IN THE COURT OF APPEAL AT NAIROBI

(Coram: Madan, Kneller & Hancox JJA

CIVIL APPEAL NO. 36 OF 1983

Between

UNITED INDIA INSURANCE CO LTD.....APPELLANT

AND

EAST AFRICAN UNDERWRITERS (KENYA) LTD.....RESPONDENT

(Appeal from the High Court at Nairobi, Platt J)

JUDGMENT

February 15, 1985, **Madan JA** delivered the following Judgment.

This appeal arises from two consolidated cases being Suit No. 4141 and No. 4142 of 1979 which were instituted in the High Court by the respondent (plaintiff) a limited liability company incorporated in Kenya. The first defendant in each case were the first two appellants the United India Insurance Company Limited, and the Oriental Fire and General Insurance Company Limited respectively. They are both incorporated in India; they are registered as two foreign companies under the Kenya Companies Act. They both carried on insurance business in Kenya.

The Kenindia Assurance Company Limited is a limited liability company incorporated in Kenya. It was the second defendant in both cases having been joined as a necessary party in the proceedings as it has been carrying on the business of insurance in Kenya since the July 27, 1979 when it assumed the responsibility for the due fulfillment of all the existing and pending obligations and also took over all the rights of the insurance business of both the United India and Oriental. These three insurance companies are hereafter collectively referred to as the defendants.

By an agreement in writing dated December 23, 1968 and made between the therein described British India General Insurance Company Limited (BIG) and the plaintiff (which agreement together with an agreement dated March 17, 1969 and made between the Oriental and the plaintiff and hereafter together referred to as the two agreements) both BIG and the Oriental appointed the plaintiff as their “Chief Agent” respectively, except for one additional appointment in each case which have no bearing upon these proceedings, for the carrying on of insurance business within the Republic of Kenya with effect from the January 1, 1968 at the remuneration and upon the terms and conditions therein stated. BIG merged with United India on January 1, 1974 which took over all the existing and pending rights and obligations of BIG, including the agreement with the plaintiff.

The plaintiff’s case is that save for the two exceptions mentioned at all material times it carried on the business of insurance in Kenya on behalf of and as the sole Chief Agent of BIG and United India, and as the Chief Agent of the Oriental respectively, on the terms and conditions set out in the two agreements;

that as from January 1, 1974 the United India and Oriental committed breaches of their respective obligations under the two agreements, by writing, securing, obtaining and procuring insurance business in Kenya directly through and from their own employees , persons and agencies other than that of the plaintiff, and, they continued so to act until October 1, 1976 when the Chief Agency of the plaintiff was terminated by both the United India and Oriental under the two agreements. As a result of which, states the plaintiff, it suffered loss and damage entitling it to the various reliefs set out in the two plaints against the defendants.

The two plaints draw attention to an identical exclusive jurisdiction clause in each of the two agreements reading as follows:

> "All suits and other legal proceedings and all arbitrations in connection with this agreement and touching the rights of the parties herein shall be governed by the law prevailing in the Domain of India to the exclusion of all other laws and courts of Bombay alone shall have the jurisdiction to entertain any disputes between the parties."

The plaintiff maintains that in neither case should the exclusive jurisdiction clause be enforced it being not binding upon the courts in Kenya which should assume jurisdiction over the two suits rather than the court in Bombay. The defendants entered appearance under protest. They also moved the court for orders to stay all further proceedings, or alternatively, that the two suits be dismissed as against them on the ground that the parties agreed that the courts of Bombay alone shall have jurisdiction to entertain any disputes between them under the two agreements. Two affidavits in support of the motion *inter alia* deponed that the High Court of Kenya had no jurisdiction to entertain the two suits.

An affidavit in reply sworn on February 27, 1981 by a director of the plaintiff company *inter alia* deponed that it is common knowledge that there are several thousand cases pending before the High Court of Bombay, and if the plaintiff is compelled to take its cases to Bombay it is unlikely to see the light of the day for "the best part of the present decade". Platt J exercising the discretion of the court, refused to stay the proceedings. Hence this appeal. The memorandum of appeal complains that the learned judge erred in not appreciating that there should be strong grounds for not enforcing the exclusive jurisdiction clause to give effect to the intention of the parties; in not giving proper consideration and effect to the period of three years limitation in India; in failing to consider what principle issues are likely to arise at the trial, and whether the witnesses and documentary evidence are mainly situated in India or Kenya; in having regard to the balance of convenience; in exercising his discretion in favour of the plaintiff and following the test suggested by Lord Denning MR in the *Fehmarn*, [1958] 1 WLR 159; and in taking into account the alleged delays in the courts of Bombay.

It was conceded before us that the High Court of Kenya has jurisdiction. It did. It has.

A. STRONG REASON

The courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the courts of some other country. The exclusive jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement.

> "Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. There must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reasons for such departure"

per Cairn LJ, in the *Makefjell* [1976] 2 Lloyd's Law Reports, Part 1, 29 at p 34.

In order to cut down an unnecessary and long argument, we refer to the indication recently given by this

court in *Carl Ronning v. Societe Navel Chargeurs Delmas Vieljeux and The Svedel Line*, Civil Appeal No. 16 of 1982, that strong reason is a pre-requisite to the exercise of the court's discretion not to give effect to the exclusive jurisdiction clause, the onus of proving strong reason being upon those who seek to avoid it. In my view the burden is a heavy one. The indication was given by repeating Sir Gordon Willmer's following direction sitting at first instance, in *The Fehmarn* [1957] 1 Lloyd's Law Reports 551:

> "Where there is an express agreement to a foreign tribunal it clearly requires a strong case to satisfy this court that that agreement should be overridden and that proceedings in this country should be allowed to continue".

The two leading counsel who travelled from abroad to appear before us to argue the appeal on behalf of the defendants and the plaintiff respectively would not appear to have had their attention drawn to Carl Ronning by the local advocates instructing them.

B. TIME BAR

Limitation is a different matter. Although counsel before Platt, J seemed to agree that the period in Kenya is longer than the three year period in India, therefore, the plaintiff's claim would be time barred in India, I would not accept counsel's view as final, not until a pronouncement thereon by the last court in the country. We are aware of numerous cases seemingly time-barred being allowed to remain or become alive by the courts. All that can be said is that time bar seems to favour the defendants. If it is a factor which tells in favour of the defendants and a stay, Lord Justice Stephenson pointed out in the *Adolph Warski* [1976] Lloyd's Law Rep Vol 2, part 3, 241 at p 247, that this view of a time bar was rejected by Lord Justice Cairns in *The Eschersheim* [1976] A UER 442 at pp 89 and 451-2. Platt J said that the law of limitation is procedure law governed by the *lex fori*, apart from the law of prescription. So it is.

In the line of the argument now under discussion I would prefer to treat it as a neutral factor which should not influence the decision of these cases one way or the other, as did Sir Gordon Willmer, Lord Justice Stephenson expressing his 'inclination' to agree, in *The Adolph Warski* (*supra*) at pp 246 and 247. In these two particular cases it also possesses a strongly inducing influence as a factor operating against a stay of which I speak quite unperturbed in any way; for, conversely, a stay will deprive the plaintiff of a legitimate juridical advantage by being non-suited because of the time bar in Bombay. Sir Gordon Willmer also said it appears that in the United States the court may be prepared to decline jurisdiction on account of a foreign jurisdiction clause, but only on terms that the claim shall not be defeated by the application of a time bar (*ibid*). The defendants have given no indication of any such abstinence.

C. ISSUE AT THE TRIAL AND BALANCE OF CONVENIENCE

The balance of convenience is not necessarily a decisive factor, nevertheless, it is an important factor. It's weight cannot be ignored, it has to be added to the other factors. The result may be a tilting of the balance to build up strong reason.

Two of the principles established by the authorities mentioned by Brandon, J in *The Eleftheria* [1970] p. 94 at p 100 are (a) in exercising its discretion the court should take into account all the circumstances of the particular case; (b) in particular, but without prejudice to (a), the following matters, where they arise, may properly be regarded:- (i) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the court of the country and the court of the foreign country. (ii) whether the law of the foreign court applies, and if so, whether it differs from the law of the country in any material respects (iii) with what country either party is connected, and how closely (iv) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantage (v) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, be unable to enforce any judgment obtained, be faced with a time bar not applicable in their country.

The two plaints give a clear idea of the issues likely to arise at the trial. The starting point is that Kenya is a natural forum for the dispute where all breaches are alleged to have taken place; therefore the evidence

of the issues of fact is both wholly situated and more readily available in Kenya as also are all essential witnesses. There ought to be no witnesses directly connected with the dispute in Bombay. The relative convenience is centred in Kenya. If the stay is not refused numerous witnesses, some big, some small, may have to travel from Kenya to Bombay at enormous expense. Some may even refuse to travel. They will not be compellable. The expense of the trial in Bombay would be staggering. The documentary evidence should be in the possession of Kenindia, or easily procurable by it, as the assignee or successor to the United India and Oriental. The evidence could be comfortably evaluated in Kenya. The two agreements embody tables and set out the method for calculating the plaintiff's remuneration as the Chief Agent. We have qualified professional accountants and auditors operating in Kenya who could carry out the tasks satisfactorily.

It seems to be agreed that the law in Kenya and the law in Bombay are the same on the subject. Two out of the four parties are closely connected with Kenya, i.e. the plaintiff and Kenindia in as much as they are both locally incorporated companies. Their voluntary domicil of choice is Kenya. They should both be happy battling on home ground. Kenya is a natural forum for both. Kenindia should not be allowed to stray away from its domicile of choice where it came into being upon being incorporated in Kenya. The plaintiff will be subjected to the inconvenience, the expense and hazard of suing Kenindia in Bombay, and have to apply to serve the writ outside the jurisdiction, possibly involving a long wrangle, when both the plaintiff and Kenindia are already within the jurisdiction. Kenindia may refuse to recognize the jurisdiction of the court in Bombay.

The United India and Oriental are both foreign companies in Kenya. Having divested themselves of their rights and obligations under the two agreements in favour of Kenindia they have no immediate interest in the dispute. They have cut themselves off. They may possibly be interested in the outcome to adjust their obligations and accounts *inter se* with Kenindia. That does not concern the plaintiff, nor will it affect the course or the conclusion of this litigation.

If successful the plaintiff should not be put to the hazard of having to transfer the decree for execution against Kenindia in Kenya and facing a challenge that it may not be executed in Kenya, another possible long wrangle. Therefore it is proper advice that the plaintiff must institute its suit against the United India and Oriental in Bombay, it would still be proper advice to sue Kenindia in its own country instead of in a foreign country. There would thus be two suits; obviously it would be a matter of great convenience if they could be tried together at the same time. In the words of Brandon LJ, in the *El Amria* Lloyd's Law Reports Vol 2, Part 2, 119 p. 128;

> "I do not merely regard it as convenient that the two actions, in which many of the same issues fall to be determined, should be tried together; rather that I regard it as a potential disaster from a legal point of view if they were not, because of the risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently, in the two countries."

Suppose there are two different decisions. The parties' beards would change to white trying to reconcile them in the courts of the two different countries. In my view the defendants, in particular Kenindia, do not genuinely desire trial in Bombay and they are seeking a procedural advantage of time bar with which the plaintiff will be faced there although not applicable in its own country. The enforcement of the exclusive jurisdiction clause is shown to be "unreasonable" under the circumstances – per Chief Justice Burger of the United States Supreme Court in *The Chaparral* [1972] 2 Lloyd's Rep 315.

D. THE FEHMARN:

Lord Denning MR, said:

> "Then the next question is whether the action ought to be stayed because of the provision ... that all disputes are to be judged by the Russian courts ... I do say that the English courts are in charge of their own proceedings: and one of the rules they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which the courts of this country will pay much regard and to which they will normally give effect but it is

> subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them .. the dispute is one that properly belongs for its determination to the courts of this country. But still the question remains: Ought these courts in their discretion to stay this action? ...
>
> I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country is the dispute more closely concerned ... I think the dispute is more closely connected with England than Russia, and I agree with the judge that sufficient reason has been shown why the proceedings should continue in these courts and should not be stayed."

Platt J pointed out that *The Fehmarn* has been received in India.

Mr Buckley for the defendants argued that Lord Denning. MR, himself referred to *The Fehmarn* as an exceptional case in *YTC Universal Ltd. v Trans Europa Compania de Aviacion* S.A. [1973] 1 Lloyd's Rep 480, and the trial judge ought not to have allowed himself to be influenced by it. I assume Mr. Buckley was saying the trial judge misdirected himself. However, Sir Gordon Willmer explained in *The Makefjell* (*supra*) pp 38, 39, that the similar statements of the principle to be followed have been made in numerous cases both at the first instance and in the Court of Appeal, which he proceeded to cite including the *YTC* case and the United States Supreme Court *Chaparral* case (*supra*).

Sir Gordon Willmer also said that the words used by Lord Denning, to wit, "unless the case is exceptional" were really used as being equivalent to what he had already said himself, namely, "unless there is strong reason". Once the general rule is accepted that parties who have agreed to the exclusive jurisdiction of a foreign court should be held to their bargain, any departure from that rule must of necessity be regarded as to that extent exceptional, and the only question can be whether the case is so exceptional as to justify holding that there is strong reason for departing from the rule. Cairns LJ pointed out, p34, that the word "exceptional" had not been used in any of the reported cases on this topic except *YTC Universal v Trans Europa de Aviacion* (*supra*), and there it appeared to have been used only as another way of saying that strong reasons are required. Lord Denning, MR's reference to the *The Fehmarn* showed that he was not proposing any novel test.

E. DELAYS IN COURTS OF BOMBAY

By his affidavit the plaintiff's director was asking the court to take judicial notice of a notorious fact which was within his own knowledge. One ought not to adopt semantic evasions by taking the pose of an ostrich in a matter of this kind. Two near enough examples are *Dennis v King*, [1916], 2 K.B 1 & 6 where judicial notice was taken that the streets of London are crowded, and dangerous.

In *Holloway v. Povey [1984] 271 EG 195*, the Court of Appeal held that a whole season's growth (garden) without doing anything about it, could constitute deterioration (of dwelling house) of which judicial knowledge could be taken. *The Law Society's Gazette, Vol 81, No 40, 1 Nov 1981, p 3083*.

Sarkar on Evidence, 10th Ed P 517, tells us that some facts are so notorious in themselves or of such public (knowledge) and universal character that the court is bound to recognise and take notice of them. Such facts do not require proof. No exhaustive list of such notorious facts has been or can be made for they are too numerous, and of an increasing trend; no limit can be set to their numbers.

The doctrine of judicial notice

> "is an instrument of great capacity in the hands of a competent judge, and is not nearly as much used, in the region of practice and evidence, as it should be ... The failure to exercise it tends daily to smother trials with technicality and monstrously lengthens them out"(Thayer Pr. Treatise, 1898, p 309).

In *Commonwealth & C. v. Peninsular & C.*, [1923] A.C 191, p. 210, Lord Summer said:

> "To require that a judge should affect a cloistered aloofness from facts that every other man in court is fully aware of, and should insist on having proof on oath of is a rule that may easily become pedantic and futile". Lord Diplock recognised the usefulness of the doctrine of judicial notice when he said in *The Abidin Daver* [1984] WLR 196 at pp 202, 203 "The possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether for ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts or unavailability of appropriate remedies".

Judicial notice taken of a fact merely dispense with proof but it is not conclusive, and a party is not prevented from disputing its correctness by offering proof (Sarkar, *ibid*). The defendants offered no proof.

F. EXERCISE OF DISCRETION

is of daily occurrence in the court. The principles upon which the exercise of the court's discretion should take place have been repeatedly stated; nevertheless mishaps continue to occur. So I state the principles again.

The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong. In my view Platt J did not err on any of these matters. He said this litigation should proceed close to the scene. He was right. It is litigation which properly belongs to this country. I would dismiss the appeal with costs. As Kneller and Hancox JJA agree it is so ordered.

Kneller JA. I agree that this appeal must be dismissed with costs.

The issue before Mr Justice Platt was whether to allow or to refuse the appellants' application for the stay of the respondent's actions. This was a matter for the exercise of his discretion for he undoubtedly had jurisdiction to try and determine then to stay them. He exercised his discretion one way, namely, by deciding not to stay them. The grounds on which this court should interfere with the exercise of the discretion are limited. They were adumbrated recently in Lord Brandon of Oakbrook's speech in the *Abidin Daver* [1984] 2 WLR 196, 211 (HL) for appellate courts in England, and again Madan JA today in this appeal for appellate courts in Kenya in much the same terms.

The appellants have not persuaded me that Mr Justice Platt's exercise of his discretion was plainly wrong or was the result of any misdirection or non-direction of law or fact.

He applied, in effect, the principles Lord Brandon has formulated from the time he was the judge at first instance in *The Eleftheria*, [1969] 1 Lloyds Law Reports 237 and in the Court of Appeal in England in the *El Amria*, [1981] 2 Lloyds Law Reports 119. I respectfully tried to bring them to bear in the High Court at Mombasa in *Carl Ronning v. Societe Navale Chargeurs Delmas Vieljeux*, Mombasa High Court Civil Suit 359 of 1980, and the Kenyan Court of Appeal approved of and adopted them in the appeal that followed on February 9, 1984.

The appellant's opposition to the respondent's application to stay might have prevailed and they condescended to furnish the judge with some details of what their defences to the actions might embrace (e.g. litigation and or the construction of the terms of the agreements only) together with the number, names and whereabouts of their essential witnesses. A credible forecast of when the relevant Bombay court would determine the probable issues in the suits by some Bombay court official or an advocate whose practice includes insurance litigation in that court might have helped for, with all due respect, the affidavit of a company director living and working in Kenya was not strong evidence of which Bombay

court would be seized of these suits or of how long it would take to dispose of them and I would not have taken judicial notice of either fact. The appellants were entitled to withhold all this material from the judge at first instance, it is true, but they did so at their peril as they will, presumably, now appreciate.

Hancox JA. In these two consolidated actions which are the subject of the present appeal, the High Court sitting at Nairobi (Platt J) refused an application for a stay of the proceedings commenced by separate but almost identical plaints filed in the High Court of Kenya on December 28, 1979. The memorandum of appearance were entered under protest and no defences were filed.

The appellants, who are respectively the successors to the British India General Insurance Company Ltd. (big), the Oriental Fire And General Insurance Company (OF&G), and The Kenindia Assurance Company Ltd which has, within Kenya, assumed responsibility for all those two parent companies' rights and obligations since July 27, 1979 had appointed the respondents as their Chief Agents in Kenya with effect from January 1, 1968. They did so under two agreements (both called "the 1968 Agreements) stated therein to be made at Bombay in India, and dated respectively December 23, 1960 and March 11, 1969. The insurance business thereby contemplated covered almost all aspects in the insurance field, and is set out in detail in sub-clause (1) of clause 2 of the two Agreements.

Both Agreements contained that which is described as an exclusive jurisdiction clause, but which may, equally accurately be referred to as a forum selection clause, which stated:

> "All suits and other legal proceedings and all arbitrations in connection with this Agreement and touching the rights of the parties herein shall be governed by the law prevailing in the Domain of India to the exclusion of all other laws and courts of Bombay alone shall have the jurisdiction to entertain any disputes between the parties."

The respondents complained that the appellant had, in breach of the 1968 agreements, between January 1, 1974 and October 1, 1976, obtained and procured insurance business in Kenya through their employees, and through persons and agencies other than the respondents.

The issues for determination by Platt J on the motion for a stay of the proceedings were identical in each case. They were whether the court should compel the parties to honour the jurisdiction clause in the agreement, into which they had voluntarily entered, or should allow the action to proceed in Kenya on the grounds that all the insurance business transacted under the agreements was in Kenya, that the premiums, commission and other monies were earned, payable and received in Kenya, that the alleged breaches of contract occurred in Kenya, that the second appellants in each case, the Kenindia Assurance Company Ltd. which had assumed all responsibility for the parent companies' obligations here is domiciled in Kenya and that all the witnesses and documents which would be necessary for the trials are situated in Kenya. The appellants have now appealed to the court against Platt J's order refusing the stay.

Mr Buckley, who led the case for the appellants on the appeal, strongly submitted that the learned judge, while paying lip service to the correct test to be applied, which is that an exclusive jurisdiction clause should always be enforced unless very strong reasons, the burden of showing which in this case lay on the respondents, are shown to the contrary, had not in fact done so. He had in effect decided, *inter alia*, because of the location of the witnesses and documents, that the balance of convenience lay with the trial proceeding in Kenya, which, of course, and I accept this, is not by itself enough to displace the rule that parties will, under the laws applied in any common law system, be held to the bargain which they have freely undertaken. To put this in the colourful way expressed recently by Lord Brandon Of Oakorook, as he now is, in *The Abidin Daver* [1948] 2 WLR, 196, which I think fairly summarises Mr Bucley's submissions on this aspect of the case, " while paying lip service ... his (the judge's) heart was not really in what he felt obliged to concede."

The facts and background to the present cases have already been set out in detail in the judgment of Madan JA, which I have had the advantage of reading in draft. I need not repeat them save to the extent of the summary I have already given. Most of the basic facts, upon which the application for the stay was resisted, are set out in the affidavit of Mr Krishman, a director of the respondent, and in particular in

paragraph 3 thereof. Mr. Buckley stated that his clients did not dispute the facts contained in subparagraph (a) to (f) in that paragraph, and he had no substantial quarrel with sub-paragraph (g). But as regards sub-paragraph (h), he said, who were the witnesses contemplated and how many? The respondent had not condescended in its affidavits to give the names and particulars of those witnesses, so how could the court possibly say, even if the balance of convenience was the criterion, that it lay in that respect in having the trial in India?

The reply of Mr. Kemp, appearing for the respondents, to this contention was that, as stated in their pleadings, the respondents' could not give any particulars as to witnesses, or otherwise, until they had the necessary information as regards the insurance business conducted and the accounts kept during the currency of the agreements (which were terminated by notice thereunder on October 1, 1976). This had, until now, been withheld from them by the appellants, and would probably continue to be withheld until discovery is ordered in the action, wherever and whenever it takes place. At this juncture I observe that the appellants have not filed any affidavits, save those in support of the respective notices of motion, in answer to the facts stated in that of the respondents, and while I agree with Mr Buckley that it is perfectly open to a defendant to adopt this course, and to say to the opponent merely "you establish your case against us, we say there is none to answer," it often puts the court in the position, as happened in this case, that it will accept the facts substantially as stated by the only deponent.

The correct test in determining the effect of jurisdiction clauses, as it had been held to be in that and subsequent decisions of the Court of Appeal in England, was stated by Willmer J, as he then was, in *The Fehmarn* [1957] Lloyds Law Reports, 511, as follows:-

> "Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be overriden and that proceedings in this country should be allowed to continue."

The subsequent decisions to which I refer are, *inter alia*, *The Chaparral* [1968] 2 Lloyds Law Report, 158 and *The Makefjell* [1976] 2 Lloyds Law Reports, 29 in both of which Willmer LJ, (as he had become) participated. Platt J in the instant case cited various portions of the judgments in the Court of Appeal in the *Fehmarn* [1958] 1 W.L.R. 150, and said that he recognised the importance of following the clearly stated intention of the parties. He also referred to *The Eleftheria* [1969] 1 Lloyds Law Reports, 237. He said that he regarded that authority as a most useful case pointing out the indices upon which this kind of case can be decided. I would go further. I would say that the depth and detail into which Brandon J (as he then was) went in that case is such that the principles which he there propounded for the purpose of deciding the issue of the forum, have not only reinforced but have supplanted the earlier test applied by Willmer J. They were applied and approved of, in particular, in the most recent case of *The El Amria* [1981] 2 Lloyds Law Reports, 119, in which Brandon LJ delivered the leading judgment and applied his own, earlier, principles, and in which, Stephenson LJ referred to them as "cardinal principles". The principles, *in extenso*, are:-

> "(1) where plaintiff sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such a strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case."

It is important to observe that in the only, recent decision of this court regarding an exclusive jurisdiction clause, *Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux and The Svedel Line*, Civil Appeal 16 of 1982, the trial judge's consideration of the matters which Brandon LJ had said were to be taken into account in applying the cardinal principles was expressly approved by the majority of the court. This, as did our adoption of Brandon LJ's principles in relation to the occasions of which a Court of Appeal is entitled to interfere with the exercise of a judge's discretion seems to have escaped the attention of those instructing leading counsel in this case until a late stage.

The matters to which Brandon J had said the court should pay particular regard in exercising its discretion, always bearing in mind cardinal principles (2) and (3), have been set out substantially by Madan JA in his judgment , and I merely refer to them. They were likewise approved of and applied in *The El Amria* (*supra*).

The next case to which Mr. Buckley referred in the course of his submissions, and which is included in the respondent's list of authorities and in their written submission handed in advance of the appeal, was *Evans Marshall & Co ltd. v Bertola S.A.. & Another* [1973] 1 WLR, 349, the "*sherry case*", which is well known to these courts as an authority on the issue of interlocutory or temporary injunctions. The agency agreement for the marketing of sherry in the United Kingdom in that case contained a foreign jurisdiction clause, which Kerr J held amounted to an exclusive (as opposed to a non-exclusive) jurisdiction clause, and there does not seem to have been any dispute about this on the appeal. Each member of the Court of Appeal upheld the reasoning and conclusion of Kerr J at first instance, wherein, in the course of deciding that it was a proper case for the exercise of his jurisdiction under order 11 rule 1 of the Rules of the Supreme Court to give leave to serve the writ out of the jurisdiction, held that all the considerations, to which he had paid regard in the case, led him to exercise his discretion in favour of English jurisdiction, notwithstanding clause 15 of the agency agreement (the foreign jurisdiction clause, stipulating trial by the Barcelona Court.) In *The El Amria*, upon which Mr Buckley dwelt at some length, Brandon L J on the appeal took the view that similar considerations with regard to the observance of a foreign jurisdiction clause applied to actions *in rem* as to applications for leave to serve the writ outside the jurisdiction, but in *The Makefjell* all members of the Court of Appeal found it unnecessary to decide the point as to whether (as had been suggested by Kerr J in *Evans Marshall Ltd. v Bertola* there was a heavier burden on the plaintiff to displace the foreign jurisdiction clause in an order 11 case than in an *in rem* action. If, however, as was pointed out by Diplock LJ, in *The Chaparral*, the contract contains a term that the English court has jurisdiction, then the application to serve the writ out of the jurisdiction is made under rule 2, to which different consideration might apply.

The Makefjell was a decision of Brandon J at first instance, and, in the course of his judgment upholding the granting of the stay of the English proceedings, Cairns LJ, at p. 34 of the report:

> "... While no absolute rule can be laid down to this effect, the court should be very slow to refuse a stay if the claim is just the sort of claim to be rejected. When a clause of this kind is introduced into a contract it must be supposed that the parties consider that, in general, trial in the place mentioned in the clause is more convenient than trial elsewhere. It does not lie in the mouth of one party to say when a claim arises; "Although this claim differs in no way from the generality of claims that might be made by me under the bill of lading, I say that the specified place of trial is inconvenient."

And Sir Gordon Willmer said at P 38;

> "Once the general rule is accepted that parties who have agreed to the exclusive jurisdiction of a foreign court should be held to their bargain, any departure from that rule must of necessity be regarded as to that extent exceptional, and the only question can be whether the case is so exceptional as to justify holding that there is strong reason for departing from the rule. In my judgment the learned judge meant no more than this, as is, I think, made clear by the concluding words of the penultimate paragraph of his judgments, when he stated his conclusion in the following words: "The plaintiffs have failed to show sufficiently strong reason why they should not be held to contract". In these circumstances, I can find no fault with the learned judge's formulation of the principles on which his discretion should be exercised."

However, in the same volume of Lloyds Law Reports another appeal from a decision of Brandon, J, which fell on the other side of the line; namely *The Adolf Warski* and *The Sniadecki*, [1976] 2 Lloyds Law Reports, P 241. In that case, in deciding on a clause in the respective bills of lading that any claims arising thereon should be settled according to Polish Law, in relation to cargoes of melons and onions shipped on Polish ships from Chile And Peru, found to have seriously deteriorated on arrival in Swansea, in the United Kingdom. Brandon J, applying the principles of *The Eleftheria* and *The Makefjell* and, indeed, of *The Fehmarn*, held that by reason mainly of the necessity of calling evidence on both sides from English

surveyors and English plant pathologists as to the state of the cargo on arrival, there was a strong balance of argument in favour of rejecting the Polish jurisdiction clause and of trial in England.

Mr Buckley not unnaturally invited us to follow the decision in *The Makefjell* and not in the *Adolf Warski.* I do not think it necessary to say that we follow either case in preference to the other, because in both the principles applicable to the upholding or rejection of a foreign jurisdiction clause were stated by the Court of Appeal to be the same. Since *Evans Marshall & Co. v Bertola* is cited at some length in the former and in The *El Amria,* I consider it may fairly be said that the principles in that case, which was not an *in rem* action, govern an exclusive jurisdiction clause where it falls to be considered in a case such as the present one.

I now revert to the *El Amria*. This case related to a cargo of potatoes shipped from Alexandria in Egypt to Liverpool in England and the bill of lading contained a jurisdiction clause similar to the one in the present case, the principal place of business of the carrier being Egypt. Sheen J decided in favour of rejecting the clause in favour of the English court, but was held by the Court of Appeal to have erred in principle in three respects in weighing up the relevant factors, with the consequence that the Court of Appeal exercised its own discretion and, applying the cardinal principles to the same factors, arrived at the same result. They deprecated the comparison made by Sheen J between the two systems of law, resulting in a supposed inferiority of the Egyptian system, adding a quotation from Willmer J in *The Fehmarn* (*supra*), which I think is important to bear in mind in considering the present case, as follows:-

> "...the court must assume, and I do assume that equal facilities for trying the case exists in this country, and that the parties will get just as fair a trial in Russia as they will get here."

I would finally observe in regard to the *El Amria* that in addition to the presence of both sides expert surveyors and agronomists in England (a factor regarded as decisive in *The Adolf Warski*) the court regarded it as undesirable that as the result of a second action which had had to be commenced in England against the dock company, there would be the risk of different decisions on the same issues by courts in two different countries. Both these factors were regarded as dominant by Brandon LJ in The *El Amria*, and led him to uphold the decision of the trial judge, despite misdirections, which he held to have occurred, in refusing the stay. Mr Buckley advances his argument in relation to the *El Amria* in this way.

He says that such is the power of an exclusive jurisdiction clause that only those dominating considerations, to which I have just referred, plus all the other factors in the *El Amria*, could displace it, and that there is nothing like that in the instant case. I fully agree that the rule that the parties should be held to their bargain should only be departed from in an exceptional case. This rule was expressed very forcefully, even in the pre *Eleftheria* days, in *The Chaparral* by both Willmer and Diplock LJJ . The reasons for this were put very clearly by Sheen J in *The Kislovodsk* [1980] 2 Lloyds Law Reports, 183 at p 186 as follows:-

> "I am prepared to assume that the unrecovered costs of proceedings in Russia exceed the amount of the costs which probably would not be recovered in England: But that is a part of the system of justice to which the plaintiffs agreed to submit when the bills of lading were signed. If it is thought that the system of administering justice in USSR has built into it some aspect which appears unfair to litigants that will be a good reason for not signing bills of lading which contain a clause giving exclusive jurisdiction to the courts of the USSR. But it seems to me that it does not lie in the mouth of a party who agreed to such a clause to say, when the clause is invoked, that the cost of proceeding in Russia is expensive."

The trial judge held here that this case was exceptional and he gave valid reasons for so doing. I agree with those reasons, and I would add emphasis by reciting one or two passages from Kerr J's judgment 'in *Evans Marshall & Co Ltd v Bertola*, which as I said, was wholly upheld in the Court of Appeal. In exercising his discretion to reject the Spanish jurisdiction clause Kerr J said:

> "My first reason is that this is a case of which the substance is exclusively concerned with this country. It is a battle about the proper marketing of sherry in the United Kingdom. Bertola have

> claimed to be entitled to terminate this agreement because they contend that Evans Marshall has failed in their obligations as distributors in this country, not only by their conduct during the summer of this year but for some years past. They say that for years Evans Marshall have pursued the wrong policies about pricing and advertising their sherry here, and in failing to try and market medium and dry as well as sweet sherry of their manufacture. They say that when it was recently suggested to Evans Marshall that these policies ought to be changed Evans Marshall wrongly maintained that their previous policies were right. They also contended that in different ways Evans Marshall were in breach of the agreement because they marketed a competing wine and because they are in a group which sells other sherries. Finally, as I have also already mentioned, they contended that the agreement is void under the principles of English Law and public policy because it is unreasonable in restraint of trade.
>
> Whatever may be the right view about all these allegations, all the essential witnesses concerning these issues are here, and all these issues essentially related to the marketing conditions of sherry in this country and nowhere else. The battle is in effect one between two groups of distributors of sherry and other wines in this country. It is my view in the interests of justice that the rights and wrongs of this conflict should be tried in the English Courts, and not in the Spanish Courts through interpreters. A trial in Spain would not be likely to be as satisfactory as a trial in England on issues such as these. The judge would probably be unfamiliar with the English language, and almost certainly with English marketing conditions and practices which it would be relevant and helpful for the court to know about, at any rate by way of background, in a battle such as this."

As regards the celerity of the proceedings of Spain, a factor which has, of course, been raised in paragraph 4 of Mr Krishnan's Affidavit in this case, which Mr Buckley criticised as incompetent for him to give, though, with respect to him, I cannot really see why, this consideration was also present to the mind of Kerr J, when he said:-

> "Finally, there is the incontradicted evidence that proceedings in Spain would be - and I quote – "extremely slow." It would take two to three years before the case would get to the Court of Appeal, and then a further five or more years would elapse if one party took it to the Supreme Court. I am not satisfied that there is any machinery under Spanish Law to protect Evans Marshall's position meanwhile. Indeed, it is the evidence on behalf of the defendants here that the Spanish Court would grant no interlocutory relief, and there appears to be no procedure for a speedy trial."

Now, it is not suggested, and I am not suggesting, that there would be anything like the difficulties in trial in India that were said to exist in Spain, but the fact remains that there is on record a sworn uncontradicted, statement as to the overloading of the lists in Bombay. I do not see why a director of a company should not so state, if, as he says it is common knowledge, even though he is in Kenya. This was one of the factors, which was noted and taken into account, though with some reservation, by Platt J, who also said:

> "Having considered the whole matter, and while agreeing that it is exceptional not to follow the clearly stated intention of the parties, this is a dispute arising out of a trade war between Insurance companies in this country. It is far better to have this war ventilated here, close to the scene. The law to be applied will not be materially different; but the possible technicality of the shown period of limitation in India should not prevent such ventilation here, when the contract has been performed. It is I think very clear that the contract is closely connected with Kenya. I hesitate to draw parallels between the performance of various courts; but I may state that a proper trial within a reasonable time can be held here. I think that, generally, from the point of view of the evidence given by witnesses, it is more convenient to have the trial here and that the point taken about the documentary evidence does not invalidate that view. Consequently, in considering all these facts it is my view that I should exercise my discretion in this matter by refusing to order a stay or to dismiss the suit. The matter should proceed to trial."

True it is that towards the end of the passage Platt J referred to the greater convenience of a trial in Kenya, but he had at its inception recognised that it is exceptional not to follow the clearly stated

intention of the parties, and had cited *The Fehmarn*, *The Eleftheria* and *Evans Marshall & Co v Bertola*. In that passage it seems to me, with respect, that Platt J expressed admirably and succinctly his reasons for the exercise of his discretion. They bear a marked similarity to those given by Kerr J, *mutatis mutandis*, in the first passage quoted above. It is also perfectly true, that due to connexions that have existed for many years between India and Kenya, plus the fact that many Indian companies do transact business here, there might not be the same difficulties in prosecuting a claim in India as in Spain. But applying the test as to when a Court of Appeal is entitled to interfere with a judge's discretion set out by Brandon L J in *The El Amria*, and, in effect, reiterated by him in the House of Lords in the *The Abidin Daver,* (*supra*) and applied by this court in *Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux* and *The Svedel Line* (*supra*) I am not satisfied that either

> (a) The judge misdirected himself on law or (b) that he misapprehended the fact or (c) that he took account of considerations of which he should not have taken account or (d) that he failed to take account of considerations of which he should have taken account or (e) that his decision albeit a discretionary one, was plainly wrong.

It might be that, had I been hearing the matter at first instance, possibly with the benefit of factual material on both sides, I would have exercised my discretion differently. On the other hand, as Lord Reid said in *The Atlantic Star* [1974] AC 436 at p 454, there is a distinction between a case where England is the natural forum for a plaintiff, and one where he goes there to serve his own ends, in other words when he goes "forum shopping".

I do not think that can be said in this case. Kenya would seem in all the circumstances to be the natural forum, or, at all events, there is a strong case in favour of Kenya as the place of trial.

Dated and delivered at Nairobi this 15th day of February , 1985.

C.B MADAN

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JUDGE OF APPEAL

A.A KNELLER

.....

JUDGE OF APPEAL

A.R.W HANCOX

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR