BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAM NO. BVIHCV2003/0170

BETWEEN:

(1) TRANS-WORLD METALS SA (BAHAMAS)
(2) LEV CHERNOY
(3) DAVID REUBEN
(4) SIMON REUBEN

Claimants

and

(1) BLUZWED METALS LIMITED (BVI)
(2) OLEG DERIPASKA
(3) JOSEPH KARAM
(4) ALEXANDER BOULYGINE
(5) ALUCOR TRADING SA (BVI)
(6) SAYANA-FOIL SA (BVI)

Defendants

Appearances:
Mr. Mark Howard QC, Mr. Roger Masefield, Mr. Philip Kite and Mr. Stephen Midwinter for the claimants.
Mr. Stephen Moverley Smith QC and Mr. Michael Fay for the defendants.

2005: February 21, 22,23 & 24;
March 22

JUDGMENT

Introductory

[1] **Barrow J (Ag.):** On 30th March 2004 this court granted an order, on a without notice application, for permission to serve the second, third and fourth defendants out of the jurisdiction. The order specified the methods of service. The second defendant was to be served by post in care of a company in Moscow, Russia and also by post upon solicitors in London, England. The third defendant was to be served by post at his official residence in Lully, Switzerland and by courier upon two different lawyers in Switzerland. The fourth defendant was to be served in the same manner as the second defendant. There was service as of right within the jurisdiction upon the other three defendants who were all British Virgin Island companies.

[2] Substituted service of a claim form out of the jurisdiction is not permitted by **The Civil Procedure Rules 2000**[1], say the defendants. They therefore apply for an order that the permission given to the claimants to serve the claim form and statement of claim upon the second, third and fourth named defendants be set aside. They also seek a declaration that the purported service upon these defendants was of no effect.[2] They further seek an order that to the extent that the purported service was valid that such service be set aside. A separate limb of the defendants' application is for a stay of proceedings on the ground of *forum non conveniens*.

The factual summary[3]

[3] The claim arises out of an alleged joint venture agreement to which the claimants and the first and second defendants were parties. The primary claim is for damages for repudiatory breach of contract by the defendants' termination of the joint venture agreement without notice. The claimants also claim for breach of fiduciary duty as a result of the attempts by those defendants to siphon joint venture assets off to shadow BVI companies (the fifth and sixth defendants) and for remedies in contract, tort and equity.

[4] The joint venture was set up in late 1994 and in 1995 in various meetings between representatives of the claimants and the defendants that took place at Transworld's London offices. The joint venture related to the sourcing of alumina and other raw materials from the international markets, brokered through London; the supply of those raw materials to plants in Russia; the processing of the material; and the sale of the processed material on the international markets, again brokered through London. The accounting and banking functions of the joint venture were conducted in London and Geneva.

[1] Rather than substituted service the rules now refer to "alternative methods of service"; rule 5.13(1). For ease of expression reference will be made to alternative service.
[2] There is a counter application by the claimants for an order to prevent the defendants from relying on a ground of challenge that they allegedly did not include in their application or, alternatively, to dispense with service on the 3rd defendant.
[3] The summary that follows presents the allegations of the claimants. It is a paraphrase of the summary that appears in the claimants' skeleton argument and the debt is gratefully acknowledged. It is worth emphasizing that these are only allegations.

[5] The essence of the alleged joint venture agreement was that all business done with the Sayansk Aluminium Plant in Russia would be done exclusively for the benefit of the joint venture save where otherwise agreed between the parties.

[6] A number of offshore[4] companies were incorporated to serve as jointly owned vehicles for the conduct of the joint venture activities. Transworld contributed investments and the supply of raw materials and undertook the international metal sales through its London offices. The first and second defendants contributed the operations of Russian smelting plants and helped to obtain the necessary licences from the Russian authorities.

[7] The joint venture was extremely profitable for a number of years and net income of around US$120 million was reported for an 11 month period in 1997-1998. Then came the secret termination of the joint venture when the defendants set up shadow BVI companies to pass off as the jointly owned companies. This was followed by a letter in January 1998 from the first defendant purporting to terminate the joint venture forthwith.

[8] To relieve the one-sided picture presented by this summary it should be mentioned that the position of the defendants is that there was no agreement that the parties would be bound generally or for an indefinite period to conduct joint venture operations. It was never agreed that all business done by any of the parties with the Sayansk Plant would be done for the benefit of the joint venture. Rather, the defendants say, there were an arrangement and a structure established to enable the parties to enter into individual joint venture agreements on a case by case basis and from time to time. The defendants therefore deny the existence of the contract that the claimants say was breached.

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[4] The reference is to companies formed in the BVI under the International Business Companies Act, Ch XX, and in other jurisdictions under similar legislation, which carry on business elsewhere than in the country of their formation (hence 'offshore'). Such companies are subject to no tax and little regulation in the country of incorporation.

The structure of the rules on service

[9] Mr. Moverley Smith QC, leading counsel for the defendants, submits that CPR 2000 deals with service in a comprehensive code which is divided into three distinct parts[5]:

Part 5	Service of Claim Form within Jurisdiction
Part 6	Service of other Documents
Part 7	Service of Court Process out of Jurisdiction.

[10] Rule 5.4 expressly states that a claim form may be served out of the jurisdiction only if permitted by Part 7. Counsel is accurate in his observation that nowhere in Part 7 appears any provision that permits the court to order alternative service. In contrast Part 5 provides a very flexible regime for service within the jurisdiction, as counsel described it, which enables a claimant to choose his own alternative method of service and thereafter satisfy the court that such service was effective (r 5.13). Provision is additionally made for the court to specify the method of service of a claim form (r 5.14). There is nothing that imports those Part 5 methods of service into Part 7, counsel submitted.

[11] That the three parts are discrete is also shown by the provision that enables the court to dispense with service of documents, submitted counsel. That provision appears in Part 6 which deals with service of documents other than the claim form but it does not appear in either Part 5 or Part 7. Again, submitted counsel, there is nothing that imports that provision into the other parts.

[12] No assistance is to be gained from the comparable provisions in the English Civil Procedure Rules 1998, counsel submitted, because that code deals with service of all documents in a single part (Part 6) which is divided into three sections. Part 6 commences

[5] The claimants urged that the headings of the rules should not be used as an aid to their interpretation because s 12(2) of **The Interpretation Act**, Ch. 138 says they are for convenience only and shall not be construed as part of the enactment. Accordingly, I have used them only for convenience. Actually, as gleaned from **Cross Statutory Interpretation**, 3rd ed. at pp. 124-125, if there is no doubt about the meaning of a provision there is really no room to treat headings and the like as aids to construction. In the instant case there is no doubt as to the meaning of any provision. The doubt is as to their application.

with Section I which is entitled 'General Rules about Service'. It is in Section I, and therefore as a general rule, that one finds rule 6.8 which enables the court to direct service by an alternative method and rule 6.9 which enables the court to dispense with service. In **Knauf UK GmbH v British Gypsum Ltd**[6] at first instance David Steel J indicated the way to read Part 6. He said that rule 6.1 makes it clear that the rules in Section I apply to the whole Part.

[13] The structure of our rules on service is significantly dissimilar to the structure of the English rules. I am struck in this regard by their scheme of making general rules that apply to the whole of Part 6 and then making special rules to apply to particular matters when this is desired. An example of this is their rule 6.12 which provides that the general rules about service of documents are subject to the special rules about service of claim forms. I keep open the question whether the difference in structure is a matter of drafting style rather than of substance.

Intention to abolish substituted service?

[14] Mr. Howard QC, leading counsel for the claimants, argued that it could not have been the intention of the new rules to abolish alternative methods of service out of the jurisdiction, which existed under the old rules. The BVI is now a corporate centre and the need to permit substituted service abroad is now greater not less than it was before. He submitted that the English Court of Appeal went out of its way in **Knauf UK GmbH v British Gypsum Ltd**[7] to endorse the sentiment of the first instance judge[8] who said that he was not to be taken as concurring with the view of counsel on both sides that amendments to the English CPR regime had, perhaps inadvertently, eliminated the provision permitting an order for alternative service out of the jurisdiction.

[6] [2001] 2 All ER 332
[7] [2002] 2 All ER 525 at [38].
[8] [2001] 2 All ER (Comm) 332 at [28].

Special considerations about service abroad

[15] It is clear from the discussion about service of process that appears in **Knauf**[9] as well as in **Dicey & Morris** on **The Conflict of Laws**[10], beginning at 8-035, that special considerations attend the matter of providing for alternative methods of service of process out of the jurisdiction as distinct from within the jurisdiction. Two significant factors make special considerations necessary. First, service of court process is an act of sovereignty. Second, the civil law tradition regards the service of process on a different footing from the common law tradition.[11]

[16] A claim form is the originating process by which a claimant invokes the peremptory jurisdiction of the state's courts over a defendant. Its precursor was the writ of summons which expressed what remains implicit in the claim form; the defendant is commanded by sovereign power to participate in the proceeding that the court will conduct. The defendant is not asked to consent to the court's power over him; it is a mandatory power that is exercised over persons within the territorial reach of the court as an incident of the sovereignty of the state over such persons. Hence the reason that a writ (defined as a form of written command in the name of a sovereign, State, court, etc in **The Concise Oxford Dictionary**) was not served outside of the realm of the sovereign. The sovereign's command did not extend to the realm of another sovereign.

[17] Coupled with the fact that there is no right to serve the command of one state in another is the fact that in civil law countries the act of service of process is an official act, to be carried out on behalf of the State as an exercise of its judicial sovereignty. In contrast, in common law countries service of process is seen as a matter for the claimant or his agents. This contrast is neatly identified in the instant case by the defendants' contention that the private service of the claim form on Mr. Karam in Switzerland is a violation of Swiss penal law.[12]

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[9] [2001] 2 All ER 332
[10] Vol.1, 13th ed, 2000, London: Sweet & Maxwell
[11] For a discussion of both of these factors see **The Sky One** [1998] 1 Lloyds Rep 238 at 241-243.
[12] This is the very point that arose in **The Sky One**, above.

[18] In England the matter of the service of process is regulated by a number of Conventions by which England and her convention partners have agreed on the manner in which the process of one country may be served in another. But even as between Convention partners it is not the case that all usual methods of service are permissible. The Court of Appeal decided in Knauf[13] that it was not permissible under either of two conventions to effect postal service upon a German defendant from England to Germany.[14]

[19] It is fundamental that the process of one state can only be served outside its jurisdiction if the foreign state in which the process is to be served permits it.[15] Even in England, with its conventions which make provision for service in other countries, methods as simple as personal service or service by post may be not permissible for one country or another. In England these Conventions produce certainty and enable the court to know what method of service is permissible in which country. The English CPR are crafted accordingly. It is not so with our rules.

[20] It is crucial to remember that the Eastern Caribbean Supreme Court is a regional court that serves nine Member States and Territories. All of these states and territories apply the same civil procedure rules. However, each state has its own ministry of foreign affairs and conducts its own international relations. Each enters into the conventions and international agreements that it chooses. There is no uniformity. It would, no doubt, be possible for judges sitting in each state and territory to ascertain what agreement exists, if any, between a particular Member State or Territory[16] and the foreign country where service is to be effected. It would also be possible for a judge to determine what methods of service a particular foreign country permits for service of process from a particular Member State or Territory according to whether that latter is a convention partner or not. But there is no

[13] [2001] 2 All ER 332

[14] [2002] 2 All ER 525 at [46].

[15] Hence CPR 7.8(2): "Nothing in this Part or in any court order may authorize or require any person to do anything in the country where the claim form is to be served which is against the law of that country."

[16] There is not necessarily uniformity even in relation to the Territories which are part of the United Kingdom because in volume 1 of Civil Procedure Autumn 2000 (The White Book Service 2000) the countries listed at note 6.24.5 under the Hague Convention include Anguilla and Montserrat but not the British Virgin Islands. The evidence in the instant case suggests that this was either incorrect or that the position has changed since the publication of this edition.

telling how reliable the process would be. I note, for perspective, that in Knauf[17] the court of appeal relied on the scholarship of published authors to learn that Germany had formally objected to a particular mode of transmittal of documents.[18] I have my doubts about the availability in our jurisdiction of similar resources.

[21] The special circumstance of having a regional court makes providing in our commonly applied rules for alternative methods of service out of this jurisdiction not as straightforward a matter as Mr. Howard thinks it ought to be. There is no imperative for me to infer that because substituted service out of the jurisdiction existed under the old rules that the rule makers could not have intended to omit that method from the new rules.

[22] Even if I am to accept Mr. Howard's view that alternative service ought to be available for service out of the jurisdiction it would not be because the former rules provided for it. I accept the caution about that approach sounded by May LJ in **Godwin v Swindon Borough Council** [2002] 1 WLR 997 as paraphrased in the head note:

> "It is not generally helpful to seek to interpret the Civil Procedure Rules by reference to the rules which they replaced and to cases decided under the former rules. It is not, therefore, persuasive either way to observe that former rules about deemed service contained [certain words which are now omitted]. The question whether there is a discretion is a matter of interpretation of the rules in the light of the overriding objective but without reference to the merits of the particular case."

Do the rules cross apply?

[23] As a straight matter of interpretation of the rules there is no getting away from the deliberate structure that placed service of claim forms within the jurisdiction, service of other documents and service of court process out of the jurisdiction in three separate parts and not as three sections within one Part. That a provision in one Part could have been made to cross apply to another Part cannot be doubted. The difficulty is that there is nothing that shows that any of the rules in these three Parts cross apply. Where rules are

[17] [2001] 2 All ER 332
[18] [2002] 2 All ER 525 at 538 d.

intended to cross apply this can be easily expressed. Thus, in Part 38 which deals with pre-trial review, r 38.3 expressly states that Part 25 (Case Management – The Objective) and Part 26 (Case Management – The Court's Powers) "where appropriate, apply to a pre-trial review as they do to a case management conference." There is nothing of the sort in the rules on service.

[24] Mr. Howard points as an instance of cross application to rule 5.16 (4) which expressly refers to service out of the jurisdiction where this is provided for by a contractually agreed method. That rule reads:

> "(4) If the claim form is served out of the jurisdiction in accordance with the contract, it is not to be treated as having been served on the defendant unless service out of the jurisdiction is permitted under Part 7."

[25] I am not sure how much this provision advances the claimants' argument. It does to the extent that a rule in the Part that deals with service within the jurisdiction refers to service out. But in so doing the rule demonstrates the very point that where it is the intention that a rule should cross apply this intention is expressed. Also, it reinforces the fact that it is Part 7 alone that permits service out because its effect is that even if the parties contractually agree on service out, such service is not to be treated as effective unless service out of the jurisdiction is permitted under Part 7.

[26] Mr. Howard also argued that rule 7.8 speaks to personal service but there is no definition of personal service in this Part. Therefore, he argued, there was need to rely on the meaning given in Part 5 and this showed the cross application of the rules. In response Mr. Moverley Smith drew attention to the treatment of personal service in section 25 of the **Interpretation Act**, Ch. 136 to make the point that Part 7 did not need reference to Part 5 to be understood.

Repetition of provisions

[27] In my view the repetition of treatment of the same subject matter in Part 5 and Part 7 [illegible]

there appears in rule 5.2 the requirement of service of the statement of claim along with there appears in rule 5.2 the requirement of service of the statement of claim along with the claim form in these terms:

> "5.2(1) The general rule is that the claimant's statement of claim must be served with the claim form.
>
> (2) The claim form may be served without the statement of claim in accordance with rule 8.2.
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> (3) In this Part reference to service of the claim form requires that –
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> (a) the statement of claim; or
>
> (b) if these rules so require, an affidavit or other document;
>
> (c) a copy of any order that may have been made; and
>
> (d) a copy of any order or application made under rule 8.2;
>
> must be served with the claim form unless the statement of claim is contained in the claim form.

[28] Part 7 gives its own treatment to the same subject matter:

> "7.1(2) In this Part references to service or filing copies of the claim form include–
>
> (a) the statement of claim (unless contained in the claim form);
> (b) an affidavit in support of the claim, if these rules so require; and
> (c) if permission has been given under rule 8.2 to serve the claim form without the statement of claim – a copy of the order giving permission.

[29] Had it been that the provisions of Part 5 were intended to be of general application there would have been no need to restate in Part 7 the general rule that appears in Part 5 that the statement of claim must be served with the claim form. Instead it could have been simply said that the general rule applies.

[30] A striking instance of what would be unnecessary repetition, if the rules in the different Parts cross applied, is found in Part 7.8 which sets out the general provisions as to mode of service of a claim form. As with the equivalent in the English CPR 1998 (r 6.24) provision is made in our rule for service (i) through foreign governments, judicial or consular authorities, (ii) on a state, (iii) in accordance with the law of the country in which service is to occur, and (iv) in accordance with a Convention.[19] However, unlike its English equivalent our rule 7.8 goes on to state one further method of service: personal service by the claimant or the claimant's agent.

[31] The significance of the inclusion in Part 7.8 of personal service as a permitted method of service is that it is sheer repetition. Part 5, Service of Claim Form within Jurisdiction, begins with the heading "Service of claim form – normal method". Under this heading appears rule 5.1 (1):

> "The general rule is that a claim form must be served personally on each defendant" .

[32] I can only conclude that the reason why it was thought necessary to provide in Part 7.8 for personal service of a claim form is because the general rule in Part 5 does not apply to Part 7. It is no coincidence that Part 7.8 has its own general rules about service. Each Part has its own general rule because the general rule in one Part does not apply in another Part.

[33] If personal service, which is so obvious a method, needed to be stated in Part 7 to be a permissible method of service out of the jurisdiction then substituted service, which is an extraordinary method, needed far more to have been stated in Part 7 to be a permissible method of service out of the jurisdiction. I simply cannot accept that the Rules could have been so punctilious as to provide in this particular rule for personal service and so cryptic as to not provide for substituted service but intend it to be available.

[19] As a matter of accuracy, service under the Hague Convention or other Conventions is dealt with in Part 7.9, not in 7.8.

[34] I am left to conclude that the rules in Parts 5, 6 and 7 were deliberately structured so as to apply to their particular subject matters and not to cross apply. Accordingly I uphold the defendants' submission that our Rules do not permit alternative methods of service of a claim form out of the jurisdiction. I therefore set aside the ex parte order that permitted such service.

Set aside service or cure the defects?

[35] The defendants submit that I should, as well, set aside the service effected pursuant to that order. The defendants say that order was procured by the claimants leading the court into the error of acting in reliance on a rule that did not apply so it was entirely the fault of the claimants that the court made an order that it ought not to have made. For that reason, urge the defendants, the claimants are not deserving of any special consideration to stave off the normal consequential order setting aside service.

[36] The claimants submit that notice of the claim form and of the intention to make the defendants parties to the claim came to the attention of the defendants. There is no dispute about that. It is an arid and desperately technical objection to service that the defendants take, according to the claimants. They submit that the court should therefore dispense with service pursuant to CPR 6.8 on the basis that service in fact, if not in accordance with the rules, has already been effected. Alternatively, they submit, the court should cure the defect in service by regarding the service that has already been effected as good service, pursuant to CPR 26.9(3). I note the defendants' objection that the claimants did not include a request for this court to exercise its curing power in their notice of application[20] and they should not now be permitted to seek an order for which they did not apply. I do not see that it would prejudice the defendants to allow the claimants to amend their application to so claim and I therefore treat the notice of application as amended accordingly.

[20] See the reference to the claimants' notice of application in the note to paragraph 1.

Dispensing with service

[37] 6.8 states:

"6.8(1) e court may dispense with service of a document if it is appropriate to do so."

Part 6, within which this rule falls, deals with Service of Other Documents. This Part and this rule deal with documents other than a claim form as appears both from a reading of the table of contents of the Rules and from a reading of the contents of this Part. Part 6 does not apply to claim forms. I have already held that the rules in these Parts do not cross apply and, in relation to this particular rule, there is nothing that makes it cross apply. I must therefore conclude that this power to dispense with service, which is new[21], does not apply to service of a claim form.

Procedural error or non-compliance

[38] Rule 26.9(3) is part of the court's case management powers. The rule is in these terms:

"26.9(1) This rule applies only where the consequence of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order.

(3) An error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders.

(4) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(5) The court may make such an order on or without an application by a party."

[21] See note 6.9.1 in Civil Procedure Volume 1 Autumn 2000 (The White Book Service).

[39] This rule, like the comparable English rule 3.10, provides that a procedural error or non-compliance does not nullify the proceedings or any step taken in the proceedings unless the court so orders. More than merely saving from invalidity this rule, in paragraph (3), positively confers power on the court to make an order to put matters right. The claimants rely on two English decisions on the pre-CPR 1998 provision that saved an irregularity from being a nullity to show how the court exercises its discretion.[22]

[40] In **The Goldean Mariner**[23] the claimant mistakenly served merely an acknowledgement of service and not the claim form upon one defendant, in attempting to serve abroad. At first instance the judge held that no service could be said to have taken place. The Court of Appeal decided that it should use its general power to cure the defective service.[24] Sir John Megaw said[25]

> "The procedural mistake which was made by the plaintiff's agents in the United States of America was, of course, lamentable, and, so far as can be seen on the material before us, inexcusable. The plaintiffs have to bear the responsibility for that mistake. If it had resulted in any misunderstanding by, or any prejudice to, any of the defendants concerned, the consequences would have been very different in these proceedings. But it is accepted that the mistakes caused none of them any prejudice; they knew that concurrent writs had been issued and were in existence in respect of each of them, and that it had been the intention that the appropriate document should be served. ... In the absence of actual harm to these defendants as a result of the process server's errors, the only ground on which it would be

[22] The process that is here being conducted is to see how the court previously exercised its discretion in deciding what should be the consequence of non-compliance; it is not to see how to interpret the rule. Accordingly the caution of May LJ in **Godwin v Swindon Borough Council**, [2002] 1 WLR 997 referred to in paragraph 22 above, may not be particularly applicable. It is still a relevant consideration, nonetheless, because the whole approach to compliance was intended to change under the new rules. I continue to hold to the view that I attempted to state in Grenada Civil Case No. 0084 of 1998 **St. Bernard v A.G. of Grenada**, ruling delivered 6 April 2003, that there should be no easy accommodation of non-compliance with the rules.

[23] [1990] 2 Lloyd's Rep 215 (CA)

[24] It is interesting to note that there was then no provision in the rules that gave the court power to dispense with service. That absence did not prevent the court from, in effect, dispensing with service by refusing to set aside the improper service that had taken place in relation to a number of the defendants.

[25] At p. 225.

proper to refuse to allow the plaintiffs to correct the mistake would be if it were right to punish the plaintiffs in the interest of upholding the importance of proper diligence in the service of proceedings. Should the plaintiffs be punished *pour encourager les autres*? I think not.

[41] A similar view had been taken by McCowan LJ:[26]

> "In the case of the 10th defendants, by an oversight no writ was served upon them at all, but only a form of acknowledgement of service which gave the title of the proceedings and listed them among the defendants sued. This was, in my judgment, plainly an attempt to take a step in the proceedings, namely to serve the writ, but it failed to comply with a requirement of hese rules as to what should be served. By virtue of O. 2, r. 1, this failure is to be treated as an irregularity and does not nullify the service.
>
> "It may well be that in many cases where no more was served on a defendant than an acknowledgement of service it would be held in exercise of the court's discretion that service must be set aside. In this case, however, the 10th defendants reacted in no way differently from the other six defendants to which I have referred. The risk had been placed with them likewise by John F. Curry, there was the same co-operation, and in quick time solicitors on their behalf were taking the same point of service. There is no evidence before the court that they were ever in any doubt that the plaintiff intended to sue them or as to the nature of the proceedings, or that they suffered any prejudice by the irregularity in service."

[42] The claimants regarded as particularly apt the remarks of Phillips J in **The Anna**.[27] Instead of serving in Gibraltar, as they had been given permission to do, the claimants served the defendants' agents in Monaco. In deciding that the defect should be cured under the court's general power the judge stated:

[26] at p. 223.
[27] [1994] 2Lloyds Rep 379.

"... Nor do I think it reasonable to have objected to the service effected on the defendants' managers in Monaco. ... The object of service of process on a party is to bring the process to the notice of the party served. Service on the defendants' managers in Monaco was better calculated to do this than service on their registered office in Gibraltar. The defendants were making life as procedurally difficult for the plaintiffs as possible. Such a posture may be legitimate, but it is not one I find attractive. The manner in which service was effected caused no prejudice to the defendants and in the exercise of my discretion I consider that it should be allowed to stand."

[43] In this case the claimants say the methods of service used were effective to bring the claim to the attention of all three defendants very quickly. They each filed an acknowledgement of service very quickly and proceeded to challenge service and forum. None of them has suffered prejudice as a result of the method of service adopted. In the circumstances the court should use its general power to correct the procedural error, the claimants submitted.

The current approach to non-compliance

[44] The cases upon which the claimants rely belong to an earlier era, Mr. Moverley Smith submitted, and reflect a different ethos. The proper position is instead shown by recent cases, he argued. In **Elmes v Hygrade Food Products Plc**[28] Simon Brown LJ considered the situation where a claim form had been served in time on the defendants' insurers instead of on the defendants themselves. The insurers had been negotiating a settlement of the claim and it was accepted that no prejudice was caused to the defendants by service upon the insurers rather than upon the defendants themselves. The question that arose for decision was whether there was power in the court, on the claimant's application under CPR 3.10 (b) (the non-compliance provision) and CPR 6.8 (alternative method of service) to remedy the error by an order deeming the service to have been good service by an alternative method not permitted by the rules.

[28] [2001] EWCA civ 121

[45] The court analyzed what remedy it was that the claimant was seeking and concluded that it could only have been an order under the English r 3.10 (the equivalent of our 26.9) that an order for alternative service under r 6.8, not in fact made, should be deemed to have been made. The court refused to so order. The court decided that such an order could not be made retrospectively, only prospectively.

[46] **Anderton v Clwyd County Council (No 2)**[29] decided that the court had power to dispense with service under r 6.9 both retrospectively as well as prospectively. It was said that the order would only be made retrospectively in exceptional circumstances. The dispensing discretion was held to be exercisable in favour of a claimant who has in fact already made an ineffective attempt in time to serve a claim form by a permissible method. It was recognized that the ground of such an application is that the defendant does not dispute that he or his legal adviser has in fact received, and had his attention drawn to, the claim form by a permitted method of service in the prescribed time. The basis of his application is that there is no point in requiring him to go through the motions of a second attempt to complete in law what he has already achieved in fact.

[47] Leaving aside for the moment the point that there is no power in Part 7 to dispense with service of the claim form, I would comment that this case supports the argument of the claimants that they should receive the benefit of the discretion where re-service is a formality and no prejudice has been suffered by the defendant.

[48] In **Bas Capital Funding Corporation v Medefinco Ltd**[30] Lawrence Collins J found that there had been no valid service of English proceedings in Malta either under English or Maltese law. It is instructive to see the treatment the learned judge gave to the objection that there had been improper service. He set out the claimants arguments as follows:

> "168. The claimants accept that the claim form has not been formally served on the defendants in accordance with Maltese law as required by CPR 6.24. But they say that the defendants have: (a) had informal service of the claim form well within the four month period for service; (b) received copies of all the relevant

[29] [2002] 1 WLR 3174

[30] [2004] 1 Lloyds Rep 652 at [167].

documents; (c) instructed English solicitors; and (d) taken an active part in the proceedings. Any defendant, acting sensibly and in accordance with the overriding objective would – on receipt of the relevant documents well within the four month period and having instructed English solicitors – have waived the need for formal service or would have instructed their English solicitors to accept service in the jurisdiction."

[49] After dealing with other aspects of the case the judge returned to the matter of service (at para 216):

> "216 At the time of the hearing of this matter service had not been effected in Malta, although of course the company, and its Board of Administration, have had the documents ... [for six weeks]. It is true that a defendant is fully entitled to insist on proper service. Proper service is particularly important in international cases, where the basis of jurisdiction is service. I would therefore hesitate before ordering service by an alternative method, or dispensing with service. But I would hope that, on mature reflection Mr. Tabona would not be advised to take any purely technical point on service. What I propose to do is to adjourn determination of the question whether I should make a special order with regard to service ... by which time I can be informed whether service has taken place or, if not, what Mr. Tabona's position is."

[50] It is not apparent from these cases decided under CPR 1998 that there is any general proposition that defective service will be inevitably, or even usually, fatal. It is clear that the court will exercise a discretion in deciding what the consequence should be.

Strict compliance with the rules

[51] In this regard it is undoubtedly true that the ethos of the new rules requires that there should be stricter compliance with the rules. As May LJ stated in **Vinos v Marks & Spencer Plc**[31]

[31] [2001] 3 All ER 784, 789-790

"If you then look up from the wording of the rules and at a broader horizon, one of the main aims of the Civil Procedure Rules and their overriding objective is that civil litigation should be undertaken and pursued with proper expedition."

[52] That objective is enforced by the terms of the Rules themselves. The court has given due effect to the intention of the rules as is illustrated, for example, by the court's approach to failure to serve a claim form within the prescribed time by recognizing the limit that the rules place upon the court's ability to extend time. The court sounded a warning on this matter in **Anderton v Clwyd**:[32]

"2. The consequences of failure to comply with the rules governing service of a claim form are extremely serious for a claimant and for his legal advisers. ... Now that the disputed Interpretations of the Civil Procedure Rules have been resolved by *Godwin's* case and by this judgment, there will be very few (if any) acceptable excuses for failures to observe the rules for service of a claim form. The courts will be entitled to adopt a strict approach, even though the consequences may sometimes appear to be harsh in individual cases."

[53] It is observed that there is a distinction in the Rules between situations where there is a limitation on the exercise of discretion, such as the discretion to extend time to serve a claim form[33], and those where there is no statutory limitation. Even where there is no such limitation on the exercise of the court's discretion that discretion must be exercised upon due consideration of all the relevant factors. CPR 2000 provide in rule 26.8 a statement of the criteria for the exercise of a discretion when there is an application for relief from sanction. These include the conditions that failure to comply was not intentional and there is a good explanation for the failure and the considerations of what would be the effect on each party of granting relief, the interests of the administration of justice, whether the failure to comply can be remedied within a reasonable time, whether fault lies with the lawyer or the litigant and the effect upon a trial date.

[32] At p. 3184.
[33] See, for example, **Godwin v Swindon Borough Council** [2002] 1 WLR 997 at 1006 B [28].

The wide discretion under r 26.9(3)

[54] The discretion that the claimants invoke is in fact a broad discretion. The claimants do not seek relief from sanction in this case because no sanction is prescribed. Rule 26.9(3) on which the claimants rely gives the court "the widest possible discretion and the court can look at all the circumstances" according to note 3.10.2 in The White Book Service 2000 on the comparable English provision (r 3.10).

[55] In considering all the circumstances I consider in particular the fact that the claimants took the very proper step of obtaining a court order that specified the methods by which service was to be effected and they complied with the terms of that order. The claimants obviously thought that the order they obtained was a proper one. They thought that our rule 5.14 applied. It was a reasonable view of the law. On a prima facie view the judge thought the claimants were correct. I have decided that rule 5.14 does not apply to service of a claim form out of the jurisdiction. But this is not settled law. Counsel have not directed my attention to any decision on the matter by our court of appeal.

[56] Especially because the claimants acted pursuant to a court order, as well as for the other reasons that appear in the claimants' skeleton argument, to some of which I have adverted, I would be minded to exercise my discretion under Rule 26.9(2) to treat the service on the three defendants that did not comply with rule 7.8 as not invalidated thereby.

Service in violation of foreign law

[57] Before I decide whether I can or should exercise my discretion in that way I must first consider the defendants' submission that service was effected in violation of foreign law. The defendants say that service on all three relevant defendants did not comply with the local law of the places where service was effected and that in the case of Mr. Karam such service was probably a violation of criminal law.

[58] To this contention the claimants have taken a formal objection. The claimants ask for an order that the defendants be refused permission to rely on the affidavit evidence of Mr.

Matteo Inaudi, who deposed that service on Mr. Karam in Switzerland was probably a violation of Swiss penal law. The grounds of the application are that Mr. Inaudi's affidavit takes them by surprise with a matter that was not indicated before and that this argument of violation of Swiss penal law was deliberately not raised until after the expiration of the time in which re-service of the claim form was permitted so that the claimants can no longer re-serve. The claimants argue that they are prejudiced.

[59] In response the defendants explain why the affidavit was not filed before. Also, the defendants argue that the alleged violation of Swiss penal law comes within the ambit of their application to set aside service. I accept that the alleged violation may be encompassed in the defendants' application for a declaration that the purported service was of no effect. But that position is undermined by the grounds stated in the notice of application which were that the Rules did not permit substituted service out of the jurisdiction and that it was not appropriate to make an order for service of the proceedings on the three foreign defendants out of the jurisdiction. Rule 11.7 requires that a notice of application must state briefly the grounds on which an applicant seeks an order. How I should treat the failure to state the ground now sought to be relied on is a matter of discretion.

[60] The defendants referred to an exchange of letters about defective service before they made their application to show that they had, shortly after service, alerted the claimants to their position that foreign law had been violated by the service that occurred. That letter specifically asserted that service on Mr. Karam was "in contravention of Swiss law". It was the duty of the claimants thereafter to make their own inquiries into the matter or to ask the defendants for particulars, argue the defendants. Instead the claimants said we will settle this in court.

[61] In my view the defendants' letter gave adequate notice to the claimants of the objection to service on the ground that it was a violation of Swiss law. I am therefore disinclined to view the late affidavit of Mr. Inaudi as an ambush or as deliberately filed late so as to allow time for re-serving to expire. I acknowledge the factor that the claimants were no longer able to reserve by the time they got the affidavit. But the prejudice the claimants suffered was from

their failure to look after their own interests when they got the defendants' letter. Had they obtained proper advice on the alleged violation of Swiss law they would not have needed to blame the defendants for not sooner giving them the benefit of Mr. Inaudi's affidavit. I cannot fault the defendants for the situation in which the claimants find themselves. I reject their application to refuse permission to the defendant to rely on Mr. Inaudi's affidavit. I give permission to formally amend the notice of application to state the ground that service was in violation of foreign law and I treat the notice of application as so amended.

[62] The affidavit of Mr. Inaudi encounters another difficulty, however. In it Mr. Inaudi offers expert evidence as to Swiss law. He says that service by courier on two lawyers in Switzerland who had acted in other proceedings for Mr. Karam is "in all probability a criminal offence under Swiss law". He says the same in relation to service by post on Mr. Karam at his former residence in Lully, Switzerland. He cites the relevant provision as being article 271 of the Swiss penal Code:

> "Any person who without proper authorization carries out on behalf of a foreign state in Switzerland any act, the performance of which is reserved to the public authorities and any person who facilitates the performance of such acts will be subject to a penalty of imprisonment or, in cases of serious offence of detention."

[63] I do not know what Mr. Inaudi means by what he says. Who committed a criminal offence under Swiss law? The postal worker? Would the postal worker be regarded under Swiss law as carrying out an act on behalf of a foreign state? Or is Mr. Inaudi referring loosely to a violation of the spirit of article 271? In **The Sky One** the process server went personally to serve the writ upon the president of the defendant company in Switzerland. In the instant case there was service by post and by courier. As a matter of reasoning I did not see how service by post, especially, could equate to personal service by a private individual who is engaged by a claimant to effect service. It is this clash between reasoning and Mr. Inaudi's conclusion that drew attention to Mr. Inaudi's performance of his duty as an expert.

[64] Rule 32.3 states that the duty of an expert witness is to help the court impartially on the matter relevant to his expertise. That duty overrides any obligation to the person who instructs or pays him. Rules 32.4(1) and (2) state that expert evidence presented to the court must be and should be seen to be the independent product of the expert uninfluenced as to form or content by the demands of the litigation. He must provide independent assistance to the court by way of objective, unbiased opinion. Rule 32.14(2) states that at the end of an expert's report he must state that he understands his duty to the court as set out in rules 32.3 and 32.4 and that he has complied with that duty.

[65] Mr.Inaudi's affidavit contains no statement that he understood that he had a duty to the court or that he complied with any. This was fitting. Because Mr. Inaudi confirmed that he had acted in Swiss proceedings brought by Transworld against Messrs Deripaska and Boulygine, that he had acted as Swiss legal adviser to Bluzwed since 1997 and that he was authorized to make his affidavit on behalf of Bluzwed. He then proceeded to argue Swiss law in favour of his clients. The affidavit did not pretend to be the evidence of an impartial, independent and unbiased expert.

[66] It is in that context that I consider the opinion of Mr. Inaudi that postal service of the claim form at Mr. Karam's address was in all probability a violation of Swiss criminal law. That is classic expert opinion evidence as to foreign law. That evidence needed to have been given by an independent expert in the same way that the Russian law expert for either side gave his evidence in the instant case: in compliance with Part 32: in a non-partisan way. Had the absence of the certificate of compliance, required by rule 32.14(2), been only a technical breach it may have been an appropriate exercise of the discretion as to how to treat non-compliance, conferred by rule 26.7(2), for the court to nonetheless rely upon the expert's evidence. However, instead of there being a mere technical breach of a formal requirement it is undeniable that Mr. Inaudi's opinion is that of a partisan and an advocate. It is precisely the sort of expert evidence that Part 32 of CPR 2000 is intended to exclude. In the exercise of my discretion as to how to treat the violation of the rule regarding the evidence of an expert witness I reject the opinion evidence of Mr. Inaudi.

Discretion to waive violation of foreign law

[67] In the event that I am wrong to reject Mr. Inaudi's evidence I go on to consider how to treat the violation of Swiss law that he said occurred in effecting service upon Mr. Karam. It appears on the authority of **The Sky One** as recognized by Lawrence Collins J in **Bas Capital Funding Corporation v Medefinco Ltd**[34] that even where the particular method of service was expressly prohibited by foreign law the court has a discretion to allow such service to stand. Staughton J said in **The Sky One**[35] that it would take a very strong case for him to exercise such a discretion. The point was not argued and he simply expressed the view, without elaboration, that he could not find sufficient grounds for exercising his discretion in favour of the plaintiffs. It is interesting that Staughton J then proceeded to decide that there were exceptional circumstances which justified renewal of the writ. The claimants were thus able to re-serve. In the instant case it is common ground that re-service is no longer possible.

[redacted] Two matters distinguish the instant case from **The Sky One**. The first is that there was no personal service in violation of Swiss penal law in the instant case as there was in that case. The second matter is that in that case the order that the plaintiffs obtained was for service out of the jurisdiction simpliciter. The order did not specify the method of service to be adopted. After the plaintiffs had obtained leave to serve the writ out of the jurisdiction the plaintiffs then contacted a Swiss firm who advised that it was legitimate to serve the defendants in person. A member of the firm then personally served the president of the defendant company[36]. Staughton J held[37] that "service of the writ by Dr. Rossi was a breach of Swiss law. By reason of O. 11, r. 5(2) it cannot be held to have been authorized by the order of Mr. Justice Turner."

[69] In the instant case the order of the court that permitted service out of the jurisdiction actually specified the manner of service. It is undoubtedly true, as Mr. Moverley Smith urged, that the claimants formed their view as to what Swiss law permitted and invited the

[34] At [157].
[35] At p. 244, col. 1
[36] See the chronology of events at p 240, col. 1.
[37] At p. 243, col. 1.

court to act on that view. The court did not go wrong on its own initiative, it was led into error. That, however, does not alter the fact that the court has already made an order authorizing the very service that took place. The court is not being asked to allow service that was done without authority to stand; it is being asked to set aside service that was done pursuant to the specific direction that it gave. If comity has been offended or Swiss law has been violated it is now too late for the court to distance itself from the offending act.

[70] Lawrence Collins J[38] in **Bas Capital** seemed favourably impressed by the obiter view of the court of appeal in **Knauf**[39] that it was permissible to treat postal service to Germany as permissible service under English law although it was a violation of German law. I respectfully share the sentiment. Even if I had accepted Mr. Inaudi's expert opinion that service by post at Mr. Karam's residence was a violation of Swiss penal law I would have regarded the fact that there was postal service as distinct from personal service and that such service took place pursuant to a court order as making it permissible to allow service to stand.

Service was effective

[71] Mr. Inaudi deposed that several large boxes were delivered by post to the address in Lully around 16th April 2004. He deposed that that address was the former residence of Mr. Karam now occupied by Mr. Karam's former wife. The boxes, he indicated, were not opened. The thought occurred to him that they may have contained claim documents since the boxes were delivered around the same time as claim documents were served on Mr. Karam's Swiss lawyers. But the boxes were not opened.

[72] In my view it does not matter that Mr. Karam did not open the boxes. I am perfectly clear in my mind that service by post was effective to bring the claim form and documents to his attention. If I had any doubts about the effectiveness of service upon Mr. Karam the fact that, on a without prejudice basis, he acknowledged service would have removed those doubts. I should also mention that a special feature of this case is the fact, as alleged, that

[38] At [157].
[39] [2001] 2 All ER 332

Mr. Karam was at all times an associate of Mr. Deripaska and allegedly acted in all relevant matters as such. Service on Mr. Deripaska's London solicitors who are now acting in connection with the instant case for all three defendants would have been factually effective notice to Mr. Karam.

[73] Pursuant to rule 26.9(3) I decline to set aside the service that has already been effected in accordance with the ex parte order. Until set aside that order remained a valid order; see **Robertson v Isaacs**.[40] It is now recognized that when an order is set aside it does not automatically result in the invalidation of steps that have been taken pursuant to such an order, see **Ex parte Jeyeantham**.[41]

[74] It should be clarified that the order that allows defective service to stand is not, in disguise, a retrospective order for alternative service because the impugned ex parte order was distinctly a prospective order for alternative service. It is this factor that permits a different outcome in the instant case from the outcome in **Elmes v Hygrade Food Products Plc.** where the refusal of the court to allow service to stand was because the court decided that it could not make a retrospective order for alternative service.[42]

[75] Before leaving the matter of alternative service it may be helpful to observe that substituted service may be available in cases of service out of the jurisdiction when service takes place, pursuant to rule 7.8(1) (b), in accordance with the law of the country where service is to occur. The relevant foreign law may permit it. This was counsel's submission and, if this is so, it seems natural that it should be so. For what it is worth, Mr. Inaudi stated that Swiss law permitted Swiss officials responsible for effecting service to effect substituted service.

The forum challenge

[76] The defendants seek an order to stay proceedings in this court on the ground that there is another forum which is clearly or distinctly the more appropriate forum than the BVI in

[40] 30 WIR 114.
[41] [2000] 1 WLR 264.
[42] See paragraphs 44 and 45, above. It is material that there should not be the double defect of impermissible substituted service and also impermissible retrospective substituted service.

which the case may be tried more suitably for the interests of all the parties and the ends of justice. This is the burden that the defendant bears, as was established in the landmark case of **Spiliada Maritime v Cansulex**[43]. The reason for imposing that burden upon the defendants is to pay proper regard to the fact that jurisdiction has been founded as of right in relation to three of the defendants which have been sued in the jurisdiction in which they were incorporated[44].

[77] Bingham LJ (as he then was) identified the four questions which the judge had to consider on the application for a stay in **Banco Atlantico v BBME**.[45] These were: (1) is there a contract? (2) If so, what appears to be its proper law? (3) what issues between these parties have to be decided under the presumptive proper law? and (4) does the defendant show that the foreign forum is clearly and distinctly more appropriate for the determination of these issues having regard to the interests of the parties and the achievement of justice? It seems appropriate to me to proceed in similar fashion in the instant case although my consideration must go further.

[78] Nourse LJ identified the starting point on the application for a stay in **Banco Atlantico**[46] in these words:

> "Where an English Court is asked, on the ground of forum non conveniens, to stay an action, a start must be made somewhere; and, where the action is for breach of a contract whose existence is admitted or established a start can only be made by identifying the proper law of the contract, an exercise which can only be carried out under the guidance of our own rules of conflict. Here, as Lord Justice Bingham has demonstrated, it is very probable, perhaps inevitable, that those rules lead to the conclusion that the proper law is Spanish. Accordingly, applying the fundamental principle approved in **Spiliada**[47] ... the judge ought to have asked himself this question:

[43] [1987] AC 460
[44] See Spiliada[1987] AC 460 at p. 477.
[45] [1990] 2 Lloyds rep 504 at. 506, col. 2.
[46] [1990] 2 Lloyds rep 504.
[47] [1987] AC 460

Am I satisfied that the issues arising under this Spanish contract will be tried more suitably for the interest of the parties and the ends of justice in the courts of Sharjah?

"That being the question which ought to have been but was not asked, there has been an error in principle to be corrected by this Court. Asking myself that question, I answer it in the negative on the grounds advanced by Lord Justice Bingham, two of which have especially impressed me: first, the Sharjah Courts would not apply the proper law of the contract; secondly, Banco can sue BBME in the English Courts as of right."

No contract established or admitted

[79] According to the defendants' submission it is only where the existence of a contract is 'admitted or established' that the court can proceed to consider what is prima facie its proper law. If the existence of the contract is in dispute, as it is in the instant case, then there is no basis upon which the court can form a prima facie view that a contract even exists. Counsel accepted that permission to serve the claim form out of the jurisdiction was given on the basis that the claimant had shown (ex parte, he reminded) a good arguable case that there existed a contract. However, the defendants' position is that no such contract existed. Therefore, counsel submitted, the court was left in the position, at this stage, that the existence of a contract was no more than a matter of argument.

[80] In examining the submission that I should make no prima facie finding as to the existence of a contract I note that this proposition runs counter to the express guidance of Bingham LJ in **Banco Atlantico.**[40] This is the first question that he said a judge has to consider: Is there a contract? Why would he have described it as a question to consider if it could not be considered because it is in question? It is true that in that case there was no dispute as to the existence of a contract. It must also be true, because Mr. Moverly Smith said so, that in none of the cases in this area has there been a dispute as to the existence of the contract. Nonetheless, the reason, in my respectful view, why Bingham LJ repeatedly

[40] [1990] 2 Lloyds rep 504 at page 508.

referred to the existence of a contract as a "question" that the judge has to consider was because when the existence of the contract was in question it was the duty of the judge to answer it in the same way as he was required to answer other questions, such as what was the proper law of the contract. If, at this stage, the court is able to make a prima facie decision as to the proper law of a contract I can see no reason why at this stage the court should not also be able to make a prima facie decision as to the existence of a contract.

[81] On the facts of the instant case, however, it is not necessary to perform even the very limited exercise of making a prima facie choice between the rival positions. This is because even without deciding if there was a contract there still arises the need to make a prima facie decision as to the proper law.

[82] The short version of the claimants' case[49] is that the parties (the JV Partners) entered into a joint venture agreement involving the sourcing and purchasing of alumina, their processing at a plant in Russia and the purchase and onward sale of the processed product to third parties. All business done with that plant by the JV Partners, whether acting directly or indirectly, would be done exclusively for the benefit of the JV Partners. The arrangement was to be of indefinite duration and could only be terminated by a year's notice.

[83] The short version of the defendants' case (which has not yet been pleaded) is that the relevant parties entered into an arrangement that was loosely and inaccurately called a joint venture. The arrangement amounted to no more than establishing a framework for certain corporate vehicles which the relevant parties created and jointly owned to enter, on a case by case basis, into transactions with the plant in Russia. The arrangement was not a contract; it involved no exclusivity and required no notice period.

[84] It seems to me that at this stage it is enough that I find, and I so find, that there was an arrangement which one party says amounted to a contract and the other party says did not amount to a contract. The core issue between the parties is primarily a question of fact – what was the arrangement? But it is also distinctly a question of law – what are the legal

[49] The fuller version appears at paragraphs 3 to 7, above.

consequences, if any, of that arrangement? This ineluctably leads to the question, by reference to which system of law should that issue be resolved? In other words, to the extent that this factual dispute as to what was agreed (or arranged, as I am sure the defendants would prefer it to be expressed) involves a question of law, by reference to which country's law must that question be answered? In short, what is the proper law?

The proper law

[85] It is settled that finding the proper law involves three considerations, as appears from the speech of Viscount Dilhorne in **Whitworth Street Estates Ltd v Miller**.[50] The first consideration, whether there is an express choice of law, does not arise in the instant case. The second consideration is whether any choice of law is to be inferred from the conduct of the parties that shows a decision in regard to the proper law. It appears from the judgment of Bingham LJ in **Du Pont v Agnew**[51] that the terms of the contract and the relevant surrounding circumstances are also to be regarded in inferring intention. If it appears that the parties never applied their minds to the question then the court moves to the third consideration, to see what system of law is the one with which the transaction has its closest and most real connection. As both of those cases show, the court does not proceed to the third consideration unless it fails to infer intention. This position had also been stated by Lord Diplock in **Amin Rasheed Shipping Corporation v Kuwait Insurance Co**.[52] The decision in **Whitworth Street Estates Ltd v Miller**[53] shows that one answer may be produced as a matter of inferred intention while a different answer would be produced on a third stage inquiry[54].

[50] [1970] AC 583 at 611
[51] [1987] 2 Lloyds Rep 585 at 592, col 1
[52] [1984] AC 50 at 61
[53] [1970] AC 583
[54] (see p 611, col 1)

[86] Inferred intention has been said to refer to the actual, not the imputed, intention of the parties: if they had been asked at the time what system of law should govern their agreement what would they have answered? see **Hellenic Steel v Svlomar Shipping Co. Ltd (The Komninos S)** per Bingham LJ.[55]

[87] In the instant case I am convinced by the written and oral submissions of Mr. Howard that there was a clear, deliberate effort by the parties to connect their venture to systems of law other than Russia. The offshore element in the affairs of the parties is overwhelming. The 1st claimant is incorporated in The Bahamas. The 1st defendant is incorporated under the International Business Companies Act of this Territory. The obvious reason why companies incorporate under an offshore regime is to avoid the tax and regulatory laws of other countries in which such companies operate. The claimants and the relevant defendants established two Bahamian companies, an Irish company and a BVI company to serve as the vehicles to conduct the joint venture operations. After the defendants ceased to act through the joint venture structure the defendants set up two BVI companies to carry on the business that the two Bahamian companies had been carrying on. Eight companies were involved. Not a single Russian company was created to participate in any aspect of the dealings between the parties. I simply cannot accept, on the present evidence, that the intention of the parties could have been other than to connect their arrangement to one or more of the common law jurisdictions in which they did their incorporations.

[88] Mr. Deripaska deposed that the fact that the meetings at which the joint venture arrangement was made took place in London was in no way a conscious decision to avoid the application of Russian law or to apply English law. I note the limit of what he said and also what he did not say.[56] He said nothing to displace the obvious inference that flows

[55] [1991] 1 Lloyds Rep 370 at 374, col 1
[56] Mr. Deripaska does not contradict the evidence of Mr. Lev Chernoy, at paragraph 6 of his affidavit filed 28 July 2004, that "the parties (including Mr. Deripaska) did not want the agreement governed by Russian law because of the fiscal and administrative requirements that would entail and all parties took all necessary steps to ensure that it was not so governed. These steps included, in particular, the setting up of the offshore corporate structures which were agreed in the 1995 meetings and which were set up precisely to avoid Russian oversight over the joint venture agreement."

from the choice of incorporations. I hold, therefore, that it is to be inferred that the parties intended English common law, as the law of these offshore jurisdictions, to govern.

[89] If the offshore factor had not been so strong I would also have been influenced by the nature of the joint venture activities. Mr. Howard described them as having four components, only one of which took place in Russia. First, raw material was purchased on the world markets chiefly through the London Metals exchange. Second, there was the tolling of that material in Russia into finished products. Third, the finished products were sold on the world markets and chiefly in London. Fourth, the accounting and financing of the joint venture took place in Geneva. The component activities do not lead me to infer that there was any intention that Russian law was to apply to the joint venture.

[90] Among the other factors on which the claimants relied to argue that Russian law was specifically intended not to apply was that Russian law required an agreement of this nature to be in writing. Each side produced opinion evidence from a Russian law expert that spoke to the proposition advanced by the claimant that under Russian law this agreement needed to have been in writing to be enforceable and because it was not in writing a Russian court would hold the agreement to be unenforceable. The claimant also advanced the proposition that a Russian court would apply that Russian law principle even if such a court were to decide that the agreement was governed by English law. The opinion of the claimants' expert was clear in its support for both propositions. The opinion of the defendants' expert was that while it was possible that a Russian court would so act the matter was not as clear as the opposing expert had it and there were other probable decisions that a Russian court could take so that unenforceability would not be the result. I think it is a fair position to take in relation to the conflict in the evidence at this stage to say that there is at least a real risk that a Russian court would act as the claimants contend.

[91] I ask myself the question that Nourse LJ said the judge in Banco[87] fell into error in failing to ask: am I satisfied that the issues arising under this common law arrangement will be tried more suitably for the interests of the parties and the ends of justice in the courts of Russia? I answer it in the negative on grounds similar to the two which especially

[87] [1990] 2 Lloyds rep 504.

impressed Nourse LJ in **Banco**[58]: first, there is at least a risk that the Russian court would not apply the proper law of the arrangement as regards the requirement of form but would apply Russian law that the alleged contract is unenforceable because of the absence of writing; secondly, the claimants can sue the three BVI defendants in this court as of right. As regards the tort and fiduciary aspects of the claim there is nothing about them that sufficiently affects my discretion as to lead me to a different decision.

Other connecting factors

[92] The proper law is only one of the factors at which the court must look to determine the forum with which the dispute has the most real and substantial connection; others include expense and convenience such as the availability of witnesses and documents and the language they speak or in which they are written.

[93] Mr. Moverley Smith was comprehensive in his advertence to these factors. He persuaded me that there would be the need for Russian based and speaking witnesses to be brought to testify and for documents in the Russian language to be translated and produced. He impressed me with his analysis of the elements of the claim and the view that the evidence would need to do far more than speak to what was agreed at the meetings in London. Among other things, it would be relevant to a determination of what the parties agreed for the court to be informed of what the parties knew about the metal trade and industry when they were making their arrangement. Evidence of all the surrounding circumstances including the nature of tolling contracts and the Russian regulatory regime will also be necessary. If an agreement were established there is the further significant matter of damages on which there would be the need for much evidence. I note that the present suggestion is that damages would be in excess of a hundred million United States dollars.

[94] I do not see the need to reproduce all the submissions of counsel on this point (and, indeed, I did not see such a need in relation to some of the points previously dealt with) but instead adopt the approach of Staughton J in **The Sky One**[59] that the spirit of Lord

[58] [1990] 2 Lloyds rep 504.
[59] [1988] 1 All ER 238 at 244, cols 1-2

Templeman's observations in **Spiliada**[60] should prevail: a forum challenge should be heard in hours, not days, and the exercise of a judge's discretion should rarely be the subject of appeal. While those sentiments may have been too hopeful they do indicate that the laborious setting out of all points and the judge's observations on them should no longer be rigidly required. A first instance judge must resist anticipating the complaint on appeal that the judge gave no, or no sufficient weight to the factors that counsel contends ought to have produced a result in his favour.

[95] Having diligently studied Mr. Moverley Smith's written and oral submissions on the factors that he says connect the claim with Russia and that make it convenient for the dispute to be tried in Russia, I am not persuaded that Russia is the natural forum or otherwise the clearly more appropriate forum. I am guided by the observation in **Dicey**[61] that one must look at the forum with which the issues have the closest connection and not simply weigh factors without reference to the issues; (12-023, note 78). That observation has some bearing on the importance to the issues, as connecting factors, of all that counsel said took place at the plants in Russia. The other connecting factors to which I have adverted in the immediately preceding paragraphs, while undoubtedly significant, are not enough to persuade me that Russia is a forum in which the case could more suitably be tried for the interests of all the parties and for the ends of justice. Lord Goff stated in **Spiliada**[62] that there are cases where no particular forum can be described as the natural forum and there is then no reason to grant a stay, where jurisdiction is founded as of right. I believe this is such a case. Accordingly, I refuse to stay proceedings.

[96] In the circumstances of this case my order as to costs is determined by the mixed result of the application. The defendants succeeded on their challenge that service was bad and that success is unaffected by the decision to exercise the discretion to cure the defect. The claimants should normally bear the costs of that challenge. The defendants failed on their challenge to the appropriateness of the forum. The defendants should normally bear the costs of that challenge. It seems to me that the practical order that I should make is that

[60] [1987] AC 460
[61] Vol.1, 13th ed, 2000, London: Sweet & Maxwell
[62] [1987] AC 460 at p. 477

each side should bear its own costs. I do not draw a distinction, for present purposes, between the defendants. I therefore order that each party shall bear its or his own costs.

Denys Barrow

Denys Barrow, S.C.
High Court Judge (Ag.)