish proceedings he wrongly stated that the first defendant had accepted that the villa in Marbella was bought with funds from the 44 Trust. Thirdly, he wrongly stated that the first defendant had told the Spanish judge that he had received laundered money.

30 The second and third alleged misstatements arise from the following passage in Mr. Licudi's affidavit dated March 29th, 1999:

> "The first defendant eventually appeared before the judge on October 23rd, 1996 and stated, initially, that the Horndahls had received various monetary gifts from Mrs. Mörner by way of bank

transfers from foreign banks in 1993 and 1994. This included over Pta. 30m. used for the purchase of the villa. He then said that in fact, they had only received Pta. 105,000 (approximately £420) from Mrs. Mörner and that the rest of the transfers consisted of laundered money which he had obtained. The first defendant added that he had agreed with Mrs. Mörner that in the event that he encountered fiscal problems in connection with these transfers, she would say that these amounts were gifts from her. The first defendant also stated that Pta. 36m. (approximately £144,000) used for the purchase of the villa were transferred to his account at Banco Santander, Calajonda, Spain, from an account in his name at a foreign bank. He refused to state which foreign bank this was."

31 This is challenged in the affidavit of Sten Erik Norling Plahn, a member of the Malaga Bar, who represents the four defendants and who was present at the relevant hearing before the Spanish judge. He deposes:

"There is now produced and shown to me, marked 'S.E.N.P. 3,' a true copy and translation of the statement made by the first defendant to the Investigating Judge on October 23rd, 1996. As this shows, para. 21(j) of Mr. Licudi's affidavit substantially misrepresents and misinterprets what happened on that occasion and what the first defendant said. The first defendant did not admit, as alleged, that the funds for the purchase of the villa in Spain were derived from the gifts made to him and his family by Countess Mörner. Neither did the first defendant use the words 'laundered money,' as is wrongly stated by Mr. Licudi. I was present at the hearing on October 23rd, 1996, acting at that time in the capacity of a translator for the first defendant. In fact, the first defendant informed the Investigating Judge that he had an agreement with Countess Mörner that she would declare that she had given this money to the first defendant if the first defendant had any problems with the Swedish tax authorities in the future. The first defendant informed the Investigating Judge that he did indeed hold some of his own investments through offshore holding companies (being assets which he had held before he had met Countess Mörner), and that he did not wish to disclose his assets outside Spain, as he is constitutionally entitled not to do, under Spanish law. The first defendant informed the Investigating Judge that the funds in question were outside the Swedish tax system and the Swedish tax authorities were not aware of their existence."

32 Mr. Licudi has sworn a further affidavit in which he defends the statements he made in his first affidavit. First, he points to the following passage from the translated transcript of the first defendant's evidence to the Spanish judge:

> "Mrs. Mörner eventually became like a godmother to them. They received gifts from Mrs. Mörner of a financial nature via bank transfers from banks abroad, they did not know whence, to the deponent's and his wife's accounts in the Banco de Santander and Banco Nat West in Fuengirola. The account at the Santander was opened around October 1993—when they purchased a house in Hacienda Las Chapas—and the account at the Nat West, in October 1994, both of which remain open today. Afterwards he transferred the account at Banco de Santander to a Mijas-Costa branch and at around the middle of 1994 his wife's daughter, Ewa Elisabeth, became the title-holder."

Mr. Licudi says that he still interprets this passage as an admission that the villa was purchased with the proceeds of the gifts from Mrs. Mörner.

33 I am uncertain whether that is a necessary interpretation of the passage quoted but it is not an unreasonable interpretation. Be that as it may, given the context in which the allegation is made and the background against which it is made, I would not regard Mr. Licudi's assertion as a material misrepresentation.

34 Mr. Licudi also points to the following passage from the first defendant's deposition to the Spanish judge:

> "After further questioning he stated that in fact he had only received a donation for a sum of Pta. 105,000 in cash from Mrs. Mörner, and that the remainder of the transfers appearing as entries in his accounts with the Nat West and Santander were in fact black money which the deponent had obtained, having agreed with Mrs. Mörner that in the event of any tax problems she would say that these were gifts made by her."

Mr. Licudi refers to the *Collins Spanish Dictionary*, which translates the term "dinero negro" as "undeclared earnings; money proceeding from crime," and asserts that he was right to state that the first defendant told the court that it was laundered money. I am minded to accept Mr. Licudi's explanation that this was not, in fact, a misrepresentation.

35 In his affidavit in support of the orders I made on March 31st, 1999, Mr. Licudi stated that the defendants had been criminally charged in Spain in relation to the transfer of money complained of. This is incorrect, says Mr. Norling, the defendants' Spanish lawyer. Various steps in an investigation have taken place before the court but no formal charge has been laid against the defendants. Mr. Licudi deposes that it was his understanding, based on documents he had seen and conversations with Mrs. Stromquist's Spanish lawyers, that the defendants had been charged, and indeed he again resorts to the *Collins Spanish Dictionary* for a translation of the word "imputados" which is extracted from the verb "imputar" which is "to impute, attribute to, charge with."

36 From the material before me, I think Mr. Licudi was in error in stating that the defendants had been formally charged. Nonetheless, the Spanish judge, in the passage of the decree I have quoted earlier in this judgment, has found that his preliminary enquiries allow for the conclusion that crimes have been committed by the defendants. That is not lost on this court, and I was mindful of the fact, when I granted the orders, that Spanish criminal proceedings take a wholly different course to ours and that, without a detailed knowledge of such procedures (which I do not have), it is difficult to ascertain what point Spanish proceedings have reached when related to our own procedures.

37 Whilst Mr. Licudi may strictly have misrepresented the position, it is not to my mind so serious a misrepresentation as to warrant the setting aside of the orders made. Mr. Licudi, I believe, genuinely understood the position to be as stated in his first affidavit and he has apologized for any misunderstanding. Furthermore, the fact that the defendants had not been formally charged in Spain would not have affected my decision to grant the orders. The distinction between the facts as they are and the facts as Mr. Licudi represented them to be is so fine as to allow me to ignore his error and to allow the continuation of my orders.

Service

38 Mrs. Horndahl deposes that the writ and accompanying documents were served on the first three defendants not on April 13th, 1999, as claimed by the plaintiff, but on April 20th. I am uncertain as to the relevance of this matter because the defendants were given 21 days from the date of service to acknowledge service, and judgment in default was not entered until May 17th, which is more than 21 days from the date Mrs. Horndahl alleges service was effected.

39 Be that as it may, I am satisfied that Mrs. Horndahl has made a mistake as to the date of service, even though she has received some support from her Spanish lawyer. There is the affidavit of service of Henry Bautista in which it is deposed that the documents were served on April 13th. Furthermore, there is evidence, showing dates, electronically recorded, that Mr. Bautista faxed Mr. Licudi's firm on April 14th, stating that service had been effected the previous day. This, for me, is sufficient confirmation that service was effected on April 13th and not on April 20th.

40 There is also a suggestion that service is defective because it was effected contrary to Spanish law. Mr. Norling deposes that Spain is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and that under the Convention service of legal process in Spain must be made either directly by the Spanish courts or through the Minister for Justice in Madrid.

41 What amounts to good service is a matter for this court, and service in this case was effected under an order of the court. We have had cases in these courts where challenges have been made to service in Spain (see, *e.g. Gibraltar Homes Ltd.* v. *Banco Español de Credito S.A.* (1)), and the court is fully aware of the difficulties encountered in serving process issued by this court in Spain and as to the rules relating to service in Spain. With all that in mind, I granted an order for substituted service, acknowledging that it was in everyone's interests, including those of the defendants, that the defendants should have speedy information about the action and the orders I had made on March 31st, 1999.

The default judgment

42 It is common ground that the default judgment entered against the first, second and third defendants did not comply with O.13, r.7B of the Rules of the Supreme Court in that leave was not obtained. O.13, r.7B(1) and (2) read as follows:

> "(1) Where a writ has been served out of the jurisdiction under Order 11, r.1(2)(*a*) or has been served within the jurisdiction on a defendant domiciled in Scotland or Northern Ireland or in any other Convention territory the plaintiff shall not be entitled to enter judgment under this Order except with the leave of the Court.
>
> (2) An application for leave to enter judgment may be made ex parte and shall be supported by an affidavit stating that in the deponent's belief—
>
> (*a*) each claim made by the writ is one which by virtue of the Civil Jurisdiction and Judgments Act 1982 the Court has power to hear and determine
>
> (*b*) no other court has exclusive jurisdiction under Schedule 1, 3C or 4 to the Act to hear and determine such claim, and
>
> (*c*) where the writ is served out of the jurisdiction under Order 11, r.1(2)(*a*) such service satisfied the requirements of Article 20 of Schedule 1, 3C or 4 of that Act, as the case may require,
>
> and giving in each case the sources and grounds of such belief."

Mr. Mowschenson, Q.C. would have me hold that this defect was a merely formal defect which can be cured and which has not prejudiced the defendants.

43 O.13, r.7B owes its origin to art. 20 of the Brussels and Lugano Conventions, in which it is stated:

> "Where a defendant domiciled in one Contracting State is sued in a

> court of another Contracting State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Convention."

Mr. McParland has taken me to the following passage from the *Jenard Report on the Brussels Convention* (O.J. 1979 C59/1):

> "Article 20 is one of the most important articles in the Convention: it applies where the defendant does not enter an appearance. Here the court must, of its own motion, examine whether it has jurisdiction under the Convention. If it finds no basis for jurisdiction, the court must declare that it has no jurisdiction. It is obvious that the court is under the same obligation even where there is no basis for exclusive jurisdiction. Failure on the part of the defendant to enter an appearance is not equivalent to a submission to the jurisdiction. It is not sufficient for the court to accept the submissions of the plaintiff as regards jurisdiction: the court must itself ensure that the plaintiff proves that it has international jurisdiction."

44 Whilst it is acknowledged that in this case matters of jurisdiction had been gone into before the writ and orders of March 31st, 1999 were issued and served, when the proceedings reached the stage of judgment they had reached a more critical stage of the proceedings from the defendants' point of view. This failure to comply with the strict provisions of O.13, r.7B does not, to my mind, amount to a mere technicality which should be cured. In all the circumstances, I am persuaded that I should set aside the default judgments against the first three defendants on this limited ground.

Conclusion

45 I therefore set aside the default judgments of May 17th, 1999 and the order for leave to serve out of the jurisdiction. All other orders will remain in force.

Order accordingly.
