Cristiana Crociani; A (by her Guardian Ad Litem, Nicolas Delrieu; B (by her Guardian Ad Litem, Nicolas Delrieu v Edoardo Crociani; Paul Foortse; BNP Paribas Jersey Trust Corporation Ltd; Appleby Trust (Mauritius) Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Fisher, Blampied
Judgment Date:	15 May 2013
Neutral Citation:	[2013] JRC 90
Reported In:	[2013] JRC 90
Court:	Royal Court
Date:	15 May 2013

Text

[2013] JRC 90

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Commissioner, and** Jurats Fisher **and** Blampied.

Between
Cristiana Crociani
First Plaintiff
A (by her Guardian Ad Litem, Nicolas Delrieu
Second Plaintiff

B (by her Guardian Ad Litem, Nicolas Delrieu
Third Plaintiff
and
Edoardo Crociani
First Defendant
Paul Foortse
Second Defendant
BNP Paribas Jersey Trust Corporation Limited
Third Defendant
Appleby Trust (Mauritius) Limited
Fourth Defendant

Advocate A. D. Robinson **for the Plaintiffs.**

Advocate R. J. MacRae **for the Defendants.**

Authorities

Royal Court Rules 2004.

De Sa -v- Luis [2009] JLR 44.

Apple Corps Limited and Another -v- Apple Computer Inc and Others ("No Challenge Interlocutary") [1992] RBC 70.

Deutsche Bank AG and another -v- Highland Crusader Offshore Partners LP and others [2010] 1 WLR.

Simon Engineering Plc -v- Butte Mining Plc [1996] 1 Lloyd's Rep 104.

Simon Engineering Plc -v- Butte Mining Plc [1997] 1. L.Pr 599.

Trafigura Beheer BV -v- Kookmin Bank Co [2005] EWHC 2350 (Comm).

Barclays Bank -v- Homan [1992] BCC 757.

Dicey, Morris and Collins on The Conflict of Laws, 15th Edition.

Royal Bank of Canada -v- Cooperatieve Centrale Raiffeisen-Boorenleenbank [2003] EWHC 2913.

Civil Jurisdiction and Judgments, 5th Edition.

Trust — ruling concerning stay of proceedings commenced in Mauritius.

THE COMMISSIONER:

1 On 10 th May, 2013, the Court ordered the defendants, as an interim measure, to stay proceedings they had commenced in Mauritius pending the outcome of their application for a stay of the proceedings before this Court on the grounds of *forum non conveniens* due to be heard on 28 th–30 th August, 2013.

2 The plaintiffs' application was supported by an affidavit sworn by Paul Owen James Lewis of Bedell Cristin, who act for the plaintiffs, and our summary of the background of this case has been drawn partly from that affidavit and partly from the documents placed before the Court by the parties.

3 The unfortunate background to this case involves a breakdown in family relationships between the first plaintiff ("Cristiana") on the one hand and her mother, the first defendant, Edoarda Crociani ("Mme Crociani") and her sister Camilla Crociani ("Camilla") on the other. It is Cristiana's case (brought with her two minor children, acting through their guardian Nicolas Delrieu) that Mme Crociani, with the other defendants, has taken steps to cut her off financially from the substantial family wealth and to starve her of funds.

4 At the centre of the case is the Grand Trust created by Mme Crociani on 24 th December, 1987, under the laws of the Bahamas. The deed is not in the usual wide discretionary terms seen in this jurisdiction. In it, Mme Crociani records her intention to have set aside a separate trust for each of her two daughters, who are named as the beneficiaries along with the Camillo Crociani Foundation Limited. This is not the occasion to analyse the trust deed but in broad terms, the trustees have power to pay income to each daughter during her lifetime, together with the Camillo Crociani Foundation Limited, and to pay capital to each daughter during their lifetimes, with the remaining capital passing as they may appoint or failing appointment to their children on their respective deaths.

5 Two provisions are relevant to mention at this stage:–

> (i) Under Clause 11, the trustees have the overriding power to transfer the whole or any part of the trust fund to other trusts in favour or for the benefit of all or any one or more exclusively of the other or others of the beneficiaries (other than Mme Crociani).
>
> (ii) Under Clause 12, the trustees have the power to appoint new trustees outside the jurisdiction and to declare that the trusts shall be read and take effect according to the laws of the country of the residence or incorporation of the new trustees "and thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder".

6 The plaintiffs assert that the Grand Trust was not created with the purpose or intention of providing any benefit to Mme Crociani, who was not able to benefit otherwise than as a

default beneficiary if her line of descendants through Camilla and Cristiana was extinguished.

7 The proper law of the Grand Trust was changed first to Guernsey, then on 2nd October, 2007, to Jersey when the third defendant, BNP Paribas Jersey Trust Corporation Limited ("BNP"), was appointed co-trustee to act with Mme Crociani and the second defendant, Paul Foortse.

8 In their Order of Justice, and insofar as it relates to the Grand Trust, the plaintiffs seek the following relief:–

(i) Equitable compensation for a number of distributions made out of the Grand Trust between December 2007 and March 2011 totalling £6,630,011.96 and US$1,235,000 which it is alleged that the trustees knew and intended would be re-directed to Mme Crociani and as such amounted to a fraud on a power.

(ii) The setting aside of an appointment made on 9th February, 2010, whereby substantial assets (thought by the plaintiffs to amount to $100,000,000) were appointed out of the Grand Trust to a Jersey settlement known as the Fortunate Trust, which the plaintiffs allege was created by Mme Crociani for her benefit (we will refer to this as "the 2010 Appointment"). It is alleged that Mme Crociani subsequently revoked the Fortunate Trust withdrawing all of its assets.

(iii) The setting aside of the deed dated 10th February, 2012, whereby the Grand Trust trustees (comprising the first, second and third defendants) purported to retire as trustees in favour of the fourth defendant, Appleby Trust (Mauritius) Limited. (We will refer to this as "the 2012 Retirement"). The recitals to the 2012 Retirement state an intention to change the governing law to that of the Island of Mauritius, but the plaintiffs allege that the operative part of the deed does not effect such change and in any event, the 2012 Retirement was a fraud on a power. The purpose was to discourage Cristiana from enforcing her rights as a beneficiary of the Grand Trust.

(iv) The setting aside of an appointment dated 12th August, 2012, by which property that was subject to the 2010 Appointment, to the extent that such appointment was invalid (and thus the property continued to vest in the Grand Trust), was appointed to a new settlement called the Agate Trust created by the second and fourth defendants under Jersey law (we will refer to this as "the Agate Appointment").

(v) The appointment of new trustees in place of the existing trustees of the Grand Trust.

(vi) Such further orders, declarations, accounts and inquiries as may be necessary to reconstitute the trust fund of the Grand Trust and to place it under the control of such new trustees.

9 A letter before action (before this Court) dated 3rd July, 2012, was sent by Bedell Cristin to Ogier, who then acted for the defendants, outlining the claims in so far as they related to the 2010 Appointment and the 2012 Retirement. It was following that letter that the Agate Appointment was entered into. Mourant Ozannes, who were now acting for the defendants in place of Ogier, wrote a very detailed response by letter dated 17th August, 2012, repudiating in robust terms the claims of the plaintiffs and informing them of the Agate Appointment. No question was raised in that letter about the suitability of this Court as the forum for such claims. Indeed, quoting from paragraph 36 of the letter:–

> *"36. All of the Grand Trustees, directors of corporate trustees, the individual professional and Madame Crociani herself, were of one mind and entirely comfortable with the decision reached. They have made it clear that if litigation cannot be avoided, they are all willing and able to explain themselves to the Royal Court."*

Furthermore, at paragraph 37 of the letter, Cristiana was warned that if she persisted with the claims, she would be subpoenaed by the defendants to attend before the Royal Court to be cross-examined.

10 The Order of Justice was served in Jersey upon BNP, which is, of course, incorporated in Jersey. No application was made to serve the proceedings on the other defendants out of the jurisdiction (Mme Crociani residing in Monaco and Paul Foortse in the Netherlands) because, by email dated 31st January, 2013, Mourant Ozannes confirmed that they were instructed to accept service on their behalf, which they duly did. The action was placed on the pending list by consent on 1st February, 2013, as against BNP and on 8th February, 2013, as against the remaining defendants.

11 By the same email, Mourant Ozannes sought an extension of time for the filing of an answer, in particular because the English counsel who had been assisting the defendants was unavailable for the whole of February 2013. The plaintiffs agreed to an extension of time to 29th March, 2013, and a consent order was issued to that effect on 4th March, 2013.

12 On 1st March, 2013, Carey Olsen gave Bedell Cristin notice that they had been instructed to act for the defendants in place of Mourant Ozannes. Carey Olsen issued a summons under Rule 6/7 of the Royal Court Rules 2004, disputing both the jurisdiction of the Court and, it would seem, the forum. A date fix took place on 8th March, 2013, when 29th May, 2013, was fixed for the hearing for the summons, which was subsequently amended on 12th April, 2013, by which amendment the defendants abandoned any challenge to the jurisdiction of the Court, but sought instead a stay of the proceedings on the grounds of *forum non conveniens.*

13 On 22nd March, 2013, and without, it would seem, any notice to the plaintiffs, the defendants applied ex parte to the Supreme Court of Mauritius on the basis that the Grand Trust was now governed exclusively by the laws of Mauritius for declarations (to be made

after due service on the named respondents) *inter alia*:–

(i) That by the 2010 Appointment, the assets the subject of that appointment were validly and effectively transferred to the Fortunate Trust.

(ii) That by the 2012 Retirement, the fourth defendant had been appointed as sole trustee in the place of the former trustees, and that the Grand Trust had become subject to and governed by the laws of Mauritius.

(iii) In the event that the 2010 Appointment had not been effective, that by the Agate Appointment all the assets specified in that appointment were validly and effectively transferred to the Agate Trust.

14 The application was supported by an affidavit sworn by Mme Crociani and Lee Chee Kiong Noel Patrick Lee Mo Lin, a director of the fourth defendant. Whilst these affidavits referred to and exhibited the Order of Justice, no mention was made of the fact that the defendants had accepted the jurisdiction of the Royal Court in the proceedings brought by the plaintiffs and had issued their own application to the Royal Court to have the Jersey forum challenged.

15 The defendants obtained an order from the Supreme Court of Mauritius for leave to serve the proceedings on Christiana out of the jurisdiction. Apparently not knowing her address, the defendants instructed the Viscount to serve the relevant papers on Bedell Cristin. On 28 th March, 2013, the Viscount attempted to serve the papers on Bedell Cristin. In his affidavit, Mr Lewis explains that Carey Olsen had given his firm no warning of these proceedings and they had no knowledge of the contents of the papers to be served. With their client living on the other side of the world, it was difficult to take instructions quickly and so service was not accepted. The defendants then made a further application to the Supreme Court of Mauritius for an order for substituted service of the Mauritius papers on Cristiana by way of hand delivery to the office of Bedell Cristin in Jersey.

16 Commissioner Clyde-Smith sat on 16 th April, 2013, to give directions in relation to the summons issued by the defendants seeking a stay of the proceedings on the grounds of *forum non conveniens* and a separate summons seeking an extension of time for the filing of their answer to 42 days after the Court ruling on their application for a stay or any appeal of that ruling. For the reasons set out in the Commissioner's judgment of 19 th April, 2013, he made the following case management orders:–

(i) He gave leave to the defendants to amend their summons dated 8 th March, 2013.

(ii) He vacated 29 th May, 2013, for the forum hearing.

(iii) He directed that new dates be fixed for the forum hearing (since fixed for the 28 th–30 th August) and a timetable for sequential filing agreed.

(iv) He directed the defendants to file a full answer on or before 29 th May, 2013.

17 When judgment was handed down on 19 th April, 2013, and following discussion, two undertakings were sought from the parties within seven days as follows:–

(i) From the plaintiffs as to whether they would extend the undertaking given by Mr Robinson as recited at paragraph 18 of the judgment of 19 th April, 2013, to any further steps taken by the defendants in the Jersey proceedings in addition to the filing of an answer — that undertaking was given.

(ii) By the defendants, whether they would undertake to the Court and agree with the plaintiffs that they would take all necessary steps to stay the proceedings currently before the Mauritian courts pending the determination of the defendants' application to challenge the forum in Jersey — that undertaking was offered, but only on the basis of a mutual stay of both the Jersey and Mauritian proceedings.

18 On 22 nd April, 2013, Cristiana made her first appearance in the Mauritian proceedings under protest, disputing the competence and jurisdiction of the Mauritian courts. In view of the complexity of the matter and the fact that her counsel had only just been instructed, he sought an adjournment of three to four weeks in order to formulate the full grounds of her objections. Counsel for the defendants asked for the matter to be dealt with expeditiously, referring to the difficulties they had had effecting service, suggesting Cristiana's counsel should file a full statement and a date be fixed within a month for the hearing of those objections. An adjournment to 6 th May, 2013, for Christiana's case " *to be in shape"* was ordered.

19 On 6 th May, 2013, Cristiana's counsel, reiterating her appearance under protest, sought an adjournment to September 2013. The record of that hearing shows that he produced an affidavit from Mr Robinson dated 3 rd May, 2013, setting out the history of the proceedings in Jersey and informing the Mauritian court, it would seem for the first time, that the defendants had accepted the jurisdiction of the Jersey court and themselves requested the Jersey court to rule on the issue of *forum non conveniens* on 28 th–30 th August, 2013. The affidavit also informed the Mauritian court of the orders made on 19 th April, 2013, and of this application by the plaintiffs for a stay of the Mauritius proceedings pending the forum hearing. Counsel for the defendants objected to the production of Mr Robinson's affidavit on the basis that it did not bear any authentication or appostille according to the Hague Convention.

20 Sir H Moollan, QC, for the defendants, is recorded as making the following submission:–

"Sir H Moollan, QC, states that he is objecting to this course of proceedings. A case has been entered before this Court in which his learned friend has put in

> an appearance, though under protest, but the purpose of this case is to see when they are going to deal with it. What his learned friend is saying is that they should not hear it at all in Mauritius and this Court should be a subsidiary Court to some Court in Jersey which is, of course, not at all the purpose of a Court of law. The applicants are left with no choice than to agree to a short postponement of one week for his learned friend to have all his papers ready but he will insist on the case being heard in Mauritius."

21 The Mauritian court, clearly rejecting Cristiana's application for an adjournment until September to allow this Court to deal with the defendants' application before this Court, adjourned the Mauritian proceedings until 20 th May, 2013, again " *to be in shape".*

Adjournment

22 Mr MacRae sought an adjournment of the plaintiffs' application. He said they were very late in identifying the nature of and basis for the application with the papers only being served on Friday 3 rd May, 2013. He had not had time to take instructions and reach a concluded stance, let alone file evidence in reply and was not therefore in a position to deal substantively with the matter.

23 As it transpired, Mr MacRae was able to file a large bundle of authorities together with skeleton arguments and the hearing, which took place on the afternoon of 8 th May, 2013, was extended through to the morning of 10 th May 2013, to allow him to complete his submissions.

24 Mr Robinson pointed out that the issue of a stay of the Mauritian proceedings had been raised in correspondence from his firm by letters dated 3 rd April, 10 th April and 18 th April, 2013. Furthermore, it had been openly canvassed when judgment was handed down on 19 th April, 2013, and when an undertaking was sought from the defendants as set out above. There were, he said, no surprises in the plaintiffs' application.

25 In our view, the defendants, who are ably advised both here and in Mauritius, had received due notice of the plaintiffs' application, and more than ample time to respond. By the hearing on 10 th May, they had had the plaintiffs' papers for a week, but in any event, had long known of the plaintiffs' request for a stay of the Mauritian proceedings and the basis for it. The affidavit of Mr Lewis did not in our view contain anything that would have taken them by surprise and if they had wanted to file evidence they had ample time to do so. BNP after all is within the jurisdiction.

26 Furthermore, we were conscious from the records of the hearings before the Mauritian court that the defendants were pressing very hard for the Mauritian courts to deal expeditiously with the plaintiffs' challenge to its jurisdiction, with the next hearing due to

take place on 20 th May, 2013. We therefore rejected the defendants' application for an adjournment.

Plaintiffs' submissions (in summary)

27 Mr Robinson submitted that the plaintiffs were not seeking a final anti-suit injunction against the defendants but an interim order, by way of a case management direction *"holding the ring"* pending the hearing of the defendants' application on 28 th — 30 th August, 2013, to challenge the Jersey forum. His submissions can be summarised as follows:–

(i) The defendants have encouraged the plaintiffs to commence proceedings before the Royal Court; see paragraph 9 above.

(ii) They then chose to accept the Royal Court's jurisdiction and to accept service through Mourant Ozannes.

(iii) They sought an extension of time for the filing of an answer, which was granted by the plaintiffs.

(iv) They then invoked the Royal Court's process to ask for a decision as to whether Jersey or Mauritius is the appropriate forum.

(v) That process will result in a hearing at the end of August.

(vi) The defendants were unable to point to one good reason why the proceedings in Mauritius in the interim are either necessary or desirable.

(vii) On the other hand if the proceedings in Mauritius are stayed, it will save costs and avoid the risk of orders being made in Mauritius, which will impact on the question of forum which the defendants have asked the Royal Court to decide.

(viii) It is an abuse of the Royal Court's process for the defendants to be exploiting the intervening period in pressing on with the Mauritian proceedings as if they had not (a) submitted to the Royal Court's jurisdiction and (b) asked the Royal Court to decide on forum and (c) as if the Royal Court had not directed that the hearing of that application be heard at the end of August.

(ix) One of the functions of case management is to ensure that cases are dealt with justly and the court's process is not abused.

(x) Moreover, the Court should find that it is a procedural tactic, which may have the effect (presumably intended) of diminishing the plaintiffs' resources for fighting this claim and sapping their morale.

(xi) One of the functions of case management is to put the parties on an equal footing.

(xii) Making the defendants stay their hand in Mauritius is necessary to prevent the abuse of its process and put the parties on an equal footing before the Royal Court.

28 Mr Robinson relied on the case of *De Sa -v- Luis* [2009] JLR 044. In that case, the petitioner had applied for ancillary relief following nullity proceedings in Jersey. The respondent applied for ancillary relief before the Funchal court in relation to divorce proceedings he had earlier commenced there (unbeknownst to the petitioner). The respondent then issued a summons seeking *inter alia* a stay of the ancillary relief proceedings in Jersey, pending the outcome of the parallel proceedings before the Funchal court.

29 As recited in paragraph 12 of the judgment of Bailhache, Bailiff, the Court ordered the respondent to adjourn the Funchal proceedings so that his application for a stay of the Jersey proceedings could be heard. At that subsequent hearing, the Court found that Jersey was the *forum conveniens* and ordered the respondent to discontinue the Funchal proceedings altogether.

30 Mr Robinson submitted that we were in the same position in this case. A final anti-suit injunction could only be granted, he accepted, once the Court had decided that Jersey is the *forum conveniens* and that issue is to be determined, at the defendants' request, this August. In the meantime, the proceedings brought by the defendants in Mauritius should be stayed to allow the defendants' application before the Royal Court to be heard. If the Royal Court finds that Mauritius is the *forum conveniens*, then the interim order will fall away. If it finds that Jersey is the *forum conveniens*, then at that stage it can consider whether a final anti-suit injunction should be granted.

31 Mr Robinson also referred to the case of *Apple Corps Limited and Another -v- Apple Computer Inc and Others ("No Challenge Interlocutary")* [1992] RBC 70 where Hoffmann J observed that it was a common feature of applications for injunctions to restrain other proceedings, whether domestic or foreign, that although they are interlocutory in form, the issues which they raise will not subsequently be litigated at the trial. In that case (as in the case before us) the question of whether an interim order should be made final was to be very much at issue at a subsequent hearing. If the defendant succeeded at that hearing, all that would have happened is that its foreign proceedings would have been held up for some nine or ten months. He held that an interim order in those circumstances (which he granted), fell squarely within the *American Cyanamid* principles.

Defendants' submissions (in summary)

32 Mr MacRae referred us to the summary of the position under English law in relation to the making of anti-suit injunctions as set out in the judgment of Toulson LJ in the decision of the English Court of Appeal in *Deutsche Bank AG and another -v- Highland Crusader Offshore Partners LP and others* [2010] 1 WLR, which we accept would guide the approach

of the Jersey courts, and which is worth setting out in full:–

> ***"…I would summarise the relevant key principles as follows.***
>
> ***(1) Under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do so.***
>
> ***(2) It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression, but, where a matter is justiciable in an English and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive.***
>
> ***(3) The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of forum non conveniens, it is generally necessary to show that (a) England is clearly the more appropriate forum ("the natural forum") and (b) justice requires that the claimant in the foreign court should be restrained from proceeding there.***
>
> ***(4) If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted.*** For that would be to overlook the important restraining influence of considerations of comity.
>
> ***(5) An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court.*** An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.
>
> ***(6) The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive.***
>
> ***(7) A non-exclusive jurisdiction agreement precludes either party***

from later arguing that the forum identified is not an appropriate forum on grounds foreseeable at the time of the agreement, for the parties must be taken to have been aware of such matters at the time of the agreement. For that reason an ***application to stay on forum non conveniens grounds an action brought in England pursuant to an English non-exclusive jurisdiction clause will ordinarily fail unless the factors relied upon were unforeseeable at the time of the agreement.*** It does not follow that an alternative forum is necessarily inappropriate or inferior. (I will come to the question whether there is a presumption that parallel proceedings in an alternative jurisdiction are vexatious or oppressive).

(8) The decision whether or not to grant an anti-suit injunction involves an exercise of discretion and the principles governing it contain an element of flexibility."

33 Mr MacRae stressed the need for caution and submitted that no order could be made by the Royal Court, until it had first determined whether Jersey was the *forum conveniens* and that the defendants' conduct in pursuing the Mauritian proceedings was vexatious, unconscionable or oppressive.

34 There was no jurisdiction, he said, to grant an anti-suit injunction as a form of case management. This was not, he said, an application for mere interim relief, but an application for a final anti-suit injunction which the plaintiffs were seeking as an end in itself.

35 If his interpretation of the law was wrong, the Court should still not apply the *American Cyanamid* principles, even if the order which they seek is viewed as an interim order. This was apparent he submitted from *Simon Engineering Plc -v- Butte Mining Plc* [1996] 1 Lloyd's Rep 104, *Simon Engineering Plc -v- Butte Mining Plc* [1997] 1. L.Pr 599 and *Trafigura Beheer BV -v- Kookmin Bank Co* [2005] EWHC 2350 (Comm). Without going into the facts of those cases, it seems clear to us that in each case the Court had been in a position to find that the English courts were the *forum conveniens*.

36 Mr MacRae went on to argue that even on the *American Cyanamid* principles, the plaintiffs' application should be dismissed. The plaintiffs, he said, could not show that there was a serious issue to be tried as to whether Jersey is the natural forum for the claim or that the Mauritian proceedings were vexatious and oppressive. The balance of convenience did not in any event point in favour of the draconian relief which the plaintiffs were seeking. If, in due course, the anti-suit injunction which the plaintiffs now sought was found to have been wrongly granted — because the defendants' forum challenge succeeds — then he said the defendants will have been wrongly deprived of their right to pursue the Mauritian proceedings despite the exclusive jurisdiction clause in favour of Mauritius.

37 As a general proposition, Mr MacRae submitted that damages were not an adequate remedy for a party deprived of its rights to enforce an exclusive jurisdiction clause as they are unlikely to be calculable, but the plaintiffs had in any event failed to offer an appropriate undertaking to pay damages to the defendants in the event that it subsequently transpired that an injunction made on the less demanding *American Cyanamid* principles was wrongly granted.

38 Furthermore, it was the normal procedure he said for the plaintiff to first make her application to the Mauritian courts, citing *Barclays Bank -v- Homan* [1992] BCC 757, although he accepted that there was English authority to the contrary effect. Indeed, Dicey, Morris and Collins on The Conflict of Laws, 15th edition 12–090 submit that there is no general requirement that application be first made to the foreign court.

39 Mr MacRae placed some reliance on the case of *Royal Bank of Canada -v- Cooperatieve Centrale Raiffeisen-Boorenleenbank* [2003] EWHC 2913 to illustrate the point that concurrent proceedings do not in themselves mean that the conduct of the other action is vexatious or oppressive or an abuse of court or of itself justifying the granting of an injunction. That case involved swaps in which Rabobank had brought proceedings against RBC in New York and the next day RBC had brought proceedings against Rabobank before the English courts, which closely mirrored the New York proceedings. Both parties had applied unsuccessfully to their respective foreign courts for a stay on the grounds of *forum non conveniens*. The agreement governing the transactions between the parties was governed by and to be construed in accordance with English law and contained this provision:–

> ***"Jurisdiction. With respect to any suit, action or proceedings relating to this Agreement ('Proceedings'), each party irrevocably:–***
>
> > ***(i) submits to the jurisdiction of the English courts if this Agreement is expressed to be governed by English law ….***; and
> >
> > ***(ii) 'waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum, and further waives the right to object with respect to such Proceedings, that such court does not have any jurisdiction over such a party.***
>
> ***Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction … nor will the bringing of Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction."***

Both sets of proceedings were close to actual trial and RBC applied again to the English court for a stay of the New York proceedings. The application was dismissed, firstly on the grounds that the bringing of the proceedings by Rabobank in New York could not be characterised as oppressive or vexatious or an abuse of the court's process (perhaps not

surprisingly in view of the above provision) and secondly, because neither jurisdiction was found to be the more natural or appropriate forum for the determination of the dispute.

40 Finally, Mr MacRae objected to the lack of evidence adduced by the plaintiffs and to the manner in which the application had been made, namely by way of summons, maintaining that it should have been brought by way of Order of Justice.

Decision

41 We entirely accepted that in considering ordering the defendants to stay the Mauritian proceedings, we should act with caution, because by definition such an order involves an interference with the process of the Mauritian courts. As Bailhache, Bailiff said in *De Sa -v- Luis* at paragraph 16:–

> ***"This court, as the judicial branch of government in a small country, regards the doctrine of comity as a particularly important consideration to be borne in mind.*** We would not readily or lightly interfere with the functions of a foreign court and will support, where possible, the reasonable orders of the judiciary in a foreign country exercising their own legitimate jurisdiction. We expect no less from foreign courts and, in particular, expect that the same respect should be accorded to our own orders."

But as he went on to say:–

> ***"17. That is the general principle but there are occasions, as indicated by Lord Goff in the extract quoted above, where the court has to exercise its power to protect its own process by issuing orders which affect the process of a foreign court. An anti-suit injunction is one example. Another example, relied upon by Mr Tremoceiro for the petitioner, was the order made by this court in*** *United Capital Corp.* Ltd v Bender. ***In that case, Birt, Deputy Bailiff made an order restraining the second defendant from seeking discovery of certain documents before the US District Court (Southern District of New York) and from testifying in that respect, and ordering the second defendant to apply to the District Court to discontinue the application.*** That order was upheld by the Court of Appeal."

42 It appeared to us from the documentation we were given in relation to the Mauritian proceedings that the defendants had not informed the Mauritian court of the position in the Jersey proceedings and in particular had not informed the Mauritian court of the following facts, which we feel confident would be of concern to it:–

(i) That the defendants have, on advice, accepted the jurisdiction of this Court in respect of the claims brought by the plaintiffs pursuant to the Order of Justice.

(ii) That the defendants have themselves invited this Court to determine whether

Jersey is the *forum conveniens* and that hearing will now take place on 28 th August — 30 th August, 2013.

43 Having brought that application before this Court, we regard it as oppressive and an abuse of this Court's process for the defendants to press forward with the Mauritian proceedings requiring Cristiana to argue before the Mauritian courts the very issues that the defendants have asked this Court to determine in August. It would seem from the pace of the Mauritian proceedings driven by the defendants that the Mauritian courts may well make determinations as to the *forum conveniens* before this Court is able to do so, giving rise, potentially, to conflicting outcomes.

44 The desire of the defendants to keep information about the Jersey proceedings from the Mauritian courts is exemplified by Mr MacRae's letter of 2 nd May, 2013, to Mr Robinson, where in the context of the plaintiffs' challenge to the jurisdiction of the Mauritian courts he said this:–

> *"Please can we have your undertaking that you will not be referring the Mauritian court, let alone supplying the Mauritian court, with a copy of the order and judgment of the Royal Court dated 19th April.* 2013."

45 That undertaking was sought on the basis that it would breach the undertaking given to the court by Mr Robinson on 19 th April, 2013, not to use the filing of an answer by the defendants or the taking of any other steps against the defendants at the forum hearing in Jersey or any equivalent hearing in Mauritius. In our view, informing the Mauritian courts of the orders and judgments of this Court could not possibly constitute a breach of the undertaking given by Mr Robinson. Indeed, we think it is important for both courts to be kept informed (certainly at this stage) as to the steps that are being taken in their respective jurisdictions, and to that end we gave the parties liberty, indeed we invited them, to disclose to the Mauritian court the Act of Court and judgment of the 19 th April, 2013, and the Act of Court of the 11 th May, 2013, and this judgment.

46 In our view the position is succinctly set out in the following extract from Civil Jurisdiction and Judgments, 5th Edition by Adrian Briggs:–

> ***"The recognition of these facts of commercial life has led to the development of two further ancillary measures, both important in protecting the effectiveness of an anti-suit injunction.***
>
> ***The first is that an applicant for such an injunction may also seek an interlocutory anti-suit injunction, to hold the ring until the application for a final anti-suit injunction can be heard.*** If the interim injunction may be said to be essentially the same as any other interlocutory injunction, its being granted should be determined on the basis of a simple balance of convenience,3 rather than according to the more demanding standard which the applicant or claimant

is required to meet to obtain a final injunction. But if the injunction, even though interim, will have the practical effect of being final, it should be ordered only on meeting the standard of proof required for a final injunction".

Note 3 cites as authority the *Apple Corps* case and is in the following terms:–

> *" Apple Corps Ltd v Apple Computer Inc* [1992] RBC 70, 76–77. ***There will still be a need, in the interlocutory application, of the need for caution in granting anti-suit injunctions: see also*** *National Westminster Bank Ltd v Utrecht-America Finance Co* [2001] EWCA Civ 658; [2001] 2 All ER (Comm) 7, ***at paras 28–29.*** But in principle, *American Cyanamid Co V Ethicon Ltd* [1975] AC 396 ***will be the applicable doctrine."***

47 The order that we have made is demonstrably not a final order. Its purpose is to hold the ring until we can determine the *forum conveniens* challenge raised by the defendants without interference. If the defendants succeed in their challenge and we find that Jersey is not the *forum conveniens*, then the order will fall away, but if we find that it is the *forum conveniens*, it will be at that stage that the Court will have to decide whether a final anti-suit injunction should be imposed. As such in deciding whether to grant the stay on an interim basis, the *American Cyanamid* principles do apply.

48 Mr Robinson made the point that if the *American Cyanamid* principles did not apply, a party could block interim relief simply by issuing a *forum non conveniens* challenge and then saying that no interim relief is available lest it prejudges the question of where the natural forum is, regardless of how oppressive or vexatious their continuation of foreign proceedings in the interim may be.

49 Applying the *American Cyanamid* principles, we could not see how Mr MacRae could contend that there was no serious issue to be tried as to whether Jersey is the natural forum for the plaintiffs' claims. Of the acts complained of, the impugned distributions and the 2010 Appointment (by which it would appear that very substantial sums were appointed out of the Grand Trust) all took place when the Grand Trust was governed by Jersey law and when the institutional trustee was a Jersey based trust company. The 2012 Retirement is expressly governed by Jersey law. The Agate Appointment is silent as to its governing law, but the Agate Trust is governed by Jersey law.

50 We accept, of course, that if the 2012 Retirement is valid (a matter to be decided under Jersey law), then the Grand Trust is now governed by Mauritian law with the fourth defendant the sole trustee and therefore that jurisdiction is a forum which the defendants are perfectly entitled to put forward as the *forum conveniens;* that will be a matter for argument in August, but it cannot at this stage be said that there is no serious issue as to whether Jersey is the natural forum.

51 We found that the plaintiffs' evidence and the documentation we have seen emanating

from the Mauritian court does illustrate a serious issue as to whether the Mauritian proceedings are vexatious and oppressive. That will be a matter for the Court if the defendants' forum challenge fails in August. In the meantime and on the basis of that evidence and documentation, we found that the ongoing prosecution of those proceedings pending the forum challenge to be oppressive and an abuse. Whilst we can understand why the defendants would wish to get proceedings on foot in Mauritius to demonstrate that they are serious about seeking justice and litigating the issues between the parties there, Mr MacRae was unable, in our view, to put forward any cogent reason why those proceedings should now be driven forward over the next three months, with the potential of the Mauritian courts dealing with the very issue the defendants have asked this Court to determine.

52 It would seem that the true purpose for the Mauritian proceedings being driven forward is for the defendants to achieve what they have offered the plaintiffs, namely a mutual stay in both jurisdictions. This Court has, however, found that for the reasons set out in its judgment of 19 th April, 2013, pending the forum hearing there should be no interruption of the proper progress of the Jersey proceedings to trial, subject to ongoing review.

53 As for the balance of convenience, that lies firmly with an interim stay being ordered. The only prejudice the defendants will suffer will be a three month delay in the proceedings they have brought in Mauritius. On the other hand, Cristiana will be forced at the instigation of the defendants to litigate the same issue in two jurisdictions and this Court may find its processes being interfered with by prior findings of the Mauritian court on the very issue it has been asked to determine.

54 We accept that ordinarily an undertaking as to damages is the price which a person asking for an interim injunction has to pay for it and any order for an interim injunction must contain such an undertaking unless the Court orders otherwise. In this case, we were being asked to order the defendants to stay the Mauritian proceedings for some three months only and as Mr MacRae said any damages are unlikely to be calculable. We saw no reason to require such an undertaking in those circumstances.

55 In our view there was sufficient evidence before the Court to justify the interim order it made. There was no substance in Mr MacRae's complaint as to the procedure used by the plaintiffs. This matter arises within the proceedings brought by the plaintiffs and it was appropriate, in our view, to be brought by way of summons supported by affidavit. The summons was issued, the date fixed and the plaintiffs' bundles filed we understand in accordance with the Court's Practice Directions. It is the case that the affidavit was initially sworn by Mr Robinson and when it was pointed out to him that he could not both appear for the plaintiffs and adduce evidence, he withdrew that affidavit and replaced it with the affidavit from Mr Lewis, substantially in the same terms. We could see no prejudice to the defendants in this respect.

56 It is clear from paragraph 12–090 of Dicey, Morris & Collins on *The Conflict of Laws*

referred to above that there is no general requirement that the plaintiffs should have first made their application for a stay to the Mauritian court. However it would appear from the record of the hearing on 6 th May, 2013, before the Mauritian court that Cristiana's counsel did seek an adjournment to the end of September for the purpose presumably of the Jersey court first dealing with the defendants' application and that was refused.

57 Whilst we accept the general principles in relation to anti-suit injunctions as summarised in the *Deutsche Bank* case, as Bailhache, Bailiff, said in *De Sa -v- Luis* at paragraph 21:–

> ***"It seems to me that all cases involving an application for an anti-suit injunction or, as in this case, an application that the respondent file a notice of discontinuance, fall to be decided on their own facts."***

We did not find the cases Mr MacRae referred to as set out above helpful, as their facts were so very different to those before us, although as we noted above, in each case the English courts had determined that either the English courts were or were not the forum conveniens. We were not in a position to make such a finding; that will fall for consideration at the hearing on 28th-30th August, 2013.

58 For all these reasons, we determined that it was appropriate to order the defendants to stay the Mauritian proceedings as an interim measure. We saw no distinction between this being described as a case management direction or an interim injunction; it is an order of the Royal Court sitting as the Inferior Number by which the defendants are bound under pain of contempt.

59 We should record that Mr Robinson was concerned that if the Royal Court were to determine that Jersey is the *forum conveniens*, the defendants may not respect that decision and continue with the Mauritian proceedings regardless. He asked, therefore, for the Court to seek certain irrevocable undertakings from the defendants in that respect.

60 Whilst we had found that the defendants were acting in a manner which was oppressive, we had no evidence to suggest that any of them would disrespect actual orders of this Court and we declined therefore to seek such undertakings from them.