Leeds United v Weston and Levi

Jurisdiction:	Jersey
Judge:	The Bailiff
Judgment Date:	28 September 2011
Neutral Citation:	[2011] JRC 185
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Court:	Royal Court
Date:	28 September 2011

Text

[2011] JRC 185

ROYAL COURT

(Samedi)

Before:

M. C. St. J. Birt, Esq., Bailiff, **sitting alone**.

Between
Leeds United Football Club Limited
Plaintiff
and
Robert Lawrence Weston
First Defendant
Melvin Stuart Levi
Second Defendant

Advocate P. M. Tracey **for the Plaintiff**.

Advocate W. A. F. Redgrave **for the Defendants**.

Authorities

Wright -v- Rockway Limited and others [1994] JLR 321 .

Solvalub Limited -v- Match Investments Limited [1996] JLR 361 .

Gheewala -v- Compendium Trust Company Limited and others [2003] JLR 627 .

Mansour -v- Mansour [1990] FCR 17 .

Jaiswal -v- Jaiswal [2007] JLR 305 .

Durant International Corporation -v- Federal Republic of Brazil [2010] JCA 214 .

Federal Republic of Brazil -v- Durant International Corporation [2010] JLR 421 .

Spiliada Maritime Corporation -v- Cansulex Limited [1987] 1 AC 460 .

Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

The Bailiff

1 This is an application by the defendants to stay the proceedings on the ground of *forum non conveniens*. They argue that England is the more appropriate forum for disposal of the case. As well as evaluating the usual factors in relation to such applications, I must consider whether the defendants are prohibited from making such an application because they have filed an answer and taken certain other steps in the proceedings.

The background

2 The parties have filed affidavits from which the relevant background would appear to be as follows.

3 In 2004, Leeds United Football Club (“the Club”) was in serious financial difficulty. At the time it was owned by Leeds United Association Football Club Limited (“LUAFC”), an English company.

4 In March 2004 a consortium known as the Yorkshire Consortium was formed with a view to rescuing the Club. The consortium acquired the shares in LUAFC through a wholly owned company called Adulant Force Limited (“Adulant”). The consortium consisted of Mr Gerald Krasner, the second defendant Mr Levi, Mr Simon Morris, Mr Melvin Helme and Mr David

Richmond. According to Mr Levi his interest in the project and certain loans advanced to Adulant were held for the benefit of Cope Industrial Holdings Limited ("Cope"), an English company which was owned as to 25% by Mr Levi and 75% by Mr Weston, the first defendant in these proceedings.

5 Unfortunately the financial position of the Club did not improve, so much so that apparently none of the major credit card companies was willing to do business with LUAFC. It was in these circumstances that in 2004 LUAFC entered into an agreement with the Phone-In Trading-Post Limited, a Jersey company which was wholly owned by Mr Weston and has always traded under the name of Admatch ("Admatch").

6 The agreement was for Admatch to act as agent to LUAFC for the purpose of selling match and season tickets by credit card. Admatch would receive the monies and then pass them on periodically to LUAFC.

7 In early 2005, control of LUAFC was acquired from the Yorkshire consortium by interests associated with Mr Ken Bates. LUAFC then terminated the agreement. There is no dispute that, when the agreement was terminated, Admatch owed £190,400 to LUAFC in respect of monies it had received but not yet passed on to LUAFC. In December 2005 LUAFC instituted proceedings in Jersey ("the Admatch proceedings") seeking payment from Admatch of the sum of £190,400.

8 On 4th May, 2007, LUAFC went into administration, with net debts reported to be about £40 million. By an agreement of that date, the administrators transferred the assets of LUAFC (including the claim against Admatch) to the plaintiff in these proceedings, and the shares in the plaintiff were sold to a consortium led by Mr Bates. Subsequently, LUAFC went into liquidation. The plaintiff was later joined to the Admatch proceedings as second plaintiff.

9 As already mentioned, Admatch admitted the debt of £190,400. However, it contended in the Admatch proceedings that the agreement contained at clause 9(f) a set-off clause which entitled Admatch to set-off from any monies it owed to LUAFC any sum owed by LUAFC (or by any parent, associate or subsidiary company of LUAFC) to Admatch (or to any parent, associate or subsidiary company of Admatch). Admatch alleged that the sum of £1,439,734 (referred to hereafter for convenience as £1.4M) was owed by LUAFC and/or an associated company to Cope, which is the company referred to earlier and was therefore said to be an associate company of Admatch.

10 In the Admatch proceedings, the plaintiffs (i.e. LUAFC and the plaintiff in this case) originally admitted the existence of the set-off provision at clause 9(f) of the agreement but denied that it was relevant on the grounds that the debt of the £1.4M was owed to Mr Levi personally rather than to Cope. Subsequently, in December 2009, the plaintiffs in the Admatch proceedings were granted leave to further amend their claim so as to allege that, contrary to what they had admitted previously, the agreement did not in fact contain the set-

off provision in clause 9(f). It was agreed by both parties that the agreement had never been signed but what appeared to be at issue between them was whether the agreement was as contained in a document described as the third draft (which did not contain the set-off provision) or the fourth draft (which did).

11 The Admatch proceedings continued for many years with numerous interlocutory hearings but eventually on 19th January, 2011, the Court made certain unless orders against Admatch. Admatch did not comply with the unless orders with the consequence that its answer was struck out. Subsequently, in a judgment dated 19th May, 2011, the Court granted judgment against Admatch in the sum of £190,400. During the course of the Admatch proceedings Mr Weston, who was representing Admatch as a director, confirmed on a number of occasions that Admatch had no assets. The sum of £190,400 had been paid away to other companies in his group because Admatch believed it was entitled to set-off its liability of £190,400 against the £1.4M debt. Thus Admatch is an empty shell. Further details of Mr Weston's assertions as to what had happened to the money are set out in the judgment of the Court dated 15th August, 2011, which ordered Admatch to provide certain information in this respect.

12 The circumstances surrounding the acquisition of the Club on behalf of Mr Bates have given rise to a number of items of litigation as well as the Admatch proceedings in Jersey. There are or have been three material proceedings in England:-

In all of these proceedings the plaintiff or Mr Bates, as the case may be, are represented by Carter-Ruck, Solicitors in London and Mr Levi and Mr Weston are represented by Ford and Warren, Solicitors in Leeds.

(i) Mr Levi instituted proceedings for defamation (“the original defamation proceedings”) against Mr Bates for statements he had made in relation to Mr Levi's conduct in connection with the Club. This came to trial in July 2009 in the High Court. The judge found in favour of Mr Levi and awarded damages against Mr Bates.

(ii) Mr Weston has brought proceedings for defamation against the plaintiff and Mr Bates in England in relation to certain statements made about Mr Weston and these are continuing (“the ongoing defamation action”).

(iii) Mr Levi and his wife have brought an action for harassment against the plaintiff, Mr Bates and Yorkshire Radio Limited, which again relates generally to the matters arising out of the acquisition of the Club by Mr Bates.

History of these proceedings

13 On 15th December, 2010, the plaintiff issued the present proceedings against Mr Weston and Mr Levi. It sued as assignee of LUAFC pursuant to a second assignment dated 9th April, 2010. As in the first action against Admatch, the foundation of the claim is the agreement between LUAFC and Admatch, the allegation that there is no set off provision

because what was actually agreed was based upon the 3rd draft, and the failure of Admatch to pay over the £190,400. The Order of Justice also alleges that Admatch held this sum upon trust for LUAFC because the agreement provided that the monies held by Admatch were the property of LUAFC. It is alleged that Admatch was therefore in breach of trust when paying the money away to Mr Weston or other companies in his group. The Order of Justice further alleges that, by his actions in procuring that Admatch should pay away these monies, Mr Weston is in breach of fiduciary duty towards LUAFC, is also liable for dishonest assistance of Admatch's breach of trust and is further liable for knowing receipt. Mr Levi is also alleged to have been in breach of his fiduciary duty towards LUAFC and to have dishonestly assisted Admatch's breach of trust and Mr Weston's breach of fiduciary duty. Both Mr Weston and Mr Levi are also said to have conspired to defraud LUAFC. Thus the plaintiff seeks to recover the relevant monies from Mr Weston and Mr Levi personally.

14 The Order of Justice was served on Mr Weston on 17th December, 2010, and leave to serve outside the jurisdiction on Mr Levi was granted by the Master on 20th December. The matter came before the Court on 28th January, 2011, when both defendants appeared personally. It would seem that Mr Levi sought to challenge the jurisdiction of this Court on that occasion but I have not been given any further information about what was said.

15 On 17th February, which was one day before the time for filing an answer expired, Messrs Baker and Partners ("Bakers") wrote to Messrs Sinels stating that they had very recently been instructed and seeking an extension of four weeks for service of an answer. Sinels replied the same day raising the point that Mr Levi had attempted to challenge the Court's jurisdiction on 28th January and seeking confirmation that this was no longer the case and that both defendants accepted this Court's jurisdiction. An extension of three weeks for filing an answer was offered.

16 Bakers replied the next day accepting the extension of three weeks and stating as to jurisdiction:-

> *"As for jurisdiction, there are in our view strong arguments that both this matter and the first claim against Admatch should have been litigated in England.* However in the circumstances we do not seek on behalf of the defendants to challenge the jurisdiction of the Royal Court in this matter."

In the same letter Bakers sought certain documents in order to prepare an answer and these were subsequently delivered by Sinels.

17 The defendants filed an answer on 11th March, 201,1 which at paragraph 4 said this:-

> *"The second assignment appears to have been entered into in contemplation of this action and requires the Court to determine matters of English law.* Consequently, the proper venue for the trial of the action is in England. The defendants do not challenge the jurisdiction, because it is convenient for this

> matter to be determined by the Court determining the Plaintiff's claim against Admatch and the Defendants anticipate that the Plaintiff would not be prepared to consent to the removal of both actions to the place of the proper law of the contract."

The answer was filed after Admatch's answer had been struck out but before its appeal to the Court of Appeal had been heard and before judgment in default was given against it.

18 On 4th April the plaintiff filed a reply to the answer and gave notice of a draft summons in respect of a request for further and better particulars of the answer and directions generally. That summons was in due course listed for 14th June.

19 On 15th April Bakers wrote commenting in some detail on the plaintiff's request for further particulars and enclosing a request by the defendants for further and better particulars of the Order of Justice.

20 As previously mentioned judgment in default was given against Admatch on 19th May. On 26th May Bakers wrote to Sinels to the following effect:-

> ***"Following the conclusion of the*** *Leeds -v- Admatch* ***proceedings we are of the clear view that the most appropriate forum for the current proceedings is now England and Wales.*** We invite your clients to agree to a transfer of the action to that jurisdiction."

The letter confirmed that Mr Weston would submit to the jurisdiction of the English court and gave notice that, if agreement was not forthcoming, a summons seeking a change of forum would be issued. The letter also invited the plaintiff to consent to a minor amendment to the answer and provided certain further particulars of the answer as had previously been requested. The minor amendments to the answer were agreed by Sinels the next day and a consent order to that effect issued by the Master on 31st May.

21 On 1st June Bakers gave notice of a date fix appointment for the issue of a summons seeking a stay on the grounds of *forum non conveniens* and accordingly the plaintiff's summons before the Master which was due to be heard on 14th June was subsequently adjourned.

22 In summary therefore, the action taken by the defendants in this case comprises the filing of an answer, the provision of some further and better particulars, the issue of a request for further and better particulars of the Order of Justice and the seeking of a minor amendment to the answer.

Are the defendants precluded from seeking a stay?

23 Advocate Tracey argued that, because the defendants have filed an answer and taken the other steps in these proceedings just described, it is no longer open to them to argue that a stay should be granted on the ground of *forum non conveniens* nor is it open to the Court to grant such a stay. He referred to certain cases in support of his argument.

24 In *Wright -v- Rockway Limited and others* [1994] JLR 321, the plaintiff sued *Rockway*, a Jersey company, and three non-resident defendants. Two of those non-resident defendants sought to set aside the order giving leave to serve the proceedings out of the jurisdiction on the ground that Thailand was the appropriate jurisdiction to hear the case against them. That application failed. Having emphasised the importance of one court dealing with the claim against all defendants, Collins JA said this:-

> ***"I would add not only that it would seem far too late for Rockway to seek to stay the action against them on the ground of forum non conveniens, but also if they were to seek to do so they would face the insurmountable difficulty that they have already served an answer and thus accepted the jurisdiction of the court."***

25 Although this was clearly an obiter statement (because *Rockway* had made no application to stay the proceedings against them), Advocate Tracey is entitled to say that it is nevertheless a clear statement to the effect that, once a defendant has filed an answer, he can no longer seek to stay an action on the ground of *forum non conveniens*.

26 Next, Advocate Tracey referred to the well known case of *Solvalub Limited -v- Match Investments Limited* [1996] JLR 361. However, I do not consider that that case assists. The issue there was whether the Royal Court had jurisdiction to hear the case. The defendant disputed that it had but, nevertheless filed an answer and counter-claim. The Court of Appeal ruled that the Royal Court did have jurisdiction and that, in view of the fact that it had filed an answer and counter-claim the defendant had to be regarded as having accepted that jurisdiction. That was, in my judgment, a very different case from a *forum non conveniens* application, where a defendant accepts that this Court has jurisdiction but simply asks the Court as a matter of discretion to stay the proceedings in favour of some other jurisdiction.

27 Thirdly, Advocate Tracey referred to an observation of Lord Walker of Gestingthorpe in the decision of the Privy Council in *Gheewala -v- Compendium Trust Company Limited and others* [2003] JLR 627. That case was again concerned with an application by non-resident defendants for a stay of proceedings on the ground of *forum non conveniens*. The Royal Court stayed the proceedings in favour of proceedings in Kenya, the Court of Appeal overturned that decision and the Privy Council re-instated the decision of the Royal Court. The judgment of the Privy Council was mainly concerned with considering the various factors in favour of one jurisdiction or another but the point was also taken in argument that none of the defendants had applied to set aside the Royal Court's orders for service out of the jurisdiction; they had merely applied for a stay on the ground of *forum non conveniens*. The Privy Council held that this was of no

significance but in passing Lord Walker said this at paragraph 28:-

> ***"But it was not suggested that a defendant's failure to apply for an order setting aside the service out disentitled him from applying for a stay (provided, of course, that he had not taken further active steps in the proceedings)."*** (Emphasis added).

Advocate Tracey argued that the emphasised passage makes it clear that it was Lord Walker's opinion that, if a defendant took active steps, such as filing an answer, this would disentitle him from applying for a stay on the ground of *forum non conveniens*.

28 Advocate Tracey also referred to the English case of *Mansour -v- Mansour* [1990] FCR 17. In that case the parties were two Egyptian nationals and the husband was claiming damages for conversion of various chattels in England and the wife was counter-claiming for breach of trust in relation to sums of money. The action had begun in December 1987 and various orders had been made, including at least one consent order. It was said that the wife had acted in breach of a Mareva injunction and a notice of motion was given to commit her for contempt. On the hearing of those proceedings the wife argued that leave to serve notice of those proceedings out of the jurisdiction should be set aside and also applied for the whole action to be stayed on the ground of *forum non conveniens*. The judge refused this latter application on the grounds that it was too late and that it was a tactical move. This decision was upheld by the Court of Appeal where Lord Donaldson MR said this at 18:-

> ***"The application was very late and may well have been a tactical move; but, for my part, I think much the most important consideration was that the application was made so late.*** If people want to raise the issue that the action should be more conveniently tried in a foreign court, they should do so at the very outset before costs are incurred in the proceedings. Mr Turner says that we can take care of the matter of costs by an order for costs. Well, maybe one could but I think it is of paramount importance that any application of this nature, which in effect is in much the same position as an application based upon the proposition that the Court has no jurisdiction, should be made at the outset and that no steps, or very minimal steps, should be taken in the action before it is made."

29 I have to say that I do not think this case assists Advocate Tracey on the question of jurisdiction. It would have been straightforward for the Court of Appeal to say that there was simply no jurisdiction to grant a stay because the wife had taken part in the proceedings including filing a counter-claim. But the court did not say that. It ruled as a matter of discretion that it would not grant the stay because the application had been brought so late. That is very different from saying that there was no jurisdiction to grant a stay.

30 Advocate Redgrave contended to the opposite effect, namely that the filing of an answer and taking other steps in the proceedings, whilst it prevents a defendant from challenging the jurisdiction of this Court, does not prevent an application for a stay on the ground that

some other court will provide a more appropriate forum.

31 In support he referred first to *Jaiswal -v- Jaiswal* [2007] JLR 305. In that case a non-resident respondent sought to argue that an action in Jersey should be stayed in favour of proceedings in India as a more appropriate forum. In response to an argument that the respondent, by taking action in the Jersey proceedings, had precluded himself from submitting that the proceedings should be stayed in favour of proceedings in India, Beloff JA said this at paras 77 and 78:-

> ***"77 Counsel for Anand had yet another arrow in his quiver.*** He argued that Karamjit had, by various actions, submitted to the jurisdiction of the Royal Court and that, by so submitting, had disabled himself from contending that the High Court of Delhi was a more appropriate forum for resolution of the issues as to the validity of the Jersey will. …
>
> ***78 But even if, on close analysis, Karamjit had at some stage dropped his guard and failed to continue to protest the jurisdiction of the Royal Court, at most this would, in our view, prevent him from contending that the Royal Court was not an appropriate (or, at any rate, available) forum, it would not prevent him from contending that another forum was more appropriate."***

32 The decision in *Jaiswal* was followed by the Court of Appeal in *Durant International Corporation -v- Federal Republic of Brazil* [2010] JCA 214. In that case *Durant* and the other respondents had argued that the proceedings in Jersey brought by the Federal Republic of Brazil should be stayed on the grounds that Brazil was the more appropriate forum. That application was rejected by the Royal Court and pending the hearing of an appeal, *Durant* filed an answer. As a result, when the matter came before the Court of Appeal, the Republic of Brazil argued that *Durant* and the other respondents had submitted to the jurisdiction by filing an answer in the proceedings and accordingly it was no longer open to them to argue that Jersey was not the appropriate forum.

33 Bailhache JA, sitting in the Court of Appeal referred to the observations of Beloff JA in *Jaiswal* and followed them. He held that the filing of the answer did not disentitle *Durant* and the other appellants from pursuing their appeal. He said that even if, by failing to reserve the position, they could be prevented from contending that the Royal Court was not an appropriate forum, they were not disentitled from arguing that Brazil was the more suitable forum for the ends of justice.

34 It is clear from the passages that I have cited earlier that conflicting statements have been made in different cases as to whether a defendant who has participated in proceedings by, for example, filing an answer is precluded from thereafter applying for a stay on the ground of *forum non conveniens*. I must decide which approach to follow in the present case.

35 In my judgment I should hold that such a defendant is not precluded from seeking a stay on

the ground of *forum non conveniens*. My reasons for so concluding can be summarised as follows:-

(i) The Court of Appeal has in both *Jaiswal* and *Durant* held that such a defendant is not to be prevented from applying for a stay. In both cases the point was taken by the plaintiff and the Court of Appeal had to decide whether the application for a stay should therefore fail on that ground. The rulings therefore formed part of the ratio of each Court's decision. They are therefore binding upon me.

(ii) Whilst it is true that *Rockway* appears not to have been cited to the Court of Appeal in either J aiswal or *Durant*, the observations of Collins JA in *Rockway* were clearly obiter. *Rockway* was not a party to the application to stay and the point was not necessary for the Court's decision. The weight to be attached to it must therefore be considerably less than the statements in J aiswal and *Durant*.

(iii) Whilst any statement of Lord Walker is to be treated with the utmost respect, the emphasised passage (at para 27 above) from his judgment in *Gheewala* was clearly obiter. It was merely an aside by Lord Walker in the context of an observation that no-one had suggested that a defendant's failure to apply for an order setting aside service out disentitled him from applying for a stay on the ground of *forum non conveniens*. The point did not arise for decision and was not material to the outcome of the case. There is no suggestion in the judgment that the point had been argued. Accordingly, notwithstanding the weight to be attached to a statement from such a source, I must follow the two decisions of the Court of Appeal in preference to an aside in the Privy Council.

(iv) I specifically asked counsel during the hearing whether they could refer me to any passage in the White Book or to an English case decided under the old rules of the Supreme Court showing that an application for a stay could not be made after a defendant had participated in the proceedings; but they were unable to do so. As already mentioned at para 29 above, I consider that *Mansour* supports the decision I have reached. The defendant in that case had participated to a considerable extent in the proceedings which had been ongoing for a lengthy period; yet the language of the judgment suggested that the lateness of the application was a point which went to discretion rather than jurisdiction to grant a stay on the ground of *forum non conveniens*.

(v) RCR 6/7 provides that any party who wishes to dispute the jurisdiction of the Court must file an application to that effect within 28 days of placing the matter on the pending list and the time for filing an answer does not begin to run until determination of that application. Paragraph (4) lists the applications covered by the Rule and a stay on the ground of *forum non conveniens* is not specified in that paragraph. It would be strange if, despite this absence, an application for stay had in fact to be made just as early in the proceedings as a challenge to the jurisdiction. If that were so, one would expect an application for a stay on the ground of *forum non conveniens* to be mentioned in Rule 6/7.

(vi) There appears to me to be no reason in principle for preventing a person who has filed an answer or otherwise participated in proceedings before this Court from applying for a stay. Such an application does not challenge the jurisdiction of this Court. It accepts that this Court has jurisdiction but merely seeks to assert that the case may be tried more appropriately in the courts of some other jurisdiction. Whilst participation in the proceedings in this jurisdiction is likely to be very relevant to the exercise of a discretion to stay, it does not seem necessary that it should prevent the making of such an application altogether. What the Court is concerned with is where the case should be tried in the interests of justice. The interests of justice may still point in favour of another jurisdiction even if an answer has been filed.

36 I find therefore that the defendants are not precluded from bringing this application by virtue of their having participated to date as described earlier. However, that is not to say that delay in making an application for a stay is not relevant; on the contrary it may well be an extremely significant factor. The more a defendant has participated in proceedings, the longer he has allowed them to proceed without challenge and the greater the expense incurred in the course of those proceedings, the less likely it is that the Court will agree that the proceedings should be stayed in favour of allowing proceedings in some other jurisdiction. As in *Mansour*, there comes a point when it is simply too late to allow a defendant to switch jurisdictions.

What is the appropriate forum in this case?

37 The doctrine of *forum non conveniens* only comes into play where there is an alternative available forum. The plaintiff cannot sue Mr Weston as of right in England, although there would be jurisdiction to obtain leave to serve him out of the jurisdiction. However, during the course of the hearing before me, Mr Weston undertook through counsel that he would submit to the jurisdiction of the English courts in the event of any proceedings similar to the current proceedings being issued in England. It is clear from the decision of the Privy Council in *Gheewala* that an undertaking to submit to the alternative jurisdiction may be taken as sufficient to show that that jurisdiction is an available alternative forum (see the judgment of Lord Walker at para 24 applied in *Federal Republic of Brazil -v- Durant International Corporation* [2010] JLR 421 at para 26).

38 I turn therefore to the question of whether this case can be tried more appropriately in England or Jersey. It is well established in this jurisdiction that the test to be applied is that laid down by Lord Goff in *Spiliada Maritime Corporation -v- Cansulex Limited* [1987] 1 AC 460. I sought to summarise the relevant approach in *Federal Republic of Brazil -v- Durant International Corporation* [2010] JLR 421 at para 19 in a passage which was subsequently approved by the Court of Appeal in that case:-

19. … the court is concerned to establish which is the appropriate forum for the trial of the action, i.e. that in which the case may be tried most suitably in the interests of all the parties and the ends of justice. Lord Goff also approved use of the expression 'the natural forum' as being that with

which the action had the most real and substantial connection. Thus, one is looking for connecting factors which will include matters such as convenience or expense (such as availability of witnesses); the law governing the relevant transaction; and the places where the parties respectively reside or carry on business. …"

39 In the present case one of the defendants, Mr Weston, was served as of right whereas the other, Mr Levi, was only served with leave of the Court to serve out of the jurisdiction. Advocate Redgrave conceded that in the circumstances and in view of the fact that this was not an application to set aside leave to serve out of the jurisdiction, the burden lay on the defendants to show that England is clearly a more appropriate forum than Jersey.

40 I also remind myself of the well known passage from the speech of Lord Templeman in *Spiliada* at 465:-

"I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere."

41 This approach was emphasised by Lord Walker in *Gheewala* at paragraph 26 where he stated:-

"An application to stay proceedings is essentially a matter of case management (however important the outcome may be to the parties) and (in line with Lord Templeman's observations in *Spiliada*) ***it has to be disposed of in a reasonably summary way."***

42 I propose therefore to summarise the arguments and reasons for my decision fairly briefly. I have however considered all the matters and oral submissions made to me.

43 I would summarise the arguments of Advocate Redgrave on behalf of the defendants as follows:-

(i) Two of the three parties are resident in England. The plaintiff is a company which carries on business in England and has no connection with Jersey. Similarly Mr Levi resides in England and has no connection with Jersey. Only Mr Weston is resident in Jersey and he agrees to the proceedings taking place in England.

(ii) Most of the likely witnesses reside in England. The case will turn firstly on whether the agreement between LUAFC and Admatch was that contained in the third or fourth draft, as it is only the latter which has the set-off clause; and secondly whether, if the

agreement was that contained in the fourth draft, the offsetting debt is owed to Cope (in which case it may be offset) or to Mr Levi (in which case it may not). The witnesses to prove these matters are the persons who were involved at the time, namely the directors of LUAFC and Mr Weston. All of the directors are persons resident in England and indeed some of them gave evidence before the High Court in the original defamation proceedings. In addition, a Mr Bulleyment may give evidence on behalf of the plaintiff. He was an employee of LUAFC at the relevant time. He too is resident in England. The only likely Jersey witness, apart from Mr Weston, would be Mr Hiren Mistry, a former employee of Sinels, who has apparently inspected the records of LUAFC in England and may give evidence as to what he found, i.e. whether the fourth draft was to be found in the records of LUAFC. Although it was possible for witnesses required for a Jersey action to give evidence in England pursuant to letters of request, this was no substitute for witnesses appearing in person before the trial court. The English court would be in a position to ensure the physical presence of all relevant witnesses resident in England.

(iii) The relevant documents were the records of LUAFC and they were situated in England. It was therefore the English Court which could ensure their production.

(iv) Both versions of the agreement state that it should be governed by the law of England or such other jurisdiction as shall, in the event that recourse to law is required, be designated by Admatch in its absolute discretion. Although Admatch had purported to designate Jersey law as the governing law during the course of the Admatch proceedings, that decision could not bind the defendants nor the Court. Admatch's decision was taken without legal advice. Furthermore the assignment of the current claim to the plaintiff was governed by English law.

(v) There would be duplication of costs if the proceedings continued in Jersey. Both parties had for some years retained English solicitors in connection with the litigation in England between the various Leeds United companies and Mr Bates on the one hand and the defendants on the other. Although the issues in those cases were not identical, much of the factual material was the same. Furthermore, legal rates were higher in Jersey than in England and accordingly overall ongoing costs would be higher. This would prejudice the defendants who were not as wealthy as Mr Bates, who was a man of substantial wealth and could afford to fund the action on behalf of the plaintiff. In the long run, a stay at this relatively early stage would save considerable future duplication of costs.

(vi) As to the change of stance, it had been reasonable for the defendants to take the view that, for so long as the Admatch proceedings were continuing, it would be in the overall interests of justice for both actions to be heard in Jersey because the issues in each case were similar, namely whether Admatch was entitled to set-off against its debt to the plaintiff the greater sum which was owed to Cope. It would not have been right to litigate that matter in two separate jurisdictions. However the position changed once judgment in default was taken against Admatch. Those proceedings were no longer live but the issues in dispute – namely whether the agreement reached between the parties contained a set-off clause or not and whether the offsetting debt was owed to Cope —had not been the subject of judicial resolution and were

accordingly open for decision in the current proceedings. As the current proceedings now stood alone, it was now appropriate that they should be heard in the natural forum, which was England. The action was still in its early stages and the work done to date would not be wasted as the relevant pleadings could simply be copied for the purposes of any new action in England.

44 On behalf of the plaintiff, Advocate Tracey argued as follows:-

(i) Considering separately matters such as residence of the parties, witnesses, proper law etc ran the risk of not seeing the wood for the trees. The events in question had happened in Jersey. There was a Jersey company, Admatch, which held money in Jersey pursuant to a contract governed by Jersey law. These monies had been paid away to other entities in Jersey. Jersey was therefore the natural forum.

(ii) As to witnesses, he accepted that the majority would probably be resident in England. However, their significance would be minor. The affidavit sworn by Mr Levi in the Admatch proceedings suggested that the agreement was negotiated between Mr Levi on behalf of LUAFC and Mr Weston on behalf of Admatch without any involvement of the other directors. The need for the other directors to give evidence was therefore more apparent than real. Furthermore, Mrs Weston might well need to give evidence as to what had happened to the money. Given the international nature of the business carried on in the Island, it was comparatively rare for the Jersey court to hear cases which did not involve witnesses resident outside the Island. In the unlikely event of a relevant witness resident in England refusing to come to Jersey, a letter of request could be sent and the evidence of that witness could be heard before a court in England and then admitted at trial.

(iii) As to documents, whilst the documents of LUAFC would be relevant, they had been collated and inspected for the Admatch proceedings and were therefore readily available for disclosure in Jersey. Equally important would be the documents of Admatch showing what had happened to the money. These were situated in Jersey.

(iv) As to the governing law, the provision in both versions of the agreement was clear, namely that Admatch could select that the agreement be governed by some law other than English law. Admatch had made that election in the course of the Admatch proceedings and this had been reflected in an order of the Court dated 4th February, 2008. That therefore determined the proper law of the agreement which was accordingly Jersey law. This was a further pointer in favour of the matter being heard before this Court. Furthermore, the claim in the Order of Justice was for dishonest assistance, breach of fiduciary duty and knowing receipt as well as conspiracy to defraud. These had all occurred or had their effect in Jersey and would therefore be governed by Jersey law.

(v) As to costs, the plaintiff did not agree that there would be a saving of costs by transferring the proceedings to England. Sinels had already done considerable work and this would have to be re-done if English lawyers were instructed. Furthermore it was likely that the defendants were seeking an advantage in that they would be able

to enter into a conditional fee agreement in relation to English proceedings which would be to the prejudice of the plaintiff.

(vi) It would be wrong to stay the proceedings at this late stage. The defendants had filed an answer in full knowledge of the fact that Admatch had failed to comply with the unless orders and was therefore likely to have judgment in default taken against it. Not only had they filed an answer, but they had provided some further and better particulars, made a request for further and better particulars and sought an amendment of the answer. The costs to date would be thrown away in the event of new proceedings having to be begun in England. The defendants had made their choice and should be held to it. It was too late to allow them to change their mind.

45 In my judgment, applying the conventional *Spiliada* principles, the natural forum or the forum in which this case may be tried most suitably in the interests of all the parties and the interests of justice is England. I would summarise my reasons for so concluding as follows:-

(i) It seems to me that the essence of the case is whether the agreement entered into between LUAFC and Admatch contained the set-off provision or not; i.e. was it based on the third draft or the fourth draft? If there was a set-off provision and if the debt of £1.4M is owed to Cope, then Admatch was entitled to keep the sum of £190,400 and there was no trust. It would follow that the defendants could not therefore be liable as accessories to any breach of trust. If, on the other hand, there was no set-off provision or if the offsetting debt was owed to Mr Levi rather than Cope, then, pursuant to the agreement, the sum of £190,400 remained the property of LUAFC. On that basis one can see the argument that Admatch held those monies on trust for LUAFC and that the payment away to other companies in Mr Weston's group was a breach of trust. It would follow that, if Mr Weston and Mr Levi had the necessary element of dishonesty when taking their respective actions, they would be liable for dishonest assistance and possibly under the other heads of claim as well.

(ii) Thus the key issues are what the terms of the agreement were and whether the alleged offsetting debt was owed to Cope or Mr Levi. The essential background to the agreement was the state of affairs at LUAFC. In my judgment the relevant witnesses are likely to be the directors and employees of LUAFC who had any knowledge as to the agreement or the circumstances surrounding it. I note Advocate Tracey's point that only Mr Levi and Mr Weston were involved in the final negotiations but it seems to me highly probable that the other directors will also have relevant evidence to give. The only Jersey witnesses on this aspect are Mr Weston himself and possibly Mr Mistry of Sinels as to what he found when he inspected the records of LUAFC. The majority of witnesses will therefore be resident in England.

(iii) It seems to me that the case will turn very much on issues of credibility. I therefore consider it important that all the witnesses should appear in person before the fact-finding tribunal rather than that tribunal having to rely on a written record of testimony taken elsewhere, as would be the case if any English witnesses gave separate evidence before an English court pursuant to letters of request. Naturally I have no

knowledge at this stage as to who would be willing to give evidence in Jersey but the best prospects of ensuring that all relevant witnesses can be compelled to appear before the fact-finding tribunal would be if the case were heard in England where the majority of witnesses are resident.

(iv) I accept that, if the plaintiff is successful in showing that the agreement is in accordance with the 3rd draft, attention will then turn as to what has happened to the funds. However Mr Weston has made it clear in what he has said during the course of the Admatch proceedings that he procured that the money was disbursed elsewhere within his companies. If therefore a trust is established, it seems that the relevant aspect of the case against Mr Weston will not be whether he has paid the money away but whether he was acting dishonestly in doing so. That could be determined as easily by an English court as by a Jersey court. The same goes for Mr Levi.

(v) As to documents, it seems to me that the records of LUAFC will be important and they are situated in England. I accept that the records of Admatch will also be relevant in order to show where the monies have gone and they are situated in Jersey. However on balance I consider that the location of the LUAFC documents, which may be relevant to the key issue in the case, is more significant.

(vi) The majority of the parties are resident in England. In particular Mr Levi appears to have no material connection with Jersey other than his relationship with Mr Weston. The one Jersey party, namely Mr Weston, has undertaken to submit to the jurisdiction of the English court.

(vii) As to the governing law, there is a dispute between the parties as to whether the agreement is governed by English law or Jersey law. The choice of law clause is unusual, to say the least, and may need to be the subject of resolution at trial. I cannot determine the matter at this stage. However I am prepared to proceed on the basis that Advocate Tracey has the better of the argument at the moment and that, following the choice made by Admatch in the Admatch proceedings, the agreement is governed by Jersey law. However in this particular case I do not consider that a very material factor. The issue for determination is a simple factual one, namely what was agreed between the parties. I do not consider that any differences between the Jersey law of contract and the English law of contract will be material. If the matter then proceeds to one of trust law and the law of dishonest assistance, conspiracy to defraud etc I do not consider that there is any material difference between the law of Jersey and the law of England. Thus even if the trust and questions of breach of trust and dishonest assistance are to be governed by Jersey law, I see no difficulty in the English court applying that law in practice.

(viii) As to costs, I consider that in the long term costs are likely to be less if the matter is litigated in England rather than in Jersey. This is for two reasons:-

> (a) I consider there will be an element of duplication if the matter is litigated in Jersey. Because of the ongoing litigation in England, English solicitors will need to be retained, so will Jersey Advocates.

(b) There is ongoing litigation in England. I accept that it does not raise exactly the same issues but it arises out of the same essential background, namely the take over of the club first by the Yorkshire Consortium and then by Mr Bates and the events surrounding this. Thus English lawyers will need to be retained and to become familiar with these events. It will therefore be straightforward for them also to deal with the issues in these particular proceedings which are closely related and arise out of the same background facts. All in all, it seems to me in the interests of justice that all the different pieces of litigation which arise out of the various take-overs of the Club, which is an English football club, should be dealt with by the courts of England. I consider that that will lead to a considerable saving of expense for both sides in the long term on the basis that Jersey lawyers will no longer be required.

(ix) Advocate Tracey referred to the fact that a conditional fee agreement might be available in England whereas it would not be in Jersey. But I do not consider this to be a factor pointing against England as the appropriate forum. I accept that Sinels have been involved in the matter for some time (because they acted for the plaintiff in the Admatch proceedings) but I see no difficulty in their making available all the work they have done to the plaintiff's English solicitors, who are also very familiar with the background, having acted for Mr Bates in the various English proceedings.

(x) I see no material prejudice to the plaintiff in being made to litigate in England. England is the plaintiff's home jurisdiction and the litigation relates to business carried on by its predecessor as owner of the club. In the event of the plaintiff being successful, it will clearly be able to enforce any judgment against Mr Levi very easily as he resides in England. So far as Mr Weston is concerned, an English judgment will be registrable in Jersey pursuant to the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 and readily enforced as if it were a Jersey judgment. Thus it will not be any more difficult for the plaintiff to enforce any English judgment against Mr Weston and his assets in Jersey.

46 For these reasons I conclude that England is clearly the more appropriate forum. But the question then arises as to whether it is now too late for a stay to be granted given that the defendants have allowed the matter to proceed as far as they have in Jersey.

47 I have considered this aspect carefully. It is clearly undesirable for a defendant to participate in proceedings, thereby allowing time to elapse and the plaintiff to incur expense and then to seek to stay the proceedings in favour of some other jurisdiction. A defendant should normally apply for a stay at an early stage in the proceedings. The longer he leaves it, the less likely he will be to obtain a stay. I entirely agree with the sentiments expressed by Donaldson MR in the passage from *Mansour* cited at para 28 above. I have borne carefully in mind the need to ensure that defendants act promptly in such matters.

48 In this case the defendants made clear from the outset that there were strong arguments in favour of England as the appropriate forum but, as explained in their answer, they felt that as the Admatch proceedings were already taking place in Jersey, the present proceedings

should be heard in the same court. I can well understand this approach. Although the claim against Admatch was based on contract whereas the claims in the present case are essentially trust claims, the underlying issue in both cases is the same, namely whether Admatch was entitled to set-off its debt of £190,400 to the plaintiff against the debt of £1.4M allegedly owed to Cope. Had the Admatch action continued there would have been a strong argument for ordering that the two proceedings be consolidated or at least heard together. However, once the Admatch proceedings were concluded without a finding on the merits, the position changed. The reason for the defendants to agree that the present proceedings should continue in Jersey had disappeared.

49 The question then arises as to whether they have left it too late. On balance I consider not. The decision giving judgment in default against Admatch was issued on 19th May, 2011. The defendant gave notice 7 days later that, as a result, the most appropriate forum for the present proceedings was now England and invited the plaintiffs to agree. This was followed by a notice of the appropriate summons for a stay on 1st June i.e. within two weeks. Furthermore, the application is made at a comparatively early stage of the proceedings. They were commenced in December 2010 and since then the parties have filed pleadings although a request for further and better particulars remains outstanding. Discovery has not taken place nor has the matter been set down for trial. I consider that the work done in this jurisdiction in preparing the pleadings can readily be transferred to the English solicitors for both parties.

50 All in all, I consider that the defendants have not delayed since the relevant change of circumstances and that the proceedings have not advanced so far that their application for a stay should be refused in circumstances where I am otherwise satisfied that the interests of justice point in favour of granting a stay.

51 For these reasons I stay these proceedings on the grounds that England is the more appropriate forum.