1984 November 22

[HADJIANASTASSIOU, DEMETRIADES, SAVVIDES, JJ.]

DOLPHIN SHIPPING CO. LTD., AND ANOTHER,

Appellants-Defendants,

v.

CANTIERI NAVALI RUINITI S.P.A.,

Respondents-Plaintiffs.

(Civil Appeals No. 6499 and 6500).

Practice—Stay of proceedings—Discretion of the Court—Principles applicable and principles on which Court of Appeal interferes with exercise of such discretion—Foreign plaintiffs suing defendants residing within the jurisdiction—Proceedings not vexatious or unjust and they did not unjustly harassed the defendants—Fact that evidence would come mainly from witnesses who were mainly located abroad totally inadequate to prove what defendants had to prove in order to succeed—Procedural advantages to plaintiffs by having instituted the proceedings in Cyprus—Interests of Justice not dictating that proceedings should be stayed.

The appellants-defendants were a shipping company having their registered office of business in Limassol, Cyprus and the respondents-plaintiffs were an Italian company of Genoa, Italy. The respondents-plaintiffs brought two actions against the appellants claiming a sum of about U.S. dollars 2,000,000 in respect of several "promissory notes and/or bonds and/or otherwise", alleged to have been issued and/or signed in Cyprus by the appellants which were presented for payment at the agreed place, i.e. Banca Commerciale Italiana, Genoa and were not paid and as a result they were duly protested in accordance with the law.

The appellants applied for leave to enter a conditional appearance, which was granted to them but as they failed to apply in time to have the writs of summons set aside, their appearance became unconditional. Thereafter appellants filed applications praying for:-

(a) an order setting aside the writ or alternatively

(b) an order staying the proceedings, or, alternatively,

(c) an order striking out the endorsement and the statement of claim in limine.

The applications were based on the following grounds: 5

(a) That the plaintiffs' claim was framed in such a way that the sums were claimed as "due upon a promissory note and/or bond and/or otherwise"; and that the plaintiffs should have made their election and decide on what type of document their claim was based, so as to enable 10 the defendants to defend the action properly as the defences may be varying according to the type of document the claim was based upon.

(b) That the appellants-plaintiffs brought an action against the defendants in Italy, which was pending before an 15 Italian Court and which included a claim on the same cause and in which the appellants had a counterclaim exceeding the claim in the action.

(c) That Italy was a more appropriate forum for determination of these proceedings in that the transactions 20 which gave rise to the claim and the counterclaim arose in Italy, most of the witnesses were in Italy and the case could be more properly adjudicated before the Italian Courts.

The trial Judge granted the application in respect of striking 25 out the phrase "and/or bonds and/or otherwise" as well as "and/or undertook and/or engaged" so that the claim be limited to one on promissory notes but refused the application for staying the proceedings. Hence this appeal.

The trial Judge held that the proceedings were not vexatious 30 or unjust or that they unjustly harassed the defendants and that the interest of Justice dictated that they should be stayed. The trial Judge, further, held that the fact that evidence in the case would come from witnesses who were mainly located in Italy was totally inadequate to prove what the defendants had to prove 35 in order to succeed.

Held, that a plaintiff should not lightly be denied the rig| to sue in a Cyprus Court, if jurisdiction is properly founde| that in considering whether a stay should be granted the Cou must take into account any advantage to the plaintiff and a| disadvantage to the defendant; that the defendant must satis the Court that there is another forum to whose jurisdiction | is amenable in which justice can be done between the parti| at substantially less inconvenience or expense, and that t| stay must not deprive the plaintiff of a legitimate personal | juridical advantage which would be available to him if he invok| the jurisdiction of the Cyprus Court; that the burden is on t| appellants to satisfy this Court that the trial Judge failed exercise his discretion on right principles; that if the trial Jud| erred in any way in exercising his discretion then the Cou of Appeal will interfere, but otherwise it is not for this Cou to substitute its discretion for his if he has not erred in a| way in exercising his discretion; that the appellants failed discharge the burden cast upon them to satisfy the Court th the trial Judge erred in any way in exercising his discretion refusing the application for stay of the proceedings in Cypru and that, therefore, the appeals must fail.

Held, further, that to the matters taken into considerati| by the trial Judge as weighing the scales in favour of the respon ents there may be added the procedural advantage which t respondents may have by having instituted proceedings Cyprus, according to the contents of the affidavit filed on th| behalf, that as a result of any judgment obtained in Cypr they may take steps for setting aside as fraudulent the alienati by the appellants of their three ships, which were registered Cyprus, which took place soon after the incurrence of th| indebtedness to the respondents.

Appeals dismisse

Cases referred to:

McHenry v. *Lewis* [1882] 22 Ch. D. 398;

Stella v. *Savvas* (1983) 1 C.L.R. 186;

Guendjian v. *Societe Tunisienne* (1983) 1 C.L.R. 588;

Christianborg [1895] 10 P. 141;

Logan v. *Bank of Scotland and Others* (No. 2) [1906] 1 K.B. 141 at pp. 150-152;

Maharanee of Baroda v. *Wildenstein* [1972] 2 All E.R. 689 at p. 693;

Egbert v. *Short* [1907] 2 Ch. 205 at p. 212; 5

Norton's Settlement v. *Norton* [1908] 1 Ch. 471;

St. Pierre and Others v. *South American Stores (Gath and Chaves) Ltd. and Others* [1936] 1 K.B.D. 382 at p. 398;

Atlantic Star [1973] 2 All E.R. 175;

McShannon v. *Rockware Glass Ltd.* [1978] 1 All E.R. 449, 10

Abidin Daver [1983] 3 All E.R. 46,

Castanho v. *Brown & Root (U.K.) Ltd.* [1978] 1 All E.R. 143;

Jadranska Slobodna Plovidba v. *Photiades & Co* (1965) 1 C.L.R. 58 at p. 68.

Appeals. 15

Appeals by defendants against the judgment of the District Court of Limassol (Artemis, S.D.J.) dated the 6th November, 1982 (Action No. 1856/82) granting plaintiffs application for striking out the phrases "and/or bonds and/or otherwise" and "and/or undertook and/or engaged" whenever they appear 20 in the specially endorsed writ but refusing their application for staying the proceedings.

St. McBride, for the appellants.

X. Syllouris, for the respondents.

Cur. adv. vult. 25

HADJIANASTASSIOU J.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: These two appeals against the judgments of the District Court of Limassol in Civil Actions 1006/82 and 1856/82 were heard together as presenting common quest- 30 ions of law and fact.

The appellants-defendants in both actions are a shipping company having their registered office of business in Limassol,

Cyprus, and the respondents-plaintiffs are an Italian company of Genoa, Italy. The respondents-plaintiffs in both actions by their said actions claim against the appellants as per their specially endorsed writs of summons, a sum of about U.S. 5 dollars 2,000,000 in respect of several "promissory notes and/or bonds and/or otherwise", alleged to have been issued and/or signed in Cyprus by the appellants which were presented for payment at the agreed place, i.e. Banca Commerciale Italiana, Genoa and were not paid and as a result they were duly protested 10 in accordance with the law. The expenses for their protestation as well as interest by way of damages, is also claimed.

The appellants applied for leave to enter a conditional appearance, which was granted to them but as they failed to apply in time to have the writs of summons set aside, their appearance 15 became unconditional. The appellants filed their applications praying for:-

(a) an order setting aside the writ or alternatively

(b) an order staying the proceedings, or, alternatively,

(c) an order striking out the endorsement and the statement of claim in limine. 20

The grounds on which the applications were based were twofold: Firstly, the applicants-appellants complained about the way the endorsement on the writ of summons was drafted, in that the plaintiffs' claim was framed in such a way that the 25 sums were claimed as "due upon a promissory note and/or bond and/or otherwise". It was their contention that the respondents-plaintiffs should have made their election and decide on what type of document their claim was based, so as to enable them to defend the action properly as the defences may be 30 varying according to the type of document the claim was based upon.

Secondly, that the appellants-plaintiffs brought an action against them in Italy, which was pending before an Italian Court and which included a claim on the same cause and in 35 which the appellants had a counterclaim exceeding the claim in the action.

In support of their second contention the appellants sought to rely not only on the ground that there existed already litigation

on the same subject-matter pending before another Court (lis alibi pendens), but, also, on the doctrine of "forum non conveniens", on the ground that Italy was a more appropriate forum for determination of these proceedings in that the transactions which gave rise to the claim and the counterclaim arose in Italy, most of the witnesses were in Italy and the case could be more properly adjudicated before the Italian Courts. 5

The respondents opposed the application on the ground that they were entitled to bring their actions in Cyprus, as the cause of action in both cases was based on promissory notes which were issued by the appellants in Cyprus and that the appellants were a company having their registered place of business in Limassol, Cyprus. Also, that there is no agreement or law for the reciprocal enforcement of judgments between the Republic of Cyprus and Italy. If a judgment is obtained in Italy, it cannot be enforced in Cyprus and new proceedings will have to be instituted on such judgment. Furthermore, the proceedings before the Italian Court were in respect of claims totalling to over U.S. dollars 7,000,000, whereas the present actions are only limited to the claim on the promissory notes which were issued in Cyprus. It was further contended that the appellants, after the execution of the said promissory notes, alienated their three ships which were registered in Cyprus and that if the proceedings are stayed, the respondents will be deprived of the procedural advantages which they have in Cyprus in taking steps for setting aside the said transfers as fraudulent, and, also, the advantage to apply for the winding up of the defendants and for the appointment of a liquidator to realise any assets of the appellants in Cyprus. 10 15 20 25

The learned trial Judge after hearing lengthy argument on behalf of both sides, granted the application in respect of striking out the phrase "and/or bonds and/or otherwise", as well as "and/or undertook and/or engaged" wherever they appeared on the specially endorsed writ, so that the claim be limited to one on promissory notes as appearing in the prayer in the specially endorsed writ of summons, but refused the application for staying the proceedings. 30 35

The learned trial Judge after dealing with the legal authorities on the matter, concluded as follows:

"In examining the evidence before me, which is included in the affidavits, I should, therefore, have in mind that it is upon the Applicants-Defendants to satisfy me that it is just and proper, in the circumstances, to exercise my discretion in their favour, for the burden of proof is upon them. I have examined their affidavit in support of their application and I must confess that I can find nothing there which shows, let alone which satisfies me, that the proceedings are vexatious or unjust or that they unjustly harass them and that the interests of justice dictate that they should be stayed. The only thing they mention, which is of some consequence, is that the evidence in the case will come from witnesses who are mainly located in Italy which, as they suggest, makes Italy the 'forum conveniens'.

Having considered the above authorities on the matter, I am of the view that this factor is totally inadequate to prove what the Applicants-Defendants have to prove in order to succeed. They have not shown that there are no advantages to the Respondents-Plaintiffs in suing in both countries, but, on the contrary, it even appears that a judgment in Italy is not enforceable in Cyprus and if one is obtained there, an action on it should be commenced in Cyprus. This was a matter which was thought to be relevant in the case of *McHenry* v. *Lewis* (supra). In my judgment, the Applicants-Defendants have failed to discharge the burden placed upon them and their application must, therefore, fail".

The learned trial Judge having reached such conclusion, found it unnecessary to deal with the submission of counsel for the respondents-plaintiffs that as the application for stay did not comply with the time limit set by the order of the Court by which the appellants-defendants were allowed to file a conditional appearance and the appearance became unconditional, they could not have raised the matters raised by their application.

The present appeals are directed against such part of the judgment of the trial Court by which the appellant's prayer for stay of the proceedings was dismissed.

The grounds of appeal on which the appellant sought to rely and which were fully argued before us, are the following:

1. The trial Court erred in holding that the Applicants-Defendants had failed to discharge the burden cast upon them so as to enable the Court to stay the proceedings. 5

2. The trial Court placed an additional burden of proof upon the Applicants-Defendants which burden was not upon them but upon the Respondents-Plaintiffs.

3. The trial Court gave undue weight to the supposed effect of an Italian judgment and the steps needed to enforce it in Cyprus. 10

4. The trial Court had insufficient or no evidence before it as to Italian Law.

It has been judicially pronounced in a number of cases of our Courts following and adopting in this respect the decisions of English Courts, that duality of proceedings by two different actions in Courts of different jurisdiction and in particular an action before a Cyprus Court and one before a foreign Court, a matter known as "list alibi pendens", that our Courts have jurisdiction to stay the proceedings pending before a Court in Cyprus at the instance of a defendant who is also sued for the same cause of action in a foreign country. This practice has its roots in a number of decided cases, dating back to the last century and has been firmly established by the judgment of the High Court in England in the case of *McHenry* v. *Lewis* [1882] 22 Ch. D. 397. The following opinion was expressed by Jessel, M.R. at page 399: 15 20 25

"That question is, whether or not when an action is brought by a man in this country against a Defendant and the same Plaintiff brings an action in a foreign country against the same Defendant for the same cause of action this Court has jurisdiction in a proper case to stay the action in this country on the ground that the Defendant is doubly vexed by reason of the action being brought also in the foreign country. 30 35

.............................I am of opinion that there is such a jurisdiction in this Court, and that it is part of the general jurisdiction of the Court to prevent a Defendant being improperly vexed by legal procedure. I see no reason on principle why, if the Court is satisfied that the Defendant is being improperly vexed, the mere fact of one of the actions being in this country and one in a foreign country should prevent the Court protecting the Defendant from being so improperly vexed. So much for the general jurisdiction".

In the *McHenry* case the Court of Appeal in drawing the distinction between two actions instituted in the same country and the position where one of the actions is brought in England and the other in a foreign country, concluded that when a plaintiff sues a defendant for the same matter in two Courts in England such a proceeding is prima facie vexatious, and the Court will generally, as of course, put the plaintiff to his election and stay one of the suits. But if one of the actions is in a foreign country where there are different forms of procedure and different remedies, there is no presumption that the multiplicity of actions is vexatious and a special case must be made out to induce the Court to interfere. The Court has, however, power to interfere in such case under its general jurisdiction to restrain vexatious and oppressive litigation, and will interfere in a proper case even before decree.

In considering the circumstances under which the Court will act, he had this to say at pp. 402, 403 (*McHenry case* ibid)

"Now what will happen as regards the second action. We have got these parties to the litigation who could not be made liable in England, and who could be made liable in America, and we have got this also, that the parties to the action in America who are resident in England can be made liable in England and cannot be made liable in America; for although you may get judgment against them in America, you cannot enforce that judgment in England; you must bring an action upon it. So strongly was that felt by the moving parties that they actually offered a personal undertaking to allow judgment to be entered up against them in England, if judgment is obtained in the American action, showing that the difficulty was present to their minds. Therefore, no special case is made out

for stopping the American or the English actions, but on the contrary there is a special case for two actions; because you can only enforce the claim of the Plaintiffs directly by getting judgment in both countries .. .

... . 5

.... But there is another thing which has been pressing upon my mind, I do not know the state of the cause lists in the United States, though I know something about the state of them here; and it may well be that it may be eminently desirable to let both actions go on with 10 a view of getting a speedy trial. It is no doubt to a certain extent a hardship on the Plaintiff who is bringing two actions; but I cannot at present say that there is any special case made out in this instance for the interference of the Court, and as far as I can see there is very strong ground 15 for saying that the actions are not only brought bona fide, but with a decided intention to enforce the remedy to which the Plaintiff believes himself entitled. On the whole it seems to me that we ought not to interfere by staying the English actions". 20

Cotton, L.J. in the same case at pages 406, 407, had this to say:

"But here, under the circumstances of this case, ought we to exercise a jurisdiction which I assume we have, and to make the order? In the first place, it is a jurisdiction which 25 one ought to exercise with extreme caution. Stopping in the middle of a suit a plaintiff from going on when he has a right of action as against the defendant, is a jurisdiction which has to be exercised with very considerable caution

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.............................., ... But I cannot say here that we 30 ought to come to the conclusion, which is the principle on which the jurisdiction is to be exercised, that proceeding with these two suits in the two different tribunals is vexatious. It may be harassing, no doubt, because it is very harassing to have an action brought against one in any 35 tribunal at all, but that is not enough. It must be vexatiously harassing the Defendant on the part of the Plaintiff, whose action is sought to be stayed; and I can see, as the Master of the Rolls has pointed out, some things which

may make it necessary, or at all events desirable, for the Plaintiff, without being vexatious, to prosecute the two suits".

To which, Bowen, L.J., had this to add at pages 407, 408:

5 "It agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move out-
10 side it. I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppres-
15 sion mean; they must vary with the circumstances of each case".

And concluded as follows at page 409:

"The fact that no English action has ever yet been stayed on the ground of concurrent litigation in America is a
20 strong argument to prove that such concurrent American litigation is not by itself a sufficient reason why an English action should be stayed. That the Court has power to do it I agree. It is clear not merely from reason, but from the language of Lord Cottenham and Lord Cranworth,
25 referred to by Lord Justice Cotton, that this Court could do it if necessary for the purposes of justice, but some special circumstances ought surely to be brought to the attention of the Court beyond the mere fact that an action is pending between the parties on the same subject-matter in America".

30 The principles on which this Court may stay proceedings, have been recently considered by the Supreme Court in the case of *Stella* v. *Sayias* (1983) 1 C.L.R. 186 and *Guendjian* v. *Societe Tunisienne* (1983) 1 C.L.R. 588. The first case concerned a claim by a foreigner in respect of a sum of money paid to a
35 third person in Athens in settlement of 13 bills of exchange signed by the defendant as principal debtor and the plaintiff as guarantor in respect of which a judgment of the Greek Court had been issued against the plaintiff in Athens and the amount was paid by him in Greece. The cause of action arose in Greece

and all necessary witnesses whose attendance could not be secured in Cyprus were in Greece. The Court, after reviewing the relevant English authorities on the matter held that the Court is vested with a discretion to refuse the exercise of jurisdiction in a proper case and has inherent jurisdiction to stay an action brought within the jurisdiction in respect of a cause of action which arose out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression to which he should not be subjected if he were sued in another accessible Court where the cause of action arose; that the trial Court properly exercised its discretion in the case and that in the circumstances the continuation of the action would have worked injustice on the respondent because it would be oppressive or vexatious to him whereas no injustice would result to the appellant if he pursued his claim in Greece.

In the second case, the cause of action arose in Beirut. Both plaintiffs and defendants were living in Beirut and the action was brought in Cyprus. The defendants entered a conditional appearance but through inadvertance failed to file an application for setting aside the writ of summons for lack of jurisdiction within the prescribed time and their application was withdrawn and dismissed. After an application for extension of the time within which to apply was dismissed, the conditional appearance of the respondents became an unconditional one, but when the application for extension of time was dismissed, the Judge who dealt with it expressed the view that the defendants were still entitled to raise an objection as to the jurisdiction of the Nicosia District Court, by their statement of defence, and they actually did so whereupon the trial Court refused jurisdiction. The Court of appeal in affirming the decision of the trial Court applying the tests set out in a series of English decisions and the principles emanating therefrom, concluded as follows:

"In our opinion, the basic transaction is that which was concluded between the parties in Beirut in relation to the aforementioned bank guarantee of £12,000 and any subsequent transactions between the parties, in some of which there were, also, involved goods to be found in Cyprus, were merely ancillary and consequential to the said main transaction.

Furthermore, as a result of such main transaction in Beirut a proceeding known as 'execution' had already been instituted, prior to the filing of the action by the appellant in Cyprus, against the appellant by the respondents in Beirut, in respect of the obligation of the appellant to the respondents which emanated from the aforesaid bank guarantee.

In the light of all the foregoing considerations, including that of effectiveness of its jurisdiction which was expressly relied on by the trial Court, we are satisfied that there existed a forum, other than that of the trial Court in Cyprus, to whose jurisdiction the present dispute between the parties was amenable and where justice could have been done between them at substantially less inconvenience; and that the refusal of jurisdiction by the trial Court did not actually deprive the appellant of any legitimate advantage which would be available to him by invoking the jurisdiction of the trial Court here in Cyprus".

The criteria which the Courts may take into consideration in dealing with an application for stay of proceedings have been considered in a series of cases since the decision in *McHenry v. Lewis* (supra). (See *The Christianborg* [1895] 10 P. 141 in which *McHenry* v. *Lewis* was approved and applied).

In the majority judgment in *The Christianborg* (Baggallay and Fry, L.JJ., with Lord Esher M.R. dissenting) we read the following in the judgment of Baggallay, L.J., at pp. 152, 153:

"I take it to be established by a series of authorities that where a plaintiff sues the same defendant in respect of the same cause of action in two Courts, one in this country and another abroad, there is a jurisdiction in the Courts of this country to act in one of three ways—to put the party so suing to his election, or, without allowing him to elect, to stay all proceedings in this country, or to stay all proceedings in the foreign country—it is not in form a stay of proceedings in the foreign Court, but an injunction, restraining the plaintiff from prosecuting the proceedings in the foreign country, which of course cannot be enforced against him if he is a foreigner and is neither present in this country nor has property here. It is an injunction

which may become inoperative, but that is how the proceedings in the foreign Court may in effect be stayed. The principle of election is clearly expressed in the case of *McHenry v. Lewis*, the marginal note of which case correctly represents the decision. The judgment there drew a distinction between the two actions being brought in English Courts, and a case in which one action is brought in a British Court and the other in a foreign Court, and the distinction is that which I draw in this case, that prima facie it is vexatious to sue the same party in two different actions in two British Courts, but that is not necessarily so where one of the actions is in a foreign Court. You must examine into the circumstances of the case, and see whether, under the circumstances, it is as vexatious as it would be assumed to be, if the same actions had been commenced in two British Courts".

In *Logan* v. *Bank of Scotland and Others* (No. 2) [1906] 1 K.B. 141 we read the following in the judgment of Sir Gorell Barns, President of the Court of Appeal at pp. 150-152:

"The English Courts are freely open to persons foreign to this country seeking to enforce their rights against our corporations, companies and citizens, in cases in which the Courts can properly exercise jurisdiction, but, where I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused. The difficulties which arise in the exercise of this power of the Court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court........

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....

If, for instance, as was put in argument, a dispute of a complicated character had arisen between two foreigners

in a foreign country, and one of them were made defendant in an action in this country by serving him with a writ while he happened to be here for a few days' visit, I apprehend that, although there would be jurisdiction in the
5 Court to entertain the suit, it would have little hesitation in treating the action as vexatious and staying it".

The dictum of Sir Gorell Barnes, P. in the last paragraph of the above citation was referred to and explained in *Maharanee of Baroda* v. *Wildenstein* [1972] 2 All E.R. 689 by Lord Denning
10 M.R. at p. 693, as follows:

"..........if a defendant is properly served with a writ whilst he is in this country, albeit on a short visit, the plaintiff is prima facie entitled to continue the proceedings to the end. He has validly invoked the jurisdiction of the Queen's
15 Courts; and he is entitled to require those Courts to proceed to adjudicate on his claim. The Courts should not strike it out unless it comes within one of the acknowledged grounds, such as that it is vexatious or oppressive, or otherwise an abuse of the process of the Court; see RSC
20 Ord. 18, r. 19. It does not become within those grounds simply because the writ is served on the defendant whilst he is on a visit to this country. If his statement of claim discloses a reasonable cause of action, he is entitled to pursue it here, even though it did arise in a foreign country.
25 It is not to be stayed unless it would plainly be unjust to the defendant to require him to come here to fight it, and that injustice is so great as to outweigh the right of the plaintiff to continue it here".

In *Egbert* v. *Short* [1907] 2 Ch. 205, at 212, Warrington, J.
30 expressed the following opinion:—

"The jurisdiction which I am asked to exercise is one which, as has been frequently said, is to be exercised by the Court with extreme caution; and, further, it is one which the Court ought not to exercise if by so doing an injustice will be caused
35 to the plaintiff, and the real question which I have to decide is whether by preventing what, in my judgment, is a grievous injustice to the defendant, I shall at the same time be causing an injustice to the plaintiff. If I should be doing so,

then I think it would be my duty to refuse this application. That is the point that I must therefore consider".

In *Norton's Settlement* v. *Norton* [1908] 1 Ch. 471, Vaughan Williams L.J. adopted the dictum of Sir Gorell Barnes in *Logan* v. *Bank of Scotland* (No. 2) (supra) at p. 150 and went on to add the following at pp. 479, 480:

"As I have already pointed out, in order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other country. In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of trial in this country are so great that injustice will be done—in this sense, that it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice in this country. Speaking generally, one may say that the litigant must shew that some injustice will be done to him. There is also another consideration to be borne in mind. If the Court, taking all the facts into consideration, comes to the conclusion that a plaintiff in commencing an action in this country has not done so on account of any legitimate advantage which a trial in this country will give him, but for purposes entirely foreign to that legitimate purpose, then, apart from any question as to expense or inconvenience, in my opinion not only has the Court jurisdiction, but it is its duty, to stay the proceedings".

The rule as to stay of proceedings was stated by Scott, L.J., in *St. Pierre and Others* v. *South American Stores* (*Gath and Chaves*) *Ltd. and Others* [1936] 1 K.B. 382 at p. 398, as follows:

"The true rule about a stay............so far as relevant to this case, may I think be stated thus: (1). A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantage of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) 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 the continuance of the action would work an injustice because it

would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. These
5 propositions are, I think, consistent with and supported by the following cases: *McHenry Lewis*(1); *Peruvian Guano Co.* v. *Bockwoldt*(2); *Hyman* v. *Helm*(3); *Thornton* v. *Thornton*(4); and *Logan* v. *Bank of Scotland* (No.2)(5)".

The above dictum was applied in *Maharanee of Baroda* v.
10 *Wildenstein* [1972] 2 All E.R. 689, the *Atlantic Star* [1973] 2 All E.R. 175, *MacShannon* v. *Rockware Glass Ltd.* [1978] 1 All E.R. 449, *The Abidin Daver* [1983] 3 All E.R. 46.

In considering the above dictum, Lord Wilberforce in the *Atlantic Star* (supra) had this to say at pp. 193-194:

15 "This clear and emphatic statement has proved its usefulness over the years. It has been applied by judges, without difficulty, to large variety of cases. I should be most reluctant, even if I were capable, of replacing it by some wider and more general principle. But too close and
20 rigid an application of it may defeat the spirit which lies behind it. And this is particularly true of the words 'oppressive' and 'vexatious'. These words are not statutory words: as I hope to have shown from earlier cases, they are descriptive words which illustrate but do not
25 confine the Courts' general jurisdiction. They are pointers rather than boundary marks. They are capable of a strict, or technical application; conversely, if this House thinks fit, and as I think they should, they can in the future be interpreted more liberally. In my opinion, the passage
30 cited embodies the following principles—all of which have been discussed in earlier authorities.

First, a plaintiff should not lightly be denied the right to sue in an English Court, if jurisdiction is properly founded. The right is not absolute. The Courts are open,
35 even to actions between foreigners, relating to foreign matters. But they retain a residual power to stay their

(1) 22 Ch. D. 397 (2) [1883] 23 Ch. D. 225. (3) [1883] 24 Ch. D. 531
(4) 11 P. D. 176 (5) [1906] 1 K. B. 141, 150, 151.

proceedings. ....

....

............Secondly, in considering whether a stay should be granted the Court must take into account (i) any advantage to the plaintiff; (ii) any disadvantage to the defendant: this is the critical equation, and in some cases it will be a difficult one to establish. Generally this is done by an instinctive process—that is what discretion, in its essence is. But there are perhaps some elements which it is possible to disengage and make explicit. In the first place, I do not think it would be right to say that any advantage to the plaintiff is sufficient to prevent a defendant from obtaining a stay. The cases say that the advantage must not be 'fanciful'—that a 'substantial advantage' is enough. I do not even think that one can say that the advantage must be substantive (i.e. in the existence in English law of some more favourable substantive rules than would apply elsewhere) rather than adjectival, though more weight might be given to the former. An example given by Lord Denning MR illustrates this: a motor collision in Italy between two Italian citizens, one of whom catches the other here and sues him. Lord Denning MR says that this would be purely Italian and so (inferentially) should be stayed. But if this is right, it must follow that advantage to a plaintiff is not in itself decisive for the suit may well have been brought here because our Courts give higher damages, or damages under broader heads: So if a stay is to be granted it must be because the Courts can additionally consider the nature of the case, and the disadvantage to the defendant. A bona fide advantage to plaintiff is a solid weight in the scale, often a decisive weight, but not always so.

Then the disadvantage to the defendant: to be taken into account at all this must be serious, more than the mere disadvantage of multiple suits; to prevail against the plaintiff's advantage, still more substantial—how much more depending how great the latter may be. The words 'oppressive' or 'vexatious' point this up as indicative of the degree and character of the prejudice that must be shown. I think too that there must be a relative element in assessing both advantage and disadvantage—relative to the individual circumstances of the plaintiff and defendant".

Lord Wilberforce, in the same judgment, at page 190 in dealing with the doctrine of "forum non conveniens" had this to say:

5 "We were urged to take this opportunity to bring English law into line with these legal systems and hold 'forum non conveniens' to be a plea available in England.

10 My Lords, I am of opinion that this is a course which we cannot take. It is clear from decisions to which I shall refer, that for some 100 years the law of England has taken a divergent path with its own rules, defined and adjusted in numerous cases, some of high authority. This same path has been followed in other Commonwealth jurisdictions—Australia, Canada, India, New Zealand. The arguments in favour of 'forum non conveniens' as a general
15 rule are not so overwhelming that we should now make a radical change of direction: indeed there is much to be said for the English rule, provided that it is not too rigidly applied. I would not therefore favour accepting the radical solution".

20 And at page 192 in dealing with the dictum of Bowen L.J. in *McHenry* v. *Lewis* (supra) at pp. 407, 408, to which reference has already been made, had this to say:

"It is obvious that this important case depends on a principle quite distinct from 'forum non conveniens': it
25 recognises an exceptional power capable of being described by reference to 'vexation' and 'oppression' but shows that these words are to be widely interpreted in relation to the circumstances and in the light of the fact that the Court's discretion is general".

30 In the same case we read the following in the judgment of Lord Reid at pp. 180, 181:

"... ... a foreign plaintiff who can establish jurisdiction against a foreign defendant by any method recognised by English law, is entitled to pursue his action in the English
35 Courts if he genuinely thinks that that will be to his advantage and is not acting merely vexatiously. Neither the parties nor the subject-matter of the action need have any connection with England. There may be proceedings on the same subject-matter in a foreign Court. It may

a far more appropriate forum. The defendant may have to suffer great expense and inconvenience in coming here. In the end the decisions of the English and foreign Courts may conflict. But nevertheless the plaintiff has a right to obtain the decision of an English Court. He must not act vexatiously or oppressively or in abuse of the process of the English Court, but these terms have been narrowly construed ....

....

So, I would draw some distinction between a case where England is the natural forum for the plaintiff and a case where the plaintiff merely comes here to serve his own ends. In the former the plaintiff should not be 'driven from the judgment seat' without very good reason, but in the latter the plaintiff should, I think, be expected to offer some reasonable justification for his choice of forum if the defendant seeks a stay. If both parties are content to proceed here there is no need to object. There have been many recent criticisms of 'forum shopping' and I regard it as undesirable.

I think that a key to the solution of the problem may be found in a liberal interpretation of what is oppressive on the part of the plaintiff. The position of the defendant must be put in the scales. In the end it must be left to the discretion of the Court in each case where a stay is sought, and the question would be whether the defendants have clearly shown that to allow the case to proceed in England would in a reasonable sense be oppressive looking to all the circumstances including the personal position of the defendants. That appears to me to be a proper development of the existing law".

In the *MacShannon* case Lord Diplock at p. 630 after interpreting the majority speeches in the *Atlantic Star* (supra) formulated and restated the principles as follows:

"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".

5 And Lord Salmon at p. 626, had this to add:

"In an action brought in England when its natural forum is Scotland, I consider the question as to whether it should be stayed depends on whether the defendants can establish that to refuse a stay would produce injustice. Clearly if 10 the trial of the action in England would afford the Scottish *plaintiff no real advantage and would be substantially* more expensive and inconvenient than if it were tried in Scotland, *it would be unjust to refuse a stay. If, on the* other hand, a trial in England would offer the plaintiff 15 some real personal advantage, i.e. if he had come to live in England, a balance would have to be struck and the Court might in its discretion consider that justice demanded that the trial should be allowed to proceed in England (see e.g. *Devine* v. *Cementation Co. Ltd.*). To my mind, the real 20 test of stay depends on what the Court in its discretion considers that justice demands. I prefer this test to the test of whether the plaintiff has behaved 'vexatiously' or 'oppressively' on a so-called liberal interpretation of these words. I do not, with respect, believe that it is 25 possible to interpret them liberally without emasculating them and completely destroying their true meaning. Surely if a man genuinely but wrongly believes that it is to his advantage for his action to be tried in England rather than in Scotland, and accepts his solicitor's advice that this 30 will cause the defendants no unnecessary expense or inconvenence, he cannot properly be called vexatious or oppressive if he oppose a stay of the action in England. Nevertheless, the Court will impose a stay if, in their *discretion, they decide that the defendants have proved* 35 that it would be unjust to refuse to do so".

The dictum of Lord Diplock in the above case and its restatement of the principle was adopted in *Castanho* v. *Brown & Root* (U.K.) Ltd. [1981] 1 All E.R. 143 and accepted by this Court in *Guendjian* v. *Societe Tunisienne* (supra).

With the above principles in mind we shall now proceed to consider whether in the circumstances of the present case the learned trial Judge, in dismissing appellants' application, exercised his discretion on right principles. The burden is on the appellants to satisfy this Court that he failed to do so. If the learned trial Judge erred in any way in exercising his discretion, then the Court of Appeal will interfere, but otherwise it is not for this Court to substitute its discretion for his if he has not erred in any way in exercising his discretion (see *Jadranska Slobodna Plovidba* v. *Photos Photiades & Co.* (1965) 1 C.L.R. 58 per Josephides, J. at p. 68).

Bearing in mind the above principles in the light of all the material before us, and having listened carefully able argument on both sides, we have reached the conclusion that the appellants failed to discharge the burden cast upon them to satisfy the Court that the learned trial Judge erred in any way in exercising his discretion in refusing the application for stay of the proceedings in Cyprus. The test applied by the learned trial Judge and the principles followed are in line with the principles applied by this Court in decided cases and by the English Courts, as developed and expounded by the majority speeches in *The Atlantic Star* (supra) and which were adopted in the *Castanho* case (supra). The speeches in *The Atlantic Star* represent the modern statement of the law on this matter and this has been affirmed by Lord Scarman in the House of Lords in the *Castanho* case (supra) at pp. 150-151 where he had this to say:

> "The principle is the same whether the remedy sought is the stay of English proceedings or a restraint on foreign proceedings. The modern statement of the law is to be found in the majority speeches in the *Atlantic Star* [1973] 2 All E.R. 175, [1974] A.C. 436".

To the matters taken into consideration by the learned trial Judge as weighing the scales in favour of the respondents we may add the procedural advantage which the respondents may have by having instituted proceedings in Cyprus, according to the contents of the affidavit filed on their behalf, that as a result of any judgment obtained in Cyprus they may take steps for setting aside as fraudulent the alienation by the appellants of their three ships, which were registered in Cyprus, which took

place soon after the incurrence of their indebtedness to the respondents.

In the result both these appeals fail and are hereby dismissed with costs in favour of the respondents.

5 *Appeals dismissed with costs.*