Case No: 2000 Folio 1103

Neutral Citation Number: [2003] EWHC 2676 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Date: Tuesday, 4th November 2003

Before :

MR JUSTICE COOKE

- -

Between :

CREDIT AGRICOLE INDOSUEZ — **Claimants**

- v -

UNICOF LIMITED — **Defendants**

- -

Tape Transcript of Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

- -

Mr D. Foxton (instructed by **Messrs Clyde & Co.**) appeared on behalf of the Claimant
Mr M. Sullivan (instructed by **Messrs Slaughter & May**) appeared on behalf of the Defendant

Hearing date: 27th January 2003

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Approved Judgment (As Approved by the Court)

MR JUSTICE COOKE

Introduction

1 .There are three applications before this court. The first is the application of the 9th defendant, SDV, dated 20 February 2003, seeking to set aside the order of Langley J of 29 May 2002 giving the claimant, CAI, permission to serve proceedings upon SDV out of the jurisdiction in Kenya. The second is an alternative application, made by way of amendment during the course of the hearing, by SDV for a stay of the proceedings against SDV on the ground that Kenya is the more appropriate forum for the determination of the issues between CAI and SDV. The third application is CAI's application of 18 July 2003 for permission to reamend the claim form and to serve it and amended particulars of claim out of the jurisdiction on the 2nd, 3rd, 7th and 9th defendants.

2 .These proceedings arise out of financing advanced by CAI to the 1st defendant, Unicof Ltd, an English company involved in the exporting of Kenyan and Tanzanian coffee. Unicof Ltd was owned and controlled by three brothers, Hanif, Ebrahim and Karim Moledina who are the 5th-7th defendants and formed part of a group comprising companies in Kenya (that is the 3rd defendant), Tanzania (the 2nd defendant), and Dubai (the 8th defendant). The finance was provided under a facility letter dated 30 August 1994, clause 3.2 of which provided that CAI was to be secured in respect of its advances by:

> "Deposit with the bank of full sets of bills of lading or warehouse warranties or telex or facsimile undertakings from warehouses acceptable to the bank confirming coffee is stored to the order of the bank where the underlying goods have a market value of not less than 100 per cent of the outstanding sums."

3 .Between October 1998 and January 2000 CAI financed various coffee purchases by Unicof in Kenya and Tanzania in a total amount of some $6.9 million and received collateral in the form of warehouse undertakings. Kenyan coffee was stored in a warehouse called the Changamwe godown in Mombasa, for which CAI received letters of undertaking from the warehouse dated between October 1998 and May 1999 in respect of loans to purchase coffee to the tune of $1.58 million approximately. For current purposes I draw no distinction between letters of undertaking given by Notco, for which SDV apparently assumed responsibility, and letters of undertaking given by SDV itself. These undertakings lie at the root of CAI's claim against SDV.

4 .Each of the letters of undertaking took a standard form and related to a particular consignment of coffee which was to be shipped to Europe by SDV on the instructions of Unicof. By the letters of undertaking SDV confirmed that the specified parcel or parcels of coffee were held to the order of CAI and that bills of lading would be issued for them, made out to the order of CAI which would be couriered to CAI. On the strength of these letters of undertaking, CAI says that it lent Unicof the money in London which was used to purchase the coffee in Kenya, with the result that, at the time of the letters of undertaking and the ensuing loan, CAI was supposed to be fully protected and secured for the money advanced.

5 .On 22 September 1999 SDV, in response to a request from CAI, sent a fax to CAI stating the quantity of coffee then held to CAI's order according to their stock records, and advising that they would not in future be able to issue any further letters of undertaking whilst continuing to monitor the stock in hand. The fax referred to 11,230 bags of coffee held to SDV's order in joint storage with coffee for other financing banks. It appears, at least on CAI's case, that SDV abandoned the management of the Changamwe godown, which belonged to another company controlled by the Moledina brothers, and that as from September 1999 a company called SGS Kenya took over responsibility for it. SGS apparently also issued other letters of undertaking.

6 6.In October 2000 CAI, who were concerned at the lack of sales and repayments of loans, discovered that despite the terms of the letters of undertaking, no stock was held to CAI's order in the Changamwe godown. When demand was made, SDV failed to deliver up the coffee. It appeared that stock supposedly held under the letters of undertaking had been moved from the godown.

7 .On 1 November 2000 CAI commenced proceedings against companies in the Unicof Group and their principals. The claim against Unicof was made in respect of loans under the facility letter and against the other defendants for deceit. On 15 December 2000 Tomlinson J granted a world-wide freezing order which was later varied by consent to exclude the 4th defendant, Josfa, who effectively stepped out of the proceedings at that point.

8 .There followed what Mr Parson describes in paragraph 10 of his third witness statement as "prolonged but ultimately fruitless" discussions with the Moledina brothers, and the receivers and administrators of Unicof and the Uneximpt companies, in the course of which CAI gathered further information as to the fraud which had been practised upon it in order to discover what had become of the coffee purchased with advances from CAI. On what appears to be a desultory basis, but one which is certainly the subject of dispute between CAI and SDV, CAI had some discussions with SDV about the breaches of the letters of undertaking, which SDV denied from the outset.

9 .On 24 May 2002 the position was as follows, when CAI applied to join SDV in those proceedings. Unicof, the 1st defendant, had been served with a claim form in England, as had the Moledina brothers, the 5th, 6th and 7th defendants. Service had been acknowledged by Nicholson Graham Jones for those defendants and for the 2nd and 3rd defendants also, which were

domiciled in Kenya and Tanzania respectively. In July 2001 acknowledgments of service from the 2nd, 3rd and 5th-7th defendants stated that they intended to contest the jurisdiction of the court. Nicholson Graham Jones had also advised that they were on the record for the 8th defendants, another Kenyan company. The 1st defendant had gone into liquidation, with the Official Receiver appointed as liquidator. Subsequently it came to be dissolved on 22 July 2002.

10. Draft particulars of claim were supplied to these defendants, save for the 4th defendant who had dropped out of the picture in December 2000, but no particulars had actually been served because Nicholson Graham Jones had given a general extension for service of such particulars whilst discussions had been taking place between the parties. The draft particulars of claim set out the following: (1) A claim against Unicof for repayment of the loans under the facility agreement; (2) a claim against Unicof in damages for breach of contract in failing to procure or maintain the security required by the facility agreement; (3) a claim for conspiracy against Unicof and the other Unicof companies, the Moledina brothers, the 8th defendant and SDV to defraud or injure by unlawful means; (4) a claim against the 8th defendant as constructive trustee of monies received for the sale of coffee pledged to CAI; (5) a claim against SDV for breach of the letters of undertaking; and (6) a claim against SDV for deceit in sending the fax of 22nd September 1999 knowing it to be false or being reckless as to its truth with regard to the coffee stored in the godown.

11. On this basis the application was made to reamend the claim form to include SDV and to serve it on the 2nd-9th defendants out of the jurisdiction, under the terms of CPR 6.20(3) and 19.2 which provide as follows:

> "6.20. In any proceedings to which rule 6.19 does not apply, a claim form may be served out of the jurisdiction with the permission of the court if ....
>
> (3) a claim is made against someone on whom the claim form has been or will be served and -
>
> (a) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

CPR 19.2 provides as follows:

> "(2)The court may order a person to be added as a new party if -
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

<u>The application to set aside service out of the jurisdiction</u>

12. Despite challenge by SDV, I have not the slightest doubt that SDV were, at the time of the application being determined by Langley J, a necessary or proper party to the claim against the other defendants. (1) At that time the other defendants were represented by Nicholson Graham Jones. (2) Although the affidavits of assets served pursuant to the freezing order of Tomlinson J showed very limited assets within the jurisdiction and outside it, as Mr Parson says in his witness statements, there was some £35,000 to £40,000 disclosed in the shape of equity in real property, and discussions with the Moledina brothers had included reference to other family assets which had not been properly disclosed. (3) Mr Parsons has stated in one or more witness statements that it is CAI's intention to pursue the other defendants, except for the 4th defendant. (4) There is plainly, and it could not be argued otherwise, a strong prima facie case against the other defendants, involving the same substratum of facts as the claim against SDV as set out in the application. (5) If all the defendants were resident in England, there is not is the slightest doubt that it would be appropriate for the claim against SDV to be determined in the same proceedings as the claims against the other defendants.

13. Thus a claim was being made against other defendants on whom the claim form had been served and the reamended claim form would be served. There was at that time a real issue which it was reasonable for the court to try and the claimant wished to serve SDV as a necessary or proper party to those claims. It was plainly desirable to add SDV to them so that the court could resolve all the matters in dispute between the claimants and SDV, as well as between the claimants and the other defendants at the same time. All the issues which involved SDV on the letters of undertaking, the conspiracy and the deceit in the fax of 22 September 1999 were the same issues or were closely connected to issues involving the other defendants and the claims against them.

14. SDV argued that, regardless of Mr Parson's statement, as solicitor for CAI, that the proceedings would be pursued against the other defendants in the hope of recovery, the court should find that CAI would not do so, because they had done nothing since December 2000, prior to 24 May 2002 or since, to indicate that they would. They could, it was pointed out, on the basis of a statement they had obtained from Mr Ebrahim Moledina, have entered judgment against him on admissions; but they had not done that. Moreover, on 4 September 2003 Nicholson Graham Jones applied to come off the record for the 1st-3rd and 5th-8th defendants, on the ground that no funds would be forthcoming for them to continue to act. It appears, therefore,

that these defendants are unlikely to appear at any trial of the action in England and are likely to take their chances as to the enforceability of any English court judgment in Kenya, or anywhere else where any of their assets might subsequently be found. SDV maintains that a judgment of this court might not be enforceable in Kenya because of the lack of jurisdiction of the court over SDV or the other defendants who are resident there.

15. Reference to the decision of the Court of Appeal, under the old Rules, in Multinational Gas [1983] Ch 258 shows that where a cause of action exists against an English defendant, the claim is properly brought even if the predominant reason for including that person as a defendant is to found an application to join a foreign defendant, provided that the claim against the English defendant is bona fide and constitutes a good cause of action. It does not matter if the English defendant could not satisfy a judgment if the claim against that defendant is properly arguable: see the judgments of May LJ, at pp 274-276 and 279, and Dillon LJ at p 285.

16. Whilst the focus in that decision was on the wording of the old RSC Order 11(1)(i)(j) and decisions under the old Rules do not carry weight as authorities under the different provisions of the CPR, the approach is consistent with the approach that I adopt to CPR 6.20(3), which requires me to be satisfied that there was a real issue between someone on whom the claim had or would be served, whether an English or a foreign defendant, as at 24 May 2002 when Langley J made his order, which it was reasonable for the court to try. Even if the defendants had little known money to satisfy a judgment, CAI could properly take the view that it was worth pursuing them in order to obtain disclosure, in order to secure such evidence as those defendants were prepared to give, and to obtain judgment in the hope of finding other, as yet unrevealed, assets, the existence of which they plainly suspect.

17. Ultimately I cannot go behind Mr Parson's statement that these other defendants will be pursued to judgment and there were plainly issues which appeared then to be reasonable to try. SDV has never maintained that there was no good arguable case against any particular defendant, although it has drawn attention to the different versions of events that CAI has put forward and as to its conclusion as to what had happened at different points over the last three years. Having been through this material, it is clear to me that CAI's understanding has changed and developed as it has discovered more. Whereas once it thought that the stock had disappeared in 2000, KPMG's 2003 report (to I which refer later in this judgment) is convincing in showing, by reference to documents, that the coffee was not in the godown at the time of the letters of undertaking in 1998 and 1999.

18. In these circumstances, I find that the requirements of CPR 6.20(3) and 19.2 were met as at 24 May 2002 and the discretion of the court was properly exercised at that stage because, although the 1st defendant was apparently in liquidation, it had been served and the Moledina brothers had been served within the jurisdiction and, failing any application to contest jurisdiction, which had not been taken in the 20 months prior to July 2002, the case against them was going to go to trial in England. Duplication of proceedings by refusing leave to serve out on SDV so that CAI would have been driven to take proceedings in Kenya in addition to those in England was clearly undesirable and the court's discretion was rightly exercised in May 2002 in favour of service out in these circumstances. As the notes to CPR 621.6 say:

> "There is no presumption in favour of granting permission in a case falling within 6.20(3) but as the forum is already chosen the only questions that may remain are (1) is the foreign defendant a necessary or proper party and (2) is it right to bring him here as a party."

19. Langley J held, in granting permission to serve out, having been informed of potential arguments in favour of Kenyan jurisdiction, that he was satisfied that England was the proper place to bring the claims against SDV in accordance with 6.21(2A). The forum conveniens issue was effectively resolved by the necessary or proper party issue and the question of discretion under CPR 6.21. Although the burden is on a claimant to show, when seeking leave to serve out of the jurisdiction, that England is the appropriate forum where the case can most suitably be tried for the interests of all the parties and the ends of justice, the fact of continuing proceedings in England against other defendants on the same or closely allied issues virtually concludes the question, since all courts recognise the undesirability of duplication of proceedings and the lis alibi pendens cases make this clear. Although there are connecting factors with Kenya to which I refer later in this judgment, if proceedings are going on in this jurisdiction on the self-same or linked issues, this is clearly the most appropriate forum for those common and connected issues to be tried between all relevant parties.

2020. It is additionally accepted that the claim against SDV in contract, under the letters of undertaking, falls within CPR 6.20(5)(a), and I hold that the claim in deceit also falls within CPR 6.20(8)(a) since there is a strong case that the 22 September 1999 fax was received in England, relied on in England and led to advances to Unicof in London, with consequent damage sustained in England since such loans were, as it turns out, unsecured or inadequately secured and that the rights supposed to be obtained were worthless or of less value than they should have been. The conspiracy to defraud or to injure by unlawful means also brings into play this relianced loss in respect of future loans, which likewise falls within CPR 6.20(8)(a) for the same reasons.

21. Although it was argued that I could not take this into account to justify the original grant of permission to serve out of the jurisdiction, because the only ground specified by CAI when seeking permission to serve out was "the necessary or proper party" provision and CPR 6.21(1)(a) requires an applicant to specify the paragraph of 6.20 relied on, I would not regard such an irregularity as requiring service to be set aside if the unspecified grounds relied on were supported factually by the evidence adduced and the foreign defendant was not prejudiced by the later introduction of arguments based on these grounds. No such prejudice arises here as, by the time of the hearing, SDV were made well aware of the alternative grounds for service out and were prepared to deal

with them.

The remaining two applications

22. In contradistinction to the application to set aside proceedings which, as was common ground, has to be approached on the basis of the circumstances existing when permission was given on 24 May 2002, an alternative application to stay falls to be considered in the light of circumstances existing at the time of determination of the application: see ISC Technologies v Guerin [1992] 2 Lloyd's Rep 430 at pages 434-5 and Mohammed v Bank of Kuwait [1996] 1 WLR 1483 at pages 1492-3. Since May 2002 SDV have successfully contested that service was properly effected upon them in Kenya and consequently had a judgment in default of acknowledgment of service set aside by a judgment of Langley J in February 2003. This was almost immediately followed by the current application to set aside his earlier order giving permission to serve out. That application has only come before the court for determination yesterday and today.

23. As appears from the House of Lords decision in Spiliada & Maritime v Cansulex Ltd [1987] AC 460 , when a defendant seeks a stay of proceedings on the ground of forum non conveniens, although the issue is at bottom the same as for cases of leave for service out of the jurisdiction, the burden is on the defendant to show that there is another forum where the case can more suitably be tried for the interests of all the parties and the ends of justice. It is in this context that a number of different and distinct factors fall to be considered by reference to developments in the English proceedings, the connecting factors with England and Kenya, the safety of witnesses in Kenya and the recent unpublished Ringera Commission report into corruption amongst the judiciary in Kenya. SDV says that Kenya is the appropriate forum for determination of CAI's claim against it in the light of all these factors.

24. Since permission was given to serve out of the jurisdiction by Langley J, Unicof, the 1st defendant, has apparently been dissolved. It has also become clear that Nicholson Graham Jones will come off the record for the 2nd-3rd and 5th-8th defendants. Thus it appears that any proceedings in this country involving defendants other than SDV are likely to be uncontested and CAI are likely to obtain judgment in default of defence against them. CAI will then have to prove damages against them in a hearing on quantum alone.

25. As mentioned earlier, CAI seek permission to amend the claim form and serve new particulars of claim out of the jurisdiction. Those particulars are different from the particulars produced as a result of the order of Langley J because more information has come to light since in the shape of a forensic report from KPMG Kenya dated 9 July 2003. KPMG obtained records from the receiver of the 2nd defendant relating to the coffee held by Notco and SDV at the time of the letters of undertaking to which reference has been made earlier in this judgment. KPMG obtained stock lists issued by Notco and SDV; stock lists issued by the godown itself, GWL, a Moledina-owned company, in respect of coffee it stored under the control of SDV; and weekly stock lists issued by the 3rd defendant, Uneximpt, for all its coffee, showing where it was stored, including lists of stocks in respect of intended sales which had not yet been effected.

26. SDV and Notco's own reports on their face show that there was little movement of stocks of coffee in the period between December 1998 and May 1999, when some of the letters of undertaking were issued. The grades of coffee to which the letters of undertaking are said to relate were taken by KPMG from the sale contracts referred to by SDV for each parcel of coffee which was to be shipped, and to which each letter of undertaking referred, although the letters of undertaking contained no express reference to grade in themselves. On the basis of the Notco/SDV stock lists and the GWL or Uneximpt stock lists, for every letter of undertaking from 17 December 1998 onwards there was insufficient coffee in storage to support the undertaking, if the letter of undertaking related to coffee of the grade referred to in each contract for the quantity specified in the letter of undertaking. This information tallies with an admission made by Mr Ebrahim Moledina in November 2000, after being served with the claim, when he said that there had never been sufficient coffee present to support the letters of undertaking and that it had been removed earlier. When this is taken in combination with a statement signed by Mr Ebrahim Moledina in September 2002, once again after permission to serve out had been obtained, stating that there were no bags of coffee in the name of CAI in September 1999 and that those effecting checks of stock in 2000 on behalf of CAI were misled by taking into account bags of coffee which belonged to another bank, it can be seen that there is powerful evidence against SDV and the other defendants, although all of this evidence is challenged.

27. On the basis of this information CAI's new particulars of claim added fresh claims of deceit and conspiracy in respect of each of SDV’s letters of undertaking from 17 December 1998 onwards, in as much as SDV thereby is said to have represented that coffee stocks of the quantities set out in the letters of undertaking were in their possession when they were not. Furthermore, CAI pleads that Mr Marques, the general manager of SDV, admitted to Mr Moore, an investigator sent by CAI in October 2000, that there was no clear ownership or accountability of the stocks deposited in the godown by the Unicof/Uneximpt group, and that the group had asked him to issue warrants for stock which SDV could not reconcile.

28. CAI now pleads that Mr Marques permitted the group and the Moledina brothers to have unsupervised access to the coffee stocks in the godown and to remove stock without regard to the letters of undertaking and the obligations of SDV to procure bills of lading in favour of CAI, with the result that by June 1999 Mr Marques knew that none of the relevant Kenyan coffee stock remained in the godown or was otherwise in SDV's control.

29. When in June 1999 SDV abandoned the management of the godown, if any stock did remain there CAI alleges that SDV took no steps to ensure that control over it was maintained in accordance with the letters of undertaking it had issued, and when SGS took over management in September 1999 there was no receipt given for the coffee stock in question and SGS undertook no responsibility for it. This Mr Marques knew, according to his conversation with Mr Moore. In October 2000 Mr Moore's stock audit shows that none of the relevant coffee stock was to be found in the godown.

30. On the basis of these pleas, CAI is going to invite the court to infer that the letters of undertaking could only have come into

existence at the request of the Moledina brothers in circumstances where all, including the Moledina companies and SDV, knew that there was insufficient stock to support those letters of undertaking so that money could be raised from CAI on a false basis. All knew that all the coffee had been or would be removed from the godown regardless of the obligations in the letters of undertaking, without the issue of the required bills of lading in favour of CAI. The unlawful conduct to which this agreement and conspiracy related was fraudulent misrepresentation, conversion and breach of the letters of undertaking.

31. In addition, by way of alternative, CAI plead negligent misstatement in the letters of undertaking, as opposed to deceit; conversion by Unicof/Uneximpt, the Moledina brothers and SDV; and breach of duty as bailees, or negligence by SDV in the care and custody of the coffee.

32. SDV's application to stay the proceedings is both to stay the existing proceedings before the amendment and service out of the particulars contained in these new allegations and, if necessary, to stay the proceedings if leave to serve out the new claims is given, contrary to SDV's contention that it should not. It is necessary, therefore, to deal with the third application, that of CAI for service out.

The application to issue and serve the amended claim form and particulars of claim with new claims against SDV

33. It necessarily follows from my decision that SDV are a necessary or proper party to the claim against the 2nd-3rd, 5th-7th and 8th defendants on the original claims that they are also a necessary or proper party to the new claims, since all the factual issues are so closely interconnected. But it is said on behalf of SDV that there will be no trial of issues on liability between CAI and these other defendants, because none will appear to contest them. Under CPR 6.20(3)(a) the question is not whether the claim will be tried against other defendants, but whether there exists at the time of giving leave to serve out, between CAI and other persons, a real issue which it is reasonable for the court to try. This jurisdiction must be unaffected by whether the other defendants choose to contest the claim or not. The court's jurisdiction cannot be determined by the choice of an individual defendant.

34. The position is thus as follows. (1) The existing claims will either give rise to a judgment against those other defendants if they choose not to contest them and allow liability to go by default; (2) the new claims will follow suit because it is clearly desirable that the court should deal with all of those at the same time so far as these other defendants are concerned; (3) alternatively the claims will be heard at a trial if these other defendants choose to contest them and the new claims will also be dealt with in the same way. (4) There are, therefore, between CAI and these defendants real issues on both the original and new claims which it is reasonable for the court to try, and which it will try if those defendants contest liability and which will be the subject of default judgment if they do not. (5) The requirements of CPR 20.6(3)(a) are thus met. (6) The requirements of CPR 20.6(3)(b) are also thus met because SDV fall within the category of a necessary or proper party to the claims against those defendants because of the connected issues and factual evidence.

35. In addition, for the reasons given earlier, the claims for deceit and negligent misrepresentation arguably give rise to damage within the jurisdiction, as does the conspiracy, since the loss is arguably felt by CAI within the jurisdiction in the making of loans without security. Such an argument does not in my judgment run in relation to the claims for conversion or negligence in the custody of the coffee, but the necessary or proper party provision applies across the board to each of the ways in which CAI puts its claim against SDV.

36. Once again, once it is accepted that claims are going to proceed here against those other defendants, the exercise of the court's discretion and the *forum conveniens* issue are virtually automatically resolved in favour of CAI if the trial on liability is to occur within the jurisdiction. But, as mentioned before, SDV says that it is now clear that no such trial on liability will take place, and the overlap on the quantum claims does not justify bringing SDV into the jurisdiction on the new claims. Yet if SDV is justifiably here on the original case for service out of the jurisdiction, it is *a fortiori* rightly here on the new case. Duplication of proceedings by having the original claims determined here and the new claims determined in Kenya is unthinkable, so that any decision on the exercise of the court's jurisdiction on the original claims has the effect of determining the court's exercise of jurisdiction on the new claims, provided there is the juridical basis for it which I have found. Once again the connecting factors to which I refer hereafter cannot outweigh this.

The stay application

37. SDV points to the connecting factors as showing that Kenya is the natural forum for determination of the issues between CAI and SDV, and rightly highlights the serious nature of the allegations made in conspiracy to defraud and deceive, all of which appears to have taken place in Kenya, both in the making of any arrangements and then in the effecting of them. Although the claim against Unicof under the loans is governed by English law and the claim under the letters of undertaking may also be, this is hardly a strong factor in the overall context of the proceedings, particularly as Kenyan law and English law are unlikely to differ much on the type of issues which arise here.

38. First, SDV points to the domicile of SDV, the 3rd defendant, the 6th defendant and the 7th defendant as being in Kenya. Secondly, SDV points to the witnesses whom, it says, it will wish to call, including Mr Marques, who is no longer employed by SDV. It is said that there is no reason to suppose he would be willing to give evidence in England and that he is compellable in Kenya. But his willingness to testify anywhere remains untested, despite his name being bandied about as a potential

witness for over a year. There is simply no evidence that he would not come to England and there is, of course, the provision for video evidence to be taken in any event under the English courts system.

39. Thirdly, SDV points to the factual connection with the Kenyan godown of all the allegations, and the potential need for SGS evidence; the evidence of SDV's managing director, Anthony Stenning, who approved the terms of one or more letters of undertaking; of Mr Molu, who signed some of the letters of undertaking; and of five other named witnesses who can testify as to the running of the godown or the export and purchase activities of Uneximpt.

40. Fourthly, SDV also says that quantum evidence will be required from Kenyan coffee experts as to the value of coffee in the godown at the date of the letters of undertaking or alleged conversion.

41. There can be little doubt that if the claim against SDV was starting from scratch and being run in isolation from any other, with SDV as the sole defendant, most of the connecting factors would count in favour of Kenya. But this is not the current position. If SDV is to succeed in obtaining a stay it must show that Kenya is clearly the more appropriate forum in the interests of all the parties and the ends of justice. The reality of the matter is that the stock records of SDV itself, quite apart from those of GWL and Uneximpt, are likely to be largely determinative of the fundamental issue as to the quantities of coffee which were and were not in the godown at the date of the letters of undertaking and the fax of 22 September 1999. What could any SDV witness say when faced with SDV's own stock records and those of other entities which coincide with them? What evidence can Mr Marques, or other managers, give that does not accord with the records? Individuals may or may not, of course, have knowledge of what was going on and may or may not have knowledge of the actual quantities of stock. But the overall position of what was in stock will essentially be established by examination of the records.

42. It appears, as matters currently stand, that the bailment breach is prima facie established, and any effort by SDV to show circumstances in which the coffee came to be lost in circumstances for which SDV is not responsible appears to depend upon SDV showing knowledge by CAI personnel in London of blending operations effected after SDV abandoned the management of the godown. This requires evidence from English witnesses if SDV are able to make good a defence to the claim of bailment where the burden rests upon them.

43. Two of the English witnesses concerned, Miss Mutter and Mr Francis, are no longer employed by CAI and they say they would not go to Kenya because of the security situation and the terrorist threat to Westerners that is the subject of Foreign Office advice, which recommends avoidance of unnecessary travel to that country, although air travel has recommenced in the last month or so. By contrast, there is in fact no evidence of unwillingness of Kenyan witnesses to come to England, although SDV asserts that this is the case for each of those to whom I have already made reference.

44. A battle based on the difficulty of persuading witnesses to travel to one jurisdiction or another cannot however be determinative of the issue of appropriate forum, and although the central allegations in this case depend upon what happened in Kenya, the position now reached is as follows. (1) The action against the 2nd-3rd, 5th-7th and 8th defendants will go on here in this jurisdiction in some shape or form, and the claim against SDV should go with that even if the liability issue is ultimately uncontested by those other defendants. (2) The crucial evidence here will be documentary, in the shape of SDV records showing the amount of coffee in the godown at any time. The crucial records have been produced in a report by KPMG and are currently in London, although movement of documents from one place to another is scarcely problematic. The evidence of witnesses of fact is likely to be less important than might be thought at first blush, because of the stock records of SDV and because they are not said to be false by SDV and because they tally with Uneximpt or GWL records. (3) Expert evidence is as readily available in one jurisdiction as another. (4) SDV have already spent over £100,000 of costs on this action here in investigating matters for their application to set aside judgment and getting to grips with the underlying facts, whilst CAI have pursued matters through English lawyers from the start. Whilst this element gets nowhere near the issue as it is in Spiliada, it is another factor to be born in mind in the equation. This case has already been the subject of extensive factual enquiry by the teams currently involved, some of which work would be wasted or duplicated if the matter were to be stayed.

45. In the result, the burden being on it, in my judgment SDV cannot establish that Kenya is clearly the more appropriate forum for trial of the claim against it in circumstances where this litigation has reached the stage it has against both it and the other defendants, against whom it will continue regardless.

46. There remain two further issues, one of which is fraught with difficulty and to which in the end I have had little regard. The first of those issues relates to limitation, and the second to the Ringera inquiry. As to the former, there is a three-year time bar in Kenya in tort but in the event of fraudulent concealment the limit is extended. There plainly is room for a time bar argument in Kenya, were CAI driven to commence proceedings there following an order of this court declining jurisdiction over SDV. Had this been a determinative issue, I would have allowed time to SDV to consider whether to give any undertaking with regard to time bar. But for the reasons already given, I have determined these applications in favour of CAI, so this point is not of crucial significance although it would have helped to tilt the scales in favour of England in the absence of an extension of time or undertaking not to take a time bar point in Kenya. The actions of CAI in taking proceedings against SDV here when there were existing proceedings against others were in my judgment entirely reasonable, although there must have been some awareness of a potential jurisdiction issue and the thought of precautionary proceedings in Kenya might have crossed someone's mind.

47. As to the more difficult issue of the Ringera inquiry, what is known is that six out of nine or eleven Court of Appeal judges, and 17 out of 36 or 39 High Court judges have been suspended whilst a tribunal is set to investigate good prima facie evidence against them of corruption. The new Chief Justice of Kenya set up the Ringera Commission to investigate corruption after a five-member panel of judges from other jurisdictions had drawn attention to the need for action to stop corruption in May 2002. Other lesser judiciary (82 magistrates) and 43 court officials are implicated by the Ringera committee report, according to the Press. The Ringera report remains unpublished, but is heavily reported in the Kenyan press and that

commission has allegedly found "creditable and substantial evidence of corruption, unethical conduct and other forms of misbehaviour against these judges". 925 people sent written evidence to the committee, it is said, in the course of a lengthy investigation.

48. It is not maintained by CAI that the whole judicial system in Kenya is endemically corrupt, or that there is no possibility of a fair trial in Kenya. What is said is that there is a huge upheaval in the system and that, despite the appointment of ten acting judges and one acting appeal judge there will be substantial delay and uncertainty in any litigation there. The opinions obtained from Kenyan lawyers on the extent of this disruption and delay varied, depending upon their experience of matters since 30 September, when the suspensions appear to have become effective. Thus the time that has passed since these matters occurred has been short and experience has been limited.

49. Delay does not seem to me to be a strong factor in the equation and, given the limits on what is known as to what took place in Kenya, I do not see this issue as one which should be determinative of my decision. At the very least, however, all one can say is that events in Kenya do not help SDV to show that Kenya is the more appropriate forum.

Conclusion

50. For the reasons I have given, SDV's application to set aside the order of Langley J giving permission to serve proceedings out of the jurisdiction on SDV, and SDV's application for a stay, are dismissed whilst permission is given for CAI to reamend its claim form and to serve it and the new particulars of claim upon the 2nd, 3rd, 7th and 9th defendants out of the jurisdiction.

SMITH BERNAL WORDWAVE