



JUDGMENT

- (1) Texan Management Limited**
- (2) All Dragon International Limited**
- (3) Blinco Enterprises Limited**
- (4) Patagonia Limited**
- (5) Shareholders of All Dragon International Limited**

v

Pacific Electric Wire & Cable Company Limited

**From the Eastern Caribbean Court of Appeal
(British Virgin Islands)**

before

**Lord Hope
Lord Scott
Lord Carswell
Lord Brown
Lord Collins**

**JUDGMENT DELIVERED BY
LORD COLLINS
ON**

26 November 2009

Heard on 24 and 25 June 2009

Appellant

Stephen Smith QC
(1st – 4th appellants)

Jack Husbands
(1st & 2nd appellants)

Paul Webster QC
Kerry Anderson
(3rd & 4th appellants)

(Instructed by Glovers
Solicitors LLP)

Respondent

Richard Lissack QC

(Instructed by Charles
Russell LLP)

LORD COLLINS:

Introduction

1. It has often been said that, in the pursuit of justice, procedure is a servant and not a master. This is a case, if the Court of Appeal for the Eastern Caribbean is right, where the law of procedure prevents the appellants from invoking a power which is designed to ensure that the litigation is centred in the court “in which the case may be tried more suitably ... for the ends of justice,” in the words of Lord Kinnear in *Sim v. Robinow* (1892) 19 R. 665, 668, adopted as part of English law in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 474, per Lord Goff of Chieveley.

2. Until it was de-listed as a result of the events which form the background to these proceedings, the claimant, and respondent on this appeal, Pacific Electric Wire & Cable Co Ltd (“PEWC”), was one of the largest listed companies on the Taiwan Stock Exchange, with over 300,000 shareholders. Its core business is in wire and cable products, but it has expanded into other businesses, including property, telecommunications, electronics, engineering, and financial services.

3. In 2003 trading in its shares was suspended following a write-off in its accounts of US\$291 million. PEWC claims that in the period 1990 to 1997 three of its directors, its former Chairman (Tung Yu Jeh), President (Sun Tao Tsun) and Chief Financial Officer (Hu Hung Chiu) (“the three directors”), were guilty of breach of fiduciary duty (*inter alia*) by using its funds to acquire investments for themselves. PEWC says that the investments were never reported to the board of PEWC and were not reflected in its financial statements, which were therefore incomplete, false and misleading.

4. PEWC has commenced proceedings in Hong Kong, Singapore, Beijing, the United States, and the BVI to recover or preserve the assets which it claims were purchased from its funds. The commercial purpose of one of the actions in Hong Kong and the action in the BVI is to obtain control of shares in a Bermuda company called PacMos Technologies Ltd (“PacMos”), which is listed on the Hong Kong Stock Exchange (but now suspended) and was formerly called PCL Enterprises Ltd and then Win Win International Holdings Ltd.

5. The three directors are said to have used a web of corporate vehicles to conceal the fact that PEWC had paid for, and therefore owned, the PacMos shares. Those companies included:

BVI

Texan Management Ltd (“Texan”)

All Dragon International Ltd (“All Dragon”)

Blinco Enterprises Ltd (“Blinco”)
Patagonia Ltd (“Patagonia”)
Super Wish Ltd (“Super Wish”)

Hong Kong

Pacific Capital (Investment) Ltd (“PCI”)
Pacific Capital (Asia) Ltd (“PC Asia”)
PCL Holdings Ltd (“PCHL”)

Bermuda

Prima Pacific (Holdings) Ltd (“PPH”), the shares in which were held as a nominee by a Mr Larry Horner (“Mr Horner”), an accountant who was also chairman of a PEWC subsidiary.

6. The defendants in the present proceedings, and appellants on this appeal, are the BVI companies Texan, All Dragon, Blinco and Patagonia (together “the appellants”). Their Lordships were informed by Mr Stephen Smith QC, who appeared for the appellants, that the registered shareholder of Blinco and Patagonia is Top Selection Ltd, a BVI international business company (the shares in which are bearer shares).

The Hong Kong proceedings

7. On September 23, 2004 PEWC commenced Action HCA 2203 of 2004 in Hong Kong against 15 defendants, including the three directors, Texan, and All Dragon. The subject matter of the action is said to be the PacMos shares.

8. The essence of what PEWC says is that PEWC’s funds were injected into Texan, which was then used as the vehicle to buy PacMos shares. Texan acquired 50.1% of the shares in PacMos from its majority shareholders. This acquisition required a general offer to its shareholders to be made, with the result that Texan acquired a total of 155,610,000 shares in PacMos (making a total of 51.92%). A further 69,186,000 shares were subsequently purchased from the majority shareholders by Super Wish (another BVI company, which was a wholly owned subsidiary of Texan) and subsequently transferred to Vision 2000 Venture Ltd, a company controlled by one of the three directors.

9. Blinco and Patagonia were used by the three directors as top tier companies to hold the shares in PCHL, which in turn wholly owned PCI, which owned 51% of the shares in Texan. The other 49% was held by PPH, whose shares were held by Mr Horner as nominee. Subsequently the shares in Texan held by PCI and PPH were transferred to All Dragon.

10. PEWC says that each of these companies and the assets which they hold were acquired with its funds, and are held on trust for it. The pleading in the Hong Kong action does not make any clear distinction between the beneficial ownership of the shares in the various companies and the beneficial ownership of assets vested in those companies. The statement of claim pleads, in particular, that Texan holds the shares in PacMos acquired by it and Super Wish on trust for PEWC; and All Dragon holds all the shares in Texan on trust for PEWC.

11. The relief sought in the Hong Kong action includes claims for declarations that:

- (1) Texan holds on trust for PEWC 214 million (alternatively, 145 million) shares in PacMos;
- (2) All Dragon holds on trust or on constructive trust for PEWC the beneficial interest in the PacMos shares;
- (3) PCHL is indirectly wholly held by PEWC.

12. The prayer for relief does not contain a claim for a declaration that the shares in the appellants are held on trust for PEWC, but the body of the pleading makes that claim as regards Blinco and Patagonia (para 20(b)), Texan (para 44(c)(ii)), and All Dragon (para 66). The claim in relation to the ownership of All Dragon is no longer pursued in Hong Kong.

13. There are two other actions in Hong Kong. They relate to PEWC's claim to an interest in a commercial property, the West Block of South Horizons Commercial Centre, also said to have been purchased with PEWC's funds. In proceedings commenced on December 7, 2004 (Action HCA 2763 of 2004) against 21 defendants, including the 3 directors, All Dragon, Blinco and Patagonia, PEWC claims the beneficial interest in the property on the basis that its registered owners and their holding companies hold it on trust for PEWC. Patagonia and Blinco each held 50% of PCHL, which through other companies (including All Dragon) held the properties. PEWC claims the beneficial interest in all the shares in PCHL on the basis that Blinco and/or Patagonia hold them on trust for PEWC. The third action is HCA 2746/2004 in which PEWC claims the proceeds of sale of part of the South Horizons property.

The BVI proceedings

14. On June 9, 2005 PEWC commenced proceedings in the BVI. The Statement of Claim was amended on October 7, 2005 and re-amended on November 9, 2005. PEWC claimed (inter alia)

- (1) a declaration that the shares in Texan held by All Dragon are held on trust for PEWC;
- (2) an order directing the transfer of those shares to PEWC;
- (3) an order that PEWC be registered as the shareholder of the Texan shares in its share register;
- (4) an order prohibiting Texan from dealing with the PacMos shares;

- (5) an order for Blinco and Patagonia to issue new share certificates to PEWC and/or for the rectification of the share register of Blinco and Patagonia to show PEWC as sole shareholder;
- (6) declarations that all the shares in All Dragon held by Blinco and Patagonia are held on trust for PEWC.

15. Claims for declarations that (a) the shares in PCHL held by Blinco and Patagonia were held on trust for PEWC, and (b) the shares in Blinco and Patagonia were held on trust for PEWC, were deleted by amendment.

16. PEWC stated the purpose of the action in this way (para 5):

“In this action, PEWC seeks to recover the legal and beneficial interest in the shares of the first four defendants herein, the defendants being companies incorporated in BVI and are subject to the jurisdiction of this Honourable Court. In an action commenced in the Court of First Instance in the High Court of the Hong Kong Special Administrative Region, PEWC is seeking to recover the legal and beneficial interest in the PacMos shares and for accounts and inquiries ...”

17. The Re-Amended Statement of Claim pleads that the three directors caused Texan to agree to purchase 50.1% of Pac Mos in June 1995, and that the sale was completed in August 1995; and Texan made an offer in July 1995 to acquire more shares so that it held about 155 million shares (51.92%).

18. The pleading, like that in the Hong Kong proceedings, is not easy to follow, but the claims to ownership are put in the following way:

- (1) PEWC is the true owner of Texan because (a) PEWC wholly owned PCHL, which in turn wholly owned PCI, which held 51% of the shares in Texan; (b) the remaining 49% was held through PPH, and the shares in PPH were the subject of a declaration of trust in favour of PEWC by Mr Horner.
- (2) The directors procured Mr Horner to transfer the 49% interest in Texan held by PPH to All Dragon.
- (3) The consequence was that All Dragon became the owner of all the shares in Texan.
- (4) PEWC is the ultimate holding company of All Dragon, whose shares are held by Blinco and Patagonia on trust for PEWC through PCHL because PCHL is wholly owned by PEWC, and because the only shares in Blinco and Patagonia are owned by PEWC.

Procedural history

19. The Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (“EC CPR”) were made pursuant to the West Indies Associated States Supreme Court Order

1967, section 17. They are closely modelled on, but are not identical to, the Civil Procedure Rules in England and Wales (“the English CPR”).

20. On July 12, 2005 Texan and All Dragon filed a notice of application seeking a declaration that the court should not exercise its jurisdiction to try the claim, and a stay on the ground of *forum non conveniens*. The notice of application was filed on the last day for filing an application, and was returnable on September 28, 2005. The evidence in support was filed on September 23, 2005 and served shortly thereafter.

21. Blinco and Patagonia obtained an extension of time from the court for service of a defence. Before the expiry of the extended time, Blinco and Patagonia filed, on September 12, 2005, a notice of application seeking a stay. The application stated that the grounds were that (a) the court had power under the inherent jurisdiction to grant a stay if there were another forum in which the case could be more conveniently tried; and (b) Hong Kong, and not the BVI, was the appropriate forum. The evidence in support was filed on September 12, 2005 and served shortly thereafter. The application, like that by Texan and All Dragon, was returnable on September 28, 2005.

22. There was a short first hearing on September 29, 2005. On October 4, 2005 the application by Blinco and Patagonia was amended so as to rely on CPR r.9.7(1) (which deals with the procedure for disputing the court’s jurisdiction and for arguing that its jurisdiction should not be exercised, equivalent to English CPR r.11(1)) in addition to the inherent jurisdiction.

23. PEWC took the procedural point against Texan and All Dragon that their application should be dismissed because the evidence was not filed with the application, and that therefore there had not been a proper application within the time limited by the EC CPR. PEWC took a different point against Blinco and Patagonia, namely that their application was out of time because it had been made not within the time limited for defence by the rules, but only within the extended time for defence allowed by the court, with the consequence that they had thereby accepted that the BVI court should exercise jurisdiction over them.

24. The substantive hearing took place on December 20, 2005 before Hariprashad-Charles J who gave judgment on May 12, 2006, dismissing the procedural objections to the applications, and granting a stay on *forum conveniens* grounds. The appeal was heard by the Eastern Caribbean Court of Appeal on June 7, 2007, and on October 15, 2007 the Court of Appeal allowed PEWC’s appeal on the procedural issues and did not address the *forum conveniens* issues. On October 6, 2008 the Court of Appeal granted leave to appeal, because it required the guidance of Her Majesty in Council on the procedural issues.

The procedural rules

25. By EC CPR r.9.7:

- “(1) A defendant who –
- (a) disputes the court’s jurisdiction to try the claim; or
 - (b) argues that the court should not exercise its jurisdiction;
- may apply to the court for a declaration to that effect.
- (2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service.
- (3) An application under this rule must be made within the period for filing a defence
- Rule 10.3 sets out the period for filing a defence
- (4) An application under this rule must be supported by evidence on affidavit.
- (5) A defendant who –
- (a) files an acknowledgment of service; and
 - (b) does not make an application under this rule within the period for filing a defence;
- is treated as having accepted that the court has jurisdiction to try the claim.
- (6) An order under this rule may also –
- (a) discharge an order made before the claim was commenced or the claim form served;
 - (b) set aside service of the claim form; and
 - (c) strike out a statement of claim.

.....”

26. For the purposes of this appeal the following points, to which it will be necessary to revert, should be noted. First, r.9.7 applies to applications disputing the court’s jurisdiction and also to applications arguing that “the court should not exercise its jurisdiction.” Second, the types of order which may be made under this rule do not expressly mention (by contrast with English CPR r.11(6)) an order staying the proceedings: EC CPR r.9.7(6). Third, the application must be made within the period for filing a defence, and the note states that EC CPR r. 10.3 sets out the period for filing a defence: EC CPR r. 9.7(3). Fourth, the application must be supported by evidence on affidavit: EC 9.7(4). Fifth, if an acknowledgment of service is filed, and an application is not made within the period for filing a defence, the defendant is treated as having accepted that the court has jurisdiction to try the claim: EC CPR r.9.7(5).

27. Because the application must be made within the period for filing a defence, it is necessary to refer to the rules dealing with the time for defence. By EC CPR r.2.4 “‘period for filing a defence’ has the meaning given by rule 10.3.” The general rule is that the period for filing a defence is the period of 28 days after the date of service of the claim form: EC CPR r.10.3(1). But if the claim form is not served with a statement of claim, the period is 28 days after service of the statement of claim: EC CPR r.10.3(3). The period for filing a defence may be extended by agreement between the parties or by order of the court: EC CPR r.10.3(5), (9). EC CPR r.12.5(b) deals with default judgments and is not directly relevant, but refers to “the period for filing a defence and any extension agreed by the parties or ordered by the court.” The distinction it draws between the initial period and the period as extended by agreement or by court order was thought by the Court of Appeal to be of assistance on the question whether the period for filing a defence referred to in EC CPR r.9.7(3) included an extension ordered by the court.

28. The rules for making applications are as follows. The time at which the application is made is its receipt at the court: EC CPR r.11.4. The application must state the grounds on which it is made (EC CPR 11.7(1)(a)) and the general rule is that notice must be given to the respondent: EC CPR 11.8(1). The applicant need not give evidence in support of an application unless it is required by court order, practice direction or rule.: EC CPR 11.8(3). If an application is made under EC CPR 9.7 it must be supported by evidence on affidavit: EC CPR 9.7(4).

29. EC CPR 11.11 deals with service of notice of an application. Subject to any rule to the contrary, notice of an application must be served as soon as practicable and at least 7 days before the court is to deal with the question: EC CPR rr.11.11(1)(a), (2). If short notice has been given, the court may direct that sufficient notice has been given and deal with the application: EC CPR r.11.11(3). The notice of application must be accompanied by a draft order and any evidence in support: EC CPR r.11.11(4).

30. The case management powers of the court are included in EC CPR Part 26, and the material provisions are substantially similar to those in the English CPR Part 3. First, by EC CPR r.26.1(2)(q), as part of the court’s general powers of management: “Except where these rules provide otherwise, the court may ... stay the whole or part of any proceedings either generally or until a specified event or date.” Second, the court may extend the time for compliance with any rule, even if the application for extension of time is made after the time for compliance has passed: EC CPR r.26.1(2)(k). Third, the court may exercise its powers of its own initiative: EC CPR r.26.2(2).

31. Except where the consequence of failure to comply with a rule has been specified, where there has been an error of procedure or failure to comply with a rule, the failure does not invalidate any step in the proceedings, and the court may make an order to put matters right: EC CPR r.26.9. An application for relief from any sanction

imposed for a failure to comply with any rule must be made promptly and supported by evidence: EC CPR r.26.8, which sets out the matters which the court has to take into consideration in granting relief.

Hariprashad-Charles J

32. On May 12, 2006, the judge rejected PEWC's argument that the appellants could not be permitted to pursue their applications because of procedural deficiencies, and granted a stay of PEWC's BVI proceedings on *forum conveniens* grounds.

33. As regards Texan and All Dragon, the judge accepted PEWC's submission that there had been a procedural defect in that their application had been served on the last day for filing a defence and no supporting evidence as required by CPR r.9.7(4) had been filed and served until September 23, 2005. But the procedural inadequacies were not fatal, and the court could exercise its discretionary powers even if the application was not made under the inherent jurisdiction. To dismiss the application because of late compliance with the EC CPR would be a draconian act when the application was still pending.

34. As regards Blinco and Patagonia, the judge said that she did not need to decide whether, by not making their application within the time limited for defence by the rules (rather than within the extended time granted by the court), and by applying for an extension of time for defence, they had taken a step in the proceedings and submitted to the jurisdiction. She accepted the submission for Blinco and Patagonia that the application was made under the inherent jurisdiction, and not under EC CPR r.9.7(1), and consequently the question of submission did not arise.

35. On *forum non conveniens* the judge directed herself in accordance with the principles in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. The BVI court had jurisdiction by virtue of the incorporation of the defendants there. The subject matter of the claims concerned property in Hong Kong, the events and transactions giving rise to the claim took place in Hong Kong, and "... it is a monumental task for [PEWC] not to accept at the end of the day that the principal issue for determination in the BVI proceedings as well as the Hong Kong proceedings is the ultimate beneficial ownership of the Pac Mos shares" and it was her firm view that the claims would be governed by Hong Kong law.

36. Were the matter to require a full trial (which PEWC claimed was unlikely), the majority of potential witnesses resided outside Hong Kong. The question of language was neutral. But the expense and inconvenience of bringing witnesses to the BVI would be phenomenal. If a substantial volume of documents were in Chinese, translation would create the risk that nuances of meaning might be lost.

37. Although the claims were framed differently, the issues were identical in both jurisdictions and there was a risk of contradictory results. The allegations of fraud were at the heart of the issue regarding the ownership of the PacMos shares and

evidently had to be resolved by a trial. PEWC chose the courts of Hong Kong which it described in application for permission to serve out of the jurisdiction as “the most appropriate forum for the case to be tried” and the defendants had submitted to the jurisdiction of that court. The judge thought that it was significant that PEWC had not applied for summary judgment in Hong Kong or the BVI. Subsequently there was an application in Hong Kong for summary judgment: see paras [42]-[43] below.

38. Her overall conclusion was that the case had strong connections with Hong Kong. Quite apart from the question of the governing law, the dispute concerned actions carried out in Hong Kong by Hong Kong or Taiwanese individuals. Many witnesses were likely to be required. They were all resident in Hong Kong or Taiwan, and none was resident in the BVI. The essence of the disputes had already been the subject of two sets of proceedings in Hong Kong. The claim did not have any real connection with the BVI except that the defendants were domiciled there. But there were several strong connections with the chosen jurisdiction, Hong Kong.

Court of Appeal

39. On PEWC’s appeal, the Court of Appeal on October 15, 2007, reversed the judge’s decision on the procedural issues and held that it was not open to the defendants to pursue the applications. The procedural points had been the subject only of written submissions and the oral hearing was concerned solely with the merits of the *forum conveniens* applications. The court did not express a view on the merits of those applications because they did not arise for decision.

40. The Court of Appeal held that the effect of EC CPR r.9.7(4) was that because no evidence had been filed or served with the application by Texan and All Dragon, there was no valid application. Consequently, the effect was that under EC CPR r.9.7(5) the defendants were treated as having accepted that the court had jurisdiction to try the claim. The court therefore did not have a discretion to dismiss the procedural challenge.

41. Blinco and Patagonia were out of time and were to be treated as having accepted that the BVI court had jurisdiction to try the claim. The application had to be made within the period in CPR r.10.3 for filing of the defence, and the extended period granted by the court did not count: *Monrose Investments Ltd v Orion Nominees* [2002] ILPr 267.

Application for summary judgment in Hong Kong

42. On January 18, 2008, Saunders J in the Hong Kong Court of First Instance ([2008] 4 HKLRD 349) granted summary judgment in favour of PEWC and held: (1) PEWC’s money was used to fund the purchase of assets including the PacMos shares; (2) Blinco and Patagonia were formed with PEWC’s money for the benefit of PEWC; (3) PEWC was the sole beneficial owner of PCHL, which was held on trust for PEWC by Blinco and Patagonia; (4) PEWC was the sole beneficial owner of Texan; (5)

Texan held the PacMos shares on trust for PEWC; (6) Super Wish held the proceeds of PacMos shares sold by it on trust for PEWC.

43. But on March 10, 2009, the Hong Kong Court of Appeal ([2009] 3 HKLRD 94) reversed the judgment on the ground that the application did not fall within Order 14 because it involved allegations of fraud; and it was not appropriate to conduct a mini-trial on affidavit in a complex case of the present kind. This judgment is under appeal to the Court of Final Appeal.

The appeal

44. Texan and All Dragon say that the Eastern Caribbean Court of Appeal erred in the following respects: (1) the Court of Appeal wrongly ignored the fact that the application was made under the inherent jurisdiction (which it had held in *Addari v Addari* (2005) still to apply), and therefore wrongly held that the application was capable of being dismissed for non-compliance with EC CPR r.9.7; (2) in any event, EC CPR r.9.7 did not require the evidence to be filed with the application; (3) the effect of the rules was that in the normal case evidence should be served with an application, but if it was not so served the court had a discretion (which the judge exercised in the present case) to direct that sufficient notice has been given: EC CPR r.11.11(3), (4); the court had a discretion to cure any defect (EC CPR r.26.9(2), (3)) and to give relief from a sanction (EC CPR r.26.8).

45. Blinco and Patagonia say: (1) their application was made under the inherent jurisdiction and they were not obliged to comply with EC CPR r.9.7(3); (2) in any event the Court of Appeal was wrong to rely on *Monrose Investments Ltd v Orion Nominees* [2002] ILPr 21 in finding to find that they had lost the right to make the application on account of their application for an extension of time for defence; (3) the time for making the application should have been extended under EC CPR r.26.1(2)(k).

46. PEWC supports the conclusions of the Court of Appeal, although it accepts that there are some errors in its reasoning. In particular it accepts that there is no requirement that evidence in support be filed (as opposed to served) with the application, and it also accepts that the judge had a discretion to relieve Texan and All Dragon from non-compliance with the procedural rules.

The issues on the present appeal

47. The issues which arise are these: (1) whether the BVI court has an inherent jurisdiction to grant a stay on *forum non conveniens* grounds, independent of the provisions of EC CPR r.9.7; (2) whether EC CPR r.9.7(4) requires that the evidence in support of the application must be filed at the same time as the notice of application is filed, and, if so, whether failure to file means that the application is a nullity, or whether the court has power to excuse or cure non-compliance (and if so, whether the power should be exercised); (3) whether the application may be made within the time

for defence as extended by the court, and, if not, whether the court has power to excuse or cure non-compliance (and, if so, whether it should be exercised); (4) if the Court of Appeal's judgment is reversed, whether the Board should deal with PEWC's appeal on *forum non conveniens* (and, if so, whether the judge's decision should be reversed), or whether it should be remitted to the Court of Appeal.

48. If the court has power to cure the defects, and if the Board were to take the view that that power should be exercised, the procedural points would not arise for decision, but the Court of Appeal gave leave to appeal because it wished to have guidance on the rules, and the Board will therefore endeavour to deal with all of the procedural points.

(1) The inherent jurisdiction and challenges to the existence and exercise of jurisdiction

The inherent jurisdiction

49. As early as 1823 Sir John Leach V-C said that "Courts of Equity have an inherent jurisdiction to stay the proceedings in any cause and in any stage of the cause ...": *Praed v Hull* (1823) 1 Simons & Stuart 331, at 332. The inherent jurisdiction to stay proceedings was expressly preserved by the Judicature Act 1873, section 24(5) and later by the Supreme Court of Judicature (Consolidation) Act 1925, section 41, and now by section 49(3) of the Supreme Court Act 1981. Section 49(3), like its predecessors, provides that no thing in the Act affects the power of the court to stay any proceedings. West Indies Associated States (Supreme Court) Act 1969, section 18, is in the same terms.

50. Until the gradual adoption in England of the Scottish doctrine of *forum non conveniens* beginning with *The Atlantic Star* [1974] AC 436, and culminating in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, stays of proceedings on the ground that there were parallel proceedings in a foreign country were sought and obtained on the ground that the English proceedings were frivolous or vexatious or an abuse of the process. The basis for the stay in such cases, which culminated in the classic exposition by Scott LJ in *St Pierre v South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382, 398-399, was the inherent jurisdiction of the court.

51. From the earliest days of the Rules of the Supreme Court it was held that the rules providing for stays of proceedings did not prevent a defendant from seeking a stay under the inherent jurisdiction. Thus in *Willis v Earl Beauchamp* (1886) LR 11 PD 59 the then rule (RSC Ord 25, r.4, replaced from 1964 by RSC Ord 18, r.19(1)) provided for a stay if the action was shown by the pleadings to be frivolous or vexatious, but it was held that resort could be had to the inherent jurisdiction if the requirements of the rule were not met because it was not apparent on the face of the pleadings that the action was frivolous or vexatious. Bowen LJ said (at 63):

“I think this action ought to be stayed as being a vexatious action within the meaning attached to that word by the Courts, because it can really lead to no possible good. It does not fall under the rule as the Lord Justice has said, but the rules, as we have pointed out more than once, do not, and that particular rule does not, deprive the Court in any way of the inherent power which every Court has to prevent the abuse of legal machinery which would occur, if for no possible benefit the defendants are to be dragged through litigation which must be long and expensive.”

52. So also in *Re Wickham* (1887) 35 Ch D 272, 280, in relation to a different rule (RSC Ord 26, r. 4) dealing with stays of subsequent proceedings if costs of prior proceedings had not been paid, Cotton LJ said: “...it does not follow that the special power given by the Rules limits the inherent general jurisdiction in the Court to stay proceedings in proper cases.”

53. That the power to stay was part of the inherent jurisdiction expressly preserved by what is now section 49(3) of the Supreme Court Act 1981 was emphasised in *The Atlantic Star* [1974] AC 436, 465, per Lord Wilberforce: “The form of section 24(5) [of the 1925 Act] was evidently such as to secure that whatever special powers might be defined by rules of court, the inherent and general power of the High Court to stay proceedings should remain.” See in the same sense also *The Abidin Daver* [1984] AC 398, 417, per Lord Brandon; *de Dampierre v de Dampierre* [1988] AC 92, at 106, per Lord Goff of Chieveley.

54. In *Rockware Glass Ltd v MacShannon* [1978] AC 795, 817-818 Lord Salmon said:

“There was nothing in the Act of 1873, or in any of the rules made under it, to limit the Court’s powers of staying proceedings to cases in which such proceedings were oppressive or vexatious. Indeed, the rules made no reference to vexation or oppression. It was not until the Judicature Rules of 1883 were enacted that the word ‘vexatious’ or cases of vexation were referred to; and not until after the Supreme Court of Judicature (Consolidation) Act 1925 that the rules referred to ‘cases of vexation or oppression,’ but they did not, in my view, curtail the court’s inherent jurisdiction to stay by confining it to such cases. The courts would never stay an action lightly but only if convinced that justice required that it should be stayed. Justice would no doubt so require it but, in my view, not only if the action would properly be described as vexatious or oppressive.”

55. Thus the House of Lords held that the court may grant a stay under the inherent jurisdiction, as an alternative to a stay under section 9 of the Arbitration Act 1996, where proceedings are brought in breach of an arbitration agreement: *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.

56. The answer, therefore, on the first issue is that there is no doubt that there is an inherent jurisdiction to stay proceedings. But that does not in itself answer the question whether the inherent jurisdiction may be exercised to the extent that the CPR themselves contain provisions for applications for stays which are subject to procedural conditions and time-limits. The authorities strongly suggest that the inherent jurisdiction to stay proceedings is such a fundamental one that it will not normally be displaced by express powers to grant a stay. It was so held by the BVI Court of Appeal in *Addari v Addari* (2005), a decision on a leave application.

57. But the modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules: *Raja v Van Hoogstraten* (No 9) [2008] EWCA Civ 1444, [2009] 1 WL R 1143. That decision concerned the court's power under the inherent jurisdiction to set aside an order made without notice *ex debito justitiae*. It was held that although the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by the CPR it should be dealt with in accordance with them and not by exercising the court's inherent jurisdiction.

The powers to stay in the CPR

58. The position prior to the introduction of the English CPR was that challenges to the jurisdiction *stricto sensu* were regulated by RSC Ord 12, r.8, and applications to stay on *forum conveniens* grounds were generally made under the inherent jurisdiction. RSC Ord 12, r.8 contained the procedure for disputing jurisdiction, and an application by a defendant within the jurisdiction for a stay of proceedings was not regulated by that rule. In *The Messianiki Tolmi* [1984] 1 Lloyd's Rep 266 (CA), Robert Goff LJ, giving the judgment of the Court of Appeal, said (at 270):

“In our judgment, the application by the appellant for a stay of proceedings was not an application under O. 12, r.8 (1). Only where a party, on one of the grounds specified in that rule, seeks relief in which he disputes the jurisdiction of the Court can his application fall within the rule. Here there was no question of the appellant disputing the jurisdiction of the Court. Indeed, as he had been served personally with the writ in this country, it is difficult to see on what ground he could possibly dispute the Court's jurisdiction. His application was for a stay of proceedings which, indisputably, had been properly commenced against him. The effect of a stay, if granted, would not have been to set aside the proceedings; it would have been simply to stop the respondents from pursuing the action any further at that time. Moreover, it would have been open to the respondents to apply thereafter to have the stay lifted, and if such an application was granted they could continue to proceed with the action.”

59. But the new English CPR Part 11 eroded the distinction between a challenge to the jurisdiction resulting in the setting aside of service and an application for a stay of proceedings.

60. CPR Part 11(1) provides:

“A defendant who wishes to –

(a) dispute the court’s jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.”

61. The concept of a declaration that the court should not exercise its jurisdiction is a novel one, but if this provision stood alone, it would be consistent with the rule being concerned only with challenges to the jurisdiction of the court in the strict sense, for example by virtue of the provisions for service out of the jurisdiction which are now set out in a Practice Direction to CPR Part 6 (CPR PD 6B, para 3.1). That is because in cases of service out of the jurisdiction under those provisions, and their predecessors CPR r.6.20 and RSC Order 11, it has always been possible, even if the court has jurisdiction under the rule, for the order granting permission to serve out of the jurisdiction to be challenged on the basis, for example, that England is not the appropriate forum, or for the permission to be set aside on the ground that the claimant has failed to make adequate disclosure. In such cases the challenge is in reality to the exercise of the court’s jurisdiction rather than its existence.

62. Subject to one important point, the other provisions of English CPR Part 11 are consistent with it being concerned only with jurisdiction in the strict sense. Thus CPR r.11(3) provides that a defendant who files an acknowledgment of service does not by doing so, lose any right that he may have to dispute the court’s jurisdiction, and CPR r.11(5) provides that a defendant who files an acknowledgment of service, but fails to make an application in the due time, is to be treated as having accepted that the court has jurisdiction.

63. A natural reading of these provisions suggests that they have no application to defendants within the jurisdiction. As is clear, and as Robert Goff LJ said in *The Messianiki Tolmi, ante*, a defendant within the jurisdiction has no grounds for contesting the jurisdiction. So also English CPR r.11(7) makes provision for a defendant who fails in an application under CPR r.11(1) to file a fresh acknowledgment of service, in which case he is treated as having accepted that the court has jurisdiction: English CPR r.11(8). These provisions are not consistent with their application to defendants within the jurisdiction who seek to have proceedings stayed on the ground that the courts of another country are a more appropriate forum.

64. But there is one important provision in CPR Part 11 which is inconsistent with this analysis, and the courts and textwriters have taken CPR Part 11 to have marked an important departure from the regime under the RSC. CPR r.11(6) provides:

“An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –

- (a) setting aside the claim form;
- (b) setting aside service of the claim form;
- (c) discharging any order made before the claim was commenced or before the claim form was served; and
- (d) staying the proceedings.”

65. The reference in CPR r.11(6) to an order “staying the proceedings” is inconsistent with CPR Part 11 having the same scope as RSC Ord 12, r. 8, and has been taken since the earliest days of the CPR as having been intended to bring applications for a stay of proceedings on the ground of *forum non conveniens* within the scope of CPR Part 11: see Civil Procedure, 2000 (first issue), vol 1, p 177. The edition of Dicey and Morris, *Conflict of Laws*, which appeared after the introduction of the CPR, 13th ed. 2000, para 12-032, said that the previous sharp distinction between a challenge to the jurisdiction and an application for a stay had been eliminated. A similar view is expressed by Briggs and Rees, *Civil Jurisdiction and Judgments*, 4th ed 2005, para 4. 21. In *SMAY Investments Ltd v Sachdev (Practice Note)* [2003] EWHC 474 (Ch), [2003] 1 WLR 1973 Patten J accepted (in a case involving service out of the jurisdiction, and therefore obiter) that CPR Part 11 covered cases both of foreign defendants who wished to set aside service and applications by defendants served within the jurisdiction for a stay of proceedings on *forum non conveniens* grounds.

66. Although it is inelegantly and inconsistently drafted, CPR 11(1) should be interpreted as being intended to apply to applications for stays of proceedings as well as challenges to the jurisdiction *stricto sensu*.

67. EC CPR r.9.7 is the equivalent of the English CPR Part 11. The EC CPR have provisions which are substantially similar to CPR Part 11, but EC CPR r.9.7(6), which is the equivalent of CPR r.11(6), does not contain any reference to a stay of proceedings. If EC CPR r.9.7 stood alone, there would be a strong argument for the position that it did not apply to applications for stays on *forum non conveniens* grounds, and that the reference to the defendant arguing “that the court should not exercise its jurisdiction” in EC CPR r.9.7(1) was a reference to the discretionary ground in cases of service out of the jurisdiction. But since EC CPR r.9.7 is so plainly derived from CPR Part 11, it cannot be construed in isolation. Consequently it must be interpreted as applying also to applications for a stay on *forum non conveniens* grounds.

68. It does not follow that all of the provisions of English CPR r.11(1) and EC CPR r.9.7 apply to applications by defendants within the jurisdiction to stay proceedings in favour of a foreign court. Thus the provision in English CPR r. 11(5) and EC CPR r.9.7(5) that a defendant who files an acknowledgment of service and does not make an application under the rule “is to be treated as having accepted that the court has

jurisdiction to try the claim” is superfluous in the case of a defendant within the jurisdiction, because there could never be any doubt that the court has jurisdiction over such a defendant. But in *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203, [2008] 1 WLR 806, which was not a case involving an application for a stay of proceedings, the Court of Appeal held that “the reference to the court’s jurisdiction is shorthand for both the court’s jurisdiction to try the claim and the court’s exercise of its jurisdiction to try the claim” (at [28]). In that decision the result was that a defendant who wished to set aside an order extending the four month time limit for service of the claim form, but had acknowledged service and did not make an application under CPR r.11(1), was to be treated as having accepted the court’s jurisdiction. The Court of Appeal’s reasoning (at [22]-[28]) was that even if the court had jurisdiction to try a claim where the claim form had not been served in time, it was undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. Consequently, CPR r.11(1)(b) was engaged in such a case. Service of a claim form out of time provided the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim. The defendant had not made the application in time and CPR r.11(5) meant not only that the defendant was to be treated as having accepted that the court had jurisdiction, but also as having accepted that the court should exercise its jurisdiction to try the claim.

69. It is not necessary for the purposes of this appeal to express a view on the correctness of this analysis. It is sufficient to say that it does not follow that a defendant who fails to make an application for a stay at the outset of proceedings is thereafter debarred from seeking a stay. The tight time limits in the English CPR Part 11 and EC CPR r.9.7 make complete sense in the case of applications to set aside service or discharge an order for service out of the jurisdiction. In such cases the question of jurisdiction must be decided at the outset of proceedings. The defendant abroad has several options: to ignore the proceedings; to appear and defend on the merits; to challenge the jurisdiction, and if the challenge is unsuccessful, to walk away or to defend.

70. But these provisions do not sit easily with applications for stays. For example, circumstances may change and a defendant may wish to apply for a stay well after the proceedings have commenced on the ground that the claimant has subsequently commenced proceedings in another jurisdiction for the same or similar relief, or the claimant may wish to apply for a stay of proceedings on grounds unconnected with the international character of the proceedings, for example on the ground that justice requires that civil proceedings be stayed pending the outcome of subsequent criminal proceedings arising out of the same matters.

71. In such cases the defendant will not have been in a position to apply for a stay at the outset of the proceedings. English CPR r. 11(5) and EC CPR r.9.7(5) cannot be interpreted to mean that for all purposes a defendant who has not made an application for a stay within the time limit in EC CPR 9.7 has accepted that the court may exercise its jurisdiction, and cannot thereafter apply for a stay. In *Global Multimedia*

International Ltd v Ara Media Services [2006] EWHC 3107 (Ch), [2007] 1 All ER (Comm) 1160, a Part 20 defendant out of the jurisdiction failed to make an application to dispute the jurisdiction and took steps which amounted to a submission to the jurisdiction. Sir Andrew Morritt C went on to consider (and dismiss) an application for a stay on the ground that Saudi Arabia was a more appropriate forum. No point appears to have been taken that the defendant was debarred from pursuing the action for a stay by virtue of his failure to make an application disputing the jurisdiction.

72. There is a further source in the CPR for the power to stay. EC CPR r.26.2(q), confers as part of the court's powers of management "except where these rules provide otherwise" the power to "stay the whole or part of any proceedings generally or until a specified date or event." This is in the same terms as English CPR r.3.1(2)(f).

73. The overall effect is this. A defendant served within the jurisdiction who has reasons for applying for a stay on *forum conveniens* grounds at that time should normally make the application under EC CPR r.9.7/English CPR Part 11. It is doubtful whether failure to make such an application in time means that the defendant has conclusively accepted that the court should exercise its jurisdiction, but that will not normally matter because the court has a power to extend the time for compliance with any rule, even if the application for extension of time is made after the time for compliance has passed: EC CPR r.26.1(2)(k). It has been held that even though English CPR r.11(5) (EC CPR r.9.7(5)) contains a provision deeming the defendant to have accepted the jurisdiction of the court, the court has power to extend the period in EC CPR r.9.7(3) retrospectively after the period for defence has expired: *Sawyer v Atari Interactive Inc* [2005] EWHC 2351 (Ch), [2006] ILPr 129, at [46] (a case of service outside the jurisdiction).

74. In addition, except where the consequence of failure to comply with a rule has been specified, where there has been an error of procedure or failure to comply with a rule, the failure does not invalidate any step in the proceedings, and the court may make an order to put matters right: EC CPR r.26.9.

75. Together these powers are sufficient to give effect to the overriding purpose of the jurisdiction to stay proceedings on *forum non conveniens* grounds, which is to ensure that the claim is tried in the forum which is more suitable "for the interests of the parties and for the ends of justice": *Sim v Robinow* (1892) 19 R (Ct. of Sess) 665, 668, *per* Lord Kinnear.

76. Where the circumstances which give rise to an application for a stay arise after the service of proceedings and outside the time limits in EC CPR r.9.7/English CPR Part 11, then the application may be made either under the inherent jurisdiction or under the court's powers of management in EC CPR r.26.2(q)/English CPR r.3.1(2)(f).

77. To summarise, the overall position is this: (1) if at the time the proceedings are first served, there are circumstances which would justify a stay, the application should be made promptly under EC CPR r.9.7/English CPR Part 11; (2) any failure to comply strictly with time-limits may be dealt with by an extension of the time-limits, and any formal defect in the application may be cured by the court; (3) if circumstances arise subsequently which would justify an application for a stay, the application would be made under the inherent jurisdiction or EC CPR r. 26.2(q)/English CPR r.3.1(2)(f).

(2) Does EC CPR r.9.7(4) require that the evidence in support of the application must be filed at the same time as the notice of application is filed, and, if so, does failure to file mean that the application is a nullity, or does the court have power to excuse or cure non-compliance (and if so, should the power be exercised)?

78. This point, which relates to the application by Texan and All Dragon, can be dealt with shortly. The effect of the EC CPR is as follows. The application must be supported by evidence on affidavit: EC CPR r.9.7(4). There is nothing in r.9.7 which deals with the time at which the evidence must be filed or served. It is r.11.11 which deals with service. When the notice of application is served it must be accompanied by any evidence in support: EC CPR r.11.11(4). The notice of application must be served at least 7 days before the hearing, but the court has power to direct that sufficient notice has been given: EC CPR r.11(1)(b), (3). An affidavit must be filed before it is used in proceedings: EC CPR r.30.1(6). There is nothing in EC CPR Part 11 which requires evidence in support of an application to be filed when the application is made. Nor is there anything in EC R CPR 9.7 or Part 11 which makes the validity of an application dependant on service or filing of evidence in support at the time the application is filed or served.

79. There is consequently no basis for PEWC's contention, which was accepted by the Court of Appeal, that a failure to serve evidence with the application means that the application is not made or is a nullity. The evidence of Texan and All Dragon was served on September 23, 2005, which was less than 7 clear days before the court was due to deal with the application on September 29, 2005, but no objection was taken. In any event the High Court had a discretion to treat the notice as sufficient (EC CPR r.11.11(3)) and a discretion to put matters right if there had been a failure to comply with a rule: EC CPR r.26.9(3). Although the judge did not indicate under which rule she was proceeding she plainly had a discretion to cure the defect in service, and the exercise of her discretion cannot be faulted.

80. It is only necessary to deal with PEWC's point that the judge ought to have applied the check list for relief from sanctions in EC CPR r.26.8. No question of a sanction arises. Even if PEWC were right in saying that there was no proper application under r.9.7 and therefore Texan and Dragon were to be treated as having accepted that the court had jurisdiction to try the claim, that is not a sanction, since it applies to any defendant who files an acknowledgment of service and is not in a position to contest the jurisdiction.

(3) *May the application be made within the time for defence as extended by the court, and, if not, does the court have power to excuse or cure non-compliance (and, if so, should it be exercised)?*

81. This point arises because *Blinco and Patagonia* applied for and obtained an extension of time for defence before making their application for a stay. The first question is whether this was an application “made within the period for filing a defence.”

82. There are decisions both on the RSC and the CPR in relation to extensions of time granted by agreement and by the court. It was held under RSC Ord 12, r.8 that an application contesting the jurisdiction could be made within the time for service of defence as extended by agreement: *Lawson v Midland Travellers Ltd* [1993] 1 WLR 735 (CA); *ISC Technologies Ltd v Radcliffe*, unreported, December 1990 (referred to in *Kurz v Stella Musical GmbH* [1992] Ch 196, 202).

83. But in *Monrose Investments Ltd v Orion Nominees Ltd* [2002] ILPr 267 Sir Donald Rattee, sitting as a judge of the Chancery Division in a case involving service out of the jurisdiction, held that on the then wording of CPR r.11(4) (“An application under this rule must ... be made within the period for filing a defence”) the application to challenge jurisdiction had to be made within the period for filing a defence without regard to any extension of that period by order of the court (in that case by a consent order). He relied particularly on the words in parenthesis “(Rule 15.4 sets out the period for filing a defence)”. Rule 15.4 referred to the specific periods for filing a defence (14 days or 28 days), whereas Rule 15.5 provided for extension by agreement. He rejected the argument that the words in parenthesis were intended only for guidance and should have no effect on the construction of Rule 11.4. This decision was applied in *Midland Resources Ltd v Gonvarri Industrial SA* [2002] ILPr 74 to a case of extension of time by agreement.

84. With effect from March 2002, English CPR r.11(4)(a) was altered so that the application was to be made within 14 days after filing a acknowledgment of service. It has been held that as a result of this change a request for an extension of time for defence is capable of being a submission to the jurisdiction: *Burns-Anderson Independent Network Ltd v Wheeler* [2005] EWHC 575 (QB), [2005] 1 Lloyd’s Rep 580 (a case of a defendant outside the jurisdiction). The EC CPR has not been changed.

85. It is doubtful whether the decision in *Monrose Investments Ltd v Orion Nominees Ltd* is correct, but it does not apply to the present case. EC CPR r.9.7(3) has a note to the effect that r.10.3 sets out the period for filing a defence. EC CPR r.10.3 deals not only with the initial time periods but also provides for extension by agreement or order of the court. Consequently even if *Monrose* were right, its reasoning would in any event lead to the conclusion that the application was made in time. The Court of Appeal relied on EC CPR r. 12.5(b) which deals with default

judgments and draws a distinction between “the period for filing a defence” and “any extension agreed by the parties or ordered by the court.” But this rule deals with a different subject matter and is of no assistance on the question whether the reference to r.10.3 in the note to r.9.7(3) is only to the initial time period.

86. The application for an extension of time for defence was not a submission to the jurisdiction because Blinco and Patagonia were in any event subject to the jurisdiction as BVI companies. Nor can it be regarded as an unequivocal recognition that it was appropriate for the court to exercise its jurisdiction. Consequently it is not necessary, as the judge thought, to resort to the inherent jurisdiction. There was no waiver of the right to apply by virtue of the application for an extension of time, and the application was made in time.

Conclusions on the procedural points

87. The effect is that the appeal should be allowed. As regards Texan and All Dragon, there was a valid application for a stay. The Court of Appeal was wrong to find that because no evidence was filed with the application, there had been no valid application. There was a minor procedural defect in not serving the evidence with the application, and the judge properly exercised her discretion to excuse it. As regards Blinco and Patagonia, there was a valid application, and the Court of Appeal was wrong to find that the application could not be made within the time for defence as extended by the court.

(4) Forum non conveniens

88. The result of the appeal on the procedural issues is that the appeal from the judge’s decision on the *forum conveniens* issue must be decided. The first question is whether the Board should consider the substance of the appeal, or whether it should be remitted to the Court of Appeal. The Board’s view is that the matter has been fully argued and the appeal is within a narrow compass, and in those circumstances there would be no point in causing yet further costs by remitting the matter to the Court of Appeal.

89. PEWC does not suggest that the judge misunderstood the *Spiliada* principles. All that is said is this: (a) because the BVI proceedings concern the ownership of shares in BVI companies, only the BVI court can give effect to the claim to relief relating to the shares, such as rectification of the register; (b) the two sets of proceedings have different issues and aims: the Hong Kong claims relate to property located in Hong Kong, whereas the BVI proceedings concern the determination of ownership of companies incorporated in the BVI and the relief sought in the BVI is not capable of being sought in Hong Kong; (c) as for availability of witnesses, the matter would be unlikely to go to a full trial because there was cogent evidence on which summary judgment might be granted, but in any event the majority of witnesses were outside Hong Kong; (d) the judge failed to take account of or give proper weight

to the fact that the claims in the two sets of proceedings involved distinct causes of action and claims for relief.

90. There is nothing in the point that only the BVI court could make orders with regard to the shares in BVI companies. It is true that only the BVI court can make an effective order for rectification of the share register, but if PEWC succeeds in Hong Kong it is certain that there will be issue estoppels which will enable it to obtain any necessary relief in the BVI.

91. It is also true that the judge may have oversimplified the position by saying that the principal issue in the BVI proceedings as well as the Hong Kong proceedings was the ultimate beneficial ownership of the PacMos shares (as distinct from the commercial object of both actions, which is the ultimate recovery of the PacMos shares). In the Hong Kong action the subject matter of the action is said to be the PacMos shares (para 4). In the BVI action the object is said to be the recovery of PEWC's interest in Texan, All Dragon, Blinco and Patagonia, which is expressly contrasted with the object of the claim in the Hong Kong action which is said to be the recovery of PEWC's interest in the PacMos shares (para 5).

92. There is no direct overlap between the formal relief sought in the prayers in the two actions. There was a claim to the ownership of All Dragon in the Hong Kong action, but it is no longer pursued. But it is plain that the ownership of the shares in Texan is in play in the Hong Kong proceedings because Saunders J on the summary judgment application made a declaration that "PEWC is the sole beneficial owner of the property holding companies (ie Texan [and others])" ([2008] HKLRD at 398). So also the body of the Hong Kong pleading makes that claim as regards Blinco and Patagonia (para 20(b)). Further, it is also clear that if both actions went further, and if the principal allegations were contested, there would no doubt be many common issues. They include: (1) Whether PEWC's funds were used as payment for the shares of Texan and its interest in Texan (Hong Kong action, paras 28-31, 34, 52-55; BVI action, paras 7, 8, 9, 29-30); (2) the circumstances of Texan's purchase of the PacMos shares (Hong Kong action, paras 33, 35, 36, 42, 43; BVI action, paras 10, 13, 14, 23, 24); (3) the ownership of All Dragon (Hong Kong action, para 51; BVI action, para 28). In addition in Action 2763 of 2004 in Hong Kong PEWC claims a declaration that Blinco and Patagonia hold all the shares of PCHL. A similar claim for a declaration in the BVI action was deleted by amendment, but the allegations continue to be reflected in the Re-Amended Statement of Claim, paras 44, 62-63, 69-70.

93. In the Court of Appeal, against the opposition of the defendants, PEWC was allowed to adduce (a) a statement made to the Taiwanese prosecution authority (by a former member of KPMG who was later recruited to work for PEWC by one of the three directors) that Blinco and Patagonia were incorporated for PEWC by KPMG and that they were beneficially owned by PEWC; and (b) other documents showing that Blinco and Patagonia were incorporated for Pacific. This evidence was not answered by the defendants or evaluated by the Court of Appeal. The fact that this material

might have provided a basis for a summary judgment application in the BVI action would not be a sufficient reason for re-evaluating the judge's exercise of discretion.

94. PEWC has not been able to point to any error of principle, nor to any matter which the judge wrongly took into account, or wrongly failed to take into account, nor has it been able to show that she was plainly wrong. There is therefore no basis for interfering with the judge's decision on this ground: e.g. *The Abidin Daver* [1984] AC 398, at 420.

95. It only remains to be mentioned that the stay is not a permanent one and it remains open to PEWC to apply for it to be lifted if circumstances change or new evidence which could not previously have been obtained comes to light.

96. Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and that the order of Hariprasad-Charles J be restored. The parties have 14 days in which to make written submissions as to costs.