Neutral Citation Number: [2008] IEHC 90

THE HIGH COURT
COMMERCIAL

2007 No. 6588 P

BETWEEN

GOSHAWK DEDICATED LIMITED AND KITE DEDICATED LIMITED (FORMERLY KNOWN AS GOSHAWK DEDICATED No. (2) LIMITED AND CAVELL MANAGEMENT SERVICES LIMITED AND CAVELL MANAGING AGENCY LIMITED

PLAINTIFFS

AND

LIFE RECEIVABLES IRELAND LIMITED

DEFENDANT

Judgment of Mr. Justice Clarke delivered on the 27th day of February, 2008

1. Introduction

1.1 Amongst the many areas of commercial life and, in particular, commercial litigation which have come to be the subject of harmonisation measures on the part of the EU is the area of recognition of judgments of courts of competent jurisdiction of other Member States. It was obvious that the orderly establishment of a single market would require that there be a significant degree of certainty concerning questions such as the appropriate jurisdiction in which litigation should be conducted and the affording of appropriate recognition to the results of such litigation.

1.2 The first major step in that direction came about when the Brussels Convention was signed on the 27th September, 1968 and came into effect on the 1st February, 1973. The Brussels Convention was, of course, replaced by the so called Brussels Regulation (Regulation 44/2001 EC) made on the 22nd December, 2000, which came into force on the 1st March, 2002.

1.3 The issue which arises at this stage between the parties to this case concerns the proper interpretation of the Brussels Regulation and its application to the circumstances which have arisen. The issue also involves a consideration of the traditional common law position concerning jurisdiction and in particular the circumstances where, as a matter of common law, the courts of one jurisdiction might, in effect, decline to deal with litigation on the basis that an alternative jurisdiction might be considered to be a more appropriate venue for the resolution of the disputes which had arisen (the doctrine of forum non conveniens). There can be little doubt but that that traditional common law jurisdiction has, at a minimum, been substantially eroded by the provisions of the Brussels Convention and the Brussels Regulation. In reality the issue which arises in this case is as to just how far that process has gone.

1.4 The defendants ("Life Receivables") maintain that it would be appropriate under the common law jurisdiction for this Court to decline to deal with this litigation by virtue of the existence of earlier proceedings in Georgia in the United States relating to the same subject matter in which Life Receivables are plaintiffs and other parties (including the plaintiffs in these proceedings ("Goshawk and Carvell") are defendants. If neither the Brussels Convention or the Brussels Regulation existed, then it would undoubtedly be necessary to consider, in accordance with established common law rules, whether it was more appropriate that these proceedings be conducted in the United States rather than Ireland. However, the primary submission which Goshawk and Carvell make is to the effect that the Brussels Regulation removes the Courts discretion under common law and that, in accordance with the Brussels Convention properly construed, the courts of Ireland are required to deal with this case. There are a number of subsidiary issues which it will be necessary to advert to in due course. It is appropriate to start by setting out very briefly the factual context in which these issues arise.

2. The Facts

2.1 Life Receivables is incorporated in Ireland and has its principle place of business in Ireland. Goshawk and Cavell are English incorporated companies which have their principal places of business in London. In June 2005, Life Receivables purchased a partnership interest in a Delaware partnership known as Life Receivables II LLP in which Life Receivables and Life Receivables Holdings are the only partners but in which Life Receivables would appear to be the only partner with a financial stake. That partnership is, in turn, a beneficiary of Life Receivables Trust, whose commercial value derives from trust property, being life insurance policies purchased in the early years of this decade together with a contingent cost insurance issued by Goshawk in respect of those policies. Life Receivables alleges that it was induced into buying into the partnership as a result of misrepresentation.

2.2 Proceedings have been commenced in the United States District Court for the Northern District of Georgia by Life Receivables against Goshawk and Cavell, and a number of additional defendants who were involved in the series of transactions which were at the heart of the disputes between the parties.

2.3 There is no doubt but that those proceedings are first in time. Thereafter, Goshawk and Cavell have commenced these Irish proceedings which seek declarations that Goshawk and Cavell did not make misrepresentation together with other similar or consequential reliefs. There is no doubt but that the Irish proceedings are a mirror image of the Georgia proceedings save that, of course, none of the additional parties who are co-defendants with Goshawk and Cavell in the Georgia proceedings are parties to the Irish proceedings.

2.4 Against that brief factual background it is appropriate next to turn to those aspects of the legal issues which are not in dispute between the parties.

3. The Undisputed Law

3.1 The starting point is, of course, that Life Receivables is domiciled in Ireland and is, therefore, *prima facie* to be sued in the courts of Ireland by virtue of Article 2 of the Brussels Regulation.

3.2 That much is not disputed by Life Receivables. However, it is said that the common law doctrine of *lis alibi pendens* remains part of the law of Ireland in this area, notwithstanding the provisions of the Brussels Convention. On that basis it is said that the provisions of the Brussels Convention do not prevent this Court retaining a discretion to stay these proceedings pending a decision by the courts in Georgia.

3.3 While the continued existence of that discretion is a matter of significant dispute between the parties, the areas of dispute on the law were, in truth, narrowed in the course of the exchange of written submissions and the helpful oral submissions made on both sides. It is appropriate to set out the common ground before going on to consider the issues which remain in dispute.

3.4 In order to understand the common ground it is important to note that in *Owusu v Jackson* (Case C281/02 [2005] E.C.R. I – 138), the European Court of Justice ("ECJ") had to consider whether the common law doctrine of *forum non conveniens*, long recognised in common law countries, continued in existence notwithstanding the provisions of the Brussels Regulation. *Owusu* was a case involving a person who was injured while on holiday in Jamaica and where, it was said, Jamaica would be a much more convenient forum for the conduct of any litigation having regard to the availability of witnesses and the like. The defendant travel agent sought to have the proceedings, which had been commenced against him in the United Kingdom on the basis of his domicile there, stayed to permit a trial of the issues in Jamaica. The Court of Justice ruled that:-

> "The Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factor to any other Contracting State."

3.5 It is important to note that the express terms of both the Brussels Convention and the Brussels Regulation deal, in the main, with questions concerning competing contentions as to which Contracting or Member State should deal with any particular piece of litigation governed by the terms of the Convention. The terms do not, expressly, deal with situations where the possible alternative jurisdiction is that of a non Member State. There are, of course, provisions which are concerned with the recognition within Member States of decisions of Courts of non Member States.

3.6 Had factual circumstances such as those which arose in *Owusu* occurred in relation to a holidaymaker in another Member State, there would have been no doubt but that the provisions of the Convention itself would have clearly governed where those proceedings were to be determined. The complication with which the ECJ was concerned in *Owusu* stemmed from the fact that the competing jurisdiction in that case was that of a non Member State. The proposition which the ECJ very strongly rejected in the passage I have cited was that the presence of a non Member State jurisdiction (Jamaica) as an alternative to that of the Member State concerned, (in that case England), allowed for the continuance of the application of that Member State's ordinary rules of private international law (the doctrine of forum non conveniens) to the selection of the appropriate jurisdiction. The defendant was domiciled in England. Article 2 provided, therefore, for England to have jurisdiction. The fact that English private international law has a doctrine of *forum non conveniens* under which it might well have been that the Courts of Jamaica would have been regarded as more convenient, was held by the ECJ, not to permit a deviation from the mandated jurisdiction specified by Article 2.

3.7 However, the real issue between the parties to this application concerns the relevance and applicability of the decision of the ECJ in *Owusu* to the contention put forward on behalf of Life Receivables that this Court retains a discretion under the *lis alibi pendens* doctrine to stay these proceedings. In the written submissions filed there appeared to be a dispute between the parties as to whether the doctrine of *lis alibi pendens* was a stand alone aspect of the private international law of common law countries, or was properly to be regarded as but an example, or species, of the doctrine of forum non conveniens. However, in the course of argument it became clear that counsel on behalf of the Life Receivables accepted that the doctrine of *lis alibi pendens* was properly regarded as an aspect of the general doctrine of forum non conveniens. However, counsel for Life Receivables sought to analyse both the opinion of Advocate General Léger in *Owusu* and the judgment of the court in that case, so as to seek to demonstrate that the extent of the matters actually determined in *Owusu* were narrow. On that basis it was suggested that *Owusu* does not, in terms, determine that the Brussels Convention prevents, in all case, the doctrine of forum *non conveniens* from applying. Rather it is said that *Owusu* determines that courts of Member States do not have any broad discretion to decline to hear a case which would otherwise, under the terms of the Convention, be appropriate for those courts to hear on the basis of a decision that the courts of a non-Member State would be more convenient. On that basis it is argued that the formal parameters of the decision in *Owusu* do not deal with circumstances such as those which arise in this case.

3.8 I did not understand counsel for Goshawk and Cavell to disagree fundamentally with this last proposition. I will refer to the relevant passages from *Owusu* in due course. However, it does seem clear that, in accordance with the established jurisprudence of the ECJ, the court was not prepared to decide any wider questions than those which were necessary for the purposes of resolving the case under consideration. Thus the court confined itself to answering a relatively narrow question. It seems to me clear, therefore, that the decision in *Owusu* does not, of itself, expressly rule out a discretion existing in other circumstances. The judgment does not, therefore, in my view, expressly rule out the possibility that the *lis alibi pendens* jurisdiction remains, whether in whole or in part, as part of the applicable law within those common law countries which enjoyed that jurisdiction prior to the coming into force of the Convention and the Regulation.

3.9 However, counsel for Goshawk and Cavell argued that the logic of and reasoning behind the decision in *Owusu*, and certain other authorities of the ECJ which preceded it, pointed to only one conclusion. On that basis it was said that it was clear from that jurisprudence that the type of discretion conferred on common law courts by the application of the doctrine of *lis alibi pendens* could not be said to be consistent with the Regulation. At the end of the day, and in the light of the way in which the arguments had, quite properly, evolved, it seems to me that this was the true issue between the parties. In order to fully explore that issue, it seems to me that the appropriate starting point should be *Owusu* itself.

3.10 However, before going on to deal with the decision of the ECJ in that case, I should also note that a further argument was put forward on the part of Life Receivables to the effect that this Court retained a jurisdiction to stay these proceedings on the basis that they were an abuse of process. In fairness, this aspect of the argument was not central to the case put forward on behalf of Life Receivables. I propose to deal with that aspect of the case when I have concluded my analysis of the effect of the Brussels Regulation on these proceedings. I, therefore, turn to the *Owusu* case.

4. *Owusu*

4.1 In his opinion in *Owusu*, Advocate General Léger conducted an extensive review of both the provisions of the Convention and Regulation and the doctrine of *forum non conveniens* in English law. It is worth noting that the doctrine was stated, at para. 25, to be as specified by the House of Lords in *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] A.C. 460. It is clear that the principles set out in *Spiliada* also form the basis of the common law doctrine of *forum non conveniens* in this jurisdiction. Advocate General Léger also noted that the Court of Appeal in the United Kingdom had, in *Harrods (Buenes Aires) Ltd* (1992) Ch. 72, agreed that there was a jurisdiction to decline to exercise a jurisdiction under Article 2 of the Convention where there was a more appropriate forum in a non-Contracting State, and where the jurisdiction of the Courts of a Contracting State, other than the United Kingdom, was not in any way involved.

4.2 It would appear that that very issue was referred by the United Kingdom Courts to the ECJ in *Harrods*, but did not come to be decided because the proceedings were resolved between the parties. It is worth noting in passing that, prior to *Harrods*, the High Court of England and Wales had decided in both *S & W Berisford Plc v New Hampshire Insurance Company* [1990] 2 All E.R. 321 and *Arkwright Mutual Insurance Company v Bryanston Insurance Company* [1990] 2 All E.R. 335, that the doctrine of *forum non*

conveniens had not survived the implementation of the Convention in the United Kingdom. As is clear from the judgment of Potter J. in *Arkwright*, that view was come to notwithstanding a consideration of the writings of a number of authors who had expressed the contrary view.

4.3 In any event, having analysed the competing arguments, Advocate General Léger went on to consider the compatibility of the *forum non conveniens* doctrine with the Brussels Convention, at para. 217 and the succeeding paras., in the following terms:-

> "217. In order to confine the subject-matter of my examination to a situation such as that at issue in the main proceedings, I should point out that, by the second part of its first question, the national court wishes to ascertain, essentially, whether the Brussels Convention precludes a court of a Contracting State – whose jurisdiction is based on Article 2 of the Convention – from exercising a discretion to waive its jurisdiction on the ground that the court of a non-Contracting State is a more appropriate forum to deal with the substance of the case, where the Latter court has not been designated by any jurisdiction clause, has not previously been seised of any claim liable to give rise to *lis alibi pendens* or related actions and the factors connecting the dispute with that non-Contracting State are of a kind other than those mentioned in Article 16 of the Brussels Convention.
>
> 218. To answer this question, I shall first consider the intention of the authors of the Convention and will then examine successively the wording of the first paragraph of Article 2 thereof, the general scheme of the Convention and the objectives pursued by the Convention."

4.4 Advocate General Léger then went on to analyse the intention of the authors of the Convention. It was noted that the original Convention was, of course, entered into between the original six members of the then European Economic Community, which were all Civil Law Countries. An analysis was conducted of the circumstances surrounding the accession of the United Kingdom, Ireland and Denmark to the Convention. On the basis of the Schlosser Report concerning the Accession Convention (OJ 1979 C59) and other materials, Advocate General Léger reached the following conclusion:-

> "229. I infer from all the foregoing that the Member States which negotiated and concluded the Brussels Convention or that Accession Convention of 1978 either had no intention of agreeing to include the *forum non conveniens* principle in the scheme of the Convention which was established or that a majority of them were firmly opposed to its inclusion.
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> 230. To accept the opposite view would therefore be tantamount to disregarding the intentions of the States which are parties to the Convention, as amended by the Accession Convention of 1978, and it is clear that those intentions were not subsequently departed from when the later accession conventions or Regulation No. 44/2001 were adopted. An examination of the wording of the first paragraph of Article 2 of the Convention, of the general scheme of the Convention and of its useful effect, in the light of the objectives which it pursues, also militates against the acceptance of the doctrine of *forum non conveniens*."

4.5 Advocate General Léger then went on to consider the wording of the first para. of Article 2 of the Convention and concluded the following:-

> "234. From this I infer that the effect of the wording of the first paragraph of Article 2 of the Convention is that, in circumstances such as those of the main proceedings, a court of a Contracting State seised of litigation on the basis of that articles has no discretion to decline to give judgment on the substance on the ground that a court of a non-Contracting State would be a more appropriate court to do so. That conclusion is also supported by the general scheme of the Convention."

4.6 Advocate General Léger also considered that the general scheme of the Convention led to similar conclusions, and having conducted a very detailed analysis, he expressed his conclusions at para. 277 in the following terms:-

> "277. It follows from all the foregoing that both the wording of the first paragraph of Article 2 of the Convention and the general scheme of the Convention, and its objectives and its effectiveness, preclude a court of a Contracting State – whose jurisdiction based on Article 2 of that Convention – from exercising a discretion to decline to exercise that jurisdiction on the ground that a court of a non-Contracting State would be a more appropriate forum for dealing with the substance of the case, where the latter has not been designated by any jurisdiction clause, has not previously had brought before it any claim liable to give rise to *lis alibi pendens* or related actions and the factors connecting the dispute with that non-Contracting State are of a kind other than those referred to in Article 16 of the Brussels Convention."

4.7 The court reached a number of conclusions which are material to the issue which I have to decide. Firstly at para. 40 the court said the following:-

> "40 The Court has thus held that the principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the general rule laid down in Article 2 of the Brussels Convention should be interpreted in such way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued (*GIE Groupe Concorde and Others*, paragraph 24, and *Besix*, paragraph 26)".

4.8 Furthermore the court at para. 43 stated the following:-

> "Moreover, allowing *forum non conveniens* in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of Contracting States, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules."

4.9 Having noted the contended for logistical difficulties based on geographical distance and difficulties arising from the need to assess the merits of the case according to Jamaican standards, and other matters, the court, nonetheless, concluded, at paras. 45 and 46, the following:-

> "45. In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when *forum non conveniens* is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Convention, for the reasons set out above.

> 46. In the light of all the foregoing considerations, the answer to the first question must be that the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State."

4.10 Before leaving the judgment of the court it is important to note that a second question had been referred to the ECJ which sought to ascertain whether the Brussels Convention precluded the application of the doctrine of *forum non conveniens* in all circumstances or only in certain circumstances. The court noted that the justification to make a reference for a preliminary ruling is not such that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that the determination of the ECJ on the issues referred is necessary for the effective resolution of a dispute. In those circumstances the court found that there was no need to reply to the second question.

4.11 It is clear, therefore, that the court expressly declined to decide any issue wider than that which was necessary for the purposes of determining the underlying case which had been the subject of the reference. It confined itself, therefore, to ruling that the Brussels Regulation precluded a court from declining jurisdiction on the basis that a court of a non-Contracting State would a more appropriate forum. The court did not, therefore, in my view rule in express terms that the doctrine of *forum non conveniens* could never be invoked in circumstances where the Brussels Convention applied. Rather it confined itself to determining that that aspect of the doctrine which allows (or more accurately would have allowed) a court in a common law jurisdiction to decline to deal with a case on the basis that the courts of another jurisdiction where more convenient, could not be used to oust the jurisdiction conferred by the Brussels Convention. That is not to say, however, that *Owusu* is of no or only limited relevance to the issue which I have to decide. The judgment of the court in *Owusu* is in clear and unambiguous terms. Likewise the reasoning, following on from the more detailed analysis conducted by Advocate General Léger, is also clear. I shall shortly have to touch on certain academic commentaries relied on by Life Receivables. Many of those commentaries come from common lawyers. It is fair to say that some of the criticisms, set out in those commentaries, of the current position as interpreted by the ECJ are concerned with a view as to what the law should be rather than what it is. It is no part of my role to engage in any such controversy. I am confined to considering the law as it is, not as it might be said it should be.

4.12 In addition it is clear from both the judgment of the court and the opinion of Advocate General Léger that a key influence on the decision in *Owusu* was to be found in the intentions of the contracting parties, both as to the original Brussels Convention and the Accession Convention, whereby, amongst others, Ireland and the United Kingdom acceeded to the Brussels Convention. For the reasons very exhaustively analysed, most particularly in the opinion of Advocate General Léger, it is clear that the original Brussels Convention followed civil law principles for the obvious enough reason that all of the countries then contracting to the Convention were civil law countries. It is also clear that detailed consideration was given to the position of Ireland and the United Kingdom (which had quite different private international law rules concerning these matters) at the time of accession of Ireland and the United Kingdom to the Convention. Notwithstanding that detailed consideration, no material changes in the Convention occurred, either at that time or later, or, indeed, when the terms of the Regulation were formulated. On that basis the obvious conclusion is that a political decision was taken at the time of the accession of Ireland and the United Kingdom to go along with the existing civil law based Brussels Convention.

4.13 To the extent that certain common law commentators are critical of the dominance of civil law over common law principles in this field, it can be said that that dominance stems from the fact that the common law jurisdictions acceded to a Convention which had been formulated on civil law principles without any material variation which would have allowed for common law principle to have an appropriate role in relation to judgment recognition after accession.

4.14 To the extent, therefore, that commentators appear to approach the issue either on the basis of suggesting what the law should be (rather than what it is), or on the basis of complaining about a dominance of civil law over common law principles in the area (notwithstanding the clear finding of the ECJ that that dominance stems from a decision of the competent law making bodies to adopt such a course) it seems to me that such commentaries are of little value.

4.15 What is there, then, to set against the clear logic of *Owusu* which emphasises certainty and the need to have common rules in this area to the exclusion of derogating national rules. It is against that background that it is necessary to turn to the refined argument put forward on behalf of Life Receivables by the close of the case. The argument has the merit of having at least some support from commentators whose views are not coloured by what counsel for Goshawk and Cavell described as a raging against the dying of the common law light. In addition the proposition, as ultimately refined, has the merit of being capable of being, at least in part, derived, at least by analogy, from the terms of the Convention itself. Before turning to that proposition it is appropriate to set out the common law position.

5. *Forum Non Conveniens* and *lis alibi pendens* in Common Law

5.1 The origins of this area of the law are set out by *Dicey, Morris and Collins* on *The Conflict of Laws* (14th Ed.) in the following terms:-

> "The doctrine of *forum non conveniens* i.e. that some other forum is more "appropriate" in the sense of more suitable for the ends of justice, was developed by the Scottish courts in the 19th century, and was adopted (with some modifications) in the United States. The Scots rule is that the court may decline to exercise jurisdiction, after giving consideration to the interests of the parties and the requirements of justice, on the ground that the case cannot be suitably tried in the Scottish court or full justice be done there, but only in another court. In England, *forum non conveniens* was always a relevant factor in the exercise of the discretion to grant permission to serve out of the jurisdiction … but until 1984 the English courts refused to accept that the jurisdiction to stay actions commenced against defendants who were sued in England as of right could be based *on forum non conveniens* grounds."

5.2 As noted by Advocate General Léger, the application of the doctrine of *forum non conveniens* was, as a matter of English law, set out by the House of Lords in *Spiliada*. In *Inter Metal Group Ltd v. Worslade Trading Ltd* [1998] 2 I.R. 1, per Murphy J., at p. 35, the statement of the law as set out by the House of Lords in *Spiliada* in the judgment of Goff L.J., was stated to represent a correct statement of the law in this jurisdiction. A similar approval can be found in the judgment of Fennelly J., in *Analogue Devices v. Zurich Insurance* [2002] 2 LIRM 366. In analysing the application of the doctrine in *Joseph Murphy Structural Steel Engineers Ltd v. Manitowac (UK) Ltd* (Unreported, Supreme Court, Griffin J., 30th July, 1985), the existence of an action pending abroad between the same parties and involving the same or similar issues was stated to be "the most common ground" on which a court in this jurisdiction might be asked to stay proceedings.

5.3 It does seem clear, therefore, that *lis alibi pendens* is an example (and indeed perhaps the most common example) of the

circumstances where it may be regarded as more convenient to stay proceedings in this jurisdiction so as to enable proceedings which are already in being in a foreign jurisdiction to continue. It is, however, clear that under the common law as interpreted in both the United Kingdom and Ireland, the staying of proceedings is discretionary and the existence of prior proceedings in a third party jurisdiction is but one of the factors (albeit an important factor) to be taken into account in the general exercise of the courts discretion. The rational for the common law doctrine of *lis alibi pendens* is, as stated by Diplock L.J. in the *Abidin Daver* [1984] 1 AC 398 at 412, where emphasis is placed on the importance of avoiding conflicting judgments from the perspective of international commity as well as the additional expense and inconvenience involved where two concurrent sets of proceedings are pursued in two different countries. It should, in passing, be noted that a similar rational for the *lis pendens* provisions of the Brussels Regulation is to be found in recital 15 to the Regulation.

5.4 Given the clear statements to be found in *Owusu* to the effect that the Brussels Regulation does not permit of the exercise of broad discretionary powers for the purposes of declining a jurisdiction which would otherwise arise under Article 2, it seems unlikely that a doctrine of *lis alibi pendens* which conferred on the court the level of discretion currently available under the common law, could survive in tandem with the mandatory requirements of the Convention.

5.5 The proposition put forward on behalf of Life Receivables at the close of its submissions needs to be seen as an understandable response to that difficulty. It is fair to say that counsel did not adopt a definitive position as to whether the proposition put forward might retain any of the discretion which appears to be inherent in the existing common law doctrine of *lis alibi pendens*. Counsel was prepared to argue in the alternative for the retention of some discretion or, if I was not persuaded that any discretion could survive in the light of the determination of the ECJ in *Owusu*, for an automatic application of the proposition. Having regard to *Owusu*, I am not satisfied that any doctrine of l*is alibi pendens* which retained a significant discretion on the part of the courts, is sustainable as being consistent with the Brussels Regulation. It is for that reason that I propose to consider the proposition put forward on behalf of Life Receivables in its more automatic form. I now turn to that proposition.

6. Life Receivables Proposition

6.1 As it ultimately evolved the proposition put forward on behalf of Life Receivables was to the effect that a court of a Contracting or Member State had a discretion (or perhaps, in the alternative, an obligation) to decline jurisdiction in favour of a court of a non-Contracting State where:-

> A. Proceedings had first been commenced in the court of the non-Contracting State; and
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> B. The judgment of the court of that non-Contracting State was such that it would, in accordance with the terms of the Regulation, be recognised within the relevant Member State.

6.2 Before going on to analyse and consider that proposition it is a useful starting point to recall the basic rules under which the Brussels Regulation deals with possible competing jurisdictional claims as and between Member States. The Regulation is clear in this regard. The jurisdiction in which proceedings are first commenced in effect retains seizer until such time as that jurisdiction has determined whether, in accordance with the rules set out in Regulation, it has jurisdiction. Any subsequent proceedings commenced in a second or subsequent Member State are stayed until such time as the courts of the Member State first seized of the case have come to a conclusion as to whether they have jurisdiction. If those courts determine that they have jurisdiction, then that is the end of the matter and (subject to the possibility that a different view might be taken by the ECJ on a reference) the courts first seized will determine the matter and the result will be recognised in all other Member States. If the courts first seized do not consider that they have jurisdiction under the terms of the Regulation, and so determine, then, of course the stay on the continuance of the proceedings in the courts of a jurisdiction second seized is lifted and that court may go on to consider, in turn, whether it has jurisdiction.

6.3 That this process is one to be rigorously applied is most strikingly illustrated in *Erich Gazzer GmbH v. MISAT* [2003] E.C.R. 1 – 14693, where the ECJ determined that the process had to be strictly applied notwithstanding it being clear that the Courts of Italy were the subject of extraordinary delays (indeed delays found on many occasions to be in breach of obligations under the European Convention on Human Rights) such that the commencement of proceedings in Italy, even where there was little basis for asserting an Italian jurisdiction, had, in practice, the effect of freezing proceedings in any other jurisdiction during the very prolonged period that would elapse before the Italian courts would be likely to determine that they did not have jurisdiction. It has been asserted in commentaries that a tactic, colourfully described as the "Italian Torpedo", was available to parties who wished to delay proceedings by the simple expedient of commencing, at the earliest possible date, a form of proceedings in the Italian courts thus freezing the possibility of any other proceedings being commenced, or progressed, elsewhere within the EU during the prolonged period that the Italian court was likely to take to determine that it did not have jurisdiction. Notwithstanding those difficulties, the ECJ held that the mandatory provisions of the Regulation required that proceedings in any other jurisdiction remain stayed pending a determination by the Italian courts of Italy's jurisdiction.

6.4 It is clear, therefore, that, as and between Member States, a strict application of the doctrine of *lis pendens* applies. Courts of one jurisdiction are precluded from exercising jurisdiction over a dispute until the courts of a jurisdiction first seized with that dispute have dealt with the question of whether that court first seized has, in fact, jurisdiction. Against that background it is argued, correctly at least so far as it goes, that the Regulation itself acknowledges a *lis pendens* doctrine. It is then asserted that there is no reason in principle why such a doctrine should not apply equally to cases where there was a lis pending in a non-Contracting State. There are, of course, a number of possible difficulties with that proposition.

6.5 The proposition was first suggested by Droz in *Compétance Judiciaire et Effects des Judgments dans le Maché Commune* (Paris, 1972 at pp 164-169). In substance the suggestion was that, by analogy, the provisions of the Regulation (or the Convention as it then was) concerning *lis pendens* ought be applied to non-Contracting States. This suggestion has sometimes been described as the reflexive application of Articles 27 and 28. The first difficulty is, of course, that the terms of the Regulation are clearly concerned with questions of priority in the commencement of proceedings between two different Member States. Article 27.1, in its terms, is concerned with a situation where the same cause of action gives rise to proceedings in the courts of "different Member States". The position is, therefore, that the Regulation expressly recognises the doctrine of *lis pendens* but, so far as its express terms are concerned, applies the doctrine only to competing claims in two separate Member States.

6.6 In addition to the commentary by *Droz*, Life Receivables place reliance on a number of textbook commentaries. The first reliance is on Layton and Mercer on *European Civil Practice* (2nd Ed.) 2004 at pp. 789 and 790. However, the relevant text was written before the decision of the ECJ in *Owusu* and does no more than point out that, as of that time, there were conflicting views on the issue to be found in the academic commentaries. Similarly a passage from Stone *on EU Private International Law* at p. 179 pre-dates *Owusu* and is, likewise, of little current relevance.

6.7 Finally Life Receivables also place reliance on the current edition of Dicey, Morris and Collins. It is important to note that Dr. Collins had previously expressed a view in an article in the Law Quarterly Review (1991) 107 L.Q.R. 180, which had, in substance, criticised the decisions in *Beresford* and *Arkwright Mutual Insurance*. Bingham L.J. in *Harrods*, had, on the other hand, approved of Dr. Collins' argument. That line of reasoning can, of course, no longer be regarded as valid having regard to the decision of the ECJ in *Owusu*. In the current edition of Dicey, Morris and Collins, which post-dates *Owusu*, some support is given for the "reflexive effect" invoked by *Droz*. I will turn to that argument in due course.

6.8 However, those academic commentaries which favour the existence of the reflexive effect need to be seen in the light of the fact that the Jenard and Mõller report on the *Lugano Convention* (1990) O. J. C 189/35 on p. 54, note that:-

> "In matters governed by the Convention, national procedural law was set aside in favour of the Convention's provisions."

The passage from Dicey, Morris and Collins seems to be predicated on the survival of the principles of private international law of individual member States to an extent that seems inconsistent with *Owusu*.

6.9 Having analysed the extent to which support might be found for the position adopted by Life Receivables deriving from the fact that the Convention and the Regulation recognise a doctrine of *lis pendens*, it is also important to look at the second leg of the argument which stems from the fact that the Convention and the Regulation also give some recognition to the judgments of third party States. Article 34.4 provides that a judgment should not be recognised:-

> "If it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed."

6.10 Thus the Regulation recognises that an earlier judgment in a Third Party State which would, in accordance with the private international law of a relevant Member State, be recognised, should have precedence over a later judgment in a Member State even though that later judgment would, in the ordinary way, warrant recognition in the Member State addressed. There is thus, also, within the terms of the Regulation, provision for recognition being afforded to prior judgments of Third Party States in those circumstances. It is, therefore, true to say that the Regulation also recognises, in principle, the appropriateness of affording recognition to the decision of the courts of a Third Party State, where that decision is prior in time to a competing judgment of a Member State and where that Third Party State judgment would be recognised in accordance with the private internal law of the Member State concerned. It should, however, be noted that Article 34.4 is concerned with priorities as and between judgments rather than priorities as and between pending proceedings.

6.11 It, thus, is clear that, at the level of principle, there is recognition in the Regulation of both the doctrine of *lis pendens* and the appropriateness of affording recognition, in accordance with the private international law of the relevant Member State, to third State judgments. The real issue which I have to decide is whether the recognition afforded to both of those matters in the Regulation is sufficient to warrant a departure from what seems to be the clear mandatory language of Article 2, as interpreted by the ECJ in *Owusu*. Any such departure needs to be seen against the clear statement by the ECJ in a number of cases to the effect that deviations or derogations from the underlying provisions of the Regulation can only be found in the Regulation itself. The Convention and the Regulation have been said to enumerate "exhaustively" the cases in which a person may be sued outside the State in which he is domiciled: see for example the opinion of Advocate General Fennelly in *Group Josi Re-Insurance Co. v. VGSC* (2002) ECR 1 – 05925. The first difficulty with the argument put forward on behalf of Life Receivables is, therefore, that the regime suggested is one which requires to be implied by analogy into the Regulation, rather than be derived from the text of the Regulation itself.

6.12 There is, however, in my view, an even greater difficulty with what is proposed. In the *lis pendens* regime specified in Article 27, the court first seized of a case has to consider whether it has jurisdiction in accordance with the terms of the Regulation itself. Thus, within the EU, issues concerning priority are determined on a uniform basis. The court first seized decides whether it has jurisdiction in accordance with the Regulation. If that court does not have jurisdiction, then the court second seized may activate litigation commenced before it, provided that the second court itself does have jurisdiction in accordance with the terms of the Regulation. Priority is determined by reference to the commencement of proceedings, but also by reference to whether any competing litigation is properly within the jurisdiction of the court concerned in accordance with the terms of the Regulation rather than in accordance with the private international law of the country concerned. This could not be the case where any competing jurisdiction is a non Member State. In that eventuality the non Member State would consider whether it has jurisdiction in accordance with its own principles of private international law. If, therefore, the courts of the competing Member State have to stay proceedings pending a decision by the courts of a non Member State as to whether that court has jurisdiction, the courts of the Member State concerned will, in effect, be staying its proceedings in circumstances where the decision as to whether the proceedings should be conducted in the non Member State will be determined, not in accordance with the provision of the Regulation, but rather in accordance with the terms of the private international law of the non Member State concerned.

6.13 Thus, in my view, the analogy with Article 27 is just not available in the case of a non Member State, because that non Member State will not be bound by the terms of the Regulation in its consideration of whether it has jurisdiction.

6.14 The only way in which this difficulty could be got round is if either:-

> (a). The Member State concerned were to decide whether the relevant non Member State would have had jurisdiction in accordance with the terms of the Regulation. This would, in my view, be pushing the analogy far too far. It is one thing to say that there might be an analogous or "reflexive" jurisdiction in respect of Third Party States. It is another thing altogether to expand that analogy by transferring the decision as to whether the State first seized should have jurisdiction from that State (as is clearly set out in Article 27) to the alternative State second seized of the proceedings; or
>
> (b). If the Regulation were to be interpreted as permitting the private international law of the Third Party State concerned to determine whether that State should have priority. There is nothing in the Regulation which would suggest that that is an appropriate interpretation to place on the overall legal position.

6.15 For those reasons it does not seem to me that the analogy argument really puts the matter very far. When faced with the clear interpretation of the Regulation by the ECJ which emphasises that exceptions or derogations must be found in the Regulation itself, it does not seem to me that the sort of implied reasoning which underlays the analogy argument is permissible in any event. Even if it were permissible in principle, it seems to me that the flaws in the analogy which I have sought to identify would preclude it being adopted.

6.16 In expressing those views I am mindful of the fact that there are also practical and difficult consequences which flow from adopting the interpretation put forward on behalf of Goshawk and Cavell. The proposition put forward by those parties does mean that entities within the EU can be sued in the country of their domicile even though those entities have already commenced proceedings in a non Member State which external proceedings may have progressed to some considerable extent. Those difficulties will be particularly significant where it is likely that any judgment of the non Member State concerned would be recognised in any relevant Member State. In those circumstances a judgment obtained in the non Member State might well be entitled to recognition under the Regulation. The Regulation does not appear to impose any preclusion for the recognition of judgments of non Member States which are appropriately recognised under the private international law of the Member State concerned. Indeed under the provisions of Article 34.4, to which I have referred, such a judgment may, in effect, have priority over a competing judgment of another Member State which is later in time. It seems to follow that there would be nothing to preclude such a judgment having priority so as to prevent the Member State concerned itself giving judgment in the matter. There may well, therefore, be significant practical difficulties encountered where proceedings have advanced in a non Member State and, at a late stage, identical proceedings are commenced in a Member State being the state of domicile of the appropriate defendant. If, in the ordinary course, the proceedings in the Third Party State come to a conclusion prior to the proceedings in the Member State and assuming that the judgment of the Third Party State is recognised in the relevant Member State in accordance with its private international law, that judgment will have to be recognised. If, therefore, under Irish private international law the judgment of the non Member State concerned was to be recognised, then it would preclude the Irish court from giving judgment even though the Irish court might be the court which had jurisdiction in accordance with the terms of the Regulation.

6.17 In truth it seems to me that all of these difficulties stem from the fact that the framers of both the Convention and the Regulation did not set out, in terms, what was to be the position in relation to competing proceedings within and without the boundaries of the contracting or Member States who might, for the time being, be bound by those instruments. I am told that there have been attempts to extend the ambit of the rules contained in the Regulation to a wider range of countries. Such a development would be laudable. However, in the meantime the difficulties involving competing claims to jurisdiction as and between Member States and non Member States remain, and must be dealt with in accordance with the Regulation and the jurisprudence.

6.18 However, for the reasons which I have sought to analyse, it seems to me that the only answer which can be given which is consistent with the jurisprudence of the ECJ is one which determines that a court in Ireland retains and must exercise a jurisdiction conferred on it by Article 2, notwithstanding the fact that there may be proceedings in a non Member State which are first in time, which involve the same subject matter, and where a judgment from the court of the non Member State would be recognised in Ireland. For those reasons it does not seem to me that I have a jurisdiction to stay these proceedings pending the result of the Georgia proceedings or, indeed, pending a decision by the competent courts in the United States as to whether those courts have jurisdiction.

7. Abuse of Process

7.1 Under this heading it is suggested that I retain a discretion to stay these Irish proceedings as being an abuse of process. In substance it is said that seeking a negative declaration of the type sought, in circumstances where there is already in being a positive claim to the same effect, amounts to an abuse of process. Whatever may be the limits of the doctrine of abuse of process it does not seem to me that that doctrine could be utilised to prevent proceedings which are properly brought in Ireland under the terms of the Regulation from going ahead.

7.2 I would leave to a case in which the issue expressly arose the question as to whether there may be circumstances in which a party seeking a negative declaration per se could be said to be engaged in an abuse of process. There may be cases where the courts in this jurisdiction will determine that no cause of action exists which can be pursued by negative declaration in particular types of cases. However, it does not seem to me that any jurisdiction to deem an action to be an abuse of process could be applied where its implementation would be, in effect, to defeat the imperative contained in the Regulation to the effect that proceedings should be brought in the country of domicile of the defendant. Unless, therefore, the form of declaration sought were not one which the courts in Ireland would, in principle, entertain, it does not seem to me that an abuse of process could be found to exist such as would defeat the requirements of the Regulation.

7.3 I am mindful, of course, of the fact that a claim for a negative declaration can effect the determination of who the defendant is, and thus, potentially, effect the appropriate jurisdiction under Article 2. If it were not possible to seek a negative declaration in the particular circumstances of a case, then, of course, it would not be possible to turn the party against whom such a declaration might be sought into a defendant and thus invoke Article 2. However, there is nothing in principle wrong with a party against whom an accusation has been made in seeking appropriate declaratory relief to clear its position. In those circumstances I am not satisfied that there is anything in principle wrong with parties, such as Goshawk and Cavell, seeking a negative declaration of the type sought in these proceedings. That being so it does not seem to me that there is anything, again in principle, wrong with Life Receivables being a defendant and thus any interference with the entitlement to bring the proceedings in the country of domicile of Life Receivables, i.e. Ireland, is, in my view, impermissible under the Regulation.

8. Conclusions

8.1 It follows, therefore, that I am not satisfied that there is any basis for staying these proceedings. They must be conducted in the ordinary way. The courts in this jurisdiction recognise the possibility of a party against whom accusations have been made, seeking declaratory orders designed to establish its position. There is nothing, therefore, in principle wrong with negative declaratory proceedings such as those which have been commenced.

8.2 In those circumstances it is open to Goshawk and Cavell to treat Life Receivables as a defendant by virtue of bringing proceedings which are, in general terms, a recognised form of proceedings in this jurisdiction. It follows that it is clear that Article 2 of the Regulation requires that these proceedings be brought in Ireland. For the reasons which I have analysed, I am not satisfied that any doctrine of *lis alibi pendens* can be invoked to stay the proceedings which are mandated to brought in Ireland under Article 2, pending the resolution of prior proceedings commenced in a non Member State.

8.3 It follows that I am not satisfied that I have any jurisdiction to stay these proceedings on any basis and I, therefore, decline to do so.