01-08-'02

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal Nos. 15, 17 and 18 of 2001
(Grand Court Cause Nos. 229 of 2001, 389 of 1999 & 398 of 2001)

BETWEEN:

(1) **TELESYSTEM INTERNATIONAL WIRELESS INC.**
(A company incorporated under the laws of Canada)

(2) **TIW DO BRASIL LTDA**
(A limited liability company organized under the laws of Brazil)

Plaintiffs/Appellants

- and -

(1) **CVC/OPPORTUNITY EQUITY PARTNERS, L.P.**
(A Cayman Islands Exempted Limited Partnership)

(2) **CVC/OPPORTUNITY EQUITY PARTNERS, LTD.**
(A company incorporated under the laws of the Cayman Islands) (Sued in its capacity as the General Partner of CVC/Opportunity Equity Partners, L.P.)

(3) **OPPORTUNITY FUND**
(A company incorporated under the laws of the Cayman Islands)

(4) **OPPORTUNITY ASSET MANAGEMENT INC.**
(A company incorporated under the laws of the Cayman Islands) Sued in its capacity as Investment Advisor and Sole Director of Opportunity Fund, and as agent for CVC/Opportunity Equity Partners, LP).

(5) **VERONICA VALENTE DANTAS RODENBURG**

(6) **DANIEL VALENTE DANTAS**

Defendants/Respondents

- and between-

1-08-02

CVC/OPPORTUNITY EQUITY PARTNERS LTD
Plaintiff/Respondents

- and -

LUIS ROBERTO DEMARCO ALMEIDA
Defendant/Appellant.

BEFORE: The Rt. Honourable Mr. Justice Edward Zacca, President,
The Honourable Mr. Justice Gerald Collett, J.A.
The Honourable Mr. Justice Ira Rowe, J.A.

Michael Black QC, Seamus Andrew, Sandi Corbett and Diarmad Murray of Walkers for the appellants.
Anthony Trace QC and Jeremy Walton of Hunter & Hunter for respondents.

Heard: March 25-28 & April 10th 2002 Released: August 1st 2002

REASONS FOR JUDGMENT

ROWE, J.A.

On March 28, 2002 we made an order in which we treated the hearing of the application for leave to appeal as the hearing of the appeal and dismissed the appeal with costs to the respondents to be taxed if not agreed. We made an order that the Mareva injunctions should remain in force for 14 days from March 28, 2002. As we promised then, we now give our written reasons for our decision.

It should be said at once that the costs appeals were resolved without argument and nothing will be said about them in this judgment.

THE PARTIES

The first appellant will be referred to throughout as TIW; the second appellant as TIW Brazil; the first to fourth respondents will be referred to as the Opportunity Group unless it is necessary to refer to a specific respondent by name; the fifth respondent will be referred to as Veronica Dantas and the 6th respondent as Daniel Dantas.

TIW is a large telecommunications corporation based in Canada, and is listed on NASDAQ and the Toronto Stock Exchange. TIW Brazil is a Brazilian wholly-owned "special purpose" subsidiary created by TIW solely to hold assets of TIW in Brazil.

The first to fourth respondents are Cayman entities. The first ("CVC LP") and the third ("Opportunity Fund") are very large Cayman Islands funds attracting money worldwide. The second respondent ("CVC Equity Partners") is the investment adviser to CVC LP. The fourth respondent (OAM") is the administrator of the Opportunity Fund. The fifth and sixth respondents Veronica Dantas and her brother Daniel Dantas, control the Opportunity Group.

THE COURSE OF PROCEEDINGS

The appellants, as Plaintiffs, filed an action Cause 229 of 2001 against the six respondents as Defendants on April 26, 2001. On the application of the appellants, Panton, J. (a) gave leave to serve the writ out of the jurisdiction on Veronica Dantas and Daniel Dantas and (b) issued a Mareva Injunction on April 27, 2001 against the total unencumbered assets of the first to fourth respondents in the amount of $390m each. The

Mareva injunction was continued in force by Graham, J. in his judgment on July 10, 2001 and by Sanderson, J. on October 5, 2001. The appellants filed their Statement of Claim on May 28, 2001 and on June 1, 2001, Veronica Dantas and Daniel Dantas filed a summons seeking to set aside service of the writ upon them.

On May 25, 2001 the respondents filed a summons in which they sought an order that the proceedings against the first to the fourth respondents be struck out or stayed as against them on the grounds that:

(1) the proper and appropriate forum for the trial of the action was Brazil and the Cayman Islands was not the proper forum for any such trial, and ,

(2) the action is an abuse of the process of the Court and/or is vexatious because the subject matter of the action was already seized by the Brazilian Courts and/or that the action sought relief relating to the same subject matter as proceedings before the Brazilian Courts and/or the action sought relief relating to matters already decided against the appellants in the Brazilian Courts.

Veronica Dantas and Daniel Dantas sought an order setting aside the order of Panton, J. for service on them out of the jurisdiction.

Graham, J. heard a number of summons in the action in July 2001 and delivered his judgment on July 10, 2001. He ordered that the Cayman proceedings in Cause 229 of 2001 be stayed. After this decision, Graham, J. recused himself from this case and an application came before Sanderson, J. on October 5, 2001 for leave to appeal against the order of Graham, J. and to set aside the Mareva injunction. Sanderson, J. refused leave to appeal as also the application to discharge the Mareva injunction. The matter then came

before this Court on an ex parte application for leave to appeal and on November 21, 2001, we ordered that the application for leave be served on the respondents and that there should be an inter partes hearing. We continued the Mareva injunction.

THE ISSUES ON APPEAL

The grounds of appeal summarized the issues for determination to be that (a) the learned trial misdirected himself on the nature and extent of the burden of proof on the respondents and failed to give effect to the correct burden; (b) the learned trial judge gave disproportionate weight to the existence of the Letter Agreement proceedings in Brazil and the extent to which there was a *lis alibi pendens*, but with the passage of time and events, the judgment should be considered solely on the *forum non conveniens* grounds; (c) the learned judge took matters into account that he ought not to have done and he failed to take into account matters that he ought to have done; and, (d) he was plainly wrong.

THE FACTUAL BACKGROUND

In 1998 the Brazilian Telecommunications system was privatized. TIW committed to invest through TIW Brazil the amount of RS464,500,000 (US$390m) into the privatization of two Brazilian mobile telephone companies, Tele Norte Cellular Participacoes S.A. ("Tele Norte") and Telemig Cellular Participacoes S.A. ("Telemig"). The investment was made jointly with the Opportunity Group and five Brazilian pension funds, known as Previ, Sistel, Petros, Telos and Funcef, ("the Pension Funds") through a

special purpose vehicle known as Telpart. TIW's portion of the joint investment was 48.9%.

The appellants, three members of the Opportunity Group, excluding Opportunity Asset Management, Inc., and the Pension Funds, entered into a Memorandum of Understanding ("MOU") on July 22, 1998 in Rio de Janeiro, Brazil, written in English, whereby the parties decided to make a joint Bids for certain "A" band cellular operations ("Targets") and in which they set out their mutual understandings regarding their mutual cooperation in the submission of Bids for the Targets and the organization of their interests in any Targets acquired by them. This MOU provided in clause 3 that representation on the Board of Directors of Telpart would be pro rata to each shareholder's voting interest. It was provided that if a Target was obtained, the MOU would terminate either by agreement of the parties or at its first anniversary, unless extended by prior agreement. Clause 11 of the MOU provided that no party thereto had authority to bind another party and no party could act as agent for another party. The governing law of the MOU was stated in clause 11 to be the law of Brazil and also that unresolved disputes should be submitted to arbitration.

A letter was written by respondent Opportunity Asset Management, Inc., under the signature of Veronica Dantas to TIW and was accepted by TIW on 26 July, 1998 ("the Letter Agreement"). It commenced with an acknowledgment of the MOU of July 22, 1998, (6 days earlier), and set out the joint understanding and agreement of the parties therein. For purposes of this appeal the most important portions of the Letter Agreement are clauses 3, 4, 9, 14 and 15. They are reproduced below:

"3. No decision to bid for a Target, and on the price thereof, shall be made without the prior agreement of both our companies, to be made jointly by our representatives on the committee established under section 1 of the MOU.

4. Opportunity will ensure that it selects the CEOs of Telpart and the Acquired Targets, as well as their Senior Management, after prior consultation and agreement with TIW.

9. Our joint objective is to cause our equity interests (including all equity rights) in the Joint Holdings to be held in a single vehicle ("Joint Holdeo") owned jointly by our two companies, pro rata to the market value of our equity interests in the Joint Holdings.

14. This agreement is valid for ten (10) years, renewable by agreement for further ten year periods, or until such time as it is suspended by another agreement.

15. Neither of us will directly or indirectly enter into any agreement or reach any understanding similar in nature or substance hereto with any third party in respect of the Joint Holdings without the prior consent of the other of us".

THE BRAZILIAN PROCEEDINGS

In about October 1998 Opportunity MEM and the Pension Funds incorporated a new company "Newtel Participatoes S.A. ("Newtel") to consolidate their holdings in Telpart and to form a single voting block. Under this structure, Opportunity MEM and through it, the Opportunity Group gained 51% control of Telpart the special purpose vehicle created under the MOU to control the Joint Holdings.

Opportunity Group declined to consult TIW in relation to the appointment of the CEO of Telpart or as to the appointment of senior management of Telpart or of any of its subsidiaries.

In the chart provided to the Court by the appellant, thirteen separate actions have been commenced in Brazil in relation to the establishment and operations of Newtel. TIW was a party to proceedings commenced on July 13, 2000 in which the parties were the Pension Funds and TIW as Plaintiffs and Opportunity MEM, Opportunity Fund, Priv. FMLA-CL, Ms. Dantas, Monteiro and Ms. Coutrim were Defendants. That action sought an ex parte injunction and plea for restraint to reverse the transfer of Pension Funds Shares in Telpart to Newtel. A second action was commenced by ordinary inter partes action on August by the same Plaintiffs against the same Defendants for similar relief. Then came the Letter Agreement proceedings which were launched by TIW against Opportunity MEM, Newtel and OAM on January 8, 2001. In the Letter Agreement proceedings the plaintiffs sought to secure consultation on the appointment of officers of Telemig and Tele Norte the operating subsidiaries of Telpart. Nine sets of proceedings filed between April 14, 2001 and May 26, 2001, all had to do with the holding of meetings of one sort or another of Telpart and the subsidiaries. The final set of proceedings are described as "Regulatory proceedings" and involves three of the Pension Funds and TIW.

In the Newtel proceedings, the appellants alleged in Part IV.3 -VIOLATION OF THE LETTER AGREEMENT SENT BY OPPORTUNITY TO TIW ON JULY 27, 1998, at paragraphs 96-100 fraudulent and illicit breaches by Opportunity of the Letter Agreement and at paragraph 128(d) request condemnation of the defendants, in any event, to indemnify the plaintiffs and Telepart for all damages, material and for pain and suffering etc. suffered by virtue of the transfer of the Telepart shares to Newtel. In

addition Part IV.4 of the Newtel complaint proceedings specifically alleged malice of the defendants to that action and at paragraphs 105 and 108 pleaded that the fraud of the defendants led TIW to act to its detriment. That action has not been concluded. An order is in force against the defendants to that action restraining them from selling the Opportunity MEM "participation" in Newtel.

The Letter Agreement action that was commenced by the appellants in Brazil was dismissed by that Court in September 2001. The appellants have appealed against that decision. The appeal has not yet been determined.

THE JUDGMENT APPEALED FROM

Graham, J. held on the evidence before him that the Brazilian proceedings were on the same facts as those in the Cayman proceedings; that the Brazilian proceedings were well advanced whereas the Cayman proceedings were at an early stage. He found that the appellants chose Brazil as the forum in which to commence the legal proceedings; that one of the Plaintiffs was a Brazilian company and that both the MOU and the Letter Agreement were to be performed in Brazil in respect of shares in Brazilian companies. He found too, that the two agreements on which the appellants were suing, were governed by Brazilian law; that the majority of the witnesses are likely to be from Brazil, speak Portuguese, would prefer to give evidence in Portuguese and that documents will be predominantly in Portuguese. He bore in mind that one of the Plaintiffs is a Canadian company and that four of the respondents are Caymanian entities

and were served as of right in Cayman. He concluded, however, that Brazil was clearly and distinctly the more appropriate forum for the trial of these proceedings.

WAS THERE AN OVERLAP BETWEEN CAYMAN AND BRAZILIAN PROCEEDINGS.

The Statement of Claim filed by the appellants in these proceedings allege that prior to the investment by TIW in the joint venture, Opportunity Group and TIW began discussions on a "side letter" whereby they would pool their votes in the consortium so as to form a control block within Telpart. TIW was intended to be the strategic partner in the consortium and would contribute industry know-how and expertise to the venture. It is further alleged that TIW was not prepared to make what was the largest investment of all the participants into the venture, approximately US$390m, without a binding agreement with Opportunity Group to ensure that it would have a degree of control over the joint venture. However, having regard to the relationship between Opportunity Group and the Pension Funds, Opportunity Group could not be seen openly to support TIW and hence the necessity for a "side letter" agreement. The relief sought in the Cayman proceedings include damages and other remedies for fraud, conspiracy, breach of fiduciary duty, breach of contract and breach of warranty of authority.

In his affidavit filed April 30, 2001, Mr. Bruno Ducharme, President and CEO of TIW, explained the essential nature of the Cayman proceedings this way:

> "After having signed the Letter Agreement with Opportunity, and having invested US$390,000,000 on the strength of the Letter Agreement,

> Opportunity and those in control of Opportunity companies have denied that the Letter Agreement have any effect and have refused to allow TIW to have any control whatsoever over its substantial investment into Telemig and Tele Norte. In fact Opportunity designed and implemented a different corporate structure in breach of its agreements with TIW, that gave it exclusive control over Telpart".

The claims in the Cayman action, Mr. Black argued, are different from those claimed in Brazil by the appellants and especially in relation to relief for breach of warranty of authority.

The Letter Agreement was made between OAM and TIW. Affidavits filed by the appellants were to the effect that Mr. Daniel Dantas and Mr. Carvalho, the directing minds of the companies in the Opportunity Group, represented to TIW that OAM was the main company, "the top", of the Opportunity Group, and had authority to bind all the other entities in the Group and therefore an agreement between TIW and OAM would bind the entire Opportunity Group. As a defence to the TIW Letter Agreement action in Brazil, the respondents pleaded that (a) the Letter Agreement was a fall back or a "Plan B" which was intended to come into effect only if the Pension Funds did not eventually participate in the consortium and (b) that OAM which was not a party to the MOU, and had no authority to bind the other members of the Opportunity Group. In any event, the respondents say, this fall back agreement did not come into effect as the Pension Funds fulfilled their obligations under the MOU and invested in the consortium.

In our view there was clear evidence coming from the appellants themselves that the proceedings in Brazil traversed in many respects the same grounds as the writ and statement of claim in the Cayman proceedings. One of the reliefs sought in the Newtel

action is to restrain Opportunity Group or some of the entities in Opportunity Group from breaching the Letter Agreement by the transfer of the Telpart Shares held by the Pensions Fund to Newtel. In the Brazilian proceedings, TIW relies not on the Letter Agreement but on the MOU. Contrary to the submissions of Mr. Black, allegations of fraud were made by the Plaintiffs (now appellants) in the Newtel proceedings and relief by way of damages was claimed.

The Letter Agreement action in Brazil was founded on the basis that it was a binding contract, unencumbered by a condition precedent to its coming into effect, and that it became effective upon execution.

Mr. Black conceded in argument that the appellants' contention that the Letter Agreement was a binding Agreement effective on the date of its execution and intended to control the conduct of the TIW and Opportunity Group in the joint venture, was no longer open to the appellants. He was constrained to accept that the Letter Agreement was construed by the Brazilian Court as a Plan B. He accepted that the Brazilian judicial system is a mature and friendly system and he accepted that unless the decision in Brazil is reversed on appeal the appellants are bound by it both here and in Brazil. It was rightly conceded by Mr. Black that there being no clear evidence in the case as to the proper law of the Letter Agreement, the Court is entitled to apply Cayman law to its construction, in which case the subjective construction of the parties would be irrelevant. To Mr. Black's submissions that the case was decided without oral testimony, Mr. Trace responded that the Judge treated the case as one for summary judgment, a procedure known to all mature systems of law.

With this concession from Mr. Black, it is difficult to see the basis of a claim for breach of warranty. If a Court of competent jurisdiction has held that there was no binding and enforceable agreement between TIW and Opportunity Group and that the intent of the parties was to have an alternative plan in case the MOU failed to operate according to its terms, how can the appellants maintain here that the true intent of the Letter Agreement was for a long term contract between TIW and Opportunity Group? We do not have to decide that troublesome point as it is enough for us to say that on the evidence before us, which was also before Graham J., (except for evidence of the order of dismissal and the appeal by TIW), he was right to say that there was a *lis alibi pendens* in Brazil.

FORUM NON CONVENIENS

> "[T]he decision whether to allow or refuse an application for the stay of an action, even though the court has jurisdiction to try and determine it, is a discretionary decision for the judge of first instance to whom the application is made. It follows that, where the judge of first instance has exercised his discretion in one way or the other, the grounds on which an appellate court is entitled to interfere with the decision which he has made are of a limited character. It cannot interfere simply because its members consider that they would, if themselves sitting at first instance, have reached a different conclusion. It can only interfere in three cases: (1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) where his decision is plainly wrong". *The Abidin Daver* [1984] A.C. 398, 420, per Lord Brandon.

Mr. Black constructed his submissions before us in an effort to show that this Court could interfere with the discretion exercised by Graham, J. on all three limbs of

Lord Brandon's test. He said firstly that Graham, J. misdirected himself as to the nature and extent of the burden of proof. The burden which lay on the respondents was to demonstrate that there is another available forum which is clearly or distinctly more appropriate than the Cayman forum in which the action may be tried more suitably for the interest of all the parties and the ends of justice. The first instance judge, he said, failed to have proper regard for the interests of TIW or the ends of justice. The speech of Lord Goff in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] AC 460, 476 et seq. laid down a number of propositions that have been followed in this jurisdiction in these types of cases. Lord Goff said:

> (a) The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice;
>
> (b) In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay;
>
> (c) The question being whether there is some other forum which is the appropriate forum, for the trial of the action, it is pertinent to ask whether the plaintiff has, *ex hypothesi*, founded jurisdiction as of right in accordance with the law of this country. This of itself gives the plaintiff an advantage in he sense that the English court will not lightly disturb jurisdiction so established. Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes where there can be pointers to a number of different jurisdictions. Of a case such as *European Asian Bank AG v. Punjab and Sind Bank*, [1982] 2 Llotd's Rep. 356, or in Admiralty, in a case of collision on the high seas, he could see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. The burden resting on the defendant is not just to show

that [England] is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum;

(d) The court will look first to see what factors there are which point to the direction of another forum. The "natural forum" is that to which the action "had the most real and substantial connection". The Court must look at the connecting factors and these will include not only factors affecting convenience or expense, such as the availability of witnesses, but also other factors such as the law governing the relevant transaction, and the place where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay;

(f) If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.

Lord Templeman expressed agreement with the views of Lord Goff, and at page 465 of the report said:

"[I]t seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in those matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties: that he will not be referred to other decisions on other facts: and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere".

The decision in *Spiliada* was applied by Schofield, J. in *Paget-Brown v. Scenic Ltd.* [1988-89] CILR 18. In that case the Plaintiff was a resident of Cayman, all the acts

of the plaintiff were done in the framework of the Cayman Companies Law, the action concerned the professional conduct of a Cayman attorney, prima facie the plaintiff did nothing in California and the defendant was a Cayman company. On the other hand, although the defendant company was registered in the Cayman Islands, the beneficial owner was an Italian with no connection to Cayman, the alleged conspiracy concerned the purchase of a farm in California, most of the actors in that alleged conspiracy resided or had connections with California, the defendant's witnesses were in California and the first successful action by the defendant had been brought in California. The Court refused to grant a stay of the California action and instead stayed the Cayman proceedings commenced by the plaintiff.

Spiliada was considered by this Court in *Contadora Enterprises SA v. Chile Holdings [Cayman Ltd.]* [1999] CILR 194 and applied in *Insurco International Ltd. v. Voluntary Purchasing Groups Incorporated* [1999] CILR 532.

Following the directions in the *Abidin Daver* and *Spiliada* cases, Graham, J. listed six factors which drove him to the conclusion that Brazil was the natural forum for the trial of the case and was clearly or distinctly more appropriate than Cayman. Mr. Black in his written submissions and before us argued that there was no *lis pendens* in the Brazilian Court involving the Letter Agreement and therefore the first four factors taken into consideration by Graham, J. had become irrelevant. This is demonstrably not so. The Letter Agreement is the subject of a claim in the Newtel proceedings at paragraphs 96-100 of the initial petition in the ordinary proceedings and confirmed in the affidavit of Sergio Bermudes. Although there is a decision of the Brazilian Court that the Letter

Agreement is of no effect, TIW has appealed and is maintaining on appeal that the Letter Agreement is valid and enforceable. There is affidavit evidence that the Letter Agreement proceedings cannot be withdrawn in Brazil without the consent of all the parties and in any event there was no evidence that the appellants have attempted to withdraw those proceedings.

Mr. Black submitted on the issue as to the law which governed the Letter Agreement that TIW had deliberately negotiated to exclude any reference to the governing law in that Agreement, and the fact that it was written in English was an indication that it was intended to be interpreted according to the law of Cayman. Graham, J. had before him the affidavit evidence that the obligations under the Letter Agreement, if it came into force, were to be performed in Brazil and expert evidence by affidavit from Brazilian attorneys that the Letter Agreement was accessory to the MOU and in consequence, pursuant to article 59 of the Brazilian Civil Code, the accessory contract followed the same rules as the main contract. The deponent opined that "because of the legal command, or because such was the will of the parties, Brazilian law applies to the disputes arising from the MOU and from the Letter Agreement that followed it". In our view, Graham, J. was perfectly correct to decide on the evidence before him that the Letter Agreement was governed by Brazilian law.

Indeed there will be commercial cases in which the court must be astute to discover with which country it is most closely connected but in this case the evidence appears to be all one way. As the respondents have submitted, the various claims in the Cayman proceedings brought by TIW, all arise out of the events leading up to the auction

of the Telebras System in Brazil in 1998. All the events relate to the ownership and control of Telpart, a Brazilian company, and the loss and damage alleged relate to the value of the appellants' shares in Telpart.

The criticism that the evidential material did not support the finding of Graham, J. that Cayman was not the more appropriate forum as two witnesses are Canadians and the others are Brazilians resident in Brazil, is not well founded. Firstly, there was no evidence that any potential witness resided in Cayman. Secondly, the companies at the center of the dispute, to wit, Telpart, Telemig, Tele Norte and Newtel, are all Brazilian companies located in Brazil; the 5th and 6th respondents, Veronica Dantes and Daniel Dantes are Brazilians, resident in Brazil; Arthur de Carvalho, who negotiated the Letter Agreement on behalf of OAM and which was signed by Veronica Dantes, resides in Brazil; and the 2nd appellant is a Brazilian company, whose controlling mind, Gerald Vasquez, resides in Brazil. Thirdly, the first respondent is a Cayman Islands exempted limited partnership; the second respondent is a Cayman Islands exempted limited company and the third respondent is a company incorporated under the laws of Cayman Islands. All three entities have their places of business in Brazil and maintain their day to day trading records there. The fourth respondent is also incorporated in the Cayman Islands but has its principal place of business in Brazil; all its staff is based in Brazil. On this state of facts, Graham, J. held that the controlling minds of the several Cayman entities in Opportunity Group are the Dantases and their associates who all reside in Brazil. There is absolutely no reason to disturb this finding of fact by the learned trial judge.

The general criticism of the decision in the court below that in applying the principle in the *Abidin Daver* case, the judge ended up in sending away from the jurisdiction, plaintiffs who had brought their action as of right against the defendants is also without merit. Lord Goff pointed to a type of case, e.g. collision on the high seas, where if the action was brought as of right in the jurisdiction, there should be no stay. This factor is not such a controlling one as to trump all other factors, however compelling. Graham, J. gave this factor full consideration, as did the Court in the *Paget-Brown* case, but found that the other factors outweighed the factor that the case was brought by a plaintiff as of right. The appellants had intentionally brought the Newtel proceedings and the Letter Agreement proceedings in Brazil and are in the process of prosecuting both.

It is worthy of mention here that the Anatel proceedings (i.e. the regulatory proceedings), in which the appellants and the Pension Funds are the plaintiffs, were also commenced by the appellants in Brazil and in that action it was complained that the transfer of shares owned by Opportunity MEM SA and the Pension Funds in Telpart to Newtel contravened Brazilian Telecommunications Law. That action was dismissed and is not now a live issue.

We could find no substance in the complaint that Graham, J. held that there will be a mass of other documents to be translated into English if the Cayman proceedings were permitted to continue. True the MOU and the Letter Agreement were in English but all the other relevant documents are in Portuguese. Mr. Trace submitted that documents created between July 1998 and August 2000 will be critical to the determination of how

the parties viewed the Letter Agreement and these included the following documents that are all in Portuguese: (a) Exclusivity Agreements between Opportunity and the Pension Funds; (b) Telpart Share Redemption Resolutions; (c) Last draft of the intended Shareholders' Agreement to replace the MOU and (d) Agreement dated July 10, 2000, between the 1st appellant and the Pension Funds. This obviously was the mass of documents to which Graham, J. was referring all of which were exhibited to an affidavit of Arthur deCarvalho in the proceedings before him.

It was submitted by Mr. Black that there was no possibility of conflicting judgments in Brazil and the Cayman Islands as there is no *lis pendens* in Brazil. We are not persuaded that is the true position. There are the Newtel proceedings and the Letter Agreement action. In addition, there is the affidavit evidence of attorneys Barbosa, Mussnich, & Angola that:

> "In fact we are aware of several law suits currently in course before the courts of Rio de Janeiro, Brazil, which involves officers and partners of the companies Newtel and Telpart. The objects of these lawsuits comprises, basically, matters relating to the control and management of said companies, such object being very similar and incompatible with the Lawsuit filed in Cayman. Therefore if the present Lawsuit were conducted in the Cayman courts, there would clearly exist the risk that the decision rendered by such courts would conflict with the judgments in the lawsuits in the course in Brazil".

There is, in our view, great force in the submissions of Mr. Trace that the substance of the dispute between the parties is what are the terms of the agreement made between the parties in July 1998 for the control of Telpart and the Court that decides this question will have to go on to determine the remedy, if any, to which the appellants are

entitled. This Court should avoid the possibility of conflicting judgments in two jurisdictions.

PUBLIC POLICY CONSIDERATIONS

Mr. Trace raised the issue of the Brazilian public policy but it does not appear that any argument was addressed to Graham, J. on this issue. What was raised and argued by the appellants is that the trial judge misdirected himself as to the significance of the Cayman public policy in this case. That public policy was said to arise because of the status of the Cayman Islands as an international financial center and the recent initiatives by international financial community, principally the Financial Action Task Force ("FATF"). It is alleged by the appellants that over 90% of Cayman registered companies are either Exempted Limited Companies [ELC's] or Non-Resident Companies [NRC's]; that an ELC must carry on its business mainly outside the Islands and is prohibited from doing business within the Islands save in furtherance of its business outside the Islands; that the same rule applies to Limited Partnerships and that an NRC cannot carry on business within the Islands.

The appellants complain that as the trial judge based his reasoning partly on the fact that three of the respondents carried on their business outside of the Cayman Islands, a *forum non conveniens* challenge by an ELC or NRC would always meet with success. If, said, the appellants, a *forum non conveniens* application will succeed solely on the basis that the business of a Cayman Islands company is carried on outside the Caymaan Islands, this means that the legal requirement to submit to the jurisdiction by ELC's and

NRC's is illusory. The consequence, they submitted would be that over 90% of Cayman companies would not be subject to the jurisdiction of the Cayman Courts in any meaningful way. These arguments were put before Graham, J. in the context of the *Contadora* case and he rejected them on the basis that public policy was not one of the factors mentioned in the *Abin Daver* or *Spiliada* cases. The trial judge distinguished the *Contadora* case on the bases that (a) there was, in that case, evidence of strong factual connections with Cayman, (which he said this case lacks); and (b) that in the *Contadora* case he had rejected the expert evidence that a Cayman Islands judgment would not or might not be enforced in Panama. That distinction was, in our view, sufficient for his decision to come to a different conclusion in this case than that to which he arrived in the *Contadora* case. However, Graham J. went on to say:

> "I accordingly reject the policy argument, which if accepted, would run contrary to the line of authority based on the Abidin Daver and The Spiliada".

Although both cases referred by the learned judge, are decisions of the House of Lords, they do not have the force of statutory instruments. It cannot mean that because the factor "public policy" was not specifically mentioned in the House of Lords decisions under reference, if a case should arise outside of the United Kingdom, where "public policy" is put forward as a relevant consideration the Court cannot consider public policy as a factor in determining the issue of *forum non conveniens.* In *Contadora*, Collett J.A. imputed to the trial judge a reliance on public policy as a factor worthy of consideration in the exercise of his discretion.

We are in entire agreement with the submissions of Mr. Walton that for public policy reasons, (a) the status of the Cayman Islands as an advanced and reputable financial center and (b) as a jurisdiction which can and does deal with international disputes between parties who use Cayman Islands companies in their structure, are factors that can be taken into consideration in an appropriate case when deciding *forum non conveniens* issues that relate to ELC's and NRC's. A similar public policy factor was recognized by the Court of Appeal of Jersey in *Solvalub Limited v. Match Investments Limited*, [1996] JLR 61. In that case the court was being asked to issue a Mareva injunction in aid of foreign proceedings and the court held that if it became known that the courts of Jersey would not lend its aid to courts of other countries by temporarily freezing the assets of defendants sued in those other countries, Jersey might soon become known as a safe haven for those wishing to evade liabilities imposed by the courts to which they are subject. Collett, J.A. at p. 206 of the *Contadora* report said:

> "The reputation of Cayman international business is to some extent at issue in these proceedings. Furthermore a judicial system which perceived itself as powerless to intervene effectively to prevent the proceeds of such a fraud from disappearing overseas would inevitably invite disparagement from the international financial community. There are, therefore, strong public policy considerations here which, in my judgment, were rightly taken into account by the learned judge".

We understand the appellants to be saying that the public policy factor is so strong that once an ELC or an NRC defendant is served as of right in the Cayman Islands, a *forum non conveniens* application should be rejected. We do not agree. We hold that public policy is an important factor to be taken into consideration by the trial judge but it

does not trump all other factors. At the end of the day, the test must still be that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. Graham, J. had, in our view, correctly distinguished this case from the *Contadora* case and consequently where he fell into error on the public policy factor did not affect his decision.

In our view the trial judge did not misdirect himself in any meaningful way; he did not take into account matters that he ought not nor has he failed to take into account matters that he ought; and it was a grave overstatement to say that his exercise of discretion was plainly wrong. We therefore did not find merit in any of the grounds of the substantive appeal.

We did not find it necessary to deal with the issue of whether the order for leave to serve Veronica Dantas and Daniel Dantas outside the jurisdiction or the service itself were valid having regard to the fact that the whole action was stayed.

THE MAREVA INJUNCTION

The respondents submitted that on the basis that Brazil is clearly and distinctly the appropriate forum for the determination of the action the Mareva injunction should fall away and no new Mareva injunction should be granted. There was no dispute that in principle the court has jurisdiction to grant a Mareva injunction in aid of foreign proceedings notwithstanding that proceedings for substantive relief in the Cayman courts

have been stayed in favour of proceedings in Brazil. In *Channel Tunnel Group Ltd. v. Balfour Beatty Ltd.* [1993] AC 344, Lord Mustill laid down three conditions on which such relief may be granted: (a) the interim relief must be needed to render more efficacious the procedures and any decision favourable to the appellants that emerge therefrom; (b) the court should approach such an order with utmost caution; and (c) the court should be prepared to act only when the balance of advantage plainly favours the grant of relief. Evans-Lombe, J. in *Phonogram Ltd. v Def American, Inc.*, The Times 7 October, 1994, applied the *Channel Tunnel* decision and held that where the cause of action is within the English court, but for reasons of *forum non conveniens* the court was inclined to stay the proceedings pending resolution in a foreign court, the English court retained jurisdiction to grant interlocutory injunctions in support of rights claimed in the foreign proceedings. He added, however, that it would be an unusual case where the English court would preempt any ruling in the foreign court by making such interlocutory orders, which the foreign court might ultimately find to be inappropriate. This matter was considered by the Privy Council in *Walsh & ors. v. Deloitte & Touche, Inc.*, judgment of the Privy Council dated 17 December 2001. This was a case from The Bahamas and was directly concerned with the grant of a worldwide Mareva injunction. The Privy Council expressly applied the *Channel Tunnel* decision to the Mareva injunction situation where it is intended that such an injunction should be issued in aid of a foreign jurisdiction after the stay of proceedings in the domestic court. The Privy Council held that as the proceedings for a Mareva injunction of a foreign court are interlocutory, it is not necessary for the applicant to show that he is likely to succeed in establishing such a

cause of action. For the purposes of the threshold requirement it is sufficient, if upon the material before the court, the appellant appears to have a good arguable case.

The evidence before us is that OAM has some US$60m in the Cayman Islands and that the amount is frozen by way of the Mareva injunction. The respondents produced figures to indicate that the respondents have assets in Brazil of nearly US$1b.

The respondents contend that the appellants have made no application for a Mareva injunction in Brazil. It is admitted that Mareva injunctive relief is obtainable in Brazil, although not on a worldwide scale, and if granted would not cover the assets of the Opportunity Group in the Cayman Islands. The respondents submitted that since the Brazilian court has already found against the appellants in the Letter Agreement proceedings case, there is really no evidence that the appellants have a good arguable case and so have not met the threshold position for the grant of the Mareva injunction in aid of the foreign proceedings. In addition, they say that the appellants are unable to show that this is an unusual case nor how would the injunction render more efficacious the Brazilian proceedings. Already, they say, the appellants have the benefit of a restraining order in the Newtel proceedings and yet they have not asked for a Mareva injunction in the Letter Agreement or in the Newtel proceedings in Brazil. Finally, they say, there is reason to believe that the appellants are undergoing serious financial difficulties in Canada and have decided to discontinue their operations in Brazil and to dispose of those assets within 12 months.

We were not persuaded by the appellants' submissions that there is a real risk of dissipation of the assets of the respondents in Brazil. We were not satisfied that this was an unusual case although one of the Plaintiffs is a Canadian and four of the respondents are Cayman entities who were served as of right within the jurisdiction, and we were not persuaded for the reasons given herein that the appellants had a real likelihood of success in the Brazilian Letter Agreement action. We therefore decided that the appellants should be given an opportunity to apply to the Brazilian Court for a Mareva injunction, if they so desired, and extended the Mareva injunctions on the existing terms for 14 days for that purpose.

In other respects the appeal was dismissed with costs to the respondents to be taxed if not agreed.

ADDENDUM - LEAVE TO APPEAL TO THE PRIVY COUNCIL.

On April 10, 2002, an application was made to the Court, pursuant to Rule 3(2)(a) of the Cayman Islands (Appeal to the Privy Council) Order, 1964, for leave to appeal to Her Majesty in Council against the Court's decision pronounced on March 28, 2002, whereby it dismissed the appeal and continued the Mareva injunction until April 11, 2002. The Court's reasons for judgment had not yet been handed down.

In the applicants' written and oral submissions, it was contended that the decision raised issues of great general or public importance that related (a) to the application of the decision of the *Abidin Daver* principle to the instant case; (b) the ambit of the public

policy decision in the *Contadora* case and (c) the factor that the parties are connected to Canada, Brazil and Cayman; are involved in international trading in very large sums of money; and consequently, the decision is of great interest in a large number of countries. The application was opposed by the respondents.

We did not think that the Mareva injunction should be continued until the reasons for judgment became known. The Court had clearly indicated that the 14 day extension of the Mareva injunction was intended to give the appellants an opportunity to obtain injunctive relief in Brazil if they were so minded. We had exceptionally heard the application for leave to appeal on an inter partes basis but were quite satisfied that the appeal was argued on both sides on well known principles of law. We were not persuaded by the submissions of Ms. Corbett that any matter of great general importance that warranted a further appeal was raised in this matter and we refused leave to appeal with costs to the respondents to be taxed if not agreed.

ZACCA, P.

COLLETT, J.A.

ROWE, J.A.