

ROYAL COURT  
(Samedi Division)

13.

24th January, 1997

Before: P.R. Le Cras, Esq., Lieutenant Bailiff,  
and Jurats Gruchy and Potter

|          |   |                    |
|----------|---|--------------------|
| Between: | The American Endeavour Fund Ltd   | Plaintiff          |
| And:     | Arthur I. Trueger   | First Defendant    |
| And:     | Berkeley International Capital Corporation<br>(A California Corporation)                  | Second Defendant   |
| And:     | London Pacific Group Ltd<br>(formerly known as Govett & Co Ltd)                           | Third Defendant    |
| And:     | London Pacific International Ltd<br>(formerly known as Berkeley Govett International Ltd) | Fourth Defendant   |
| And:     | James Hardie Industries Ltd   | First Third Party  |
| And:     | Firmandale Investments Ltd  | Second Third Party |
| And:     | Robert A. Christensen   | Third Third Party  |
| And:     | Alison Mary Holland<br><br>(by original action)   | Fourth Third Party |

AND

|          |   |                  |
|----------|---|------------------|
| Between: | Berkeley International Capital Corporation<br>(A California Corporation)                  | First Plaintiff  |
| And:     | London Pacific Group Ltd<br>(formerly known as Govett & Co Ltd)                           | Second Plaintiff |
| And:     | London Pacific International Ltd<br>(formerly known as Berkeley Govett International Ltd) | Third Plaintiff  |
| And:     | The American Endeavour Fund Ltd   | First Defendant  |
| And:     | James Hardie Industries Ltd   | Second Defendant |

|      |   |                   |
|------|---|-------------------|
| And: | James Hardie Finance Ltd                | Third Defendant   |
| And: | Firmandale Investments Ltd              | Fourth Defendant  |
| And: | Michael G. Allardice                    | Fifth Defendant   |
| And: | Robert A. Christensen                   | Sixth Defendant   |
| And: | Graeme A. Elliott                       | Seventh Defendant |
| And: | Alison Mary Holland                     | Eighth Defendant  |
| And: | Volaw Trust & Corporate<br>Services Ltd | Ninth Defendant   |

(by way of counterclaim)

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Application by the First, Second, Third and Fourth Defendants in the original action for an Order:

- 1) That the Royal Court grant an injunction restraining the Plaintiff from taking oral testimony, pursuant to 28 U.S.C.A. 1782 from Citicorp Venture Capital Limited for use in these proceedings before the Royal Court, such application having been filed by the Plaintiff with the United States District Court Southern District of New York on 27th November, 1996, and having been assigned to the Honourable Judge, Sidney H. Stein, Room 2210 at the Court House at 500 Pearl Street, New York, New York 10007; and
- 2) That the Plaintiff pay on an indemnity basis, the costs of and incidental to this summons incurred by the Applicant.

The Plaintiff sought to take oral testimony from a witness, not a party to the litigation, and against whom no allegation of wrongdoing was made, resident in the U.S.A. under 28 U.S.C.A. 1782. The Defendants, whilst not objecting to the obtention of documentary evidence under that statute, objected to the Plaintiff taking depositions on oath and sought an injunction restraining it from doing so on various grounds including surprise, that the application was "fishing", that it might inhibit oral evidence at trial, that there were major unresolved pleading issues, that taking oral evidence would disrupt and delay the trial, and that while pursuing this course the Plaintiff was seeking to return to the Courts of the U.S.A. The Plaintiff, which claims, *inter alia*, to have been defrauded, and which claims not to be in possession of the full facts which are known to the Defendants, wished to protect itself against a massive counterclaim, and to identify what witnesses to call. That pleadings were not closed and discovery had not started were, it claimed, irrelevant to these proceedings, as was the question of whether the Plaintiff wished if possible to return to the U.S.A. In short, the Plaintiff was entitled to use this procedure at this stage as it was no more than a legitimate means to gather evidence.

Held, that whilst the Court has the power to impose an injunction on such an application, no legal or equitable right had been infringed, the proposed course of action was not axiomatically unconscionable and on the facts before the Court it could not be said to be unconscionable, certainly at this stage, although it might become so in the future. The application for the injunction was therefore dismissed.

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Advocate J.G. White for the First, Second, Third and  
Fourth Defendants in the original action.  
Advocate W.J. Bailhache for the Plaintiff in the  
original action.

JUDGMENT

LIEUTENANT BAILIFF: This is a summons issued by the First to the Fourth Defendants requesting the Court to grant an injunction restraining the Plaintiff from taking oral testimony pursuant to 28 U.S.C. 1782 from Citicorp Venture Capital Ltd ("Citicorp") for use in the present proceedings.

This hearing arises from a successful application by the Plaintiff to the United States District Court, Southern District of New York, whereby that Court ordered on 7th January, 1997:

"It is hereby ordered that, the statutory requirements of 28 U.S.C.A. 1782 having been met, the American Endeavour Fund Limited's application is granted. See Esses -v- Hanania No. 96-9211, 1996 WL 692402, at \*2 (2d Cir. Dec. 4, 1996). The Court of Appeals for the Second Circuit has cautioned the district courts against "speculative forays into legal territories unfamiliar to federal judges", *id.* at \*4 (quoting Euromepa SA -v- R. Esmerian Inc. 51 F.3d 1095, 1099 (2d Cir. 1995), and that only upon "authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782, "should a district court refrain from granting the assistance offered by the act. *Id.* (quoting Euromepa, 51 F.3d at 1100)). No such authoritative proof has been presented here. Further, the Court does not presume that the Royal Court of Jersey will be a passive observer in this case, but that it instead will remain "master of [its] own domaine". *Id.* (quoting Euromepa, 51 F.3d at 1101). Accordingly, the application of the Fund is granted and discovery shall proceed in accordance with the subpoena attached as Exhibit A to the Declaration of Ira Brad Matetsky in support of the Fund's application".

It is common ground that "discovery" includes the giving of testimony (i.e. on oath) by one of Citicorp's officers and the production of documents in the instant proceedings by Citicorp.

Citicorp is not a party to the proceedings and it appears that the Plaintiff does not make any allegation of wrongdoing against that company.

The Defendants raised no objection to the production of documents, which it expects in due course to see, but they do object most strongly to the Plaintiff being able to take depositions on oath from an officer of Citicorp.

The application for an injunction preventing the Plaintiff from proceeding to take this evidence under oath is put in this way by Mr. White.

First and foremost, the Defendants claim that they are being taken by surprise. The Plaintiff's lawyers had been in correspondence discussing timetables and the obtention of evidence, when, without warning, and within the last few weeks it made an application, initially *ex parte* for what we may perhaps term as the 1782 order.

To act in such a way is at once, the Defendants' claim, to raise the question as to how far this Court should govern its own procedure in an action which is before it.

In submitting answers to this question, Mr. White put his case thus:

First, insofar as concerns modern practice in issuing injunctions, the Court looks to English practice, but has a jurisdiction which is certainly no less wide than that of the High Court.

In exercising this jurisdiction, the Court would, he submitted, certainly have powers to make an order in *personam* restraining the parties from proceeding elsewhere, whatever their rights under the law of the foreign jurisdiction.

This power should be exercised, he submitted, where justice requires restraint of foreign proceedings (Société Nationale Industrielle Aerospatiale -v- Lee Kui Jak (1987) AC 871 (PC)). Put another way, the restraint should be exercised where the proceedings are unconscionable.

Here, it is obvious from the terms of the order that the learned United States Judge recognises that the Royal Court will be "master of [its] own domaine". Furthermore, (Bankers Trust International plc -v- PT Darmala Sakti Sejahtera (19th October, 1995)) the United States Courts do not investigate issues of our own procedure (Euromepa SA -v- Esmerian Inc (1995) 51F 3D 1095).

Second, the application to take oral evidence is unconscionable because:

- a) it is "fishing" to establish fraud which, in his submission, is not expressly pleaded against FEI, the investment in which Citicorp is presently concerned.
- b) the giving of oral evidence may inhibit evidence at the trial.
- c) there are presently major unresolved pleading issues.
- d) the taking of oral evidence is bound to disrupt and delay the trial; and
- e) whilst using this procedure as a foreign litigant, the Plaintiff is seeking to return to the United States of America.

Further, in effect, the Plaintiff may be able to put leading questions to a witness, who may or may not otherwise be wishing to talk to him, and who may thereby render himself liable to be called as the Plaintiff's witness.

5 In addition, discovery is clearly much wider in the United States than it is here (see Lord Devlin's speech in Radio Corporation of America -v- Rowland Corporation [1956] 1QB 618, quoted in Rio Tinto Zinc Corporation -v- Westinghouse Electric Corporation (1978) AC 547) at p. 561E.

10 The proper time and place for a witness to give his evidence is at the trial or under the control of the court hearing the case and to do otherwise is to encourage extra costs, gross delay and the possibility of injustice.

15 Mr. White conceded, as we think he had to do, that a party - in this case of course the Plaintiff - can use legitimate means to gather evidence to seek to establish fraud; and if he does so, may seek to amend his claim.

20 What he is not entitled to do, however, in these Courts is to "fish" for fraud with a view to seeing if he can establish it by examining witnesses on oath.

He relied, as his authority, on the old case of Hennessy -v- Wright [1890] QBD 445 where at p.448 Lord Esher MR put it in this way:

25 *"In other words, the plaintiff wishes to maintain his questions, and to insist upon answers to them, in order that he may find out something of which he knows nothing now, which might enable him to make a case of which he has no knowledge at present. If that is the effect of the interrogatories, it seems to me that they come within the description of "fishing" interrogatories, and on that ground cannot be allowed.*

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*The moment it appears that questions are asked and answers insisted upon in order to enable the party to see if he can find a case, either of complaint or defence, of which at present he knows nothing, and which will be a different case from that which he now makes, the rule against "fishing" interrogatories applies. I think all these interrogatories, including the eighth, are open to this objection, and therefore the Court ought not to order them to be answered".*

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It is early days yet in this action. The pleadings have not been closed and discovery is not yet due to be made.

45 The case, as presently pleaded, must stand up on its present merits, and to attempt to use the 1782 procedure for a fishing expedition on oath is one which should not be permitted.

50 Further, there are some fifty parties in seventeen States, and a plethora of these applications will slow the procedure down as so much effort will have to be put into answering them.

In support of his submissions, he relied on two main authorities.

55 The first was South Carolina Insurance Co -v- Assurantie Maatschaapij "de Zeven Provinciën" NV (1987) AC 24 (HL). He took the Court through it at great length.

In particular, he took the point (at p.38) that the position had changed since the Court of Appeal, which had upheld an injunction prohibiting the use of the 1782 procedure, had given its decision. It was put in this way:

*"The second change of position concerns the scope of the re-re-insurers' application to the United States district court. As I indicated earlier, that application as originally framed covered two distinct matters: first, the production and inspection of specified classes of documents; and, secondly, the appearance of three named persons from P.G.A. and Campbell-Husted to give testimony by depositions. On the face of the motion it appeared that what the re-re-insurers were seeking in relation to the second of these matters was the taking of oral evidence from the persons named relevant to the issues in the English actions, such evidence to be recorded in depositions. Before the Court of Appeal, however, Mr. Sumption for the re-re-insurers expressly abandoned any intention to achieve this end, and before your Lordships Mr. Alexander made it clear that the appearance of the named persons was only sought for the purpose of their producing and identifying the relevant documents held by P.G.A. and Campbell-Husted, and in no way for the purpose of their giving oral evidence to be recorded in depositions with regard to issues of fact arising in the English actions".*

The question therefore with which their Lordships were dealing was that of the production of documents, not oral evidence. Furthermore, the actions were by then much further advanced than had previously been the case.

Here, of course, as in the hearing in the House of Lords in South Carolina, no objection was being made to the discovery of documents, all of which in his view would, of necessity, be available to both sides. The objection here was to the obtention of oral testimony on oath under a Court order.

It is quite clear, (see eg at 41G and 42B-E) that the discovery of documentary evidence could not, in their Lordships view, be described as unconscionable, and the Defendants took no issue with this finding.

Mr. White's submission was that the position with regard to oral evidence was quite other. This had, clearly, been pursued before Hobhouse J at first instance, and withdrawn in the Court of Appeal. The passage dealing with it is cited at 34D:

*"The decision of Hobhouse J was, as I indicated earlier, affirmed by the Court of Appeal [1986] QB 348. Griffiths LJ gave the principal judgment, with which Slade and Lloyd LJ both agreed. The main reason which Griffiths LJ gave for his decision was similar to that relied on by Hobhouse J. He said, at p.358:*

*"Once the parties have chosen or accepted the court in which their dispute is to be tried they must abide by the procedure of that country and that court must be master of*

5       its own procedure. Litigation is expensive enough as it is, and if a party fighting a case in this country has to face the prospect of fighting procedural battles in whatever other jurisdiction his opponent may find a procedural advantage it may impose intolerable burdens, and encourage the worst and most oppressive form of procedural forum shopping. We should set our face against any such situation developing.

10       Severe dislocation to the timetable of the English litigation is a readily foreseeable consequence of unrestrained access to foreign procedural remedies. This is likely to cause hardship or inconvenience not only to the other party to that litigation but will also affect other  
15       litigants whose cases are listed upon forecasts dependent upon litigation being conducted in accordance with our own rules of procedure. As the judge said, the court will lose control of its own proceedings. Furthermore, one party might be able to gain a very unfair advantage in the English  
20       procedure if he was able to take the deposition of and cross-examine a witness whom he would never call on his own behalf at the trial, for example, the employees or business associates of his opponent. I think Mr. Sumption [counsel for the re-re-insurers] recognised this when he said he  
25       would be content to accept the stay in respect of his application to take the depositions of the witnesses from P.G.A. and Arthur Campbell-Husted & Co. I am therefore satisfied that as a matter of principle the court must have an inherent jurisdiction to make any necessary order to  
30       ensure that the litigation is conducted in accordance with its own procedures".

35       Nothing in their Lordships' later findings had modified what he suggested, by implication at least, was the distaste shown by the Judges in the Court of Appeal to the adduction of oral evidence.

40       Next Mr. White referred the Court to an unreported judgment of Leggatt J in Magnier and Ors. -v- Road Transport and General Company Limited & Ors (21st June, 1989) QBD [No. 1984C (No.9392)] Unreported.

45       This concerned a 1782 application for both discovery of documents and oral testimony. The documents, it would appear were produced, but the Defendants, although having no present intention (at p.3) to proceed with the obtention of oral evidence, nonetheless wished to keep open the option which had been made available by the District Court of Kentucky.

50       Now the situation here is different in that in Magnier the Plaintiff had declared an intention to produce witness statements, so that the exercise of the option would produce a "fishing expedition" in the worst sense.

      The learned Judge, however, having stated at p.3:

55       "It is true that, upon a careful reading of the Order that the Kentucky District Court has given, it is not confined to the production of documents but the taking of oral testimony - the

bane of civil litigation in the US as any Federal Judge would say".

Went on to say at p.4:

"Also, the person who would have to give oral testimony may be in the position whereby he is cross-examined ie treated as a hostile witness by the party who seeks to adduce his evidence.

For the reasons expressed by Lord Justice Griffiths in the Court of Appeal in South Carolina (1987) Appeal Case of 24, reproduced in the reasons of Lord Brandon at p.34, it appears to me that the use of evidence obtained in this way is undesirable, and in the terms being considered by the House of Lords, unconscionable. It seems plain that although granting an injunction to restrain proceedings in a foreign state is a remedy to exercise with caution, it would be no surprise to a thinking Federal Judge, if this Court takes action to prevent this happening. It is plain by the case cited per Lord Brandon at p. 36h - 37a that the Courts of the US regard with circumspection any attempt to make available for foreign litigants, processes of law not available for use or rather "abuse" by those litigants under the Section 1782 due procedure.

The House of Lords was by force of a concession by counsel concerned only with documents, not oral testimony. So the House of Lords did not pass comment directly on the passage of Lord Justice Griffiths. Nevertheless the speech of Lord Brandon shows that their Lordships implicitly proceeded, particularly at 38e to h, on the same footing. At the very least, nothing in any speeches of their Lordships, detracted from what Lord Justice Griffiths had said in the Court of Appeal regarding oral testimony as opposed to production of documents.

Therefore in answer to Mr. Thomas' question whether Section 1782 procedure is open for oral testimony the answer must be "no".

The best evidence must be a witness examined here, and the witness should not be pre-examined in circumstances where the statement might or might not be admitted here.

As a further point, Mr. White submitted that the fund is seeking a 1782 order because it is a litigant here but it is, it would appear, still trying to get the case heard in the United States of America, in which case the question must arise as to whether it would then be allowed to use this procedure.

In answer, Mr. Bailhache made a series of preliminary submissions.

In short, the fund claims that the Defendants never told the fund of commissions it was collecting from the investee companies.



He was clearly exercised by the comments made that counsel should be satisfied there was a proper case to prove fraud and as to whether fraud was duly pleaded.

5 By leave of the Court, he commented on the pleadings and put before the Court certain documents, to be gathered together in an affidavit, which he subsequently produced to the Court.

10 Now we wish to say, first, that Mr. Bailhache's personal position and his duty to the Court is not before us on the present summons.

15 What he put before us - and we see no need to go through it in detail - appears to the Court to amount to this, namely that the Plaintiff is satisfied that it has been defrauded and claims that there is sufficient evidence already available to it properly to plead fraud, which it claims to have done, making the point that there is no application to strike out the Order of Justice.

20 In support of this submission he produced the term sheet for Evans Rents, which contained a note as to the legal expenses and a note that the company was to pay a fee of 8% to Berkeley Govett. When it came to schedule B of the short form memo presented, it would appear, to the fund, just these items were omitted.

25 We should say at this point that we approach this application on the basis that the Plaintiff considers that it has serious grounds of complaint on the grounds (*inter alia*) of fraud.

30 In those circumstances they, not unnaturally, wish to discover any further information to support their case which they may legitimately obtain, this being the more urgent in that the Plaintiff claims that whilst the Defendants are in possession of all the relevant information, the Plaintiff is not and therefore wishes to redress the balance. It cannot, he submitted, be unconscionable to know what witnesses to call.

35 What the Plaintiff would wish to ask the witnesses, on differences between the documents and the pleadings is "what services were contemplated for these fees?" The Plaintiff, as well as the Defendants is, he submitted, entitled to justice.

40 As to document discovery, this is "fishing" just as much as by examining witnesses. Besides, there is sufficient evidence of fraud to ensure that this would not be a fishing expedition, indeed, so much so as to lend no credence to this suggestion.

45 In any event, unless the parties so agree, or the Court orders, the transcript would not come before the Court and to treat a witness as hostile, the Court would have to so order.

50 That the Court has this control over its own procedure was, in his submission, a complete answer.

55 Further, it would not be so different from a sworn witness statement, with the added advantage that the Court would be able to see what, if any, pressure was put on the witness. Further, if put, it would be put to prove inconsistency rather than truth.

5 Taking the transcripts, he submitted, could not interfere with the course of justice, as if the witness does not give evidence then in Jersey - unlike in the United Kingdom (a vital distinction, *v. infra* - the deposition could not be put before the Court. Thus, if the witness does not give evidence under the Hague convention, there can be no prejudice to him.

10 Further considerations on this point were that information given by a deposed witness may cause less time to be taken at trial; that there is no reason for a witness to object to deposing more than once, and, perhaps most importantly amongst them, that it is not the function of this Court to protect witnesses in other jurisdictions where the law of the place where they live expressly permits such examinations.

15 In South Carolina, this last point is exactly the course taken by the House of Lords with regard to the discovery of documents.

20 Although the deposition is ultimately in the control of the Court, he gave an undertaking that the fund undertakes to take the deposition as though it were a proof of evidence.

25 In those circumstances he would not expect any hostile cross-examination of the witness though he might be asked to clarify points; and, after all, there is nothing to stop anyone from taking a statement from a witness at any time.

So far as compulsion went, this was dealt with in South Carolina. He cited the passage at 35F to 36E:

30 "Because of the first limitation to which I have referred, there is no way in which a party to an action in the High Court in England can compel pre-trial discovery as against a person who is not a party to such action, either by way of the disclosure and inspection of documents in his possession or  
35 power, or by way of giving oral or written testimony. I would, however, stress the word "compel" which I have used in the preceding sentence, for there is nothing to prevent a person who is not a party to an action from voluntarily giving to one or other or both parties to it either disclosure and inspection  
40 of documents in his possession or oral or written testimony.

45 The procedure of the High Court in England, while not enabling parties to an action to compel pre-trial discovery as against a person who is not a party to such action, nevertheless affords ample means by which such a person, provided that he is within the jurisdiction of the court, can be compelled either to give oral testimony, or to produce documents in his possession or power, at the trial of the action itself. Under R.S.C., Ord. 38, Part II, such a person may be compelled to give oral testimony at the trial by the issue and service on him of a subpoena ad testificandum, or to produce documents in his power or possession (so long as they are adequately described and defined) by the issue and service on him of a subpoena duces tecum. The issue of such subpoenas is in the first instance a ministerial rather than a judicial act, and a party may therefore issue subpoenas of either kind as he thinks fit; the court, however, has power to set aside any subpoena on proper

grounds, for instance, irregularity of form, irrelevance, oppressiveness or abuse of the process.

5 The procedure of the High Court in England includes a further  
power of the court, conferred on it by R.S.C., Ord. 38, r.13,  
to order any person to attend any proceedings in a cause or  
matter and produce any documents to be specified or described  
10 in the order, the production of which appears to the court to  
be necessary for the purpose of that proceeding. It has,  
however, long been established that this rule is not intended  
to be used, and cannot properly be used, to enable a party to  
an action to obtain pre-trial disclosure and inspection of  
documents in the possession or power of a person who is not a  
15 party to such action. It is a rule of limited application,  
involving the production of a document or documents to the  
court itself rather than to either of the parties to an action.

My Lords, the civil procedure of courts in the United States  
differs essentially from that in the High Court in England in  
20 that under it parties to an action can compel, as against  
persons who are not parties to it, a full measure of pre-trial  
discovery, including both the disclosure and production for  
inspection and copying of documents, and also the giving of  
oral or written testimony. This power of compulsion can be,  
25 and regularly is, used at an early stage of an action".

It is clear from this, he submitted, that United States practice is  
quite different, in that compulsion for discovery is regularly used at  
an early stage of the action.

30

He referred further to the passage at 42A to H:

"It was not in dispute that, if P.G.A. and Campbell-Husted,  
uninfluenced by the control exercised over them by South  
35 Carolina on the advice of the latter's English solicitors, had  
freely and voluntarily allowed the re-re-insurers to inspect,  
and where necessary to copy, all the documents referred to in  
the latter's application, it could not possibly have been said  
that there had been any interference with the English court's  
40 control of its own process. That being so, I cannot see why,  
since the Federal law of the United States authorises an  
application of the kind made by the re-re-insurers in this  
case, the making of such application, which may or may not  
succeed in whole or in part, should be regarded as being such  
45 an interference either. I cannot, therefore, agree with the  
first ground of decision relied on by the Court of Appeal.

I consider, secondly, the ground that the procedure of United  
States courts is significantly different from that of English  
50 courts, and the parties, by submitting to the jurisdiction of  
an English court, must be taken to have accepted its procedure.  
It is, no doubt, true that the re-re-insurers, by entering  
unconditional appearances in the two English actions, can be  
said in a certain sense to have accepted the procedure of that  
court. Your Lordships were not, however, informed of any  
55 ground on which the re-re-insurers could, with any prospect of  
success, have contested the jurisdiction of the High Court in

England in respect of the disputes which are the subject matter of the two actions concerned. Be that as it may, I cannot see that the re-re-insurers, by seeking to exercise a right potentially available to them under the Federal law of the United States, have in any way departed from, or interfered with, the procedure of the English court. All they have done is what any party preparing his case in the High Court here is entitled to, namely to try to obtain in a foreign country, by means lawful in that country, documentary evidence which they believe that they need in order to prepare and present their case. It was said that the re-re-insurers could have applied to the High Court under R.S.C., Ord. 39, r.2, for letters of request to issue to the proper judicial authorities in the United States. But 28 United States Code, section 1782, allows an application to be made either indirectly by the foreign court concerned or directly by an interested party, and I can see no good reason why the re-re-insurers should not have chosen whichever of these two alternatives they preferred. It is, I think, of the utmost importance to appreciate that the reason why English procedure does not permit pre-trial discovery of documents against persons who are not parties to an action is for the protection of those third parties, and not for the protection of either of the persons who are parties to the action. I cannot, therefore, agree with the second ground of decision relied on by the Court of Appeal".

The only conclusion which he could draw was that the compulsory production of documents (under a 1782 order) was not a factor which weighed with their Lordships.

In his submission, given the differences between the English Civil Evidence Act, under which the depositions, it seems clear, might be adducible in England, and the procedure here, where they would not, the same arguments had to apply *pari passu* to the discovery of documents and the taking of depositions on oath.

This was a truly vital distinction and one which permitted, or rather virtually compelled, the Courts here to take a different view from that initially taken by the High Court (in South Carolina).

This apart, he made a series of further points.

1. The fund was subject to a massive counterclaim and wished to protect itself.
2. That discovery had not commenced and pleadings were not closed is immaterial.
3. It may not be easy to persuade witnesses to come to Jersey.
4. The use of the Hague convention procedure is not always straightforward, as a high degree of precision is required. In theory the Court sat as a Royal Court and therefore the evidence admitted there should be no different to that admitted before this Court, which would in any event control it.

5. At the moment the Plaintiff does not know what witnesses to call. Use of the 1782 procedure should short circuit the numbers of applications made under the Hague convention. This, of course, he submitted, would not apply to the Defendants who already knew who dealt with what.

Indeed, once the witnesses have been identified, their depositions might save time and help with sifting through documents. The depositions would be passed on to the Defendants.

On the question of whether the fund was intending to move proceedings back to the United States of America, Mr. Bailhache advised the Court that there had been an appeal against the decision of the Federal court, striking out the action there. This appeal had been heard in November and judgment is awaited.

The present position is that the fund does intend to take the litigation to trial in Jersey, but that it reserves its rights. It is clear therefore that Mr. Bailhache - and no criticism of him is intended - is not in a position to give a definitive answer to this question. He made certain criticisms of the actions of the Defendants, but these did not assist him in answering this point. That his client's have appealed against the decision in the United States would indicate that the Plaintiff would prefer to proceed there, and this assumption is reinforced by Mr. Bailhache's statement that the Plaintiff did not originally want to come to Jersey.

Returning to the issue of the status of any "1782" depositions, he was, he submitted, at one with Mr. White. It seemed unlikely that any such deposition could be used in Jersey, and it would be necessary to produce the witness in Court - or under the Hague convention before they might be useful. In any event, the most they could show, if put to the witness, was that he was inconsistent.

Mr. Bailhache then turned to the authorities and made a series of detailed submissions.

His starting point was John Deere Ltd & Anor -v- Sperry Corporation (1885) 754F. 2d 132. This United States case was, he submitted, (at 135/1 A) authority for the broadening by the United States legislature of the scope of international judicial assistance by the United States Federal Courts.

He went on to cite the passage at 135/1 A:

*"As a co-operative measure, section 1782 cannot be said to ignore those considerations of comity and sovereignty that pervade international law. A grant of discovery that trenched upon the clearly established procedures of a foreign tribunal would not be within section 1782. That the statute is an attempt to codify measures for international judicial assistance, however, does not imply a reciprocity requirement. Rather, the legislation is largely exemplary and aspirational, an attempt to stimulate reciprocity."*

*The liberal intent to provide judicial assistance whether or not reciprocity exists has been acknowledged as a primary statutory goal since section 1782's inception".*

5 He further referred to the passage at 135/2, where the Court stated:

10 *"Courts also have recognised that the unilateral character of the legislation does not require reciprocity as a predicate to the grant of a discovery order".*

15 In his view, clearly established procedures of a foreign tribunal would include, e.g. privilege or protection against self-incrimination. They could not extend to the information gathered under the order presently sought.

Here, there was absolutely no reason not to have early United States document discovery.

20 This being the case - and it was in any event not disputed - he could not, he submitted - see the distinction between the discovery of documents and the obtention of depositions (v. *infra*).

25 In any event, the United States Courts will not permit litigants to evade the limitations placed on pre-trial disclosure by foreign tribunals. This objection should be taken in the United States Courts. It has been and it failed.

30 In support of this contention, he cited the passage at 136/1:

35 *"We are also satisfied that permitting discovery in this case would not offend the Canadian tribunal. Our decision does not countenance the use of U.S. discovery procedures to evade the limitations placed on domestic pre-trial disclosures by foreign tribunals. Concern that foreign discovery provisions not be circumvented by procedures authorized in American courts is particularly pronounced where a request for assistance issues not from letters rogatory, but from an individual litigant. In In re the Court of the Commissioner of Patents For the Republic of South Africa, 88 F.R.D. 75, 77 (E.D.Pa.1980), the court denied a request for discovery where it was doubtful that the documents and testimony sought would be discoverable under South African law. However, in the present case, as we have noted, the testimony sought would generally be subject to discovery were all the parties in Canada".*

45 It was, he submitted, common ground that, in South Carolina, no legal or equitable right was infringed (at 41 A-B). The question which is before this Court is whether it is unconscionable.

50 He next turned to British Airways Board -v- Laker Airways Ltd [1985] AC 58, and, after citing the passage at 78 D where Lord Diplock describes the much wider scope of discovery in the United States of America went on to refer to the passage at 80 H:

55 *"The answer to these appeals, in my opinion, clearly emerges from the application to the allegations that are crucial in*

Laker's case against B.A. and B.C. in the American action of what since the merger of the courts of common law and Chancery has been a fundamental principle of English legal procedure. That principle, originally laid down in *North London Railway Co -v- Great Northern Railway Co.* (1883) 11 QBD 30, was re-stated by me (albeit in terms that I recognise were in one respect too narrow) in *Siskina* (Owners of cargo lately laden on board) -v- *Distos Compania Naviera SA* [1979] AC 210, 256:

"A right to obtain an ... injunction is not a cause of action ... It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court".

This, being said in the context of an application for a *Mareva* injunction, omitted to mention the type of case that is of comparatively rare occurrence in the English courts in which the plaintiff seeks against a person amenable to the jurisdiction of the English High Court an injunction to restrain the defendant from bringing suit against him in a foreign court upon the ground that the plaintiff is entitled under English law to a legal or equitable right not to be sued in that foreign court by that person upon the cause of action that is the subject of such proceedings. A right not to be sued upon a particular cause of action in a particular foreign court by the person against whom the injunction is sought may be contractual in origin. A common example of this is an exclusive jurisdiction clause in a contract. Furthermore, if under English law a defence would be available to the injunction-seeker, that defence may be given anticipatory effect as a right not to be sued that is enforceable by injunction in an action for a declaration of non-liability. Of such defences it is not difficult to point to a number of examples most of them equitable in historical origin, such as estoppel in pais (which was also a defence at common law), promissory estoppel, election, waiver, standing by, laches, blowing hot and cold - to all of which the generic description of conduct that is "unconscionable" in the eye of English law may be given. I would accordingly agree, as I did in *Castanho's case* [1981] AC 557, with the qualification to the statement of principle in the stark terms in which I expressed it in the *Siskina* case [1979] AC 210, 256, that was added by Lord Scarman in *Castanho's case*, at p.573:

"But the width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed: but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice".

The point which he sought to make was that "unconscionable", in law, covered a variety of defences; it is difficult to define, but, to

put it crudely, it must be something pretty bad. Another way to view it was (per Lord Scarman above) that an injunction could be granted to avoid injustice. This would inevitably be a question of fact in each case.

5 That it was not easy to define, was, he submitted, confirmed by Lord Brandon at 41C-D in South Carolina when he stated:

10 *"It is difficult, and would probably be unwise, to seek to define the expression "unconscionable conduct" in anything like an exhaustive manner. In my opinion, however, it includes, at any rate, conduct which is oppressive or vexatious or which interferes with the due process of the court".*

15 He then turned to South Carolina (1987) HL. It was decided in the House of Lords, and was therefore of the strongest persuasive authority. He agreed that the decision concerned discovery of documents and not depositions, as the application regarding oral testimony had been withdrawn in the Court of Appeal. He conceded that this might well have  
20 been done as a tactical move.

This was not entirely clear. What in his submission was, however, clear was that the logic of the judgment applies equally to both documents and depositions.

25 He started with the statements of Lord Brandon at 40B referring to the grant of injunctions by the High Court:

30 *"The nature of the limitations to which the power is subject has been considered in a number of recent cases in your Lordships' House: Siskina (Owners of cargo lately laden on board) -v- Distos Compania Naviera SA [1979] AC 210; Castanho -v- Brown & Root (UK) Ltd [1981] AC 557; and British Airways Board -v- Laker Airways Ltd [1985] AC 58. The effect of these*  
35 *authorities, so far as material to the present case, can be summarised by saying that the power of the High Court to grant injunctions is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable".*

45 He did not proceed further with this passage as this is not a case of contested jurisdiction.

50 His primary submission was based on the passage at 42 E-F (v. supra) where the Court had said:

55 *"I cannot see that the re-re-insurers, by seeking to exercise a right potentially available to them under the Federal law of the United States, have in any way departed from, or interfered with, the procedure of the English Court".*



He referred to the passage at 34 E (v. supra) and submitted that if it is put that the position was saved - so far as the Defendants were concerned - insofar as the depositions were concerned, this was in fact not the case.

5 The Court of Appeal did not make that decision, because it was not before them, the application having been withdrawn by counsel.

10 In any event, the argument there set out was rejected decisively by the House of Lords when it came to the discovery of documents at 41 G:

15 *"I consider, first, the ground that the re-re-insurers' conduct was an interference with the court's control of its own process. It is not clear to me why this should be so. Under the civil procedure of the High Court the court does not, in general, exercise any control over the manner in which a party obtains the evidence which he needs to support his case. The court may have given him help, certainly; for instance by discovery of documents inter partes under R.S.C., Ord 24; by allowing evidence to be obtained or presented at the trial in various ways under Orders 38 and 39; and by the issue of subpoenas under Part II of Order 38, to which I referred earlier. Subject, however, to the help of the court in these various ways, the basic principle underlying the preparation and presentation of a party's case in the High Court in England is that it is for that party to obtain and present the evidence which he needs by his own means, provided always that such means are lawful in the country in which they are used".*

30 At 34F, Griffiths LJ had foreseen severe dislocation, and this argument also was rejected (see 43 E-F).

35 As to the unfairness of calling witnesses before a United States Court, neither the House of Lords nor the Court of Appeal have had to deal with it. What can be said, he averred, was that the remarks of Griffiths LJ at 34G (v. supra) had, with regard to the point with which the House of Lords was concerned, been firmly rejected.

40 Furthermore, he submitted, the Plaintiff here is in very much the same position as the Plaintiffs in South Carolina, for whose problems he referred to the passage at 32 E-F as follows:

45 *"My Lords, Seven Provinces, Al Ahlia and Arabian Seas ("the re-re-insurers") are, by reasons of their position, remote from the facts in dispute, and obliged to rely for detailed information about them on such documents as they can obtain from South Carolina or P.G.A. and Campbell-Husted. The latter two, however, were not the agents of South Carolina in connection with the relevant transactions; it follows that discovery of documents by South Carolina in the two actions in England would not extend to relevant documents held by them. In this situation, if the re-re-insurers are to achieve their legitimate object of inspecting and copying where necessary, relevant documents held by P.G.A. and Campbell-Husted, some other means have to be found to enable them to do so".*

55

That the reasoning in South Carolina was decisively in his favour was not affected by the report of the judgment of Leggatt J in Magnier.

The report should, he submitted, be approached with care.

It was not an authority. It was unreported, and not approved by the Judge himself. We are not in possession of the full facts and the Judge appears to have been affronted by a party going behind his back.

With the greatest respect to him, for the reasons adumbrated above, counsel suggested that his decision was wrong in law, their Lordships having overruled Griffiths LJ. This finding cannot, therefore, be relied on as a matter of principle regarding 1782 applications.

Finally, counsel referred to Bankers Trust International plc -v- PT Dharma Sakti Sejahtera [1996] CLC 252, that is, a reported case, some nine years after South Carolina which was, of course, decided in 1986, although reported in 1987.

It is clear from the headnote that a 1782 application had been launched after the trial of the action, but before judgment had been pronounced.

As this judgment may not be readily available to all the members of the legal profession, a copy will be attached to this finding, rather than citing the considerable passages which Mr. Bailhache put before us.

The scene is set by Mance J at 253, and at 254 A he refers to South Carolina as being the leading authority on this point.

Having found (at 254 A) that no legal or equitable right has been infringed, he goes on to say that "...generally speaking, the only other circumstances in which an English court will restrain a party from pursuing foreign proceedings are when to do so would be "unconscionable" a term which "includes, at any rate conduct which is oppressive or vexatious or which interferes with the due process of the court" (per Lord Brandon in South Carolina).

He was quite definite in finding that (at 254 D-E):

*"The House of Lords decision (i.e. in South Carolina) shows that there is nothing axiomatically unacceptable about the use of s. 1782 to gather evidence in the United States for use in the English proceedings, although the means by which such evidence is gathered would not be available under English law and might involve the taking of depositions from and pre-trial discovery against third parties who were not parties to the English proceedings".*

In Mr. Bailhache's view, this passage shows that the learned Judge draws no distinction between discovery and the taking of depositions; and that this submission is further fortified by passages at 261 E-F, 262 G and 264 B.

There were, however, important distinctions between the issues in South Carolina and those arising in Bankers Trust.

First, unlike in South Carolina discovery was sought not against persons not party to the action but, effectively, the parties themselves (see 255 A-D).

5           Second, the 1782 application is made at a very different stage to that in South Carolina, having been made after the trial is over and while judgment is awaited (at 255 E).

10           Third, many of the documents now sought (see 255 F) had already been the subject of applications for discovery. Counsel put it in this way that this was an attempt to go behind the back of the Judge.

15           The Plaintiff complained that very wide oral submissions (at 256 B) and the production of material which, costly and time consuming to obtain, might be irrelevant or incapable of use.

20           In terms, the learned Judge came to the conclusions (at 261 E) that the exercise was "*essentially speculative*", and in this passage refers to both the depositions and discovery without making any distinction between them.

25           As a further distinction the application before the learned Judge had to be viewed in the context of litigation which had already gone to trial.

          Further (see 262 E) it could not be said that "*the new material now available relates to a wholly new area ... outside ... knowledge at the time of trial...*".

30           In all the circumstances, the learned Judge is quite clear (at 263 G) that the Court will not exercise any jurisdiction to restrain foreign proceedings unless they constitute an abuse in the context of English proceedings or are otherwise oppressive.

35           It is hardly surprising that in Bankers Trust the learned Judge refused to let the proceedings go on, finding them abusive and oppressive. (at 263 H).

40           This, however, does not affect the basis upon which he approached the application, nor his construction of the findings of Lord Brandon, with which counsel wholeheartedly concurred.

45           Put another way, the learned Judge agreed in principle that depositions could be taken, but threw the application out because of the circumstances and this is the way - the circumstances here being so very different - in which the Court should approach the present application.

50           Mr. Bailhache concluded his submission first by emphasising the point he had made earlier, viz. that the injunction could only be granted if there were an infringement of a legal or equitable right, which was not claimed, or that it was unconscionable, the onus of proof being upon the party seeking the injunction.

55           For authority that it was not axiomatically unconscionable, he relied on South Carolina. It depended on the circumstances; and these were such here as to justify, as with discovery, the obtention of oral testimony.

5 The Court is in control of its own procedure and can regulate both costs and delay. The merit, on the present application, lay entirely with the Plaintiff and the fund should be permitted to proceed.

In reply, Mr. White introduced affidavits in reply to that put in by Mr. Bailhache.

10 He emphasised certain points.

First, on the pleadings, the Plaintiff had known since May, 1993, that fees had been taken. The fund had then started proceedings in the United States of America (in February, 1995) and both actions had been struck out there.

15 Despite the delay of 3 1/2 years it was only now - when a timetable for the hearings was being discussed - that the 1782 proceedings were being launched. In addition there was a summons out relating to the Plaintiff's pleadings. The delay to date was the Plaintiff's and this would merely create more delay.

20 In addition, it would multiply the costs enormously as, of course, it would be necessary to attend each hearing. In addition there was a very substantial counterclaim based on malice and improper motive against the fund and its officers, and the Defendants had every reason to be concerned that far too much of the fund's assets would be dissipated in unnecessary costs and would thus not be available to meet the damages claimed which amounted, he stated, to some \$460,000,000. We may say at once that the Court accepts both these as valid points.

30 He dealt, as the Court thought he must, with the information left off the short form memorandum which had been produced by Mr. Bailhache in which, effectively, only the information concerning the Defendants' commission had been removed.

35 He did it in this way. A commission or charge, he submitted, is generally made. The Defendants did (and did only) what they were asked to do. Had they been asked about it, they would have given the information. Those involved for the fund were experienced and would have known the position. It had been pleaded that the Directors were on notice that management funds normally charged between 1% and 3% and (in terms) that a charge is generally made.

40 There was, he submitted, no evidence of fraud. He put to the Court an affidavit by Mr. C. Chaplin who deposed that the investment memoranda were deliberately short. In accordance with the agreements and procedures, the directors were to be sent "a short description of the company, the amount of the investment, and the terms of each transaction".

50 The Defendants' case was that the fee paid to BGIL was not part of the transaction entered into by the fund, even though it might be part of the overall transaction. He conceded that, in looking at the return the fund was expecting, the fee might affect the interest which it was to receive.

55

His clients were looking at the return the fund was looking for, that is, a minimum return to enable Firmandale to meet its costs.

5        Asked by the Court whether the charging of an undisclosed level of commission did not fall within the description "the terms of each transaction", he first replied that it was not pleaded that the fund received an unacceptable level of return.

10       His clients did not admit the omissions were made with dishonest intent.

15       The reason, he averred, that the directors of the fund did not ask questions was that they knew that commissions were being taken and did not expect these issues to be raised in the short form memorandum. Indeed, there was an express request from the Board for a shorter form, in which the information was reduced to a minimum. The parties had been on close terms and the directors of the fund were experienced in business, and by implication knew the form.

20       Explanations were only asked for after the proceedings started. In any event, his clients thought Mr. Christensen knew about the charging of commissions.

25       Mr. White produced a letter of 17th January, 1997, from Citicorp, protesting strongly at their involvement. They would, it is quite clear - and, the Court agrees, quite understandable from their point of view - prefer not to have these burdens placed upon them, nor to have to go to the trouble and expense of dealing with them.

30       So far as the law was concerned, Mr. White, in terms, accepted that the test was unconscionable. The Court had first to decide whether, as he submitted, that it was axiomatic that such an application, ie for a 1782 order, was so. If not, then it would be a matter of fact on the circumstances for the learned Jurats so to decide.

35       He agreed that it was not a simplistic term. This was not a simple case and was already nearly unmanageable, and complications and delay caused by 1782 applications, if they pushed back the date of the trial, would amount to unconscionable behaviour. Allegations of fraud had been made and, other factors apart, his clients were entitled to protection under the procedures of the Royal Court.

40       Last, he did not accept that the burden of proof fell on his clients. They had good grounds for proposing that what was happening was unconscionable, and it was for the fund to justify the 1782 applications; and the fund had shown no good reason for them to be permitted to proceed.

45       As this is the first occasion on which such an application has come before the Court, the Court, albeit that it is an interlocutory application, has felt it proper to set out the contentions at considerable length.

50       Counsel have taken the Court through the authorities and the issues with great care, and we should say at the outset that we are most grateful to them.

It is apparent to the Court that it has the power, on an application such as the present, to impose an injunction should it see reason to do so.

5 It is also clear that the Court is in control of its own procedure.

10 It was conceded by both parties that no infringement of any legal or equitable right was at issue before us. The issue was whether the proceedings under the 1782 procedure were unconscionable.

It was submitted by Mr. White that such proceedings were, in law, axiomatically unconscionable.

15 The Court does not accept that submission. It concurs with the submissions put forward by Mr. Bailhache as to the reasoning of their Lordships in South Carolina, supported as they are by the findings of Mance J in the Bankers Trust case.

20 Parties are entitled to gather evidence so long as they do so legitimately. They are, and it is not contested, able to seek discovery of documents from third parties under a 1782 order, and the Court accepts on the authorities, that the English Courts make no distinction in principle between being able to call for the production of documents or the obtention of evidence on oath, provided of course that in either  
25 case it is not unconscionable.

The Court accepts that reasoning.

30 Whether, therefore, the 1782 proceedings are unconscionable is therefore a matter to be decided on the particular circumstances put before the Court.

35 In approaching the question, the Court must first have regard to the ambit of the word "unconscionable".

The Court accepts the dictum of Lord Diplock in British Airways Board -v- Laker Airways Ltd (supra), together with the remarks of Lord Brandon in South Carolina at 41 C-D. The Court must therefore examine whether the conduct is oppressive or vexatious or interferes with the  
40 due process of the Court.

A number of submissions were put before the Court.

45 First, the Defendants claim to have been taken by surprise. However, it is clear that they have lawyers in the United States of America and nothing was put to the Court to show that they were unaware of such a procedure. Indeed, the evidence from Citicorp was all the other way in that they seem to have a department specifically to deal with such applications.

50 The Court finds that there is no weight in that submission.

55 Next, it is claimed that this is mere "fishing" for evidence to find, in particular, evidence to support allegations of fraud, against which they should be protected, under the procedural rules of this Court.

Against that, evidence is not being sought from parties to the action but from third parties.

5 Given the evidence put before us, and in particular Mr. Chaplin's affidavit, the Court finds that, in view of the plain allegations of fraud, and despite the numerous documents produced on discovery, the fund is very much in the position of the complainants in South Carolina. The other side have, or had, the documents, and the fund wishes to find out from other parties what went on, and, in view of this procedure  
10 which is available, this they are clearly entitled to do, so long as they do not act unconscionably in so doing. Further, and by no means least, given the submissions which were made with regard to Mr. Chaplin's affidavit, in the view of the Court the fund should have the opportunity, if it exists, to gather the maximum information at the  
15 earliest opportunity. This submission, therefore, we also reject.

That Citicorp object, and it is hardly surprising that they do, is not a matter before us. They live in the United States of America, are subject to United States law, and must make their application to the  
20 United States courts.

Equally, neither the fact that the pleadings are not resolved, nor that discovery has not yet been ordered here, appear to the Court to be material. Indeed, the sooner potential witnesses and documents can be  
25 identified, the sooner the case will come forward.

Then again, that the evidence may not be producible, or that witnesses may have to testify twice, is not a factor which weighs heavily with the Court. The fund is entitled to seek information to  
30 ascertain whom they wish to call as witnesses and to seek to put witnesses before the Court or, if necessary, under the Hague convention.

Equally, that the fund would clearly prefer to proceed in the United States of America is, for the purposes of this application, of little weight. It has been refused there, is before this Court and is  
35 entitled to proceed using any legitimate means available to it in this Court.

Finally, and more relevantly in our view, the Defendants complain, first, that the 1782 proceedings come very late, the fund having known of the commissions since May, 1993; second, that, as we accept, the Defendants will have to attend all the 1782 hearings, which will mean an enormous increase in cost and further and inevitable delay at a time  
40 when they are trying to agree a timetable for a reasonably early date; and third, that apart from the manpower involved, the costs will be so great that the fund is likely to be too short of money properly to meet the substantial counterclaim.  
45

All of this, it is claimed, leads to two ends - the first is that a case which is nearly unmanageable already will become entirely so; and second, that these factors combine to place an oppressive burden on the Defendants.  
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There is merit in that submission, but the Court is of the opinion that the weight, at present, does not make the obtention of the 1782 order unconscionable.  
55

Having said that, circumstances may change in the future, and it is always open to the Defendants to return. However, in the view of the Court, the scales, at present, are tilted firmly in favour of the fund.

5           Last, we should add this. The Court has approached this hearing on the basis that the burden of proof lies upon those who seek the injunction, i.e. here, the Defendants. However, we wish to add that had  
10           this burden been upon the fund, we would nonetheless have come to the same conclusion.

The summons of the Defendants is therefore dismissed.



Authorities

- Société Nationale Industrielle Aerospaciale -v- Lee Kui Jak (1987) AC 871 (PC).
- South Carolina Insurance Co -v- Assurantie Mattschappij "de Zeven Provinciën" NV (1985) 2 All ER 1047 (CA).
- South Carolina Insurance Co -v- Assurantie Mattschappij "de Zeven Provinciën" NV (1987) AC 24 (HL).
- Bankers Trust International plc -v- PT Darmala Sakti Sejahtera (29th November, 1995) Unreported Judgment of the High Court of England.
- European SA -v- Allied Insurance and Reinsurance Company (1995) SI Fed 1095 US CA for 2nd Circuit.
- Rio Tinto Zinc Corporation -v- Westinghouse Electric Corporation (1978) AC 547.
- Magnier & Ors. -v- Road Transport and General Company Limited & Ors. (21st June, 1989) QBD [No. 1984 C (No. 9392)].
- John Deere Ltd & Anor -v- Sperry Corporation (1885) 754F 2d 132.
- Euromepa SA -v- R Esmerian Inc (1995) 51F 3D 1095.
- British Airways Board -v- Laker Airways Ltd [1985] AC 58.
- Bankers Trust International plc -v- PT Dharmala Sakti Sejahtera [1996] CLC 252.
- Heerema -v- GP Heerema (1985/86) JLR 293.
- Hennessey -v- Wright (1890) QBD 445.
- Baltic Partners -v- Sparbanken Sverige (18th April, 1996) Jersey Unreported.

ANNEXURE

BANKERS TRUST INTERNATIONAL PLC V PT DHARMALA SAKTI SEJAHTERA AND COUNTERCLAIM.

Queen's Bench Division (Commercial Court)

Mance J.

Judgment delivered 19 October 1995.

*Discovery - Foreign proceedings - Order for discovery overseas - Action tried in England - Judgment reserved - Plaintiffs commenced US proceedings - Application in US court for discovery in order to obtain evidence for production in English proceedings - US orders for disclosure in relation to defendants' transactions with other clients - Whether foreign proceedings abusive and oppressive - Whether costs to be taken into account - Whether English or US court to judge whether US proceedings oppressive.*

This was an application for an order requiring the plaintiffs to apply to the US District Court to discontinue the proceedings commenced there, to set aside its ex parte orders for discovery and to restrain further proceedings.

In this action the plaintiffs, Bankers Trust International plc ('BTI') claimed that the defendant, PT Dharmala Sakti Sejahtera ('DSS') owed nearly \$565m in relation to transactions in derivatives which the parties had entered into. BTI had acted through Bankers Trust Co ('BTCO'). DSS counterclaimed for rescission of the transactions, and damages for deceit and negligence. The proceedings were commenced in England. DSS made interlocutory applications, which were largely unsuccessful, for discovery in relation to BTI's transactions with other clients. The applications were based on a claim that BTCO had been fraudulent. The trial of the claim and counterclaim took place in July 1995 and judgment was reserved.

In August, DSS obtained a copy of an article published in the 'Washington Post' relating to an action in America against BTCO and BTI. DSS believed it showed that a fraudulent 'system' of conduct had been operated by BTCO in relation other clients as well as themselves. DSS also believed that there were a number of other actions which endorsed their belief. As a result DSS applied, unsuccessfully, to the trial judge for leave to amend its pleadings to include a claim of systematic fraud. DSS then applied to the US District Court for an ex parte order for disclosure directed to BTCO and its parent and associated company. The US court granted the orders. DSS hoped that as a result new and relevant information would emerge that would enable them to reapply to the trial judge for leave to amend in order to assert systematic fraud.

BTI and BTCO applied for an order that DSS apply to the US District Court to discontinue the proceedings there and for the setting aside of the US District Court's orders.

*Held*, allowing the application and making the appropriate order to restrain the US proceedings:

1. Although in principle foreign proceedings could be used to gather evidence in a foreign jurisdiction for use in English proceedings, the court had jurisdiction to restrain a party to English proceedings from pursuing foreign proceedings where they were oppressive or vexatious. DSS had produced insufficient new evidence of a systematic fraud to warrant pursuing US proceedings in order to adduce fresh evidence or amend in England at a time when the English actions had already been tried.

2. It was for an English court to judge whether foreign proceedings in a US court constituted an abuse or were otherwise oppressive in the context of English proceedings. Taking into consideration all the circumstances, including the fact that costs could not be recovered in the New York court, and the speculative nature of the proposed large-scale investigation into the plaintiffs' business which, if it produced material to support the fraud allegations would require the reopening of the English trial, the US proceedings were both abusive and oppressive and ought to be restrained. (*South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provicien' NV* [1987] AC 24 distinguished.)

The following cases were referred to in the judgment:

*Euromepa S.A. v R Esmerian Inc* 51 F 3d 1095 (2nd Cir 1995).

*Ketteman v Hansel Properties Ltd* [1987] AC 189.

*Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871.

*South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provicien' NV* [1987] AC 24.

Ian Milligan QC and David Owen (instructed by Linklaters & Paines) for the plaintiffs.

Stuart Isaacs QC (instructed by Ince & Co) for the defendant DSS.

#### JUDGMENT

Mance J: These actions relate to transactions in derivatives entered into by PT Dharmala Sakti Sejahtera ('DSS') with Bankers Trust International plc ('BTI') acting through Bankers Trust Company ('BTC'). BTI claims that DSS owes it nearly \$65m. DSS counterclaims for rescission of the transactions and/or for damages for deceit and/or negligence and/or negligent misstatement. An expedited trial was ordered by Waller J on 5 May 1995. Applications by DSS for discovery were determined by Longmore J on 9 June 1995 and by myself on 4 July 1995. The trial took place between 10 and 28 July 1995 when I reserved judgment. Judgment has not yet been given.

On 14 September 1995 DSS applied ex parte to the US District Court, Southern District of New York for, and on 20 September 1995 they were granted orders for the taking of depositions and production of documents directed to (a) BTC and (b) BTC's ultimate parent company, Bankers Trust New York Corp

('BTNYC') and another subsidiary of BTNYC, BT Securities Corp ('BTSC'). On 21 September 1995 they served three subpoenas addressed to each of these Bankers Trust companies. The subpoenas identify as persons sought to be deposed seven named witnesses, from the chairman and president down, together with a custodian of records in relation to the documentary requests and :

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'a witness designated pursuant to Fed.R.Civ.P 30(b)(6) with knowledge of: (a) policies and practices of Bankers Trust in 1994 with respect to marketing and selling derivatives; (b) complaints and/or claims asserted by Bankers Trust customers arising out of or relating to the marketing and sale of derivatives; and (c) investigations by regulatory authorities relating to the marketing and sale of derivatives by Bankers Trust.'

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BTI and BTCo now apply by summons dated 27 September 1995 for an order requiring DSS to apply to the US District Court to discontinue the proceedings and to set aside its orders dated 20 September 1995 and restraining DSS from seeking to enforce the orders or to commence or continue any further like application. The summons also seeks declarations that any application by DSS for leave to re-amend its pleadings in the present actions to allege facts founded on evidence obtained in the New York proceedings would be refused and that the evidence to which the New York orders and subpoenas relate would not be admitted. I do not consider that this court can make any such prospective declarations in respect of applications for leave to re-amend not yet formulated or made and evidence not yet identified. I say no more therefore about the claim to these declarations. It was and is the claims requiring withdrawal of the US proceedings and restraining further such proceedings which are central to this application.

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That there is jurisdiction to restrain a party to English proceedings from pursuing foreign proceedings in certain circumstances is beyond question. The nature of the jurisdiction and of the circumstances in which it may be exercised was considered in the House of Lords and Privy Council in *South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provinciën' NV* [1987] AC 24 and *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871. The present is not a case where BTI or BTCo can or do suggest that DSS by its proceedings in New York has invaded or is invading any legal or equitable right of any Bankers Trust company. These two cases show that, at least generally speaking, the only other circumstances in which an English court will restrain a party from pursuing foreign proceedings are when to do so would be 'unconscionable', a term which 'includes, at any rate, conduct which is oppressive or vexatious or which interferes with the due process of the court' (see per Lord Brandon in the *South Carolina* case at pp. 40F and 41D and per Lord Goff in the *Aerospatiale* case p. 896F-G). In judging whether this is the case, the court must take into account not only the potential injustice to the one party if the other is allowed to pursue the foreign proceedings, but also the potential injustice to the latter if he is not so allowed (*Aerospatiale* at p. 896G).

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The most common situation in which these principles come before the court for consideration is when there are two competing sets of proceedings, in both of which one or other party claims determination of the substantive dispute. An example occurred in the present case when BTI and BTCo applied unsuccessfully to Waller J in May 1995 for an injunction restraining the pursuit by DSS of concurrent Indonesian proceedings against them. The present situation is different in that the avowed aim of the New York proceedings is to complement and provide material 'for use in' the present English proceedings. This was also the situation in the *South Carolina* case. the House of Lords decision there shows that there is nothing axiomatically unacceptable about the use of s. 1782 to gather evidence in the US for use in English proceedings, although the means by which such evidence is gathered would not be available under English law and might involve the taking of depositions from and pre-trial discovery against third parties who were not parties to the English proceedings. To use s. 1782 was not to interfere with the English court's control of its own process: see per Lord Brandon at p. 41G. The defendants who were making use of s. 1782 were simply trying to obtain in a foreign country, by means there lawful, evidence which they believed that they needed for their case. Whether they applied to this court under RSC, O.39, r. 2 for letters rogatory or to an American court under s. 1782 was also a matter for them. The rule precluding the obtaining of pre-trial discovery against third parties under English law is for the protection of third parties, not of either of the parties to English litigation: see per Lord Brandon at p. 42E-G. In so far as the plaintiffs in the *South Carolina* case had incurred extra costs in resisting the orders sought under s. 1782, that was their choice. The third parties were willing to supply the material sought: see pp. 42H-43C. In so far as the steps taken under s.1782 caused inconvenience in terms of delay, part of such delay arose from the plaintiffs' attempt to injunct the defendants from pursuing their s. 1782 applications and any further delay in trial of the English proceedings was the price of justice being fully done in such proceedings and could also be controlled by the court fixing a date: see p.43F and 43H.

Distinctions exist however between the circumstances in the present case and the *South Carolina* case. There the defendants were retrocessionaires and their application under s. 1782 was against the agents who had accepted and the adjusters who had investigated claims on the original insurance business written on behalf of the original insurers. The agents and adjusters were not agents of the plaintiffs who were the reinsurers. A request to the agents for voluntary disclosure had been refused, after being referred to the original insurers as well as the plaintiffs who were their reinsurers. However, neither the agents nor the adjusters resisted disclosure when sought under s. 1782. Later, despite an English injunction obtained in the meanwhile to restrain pursuit of the s. 1782 application, certain disclosure by the agents and adjusters was permitted by the plaintiffs. But it was in issue whether this was full or adequate. The present case differs in that the relief sought under s. 1782 is directed to the other party to the English action (BTCO) as well as its parent (BTNYC) and an associated company (BTSC). Mr. Isaacs QC for DSS pointed out that the latter two companies are as third parties in a parallel position to that of the agents and adjusters against whom s. 1782 relief was sought in the *South Carolina* case. That is so in form. In substance, however, the corporate connection between the three Bankers Trust companies may put a different complexion on the

matter. Precisely the same relief is sought against all three Bankers Trust companies under s. 1782. The evidence filed by DSS to obtain s. 1782 relief in New York consists of affidavits of Mr. Sesser, a partner in their New York attorneys, and an accompanying declaration by Mr. Thillagarainam, a partner in their Singapore lawyers, which do not differentiate between the three companies or explain why all three were sued. On the contrary Mr. Thillagarainam's declaration asserts that the information in the *Washington Post* article, which is relied on as providing the basis of the s.1782 application:

'is limited to an allegation that BTI and [BTCO] would not allow a customer to get out of a swap with losses less than the bank's reckoning'.

This suggests that the article is viewed as demonstrating systematic fraud on the part of the two Bankers Trust companies which are parties to the English proceedings, and does not explain why the other companies have been involved, save perhaps out of major caution.

A second important distinction lies in the different stages at which the applications were made. In *South Carolina* the application was at an early stage, with a view to providing evidence at trial, which would not have been delayed much, if at all, had it not been for the plaintiffs' unjustified attempts to stop the s. 1782 proceedings. In the present case, the trial is over, and judgment is awaited. I should however add that DSS do not seek to suggest that the date when I give judgment should be in any way delayed or affected by the existence of the s. 1782 proceedings. Mr. Isaacs simply submits that DSS should be allowed to carry on with their pursuit of further evidence in the hope that it will produce further material justifying an application before judgment, or, if not, after judgment.

A third distinction is that many of the precise categories of documents now sought to be obtained under s. 1782 have in the course of the present actions been the subject of applications for discovery, in which DSS were largely unsuccessful before Longmore J and myself. To the extent that discovery was ordered, no complaint has been made in the present actions that it was not properly given. I was given a schedule of the suggested overlap between the documents identified in the New York subpoenas and the previous applications to this court in the present proceedings. Having examined the material to which this schedule refers, I say no more than that the overlap, even though not quite as complete as the schedule might superficially suggest, is very considerable, as for example in the areas of procedures and standards in the conduct of derivatives business, problems with customers and regulatory authorities experienced in that regard, any changes resulting from such problems, the 'orderly withdrawal in the first quarter of 1994 from substantial market positions in [BTNYC's] trading and positioning function' referred to in an annual report and the fees, profits and any other benefits received by Bankers Trust companies and Mr. Hyun from such business. The documents now sought also include documents in specific areas (such as the termination of Mr. Hyun's employment) where there was cross-examination at trial, but no request for discovery was pursued. It is also to be noted that the blanket request now made for discovery of 'all documents relating to

Indonesian companies to whom Bankers Trust sold derivative products from January 1993 to the present' is made in circumstances where (a) the fact that BTCo did derivatives business in Indonesia was well known (it is indeed one of DSS's pleaded allegations that Mr. Nurjadin represented to DSS that none of BTCo's customers in Indonesia had ever lost money on BTCo's products) and (b) Mr. Hyun was asked questions in cross-examination about problems with one such customer, PT Adimitra Rayapratamo ('Adimitra') without any specific request for discovery of documents in relation to Adimitra being pursued. I shall return to Adimitra later.

The plaintiffs suggest further distinctions. In the *South Carolina* case, there was no suggestion that the material sought under s. 1782 would be irrelevant or incapable of use in the English proceedings. In the present case, the plaintiffs submit, the material sought will not be admissible and will not enable any application to amend. Moreover, if the s. 1782 subpoenas are allowed to be enforced, they threaten to involve very wide oral depositions as well as very onerous discovery, which will involve large costs and take up much time, in relation to an action in which the plaintiffs were entitled to assume that the next step was a judgment, followed by a possible appeal by one side or the other. For these and other reasons to which I will come, the plaintiffs submit that the *South Carolina* case can and should be distinguished and that DSS's present attempt to reopen evidential matters should be restrained as abusive and/or oppressive.

DSS's justification of the proceedings under s. 1782 is set out in the declaration of Mr. Thillagaratnam. That declaration, inter alia, recounts as background DSS's case in the English proceedings, and both the course of certain Indonesian proceedings begun by DSS against BTI and BTCo and of the present English proceedings. It ascribes the application under s. 1782 to the obtaining by Mr. Thillagaratnam on 2 August 1995 of a faxed copy of an article published in the *Washington Post* on June 1995. To avoid a possible adjournment of their present applications, the plaintiffs agreed not to pursue any suggestion that DSS could nor should have obtained notice of the *Washington Post* article prior to 2 August 1995 or have taken earlier steps thereafter to invoke s. 1782, if it was appropriate for them to invoke it at all. Mr. Thillagaratnam says in para. 18ff.:

'(18) ...If the material in this article had been made available earlier to DSS, it would have been able to plead the existence of a "system" of conduct operated by Bankers Trust in relation to other clients and DSS. The information in the *Washington Post* is limited to an allegation that BTI and Bankers Trust [defined elsewhere in the declaration as a reference to BTCo] would not allow a customer to get out of a swap with losses less than the bank's reckoning. At the bottom of p.7 of the article it says:

"At the same time, the bank did not want a customer to pull out of a derivative based on a quoted value that was higher than the true value... So, sales people would attempt to convince a customer to hang on."

This is precisely what Bankers Trust did immediately after the US Federal Reserve Board raised Federal Fund Rates on February 4, 1994.

5 (19) There may well be other examples of systematic conduct that may be discovered when enquiries are made in the USA, but the material in the *Washington Post* article is the starting point. DSS clearly did not have the benefit of the material stated in the *Washington Post* article at the time when the discovery applications were heard in the English proceedings.

10 (20) The allegation would have greatly strengthened the case on the relevance of the matters on which DSS sought discovery in the English proceedings, which discovery was refused...'

Mr. Thillagaratnam then summarised Longmore J's ruling on 9 June 1995 ordering that discovery need not be given in respect of issues raised by para. 35(iv) of DSS's points of defence and counterclaim in  
15 the present proceedings. Paragraph 35 pleads that BTCo as agent for BTI made the alleged representations deceitfully or recklessly. Sub-paragraph (iv) refers in support to para. 35-40 of an affidavit of Mr. Thio sworn 22 April 1995. Mr. Thio there refers to suits brought by a number of American companies, including Gibson Greetings Inc and the Proctor & Gamble Co ('P & G'), against BTCo and other associated companies alleging misconduct in respect of derivatives transactions and leading, in the case of Gibson  
20 Greetings, to a finding by the Securities and Exchange Commission ('SEC') of fraud by BTSC and to disciplinary action and a fine of \$10m in respect of such misconduct. Longmore J held that it was impossible to go into a whole series of different transactions in New York on the basis of similar fact evidence in a trial fixed for 10 July 1995 and estimated to last eight days, that if discovery was given it would inevitably result in a mini-trial in England of all that went on in New York, undermining both the eight day  
25 estimate and Waller J's order for expedition and, further, that it was not necessary for there to be such discovery and that, since DSS had not thought it necessary to make any similar allegation in the Indonesian proceedings, it was in that light also not necessary for the just disposal of the English proceedings to order the discovery sought. I would add that Longmore J also pointed out, firstly, that what DSS were seeking to do was to infer from allegedly fraudulent conduct in America that there were similar frauds in relation to the  
30 conversations which took place with DSS involving Mr. Hyun and Mr. Nurjadin in the Far East, and, secondly, that he was not deciding that DSS could not at trial cross-examine and argue and make submissions about what happened in New York if they felt that assisted their case, subject always to any ruling by the trial judge. In the event, after a brief allusion in opening, the allegations in para. 35(iv) of the pleading and para. 35-40 of Mr. Thio's affidavit really played no part in the trial. Mr. Williams, a Bankers  
35 Trust economist, was asked whether his reports had also played a part in relation to any of the American deals which became the subject of litigation, to which he answered, not to his knowledge; otherwise there were only a few tangential references to the American problems in evidence and submissions. It was not



suggested to Mr. Hyun or Mr. Nurjadin that their conduct was in any way connected with or part of any policy or practice evidenced by the American problems experienced by any Bankers Trust company.

Mr. Thillagaratnam also mentioned the discovery application which I decided on 4 July 1995, saying that, on the issue whether DSS was entitled to discovery of New York documents as to whether BTCo used DSS's transactions to hedge other unprofitable commitments, I considered that:

'documents in this area are unlikely to carry matters very far therefore, although some further documentation may be able to be provided. It is clear on the evidence and because of the complexity of the Bankers Trust Group internationally that any detailed investigation of profitability or of hedging ... is unlikely to be either simple or, in the context of the issues in this action, justified.'

In fact this does not appear to be a wholly accurate summary of the relevant part of my judgment, where 'the area' referred to in the first sentence was the possible self-interest of the plaintiffs or their salesman in the form of profits and/or remuneration to be earned. The reference to hedging in the second sentence was (as the passage omitted from the quotation shows) to hedging of the DSS transactions conducted after they were effected. I had in the previous paragraph accepted the plaintiffs' evidence that there was no question of the DSS transactions being entered into to hedge previous unprofitable transactions. My judgment also dealt with a large number of other aspects of discovery not summarised by Mr. Thillagaratnam. In particular, in relation to an application for discovery relating to the agreements made with the Federal Reserve Bank, I applied what had been said by Longmore J and added this, at p.32:

'It is impossible to dive sensibly into one aspect - the culmination - of problems involving other clients without a full investigation of the position vis-a-vis the other clients and it would, it seems to me, be intolerable to overload this action with discovery going to the plaintiffs' relationship with other clients. Assuming, as Longmore J did, that this could be admissible, it still seems to me unlikely to be particularly helpful to investigate or consider, in relation to this action, what were no doubt substantial relationships, which have evidently given rise to substantial problems in the US between different arms of the plaintiffs and different clients. That seems to me to apply both in relation to the issue whether there was negligence in this case and also in relation to the issue whether there was fraud. As to fraud there is no suggestion of any overlap between the relevant personnel dealing with those different clients and dealing with DSS. The matters the subject of the agreement with the Federal Reserve Bank appear to have occurred in a different part of the world. Once again it seems to me that this request suffers from being far too diffusely spread.'

I then went on to make a qualification in relation to any specific video tape or document describing the particular type of derivative contracts represented by either of the swap transactions the subject of this

action, which I held should be disclosed, especially if it reached Mr. Hyun or Mr. Nurjadin, but also even if it did not.

Mr. Thillagaratnam's declaration next said that he has been advised by Mr. Isaacs QC that, if the evidence of the material in the *Washington Post* article was now to be obtained, DSS would have quite a strong case for applying to me, as the trial judge, before any judgment for leave to amend its pleadings to assert systematic fraud. He then referred to RSC,O.20,r.5 and said that he has been advised that it permits amendments of pleadings even after trial or even after judgment or on appeal. He referred to O.59,r.10. He also made reference to the *South Carolina* case.

The hearing took place before me on 2 and 3 October 1995. Mr. Isaacs did not then support Mr. Thillagaratnam's suggestion that, had the material in the article been available, DSS 'would have been able to plead the existence of a "system" of conduct operated by [BTC] in relation to other customers and DSS'. He also accepted that the passage quoted by Mr. Thillagaratnam from the article related to the particular facts of the Gibson Greetings case, but he said that DSS's contention was that this was only one of the plaintiffs' practices and that the article indicated that there were others, though DSS was not in a position to identify them. DSS simply 'do not know what further evidence of a fraudulent system may be thrown up by material discovered in New York' and the article was 'just the starting point'. In my judgment this is all extremely speculative.

Subsequently, on 9 October 1995 DSS's solicitors, Ince & Co, indicated a wish to rely on certain newspaper articles in the *Wall Street Journal* of 3-4 October, the *Independent* and *Financial Times* of 5 October and *Business Week* for 16[sic] October 1995. I required the matter to be restored for further submissions and on 10 October 1995 DSS applied without objection to introduce an affidavit of Mr. S P Knight of Ince & Co, exhibiting their letter dated 9 October with accompanying articles, together with a letter from Mr. Sesser of DSS's New York attorneys dated 9 October 1995 attaching pp. 1-47 of an unsealed second amended complaint by P & G against BTC and BTSC. Mr. Sesser asserts in his letter that:

'it is now known that at least ten Bankers Trust customers, including Proctor & Gamble and DSS, may have suffered from serious misconduct of Bankers Trust in connection with its sale of derivatives in the 1993-94 time frame, resulting in losses of many millions of dollars to each of those customers. Moreover, the misconduct in each case reflects a pattern of activity fully consistent with the allegations of DSS.'

He then summarises P & G's second amended complaint and goes on:

'We believe that this new information amply supports DSS's position that the harm it suffered at the hands of Bankers Trust was not conduct to be judged in isolation, but rather was part of a pattern of

systematic conduct tolerated and perhaps even encouraged at the highest levels of management. The *Business Week* article makes it clear that Proctor & Gamble's amended complaint is not based upon unsubstantiated allegations, but rather is based upon "a mountain of evidence" - including 6,500 tape recordings of Bankers Trust employees. These recent revelations - most of which came to light only after our application to the court in New York - clearly reinforce the justification for Judge Patterson's discovery order and our subpoenas.'

The matter was not put before me so high in Ince & Co's letter of 9 October 1995 or by Mr. Isaacs in his further submissions on 10 October 1995. The letter says this:

'In essence, the particular points which DSS make on the press cuttings are:

- (i) [P & G] have succeeded in adding to its claim against BT the US civil racketeering charges. The P & G filing, in support of its new charges, identifies eight customers of BT other than P & G itself, of whom five (including Gibson Bros) have not previously been mentioned in any public document. The remaining seven have now been identified and they include Adimitra, which featured in evidence to the trial judge before Mr. Justice Mance and on which Mr. Hogi Hyun was a material witness.
- (ii) The civil racketeering charges allege a pattern of wrongdoing on the part of BT which is not confined to understatement of the value of a customer's losses. They involve the allegations summarised on p.1 of the *Business Week* article.
- (iii) BT's description of P & G on p.4 of the *Business Week* article as "sophisticated, experienced and knowledgeable about the use of interest-rate derivative contracts and the risks presented by those contracts" are closely mirrored in the present actions.
- (iv) The allegations, as in the present actions, concern inter alia BT's conduct in the period after 4 February 1994 US dollar interest rate rise.
- (v) BT's bid to block *Business Week* from publishing the article based on sealed documents from the P & G dispute failed.

Mr. Isaacs made it clear that there was in the material attached to Mr. Knight's affidavit no basis upon which he could properly make any application either to introduce fresh evidence or to amend DSS's pleadings. DSS were, he said, simply seeking to obtain fresh evidence in New York which might enable them in the future to make such an application. He accepted also that there is, so far as presently known, nothing in

the contents of the trading or training tapes to which the press articles refer, which links with Mr. Hyun. He submits, however, that the 'tenor' of the material appears to undermine the plaintiffs' case in general and Mr. Hyun in particular. He points out that P & G's complaint identifies a number of companies as allegedly defrauded or deceived by, and in some cases as involved in consequent litigation with, BTCo and/or BTSC.

5 Among these is Adimitra. Mr. Isaacs said that, if these transactions, with Adimitra in particular, were established as part of a pattern or system of fraud falling within the Racketeer Influenced and Corrupt Organisations Act ('RICO') as P & G assert, then DSS could hope to show (a) that Mr. Hyun was aware of the fraudulent selling techniques which P & G has alleged against the Bankers Trust group and/or (b) that Mr. Hyun applied such techniques or acted fraudulently in other ways vis-a-vis DSS in the course of the

10 transactions the subject of this case.

The bulk of pp. 1-47 of P & G's complaint deals in detail with the transactions with P & G and others which appear to have little resemblance to and no connection with the present. The transactions with P & G are first set out (pp. 1-31), with references to the agreement with the Federal Reserve Bank of 4 December

15 1994 and the consent order made by the SEC on 22 December 1994 (pp. 31-33), with references to the problem with Gibson Greetings (pp. 33-37) and then with a summary of various, now disputatious transactions with other American companies (pp. 37-45 and 46-47). None of these involves or indicates any link with the present transactions or the persons handling them. Looking at some of the points made in Ince & Co's letter of 9 October 1995, the present case cannot be allowed to turn into a general investigation

20 of derivatives transactions entered into, varied or terminated by Bankers Trust employees after 4 February 1994 interest rate rise. The fact that P & G may have been described by Bankers Trust as 'sophisticated, experienced and knowledgeable about the use of interest-rate derivative contracts' and that it is part of BTI's and BTCo's case in the present litigation that DSS were also 'sophisticated, experienced and knowledgeable', even if not to the same extent as P & G, does not carry DSS anywhere. The level of

25 sophistication, experience and knowledge actually or apparently held in any case must depend on the circumstances and can only be assessed on a case by case basis. It would be quite inappropriate to attempt in the course of the present case to determine whether some unknown Bankers Trust employee may in some other case or context have misdescribed Bankers Trust's understanding of P & G's expertise, with a view to arguing that BTI or BTCo, or Mr. Hyun in particular, has also misdescribed BTCo's

30 understanding of DSS's expertise in the context of the present litigation. The attempt to block publication by *Business Week*, which I am told was anyway a joint attempt by Bankers Trust and P & G, is patently irrelevant.

As to Adimitra, Mr. Hyun accepted in cross-examination during the trial of the present action that he

35 had on behalf of one or other Bankers Trust company (quite probably BTCo) entered into, firstly, in October 1993 a time dependent swap and, secondly, on 1 March 1994, a LIBOR barrier swap with a potential 22.22 fold leverage factor, similar to respectively swaps 1 and 2 with DSS in this case. As summarised in P & G's complaint, Adimitra are alleging that BTCo and BTSC 'misrepresented or omitted material information in their

dealings with [Adimitra] during the course of [Adimitra's] transactions in complex, leveraged derivatives'. This is not, in terms, necessarily a plea of fraud, but I will assume that fraud in an English sense is in fact alleged by Adimitra, although Mr. Isaacs accepted that fraud may have a more extended meaning and usage in US law and litigation than in this country. P & G's complaint says that:

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'Based on [Adimitra's] allegations, P & G expects discovery to reveal additional fraudulent acts committed by [BTSC] and [BTC] as part of transactions with [Adimitra].

10 I accept that there are parallels between the initial and replacement swaps entered into by or through BTC with DSS and Adimitra. The parallels extend to an allegation by Adimitra that BTC represented that swap 2 was 'less risky' than swap 1 (said to be false because of the absence of a cap and the potential 22.22 fold leverage factor) and that converting to swap 2 would improve Adimitra's position. But such parallels prove nothing. One would expect BTC through Mr. Hyun to be marketing the same type of transactions to different customers at the same time in broadly the same terms. It might be more a  
15 matter of comment if they were not doing so.

P & G's complaint also records the inclusion in Adimitra's complaint against BTC and BTSC of an allegation summarised as follows:

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'The payment by Bankers Trust to [Adimitra] on the day that [Adimitra] unwound the swap and entered into the LIBOR barrier swap was accompanied by language suggesting that [Adimitra's] position, as a result of making the change to swap 2 was a gain of \$638,000, the amount of Banker's Trust payment. In fact at that date [Adimitra's] position was a loss of \$16m.

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This allegation focuses on the alleged difference between the amount paid over by BTC on entry into swap 2 and the value of swap 2 as assessed internally by BTC. Again it has a limited (although on its face less prominent) parallel in the present action in so far as DSS have alleged that the current market values to BTI of swaps 1 and 2 were, respectively, minus \$2m and minus \$8m on the dates when they were entered into and that these values were not disclosed by BTC to DSS, and have relied upon these matters in support of  
30 their allegations of fraud. The fact that there was non-disclosure of current market values in two transactions, as opposed to one, does not appear to me by itself to assist on the question whether there was fraud in either. BTI and BTC say that it was simply not the practice to disclose such values. The further suggestion by P & G that it expects discovery in respect of Adimitra to reveal that BTC or BTSC 'used language suggesting that [Adimitra's] position, as a result of making the change, was a gain of \$638,000',  
35 whereas in fact it was a loss of \$16m, is largely unspecific, and does not appear to carry the matter much, if at all, beyond an allegation that the value to BTC or BTSC was not disclosed. Viewing the position in respect of Adimitra generally, nothing in the summary given by P & G or in any other material before this court suggests that any easy conclusions, about matters such as fraudulent system or intention, could be

I would add, although it simply reinforces the conclusion to which I would anyway have come, that the existence of disputes relating to transactions with other clients of Bankers Trust companies was referred to in some detail in Mr. Thio's affidavit of 22 April 1995, where he suggested specifically that the transactions with P & G, Gibson Greetings and others were:

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'strikingly similar and raise the issue of the possible existence of instructions given by BTCo by its principals as to how derivative products are to be marketed and sold.'

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Mr. Thio also identified and summarised the December 1994 agreement with the Federal Reserve Bank and the consent order by the SEC (even though copies may only have been received later). DSS on the face of it had the opportunity to investigate these matters further in America. They also discovered the existence of the Adimitra litigation, and knew that it was continuing, before Mr. Hyun was cross-examined - although Mr. Isaacs informed me only shortly before. Mr. Isaacs then asked Mr. Hyun various questions about that dispute. DSS did not seek further details or an adjournment or apparently even obtain a copy of the New York complaint. It cannot in all these circumstances be said that the new material now available relates to a wholly new area which was outside DSS's knowledge at the time of trial or which they had no opportunity whatever to investigate whether by making enquiries or by seeking discovery in America prior to trial here. They did of course seek considerable discovery here with the result which I have indicated.

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Mr. Isaacs submitted that I should nonetheless follow the approach of the House of Lords in *South Carolina* case. DSS should be allowed the freedom to make any enquiry and take any legal action which New York or any other foreign law may permit. As regards enquiries, no-one challenges DSS's right to make any enquiries they wish of anyone. What is in issue is DSS's entitlement to continue, after the trial of the action in England but before judgment, to pursue BTCo and its associate companies for depositions and discovery in New York in the hope of and with a view to obtaining useful material to facilitate an application to adduce fresh evidence or to amend in England. Mr. Isaacs submits that, if this is objectionable at all, then the right course is for the plaintiffs or their parent and associate company to raise the objection in New York. The order expressly gives them such a right in respect of discovery and there is no doubt also an inherent common law right to apply to discharge or vary such an *ex parte* order. This submission merits close consideration. However, the suggested course would itself mean a substantial application to the New York court, which would start with the disadvantage that it was considerably less familiar both with the English proceedings and with English procedure than is this court. The problems of conveying, even to the experienced US District Court for the Southern District of New York, the effect of what has happened to date in England, as well as, I add, the implications of English rules of court relating to the production and use of fresh evidence after trial or on appeal, are I think apparent from a reading of Mr. Thillagaratnam's declaration. I understand moreover that there would be no right to recover costs in New York. The *South Carolina* case is not authority that costs must always be irrelevant, although they were there, largely because they were self-inflicted or could be dealt with by the English court.

I am, further assisted at this point by the US courts' own attitude. In *Euromepa SA v R Esmerian Inc* 51 F 3d 1095 (2nd Cir 1995) the US Court of Appeals for the Second Circuit, on appeal from the District Court for the Southern District of New York, refused to limit depositions and discovery under s. 1782 to cases where similar relief could be obtained in the relevant foreign court, preferring the issue of closely tailored discovery orders in such cases to outright refusal of relief. It acknowledged an exception to this approach in a case where there was 'authoritative proof that a foreign tribunal would reject evidence obtained with the aid of s. 1782' and cited the *South Carolina* case in a footnote as a useful example of authoritative guidance in an opposite sense from England. The court pointed out:

'Because the French court can always enjoin [the applicant] from pursuing discovery in a manner which violates the judicial policies of [the foreign country] or can simply refuse to consider any evidence that [it] gathers by what might be - under French procedures - an unacceptable practice, we do not think that the district court's concern for trespassing upon the prerogatives of French sovereignty should have weighed so heavily in its decision.'

It went on to say:

'After all, a foreign tribunal's corrective response to a well-intentioned but unwelcome grant of discovery could bar the evidence gathered in the given case, and it could also constitute the kind of authoritative declaration mentioned earlier that would provide helpful instruction to American courts in handling future cases.'

After a further reference to the *South Carolina* case, the court said:

'Since section 1782 contemplates international cooperation, and such cooperation presupposes an on-going dialogue between the adjudicative bodies of the world community, such a result would be far from undesirable.'

Thus, in the first passage, the US court expressly contemplates of specific intervention in the particular case. There seems to be no reason why such specific intervention should be any less welcome than the general guidance which it might afford for future cases.

I have already indicated why in my opinion the English court is better placed to assess the background, implications and propriety of the present s. 1782 proceedings than is any US court. Further, the English court will not exercise any jurisdiction to restrain foreign proceedings unless satisfied that they constitute an abuse in the context of English proceedings or are otherwise oppressive. But, whether they are so abusive or oppressive, is pre-eminently a matter for the English court to judge, and, if they are, I do

not think that this court should then be hesitant about giving effect to its conclusions. If the proceedings are abusive or oppressive, then intervention by this court now will also avoid any future problem. It must be assumed, indeed Mr. Isaacs positively confirmed, that DSS will comply with any English injunction so that the s. 1782 proceedings would be withdrawn. By contrast, if this court simply steps back, as Mr. Isaacs  
5 invited, on the basis that the plaintiffs' first course should be to apply in New York, there is at least an increased risk of conflicting attitudes, quite possibly because of the difficulty which may exist in putting the full picture before the New York court.

in the present circumstances, I consider that the applications made under s. 1782 are, on the basis  
10 on which they are now sought to be justified, both abusive and oppressive. There must be some end to litigation. The trial in this action has taken place. Even corporate litigants have a 'legitimate expectation that the trial [of the action] will determine the issues one way or the other', to quote Lord Griffiths in *Ketteman v Hansel Properties Ltd* [1987] AC 189 at p. 220F. There have been extensive interlocutory rulings on the scope of discovery. I would fully acknowledge the value of properly controlled discovery both  
15 in cross-examination and as an aid to ascertaining the truth. Nonetheless, the scope of discovery, even of a purely documentary nature, is recognised as a potential problem in English proceedings. Mr. Isaacs openly accepts that the material now available is but a starting point for the further investigation thereby intended. Moreover, what is proposed includes compulsory examination of large numbers of the plaintiffs and their associate companies' officers, including an unidentified deponent on practices and procedures whom the  
20 plaintiffs are required to nominate for the purpose, in respect of a large number of other cases which have hitherto played no significant part whatever in the trial. Volumes of documents are also sought, many of which, I should add, would seem to be capable of bearing only the most indirect relationship to any suggestion of any systematic conduct which DSS might hope to establish by anyone. The course of action now proposed in New York, purportedly in aid of the present proceedings, could itself well involve, and could  
25 certainly lead, to something more than the 'mini' trial which Longmore J feared would arise in the present action if discovery were ordered of material relating to Bankers Trust problems with clients and regulatory authorities in New York. It would represent a large scale investigation of the general conduct of the plaintiffs' derivatives business conducted on a speculative basis with a view to discovering material to enable or support allegations which, if they could properly be made at all, would doubtless be highly contentious,  
30 would require the reopening of the trial and would involve examination of other transactions entered into with other clients.

In my judgment, drawing all the matters which I have identified together, the new material constitutes a wholly inadequate foundation for the course of conduct now proposed at the present stage in  
35 these proceedings. In my judgment what is proposed in New York under s. 1782 is abusive and oppressive in the context of the present proceedings which provide its purported justification. In this connection I draw no distinction between BTCo on the one hand and BTNYC and BTSC on the other hand. No separate need for involving BTNYC and BTSC in New York has been suggested or shown. DSS themselves have drawn



no distinction between the three companies in the New York proceedings, claiming the same relief in the same terms against each. To treat the three companies as one for present purposes reflects the substance of the matter. It would be unrealistic and unjust if this court were to restrain the pursuit of abusive and oppressive action against BCo on the ground that it is the other party to the English litigation, but were at the same time to allow duplicate proceedings addressed to BCo's associate companies in America which would appear to produce precisely the same abusive and oppressive effect for BCo (and for the Bankers Trust group as a whole), for those handling this litigation on BCo's behalf and for the conduct of the trial. I shall accordingly restrain the pursuit by DSS of all three sets of s. 1782 proceedings and subpoenas.