Neutral Citation No. [2013] NIMaster 16 | *Ref:* **2013NIMaster16**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **29/08/2013**

12/099313

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION

Between:

DAARON MICHAEL ROBINSON

Plaintiff;

AND

G4S INTERNATIONAL EMPLOYMENT SERVICES LIMITED
AND
SERIOUS ORGANISED CRIME AGENCY

Defendants.

MASTER McCORRY

[1] By summons issued 14 December 2012 the first defendant applies for an order pursuant to O.11, rule 1, O.12, rule 8 and the inherent jurisdiction of the High Court, setting aside or staying the plaintiff's writ of summons on the grounds that the High Court in Northern Ireland does not have jurisdiction to determine the action. By summons issued 27 March 2013 the second defendant applies for an order pursuant to O.12, rule 8 and the inherent jurisdiction of the High Court setting aside the writ

on the grounds that the High Court in Northern Ireland does not have jurisdiction to determine the action and further staying the action on the ground that Northern Ireland is forum non conveniens. Both summonses were heard together on 3 May 2013 and 25 June 2013. In addition to counsel's concise and focussed submission the court had the benefit of skeleton arguments by each of
the three counsel. The evidence to which this court had regard was contained in the following affidavits:

- Grounding affidavit of Ian Dulake for first defendant dated 10.12.12;
- Replying affidavit if Stephen Clarke for plaintiff dated 15.02.13;
- Rejoinder affidavit of Ian Dulake dated 15.03.13;
- Grounding affidavit of William Ellis (Solicitor of the Crown Solicitor's Office) for second defendant dated 27.03.2013;
- Replying affidavit of Stephen Clarke dated 23.05.2013, and
- Further affidavit of Stephen Clarke dated 19.06.2013.

[2] The plaintiff's cause of action accrued on 1 May 2011 when he sustained personal injuries in a fall from the roof of a building situated in the Serious Organised Crime Agency's (second defendant) secure compound in the "green zone" in Kabul, Afghanistan. The plaintiff resides, and is domiciled in Northern Ireland. The first defendant is a company incorporated in Jersey in the Channel Islands whose business includes the provision of security services, which engaged the plaintiff to work for it under a service agreement in Afghanistan. The second defendant is a government agency which has its headquarters in London but operates throughout the United Kingdom. It contracted out the provision of security services for its staff in Afghanistan to the first defendant. It denies that it in any way employed the plaintiff. Following the accident the plaintiff's early treatment was at the French Hospital in Kabul, before he was flown back to Northern Ireland. The first defendant has no presence in, or connection with Northern Ireland and the service agreement or contract of employment between the plaintiff and the first defendant was arranged at a meeting in its London Office.

[3] In his affidavit sworn 17 December 2012, Mr Ian Dulake, a director of the first defendant company, avers that on 26 April 2011 the first defendant and plaintiff entered into a contract of employment whereby the plaintiff was engaged as a team leader operating in Afghanistan. Clause 22 of the contract provided: "This agreement shall be governed by and construed in accordance with the laws of Jersey and the parties hereby submit to the exclusive jurisdiction of the Jersey Court." The agreement was signed by Mr Dulake for the first defendant in St Helier, Jersey on 18 April 2011 and by the plaintiff in Kabul on 26 April 2011. However, in an affidavit sworn 15th February 2013 the plaintiff's solicitor Stephen Roy Clarke, in response to Mr Dulake's affidavit, states that the words at clause 22 referred to by Mr Dulake continue: "The Company retains the right however, to take action in any jurisdiction to enforce the obligations of the Executive under this Agreement". Annex B to the contract contains a document entitled "GENERAL RELEASE FROM LIABILITY IN FAVOUR OF G4S INTERNATIONAL EMPLOYMENT SERVICES LIMITED IN THE EVENT OF RETURN TO COUNTY OF RESIDENCE UNABLE TO WORK". That General Release includes the words: "This General release shall continue in full force and effect notwithstanding any termination of my Service Agreement and is governed by Jersey Law." Further, Mr Clarke avers that the original contract was signed by the plaintiff on 17 March 2009 at the first defendant's Buckingham Gate Office in London before he went to Afghanistan, and upon its annual renewal all that he received and signed was the back page of the contract. He stated that the only association with Jersey was that this is where the plaintiff's pay slips were sent from. Mr Dulake in his further affidavit sworn 15 March 2013 denies that the plaintiff was only provided with a back sheet to sign the company practice being to send the entire contract and reiterates that the relevant employment contract was that signed by the plaintiff on 26 April 2011. He also denies that the plaintiff's only contact with the Jersey Office was in relation to payslips and refers to various exhibited documents showing that there was other contact.

[4] In an affidavit sworn 27 March 2013, Mr William Kerr Ellis, Solicitor of the Crown Solicitor's Office, avers that the contract for the provision of security services between the first and second defendants includes at clause 30.2 an indemnity clause

whereby the first defendant agrees to indemnify in full the second defendant in respect of claims, inter alia, for personal injuries, loss and damage, which arise out of or in consequence of the presence of the first defendant or its staff on the second defendant's premises. It also provides at clause (47) a jurisdiction clause stating: "This contract shall be governed by and interpreted in accordance with English Law and shall be subject to the exclusive jurisdiction of the Courts of England and Wales." Clause 11.6 of the contract also states: 'that any or all staff shall remain under the overall control of the First Named Defendant at all time and shall not be deemed to be employees, agents or contractors of the Second Named Defendant'. This obviously gives rise to a number of issues between the two defendants including: (a) if the action is stayed in this jurisdiction either for lack of jurisdiction or on grounds of forum non conveniens, is the proper jurisdiction Jersey or England and Wales? (b) in light of the indemnity clause and clause 11.6 should the second defendant be sued at all? (c) Can the second defendant be said to be domiciled in Northern Ireland, which whilst primarily an issue for the plaintiff has implications for the first defendant.

[5] As regards issue (a) in the foregoing, at hearing counsel for the second defendant adopted the position that if proceedings in Northern Ireland were stayed it was not necessary for this court to rule on which of the two jurisdictions, England and Wales or Jersey, were the proper forum. However as different statutory frameworks and tests applied when considering whether the proper forum was Northern Ireland or Jersey (the "international issue") as opposed to considering whether the proper forum was Northern Ireland or England and Wales (the internal issue), this court had to consider both issues. He also conceded in respect of issue (b) that it could not at this stage of the action be said that it was either inappropriate or outrageous for the plaintiff to join the second defendant in the action. In respect to (c) counsel for the second defendant conceded that in certain cases the Agency could be sued in Northern Ireland and that therefore it based its application to set aside or stay on grounds of forum non conveniens rather than any other issue. Counsel for the other parties, accepting the concessions by the second defendant, broadly agreed that this was the correct approach, as did this court.

[6] In adopting this approach much of the disputed evidence as to where the contract between the first defendant and the plaintiff was entered into is rendered irrelevant because it is patently clear that the contract could not be said to have been entered into in Northern Ireland. Likewise, the various arguments in the first defendant's skeleton argument about whether or not the second named defendant could be said to be domiciled in Northern Ireland or that the courts here could therefore be said to have jurisdiction over it, do not in fact arise to be determined. This means that the first defendant's submissions before this court are focussed on the exclusive jurisdiction clause in the contract between the plaintiff and first defendant and whether or not this court should stay the action on the basis that Jersey is therefore the correct jurisdiction, in other words, the "international issue". The second defendant focused on the issue of forum non conveniens, i.e. the "internal issue" between Northern Ireland and England and Wales, but counsel's analysis of the different tests to be applied was illuminating and particularly helpful to this court in crystalizing the issues.

The Legal Framework

A. The first defendant's application: Northern Ireland versus Jersey

[7] The first defendant's application is based on two grounds. The first is that the first named defendant is domiciled in Jersey. The second is the exclusive jurisdiction clause contained in clause 22 of the service agreement which establishes the contractual relationship between the plaintiff and the defendant. Jersey of course is not a signatory to the Brussels or Lugano Conventions and therefore the 1982 Act does not apply so far as it is concerned. Dealing firstly with domicile, It is not disputed that that the first defendant is not domiciled within Northern Ireland or indeed within the United Kingdom for the purposes of Council Regulation (EC) 44/2001 ("the Judgments Regulation).

[8] What this means for the plaintiff is that, in the first instance, to establish jurisdiction against the first defendant in the Northern Ireland courts the plaintiff

must show that the first defendant is domiciled here, in the sense that it has a place of business here, because it is based either in Jersey or in London, but clearly has no presence in, or indeed any connection whatsoever with, this jurisdiction. The plaintiff however seeks to circumvent this obvious block to the plaintiff suing the first defendant in this jurisdiction by relying upon the presence, and therefore for practical purposes domicile, in this jurisdiction of the second named defendant, and as I have already indicated, counsel for the second defendant has conceded that the second defendant operates throughout the United Kingdom and can be said to be domiciled here and that it cannot be argued at this stage that it was improper for the plaintiff to include it as a party. That concession has significant implications for the first defendant. Because the plaintiff therefore relies upon Owusu v Jackson [2005] 1 QB 805 C-282/02, a decision of the Court of Justice of the European Communities, to argue that the Northern Ireland Courts no longer have power to stay proceedings brought as of right against parties domiciled in Northern Ireland. In other words, the plaintiff contends that as he was entitled to sue the second defendant here and the second defendant has domicile here, then the court here cannot stay the action at the behest of another defendant in favour of the courts of a non-E.U. state such as Jersey.

[9] In Owusu v Jackson the plaintiff sustained catastrophic injuries whilst on holiday in Jamaica when he struck his head off a submerged sandbank of which he had not been warned. He had hired a holiday villa with access to a private beach from a defendant domiciled in England and Wales, and he sued a number of other defendants domiciled in Jamaica who owned the beach or had the benefit of licenses in connection with its use. The defendants sought a stay by the English court in favour of the courts in Jamaica on the basis of forum non conveniens. This was refused at first instance on the grounds that despite the connecting factors with Jamaica, article 2 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 obliged the courts in England and Wales to assume jurisdiction against the first defendant on grounds of domicile, and if it did not therefore try the action against the other defendants there was a risk of conflicting decisions in different jurisdictions. The defendants appealed to the Court of Appeal which referred the case to the Court of Justice of the European

Communities. The question referred was: "whether, where the case before a court of a Brussels Convention contracting state, had connecting factors with a non-contracting state but none with any other contracting state, the court could exercise a discretionary power, available under its national law, to decline jurisdiction in favour of the courts of the non-contracting state. The Court of Justice held:

> ""that since article 2 of the Convention was mandatory and the Convention contained no express exception relating to forum non conveniens, it was not open to a court of a contracting state to decline jurisdiction conferred on it by article 2 on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other contracting state was in issue or the proceedings had no connecting factor with any other contracting state."
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> (Article 2 of the Brussels Convention provides:-
> "Subject to the provisions of this Convention, persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state. Persons who are not nationals of the state in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that state".
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> Although article 5(I)(3) provides p803G):
> ("that a defendant may be sued in another contracting state, in matters relating to a contract, in the courts for the place of performance of the obligation in question, and, in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.")

As stated by Munkman on Employers Liability, 15th ed 2009 at 31.06 "The consequence of the ruling in Owusu is that UK domiciled defendants are now answerable in their domestic courts for torts committed worldwide, whatever the proper law of the tort." That of course would appear to hold good as between the

plaintiff and the second defendant in this case, and then extends in effect to the first defendant because of the operation of article 2.

[10] I turn then to the exclusive jurisdiction clause at clause 22 of the service agreement which confers exclusive jurisdiction to the courts in Jersey. As I have previously observed much of the disputed affidavit evidence from the plaintiff and the first defendant as to where the contract was signed is largely irrelevant because one thing that is certain is that it was not signed in Northern Ireland, and whether it was signed in Afghanistan or in London is therefore not an issue which this court need decide in the context of a dispute as to whether Northern Ireland or Jersey is the proper jurisdiction. Likewise it is unnecessary for this court to decide issues such as whether or not when the contract was renewed annually, only the back sheet was sent to the plaintiff in Afghanistan, for signing. The plaintiff does not dispute that the original contract signed by him at the first defendant's office at Buckingham Gate in London. In these circumstances I do not think that the plaintiff can sustain an argument that the contract did not contain an exclusive jurisdiction clause whereby the agreement was to be governed by and construed in accordance with the laws of Jersey or that the parties thereby submitted to the exclusive jurisdiction of the Jersey Court. The question is what is the effect of that clause.

[11] As Jersey is not a signatory to any relevant convention the Civil Jurisdiction and Judgments Act 1982 as amended provides no assistance, and the Rome II Convention does not apply. In Adair Smith and Marcus Smith t/a Adair Smith Motors v Nissan Motor (GB) Limited (Unreported, 19.05.1993) the plaintiff, sued the defendant in breach of contract when it failed to appoint it as sole Nissan dealer in the Newtownabbey area. In deciding whether or not to override the exclusive jurisdiction clause Carswell J followed the principles set out by Brandon J in The Eleftheria [1970] P94, 99-100, a summary of which was approved by the Court of Appeal in The El Amria [1981] 2 Lloyd's Rep 119, 123 and accepted as correct by the House of Lords in The Sennar [1985] 2 All ER 204. Those principles are:-

"(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiff. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, and without prejudice to (4), the following matters, where they arise, may properly be regarded:-

(a) In what country the evidence on the issues of fact is situation, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

[12] In Antec International Limited v Biosafety USA Inc [2006] EWHC 47 (Comm) the courts in England had jurisdiction to hear the case because the plaintiff company was incorporated and domiciled in the United Kingdom. The claim concerned a distribution agreement which contained a clause whereby the parties submitted to "the non-exclusive jurisdiction of the English Courts". The defendant argued that the appropriate forum for trial was Florida. Gloster J summarised the applicable principles derived from the authorities as follows:

"i) The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is

appropriate to approach the matter as though the claimant has founded jurisdiction here as of right, even though the clause is non-exclusive ….

ii) Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule …..

iii) Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard Spiliada balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain …"

[13] These authorities reveal a number of distinct and different approaches to the question of jurisdiction reflecting the different situations which arise including: the straightforward jurisdiction clause (exclusive or non-exclusive); the pure forum non conveniens case; the forum non conveniens versus exclusive jurisdiction case, and the Schedule 4 domestic United Kingdom cases as opposed to the United Kingdom jurisdiction versus foreign jurisdiction (international) cases. Setting aside for the moment the impact of Owusu v Jackson, it seems to me that this is an exclusive jurisdiction clause case with, from the first defendant's perspective, features of a forum non conveniens case where the first defendant relies upon an exclusive jurisdiction clause but also argues that Northern Ireland is not an appropriate jurisdiction. However, this is not a forum non conveniens argument per se because forum non conveniens no longer applies as a ground for staying an action where the disputing jurisdictions are in the United Kingdom and outside the United Kingdom, and as Jersey is a non-signatory, the 1982 Act does not apply and therefore that Act's specific preservation of the forum non conveniens ground for stay in the internal

United Kingdom context, does not apply. However, in deciding whether or not to give force to the exclusive jurisdiction clause, or to allow a party to depart from it, are the factors to which the court shall have regard similar to those in a forum non-conveniens case? At paragraph 31.26 of Munkman on Employer's Liability the author seems to suggest that in deciding which is the most appropriate jurisdiction the court shall follow the principles in Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460, but in Antec Gloster J says that it is not appropriate to embark upon a standard Spiliada balancing exercise. Rather, he would say, the party arguing for a stay on the basis of the exclusive jurisdiction clause has to point to some factor which it could not have foreseen at the time the contract was concluded; and even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this would not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain …" His focus is less on the appropriateness of a particular jurisdiction but whether or not a party ought to be allowed to depart from the agreed choice as to jurisdiction in their contract. That approach would make it very difficult for this plaintiff to avoid the consequences of the exclusive jurisdiction clause, again setting aside for the moment the impact of the Owusu case. As to the Spiliada approach, that would entail this court applying to the issues between the plaintiff and first defendant much the same approach as to the issues between the plaintiff and the second defendant, or the between the 2 defendants.

B. The second defendant's application: Northern Ireland versus England.

[14] The starting point with respect to the relevant law is sections 16 and 17 and Schedule 4 of the Civil Jurisdiction and Judgments Act 1982 as amended. Section 16 (1) provides that: "The provisions set out in Schedule 4 … shall have effect for determining for each part of the United Kingdom, whether the courts of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where- (a) the subject-matter of the proceedings is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or

not the Regulation has effect in relation to the proceedings); and (b) the defendant or defender is domiciled in the United Kingdom or the proceedings are of a kind mentioned in Article 22
of the Regulation (exclusive jurisdiction regardless of domicile)." Article 1 of Schedule 4 provides: "Subject to the rules of this Schedule, persons domiciled in a part of the United Kingdom shall be sued in the courts of that part." Article 3 provides: A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question." Article 12 provides: "(1) If the parties have agreed that a court or the courts of a part of the United Kingdom are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, and, apart from this schedule, the agreement would otherwise be effective to confer jurisdiction under the law of that part, that court or those courts shall have jurisdiction." Finally, Section 49 of the Act provides: "Nothing in this Act shall prevent any court in the United Kingdom from staying, … striking out or dismissing any proceedings before it, on the grounds of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention" (Brussels Convention or as the case may be Lugano Convention).

[15] In Walker t/a The Country Garage v BMW (GB) Ltd [1990] 6 NIJB 1 Campbell J held that in cases where the parties are resident in different parts of the United Kingdom, an exclusive jurisdiction clause may be overridden in certain circumstances and the action stayed on the grounds of forum non conveniens. As we have seen Carswell J in Adair Smith and Marcus Smith t/a Adair Smith Motors v Nissan Motor (GB) Limited Unreported, 19.05.1993) was of like mind but he held that the circumstances in which a court would override an exclusive jurisdiction clause on grounds of forum non conveniens were limited.

[16] The issue of whether or not to stay an action on grounds of forum non conveniens arose before Higgins L.J. in Batey v Todd Engineering (Staffs) Ltd (Unreported 07.03.07).

As in this case the dispute arose in the context of a personal injuries claim. There was no exclusive jurisdiction clause and the issue concerned the appropriateness of

pursuing the action in the courts in Northern Ireland where the accident had occurred and early medical treatment had been provided: as opposed to England where both plaintiff and defendant were domiciled, continuing medical treatment had been provided and most of the medical experts were based. Higgins L.J. stated:-

> "The locus classicus of the principle applicable in an application to stay proceedings on grounds of forum non conveniens is the speech of Lord Goff in Spiliada Maritime Corp. v Cansulex Ltd 1987 1 A.C. 640 at page 466. In that case it was alleged that corrosion was caused to a chartered Liberian owned vessel when it was loaded in Vancouver, British Columbia, with sulphur bound for ports in India. Leave to serve proceedings on the shippers in Canada was granted by Staughton J, in the High Court in London, on the ground that the proceedings involved breach of a contract governed by English law. The Court of Appeal set aside the writ on the ground that it was impossible to conclude that the English court was distinctly more suitable for the ends of justice. The ship-owners appealed to the House of Lords who allowed the appeal. It was held that the determination whether a case was a proper one for service out of the jurisdiction required the court to apply the same principles as in an application to stay proceedings on the ground of forum non conveniens. Thus the court had to identify the forum in which the case could most suitably be tried for the interests of all the parties and for the ends of justice. Having reviewed the authorities Lord Goff, with whom the other members of the House agreed, set out a summary of the law and its application between pages 474 and 484. At page 474 he identified the fundamental principle in these terms -
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> > "In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called forum non conveniens. That principle has for long been recognised

in Scots law; but it has only been recognised comparatively recently in this country. In The Abidin Daver [1984] A.C. 398, 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in Sim v. Robinow (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:

'the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'."

[6] Lord Goff then went on to emphasise that the application of the principle did not involve a consideration of what was convenient for the parties, rather what was the most suitable or appropriate jurisdiction. At page 476 he summarised the law in these terms -

"(a) The basic principle is 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, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the Société du Gaz case, 1926 S.C. (H.L.) 13, 21, per Lord Sumner; and Anton, Private International Law (1967) p. 150). It is however of importance

to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).

(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 fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established..... In my opinion, 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. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see MacShannon's case [1978] A.C. 795, per Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the
connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings

during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the Société du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin *478 Daver [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Crédit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places 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; see, e.g., the decision of
the Court of Appeal in European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356. It is difficult to imagine circumstances where, in such a case, a stay may be granted.

(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. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the The Abidin Daver [1984] A.C. 398, 411, per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage." "

The Parties' Arguments

The Plaintiff

[17] The Plaintiff's arguments against the first defendant are based: firstly on the ruling of the European Court of Justice in Owusu v Jackson, namely that where a plaintiff sues as of right a party domiciled in this jurisdiction (the second defendant),

then the court in Northern Ireland cannot stay the action at the behest of another defendant (the first defendant) in favour of the courts of a non-E.U. state such as Jersey. His second argument is that Northern Ireland is the more appropriate jurisdiction based on the principles akin to those applicable in forum non conveniens cases (if the approach favoured by Munkman is correct). His argument against the second defendant is pure forum non conveniens. His first argument largely speaks for itself. His second argument is more difficult because it is clear from the outset that the primary connection between the circumstances of the cause of action and of the case, and Northern Ireland, is the fact that the plaintiff resides here which of course is not a significant factor in itself.

[18] As I have already indicated the disputed affidavit evidence as to where the contract as between the plaintiff and the first defendant was signed, or were the first defendant is based, is largely irrelevant because what is certain and undisputed is that it was not in Northern Ireland, although I suppose the plaintiff would argue that under the principles in forum non conveniens the question is whether there is a jurisdiction with greater connection to the case than Northern Ireland, and he would contend that if there was, it was not Jersey. The plaintiff also introduces into the argument the fact that whilst the early medical attention was provided at the French Hospital in Kabul, thereafter the plaintiff was flown home and his treatment from thereon was at the Ulster Hospital, Dundonald. The affidavit dated 19.06.2013 by the plaintiff's solicitor Mr Clarke avers that two medical reports have been obtained from Mr Morrow (Consultant Neurological Surgeon) and Dr Loughry (Consultant Psychiatrist), which have not been agreed by the defendants and the plaintiff argues that if the case goes to trial outside Northern Ireland then it will be necessary for those doctors to travel there to give evidence, thus tilting the balance in favour of the case being heard in Northern Ireland. Against that of course, all the other relevant witnesses, employees of either the first or second defendants would have to travel to Northern Ireland if the court here retains jurisdiction and refuses a stay.

The First Defendant

[19] The first defendant's arguments against the plaintiff are firstly that the plaintiff should be held to the parties' contractual choice of jurisdiction in accordance with the exclusive jurisdiction clause, but apparently adopting the Munkman approach, that the more appropriate jurisdiction is Jersey, or at least is not Northern Ireland. The relevant factual background has already largely been covered, and in essence the first defendant has no connection whatsoever with Northern Ireland, but equally there appears to be little connection between Jersey and the plaintiff's service contract, he having signed it either in London or Kabul, the only on-going contact being a small number of emails and the fact that the plaintiff's payslips were sent from Jersey. So far as the plaintiff's argument with regard to the medical evidence and witnesses is concerned, the first defendant would not concede that this tilts the balance in favour of Northern Ireland as the most appropriate jurisdiction, arguing that it would take more than a tilting of the balance to off-set the effect of the exclusive jurisdiction clause. It contends that where a clause in the contract confers exclusive jurisdiction on a specified court, another court, in this case the Northern Ireland Court, is obliged to decline jurisdiction unless the plaintiff establishes that it is just and proper to allow the action to proceed here; the burden being on the plaintiff to establish a strong cause to justify being allowed to break the contract (the Eleftheria line of cases).

The Second Defendant

[20] The second defendant's argument is based entirely on forum non conveniens. Relying upon Higgins' L.J.s detailed analysis of the authorities on forum non conveniens in Batey v Todd (unreported, 07.03.2007) and in particular Lord Goff in Spiliada Maritime Corporation v Cansulex Ltd, and also Carswell J in Adair Smith v Nissan following The Eletheria principles, the second defendant contends: (a) all of the first named defendant's witnesses are more readily available in England; (b) to the extent that any United Kingdom law applies in Kabul it would be that of England and Wales; (c) the only connection with Northern Ireland is the plaintiff's residence which carries little weight; (d) the second defendant genuinely seeks trial in England

and secures no procedural advantage from so doing; (e) there is no prejudice to the plaintiff in not having his action determined in Northern Ireland in the sense contained at points (e) (i) to iv) of the Eleftheria principles (security for their claim in a foreign jurisdiction, ability to enforce, foreign time bar or unlikelihood of a fair trial for political, religious or racial reasons); and (f) the burden of proof on the plaintiff. Counsel also makes the point that the fact that two medical experts are based in Northern Ireland is not sufficient to "tilt the balance. All witnesses of fact are in England and the court should avoid encouraging a race to engage expert witnesses for the purposes of creating a connection with a particular jurisdiction. He also raises the exclusive jurisdiction clause in the contract between the first defendant and the second defendant, but as plaintiff's counsel fairly points out, that has nothing to do with the plaintiff and is a matter between the defendants.

Conclusions

[21] Dealing firstly with "the international jurisdiction issue", that is the first defendant's application based on the exclusive jurisdiction clause in favour of Jersey, The Court of Justice of the European Communities in Owusu v Jackson has ruled that the Northern Ireland Courts no longer have power to stay proceedings brought as of right against parties domiciled in Northern Ireland. As the plaintiff was entitled as of right to sue the second defendant here and the second defendant has domicile here, then the court here cannot stay the action at the behest of another defendant, the first defendant, in favour of the courts of a non-E.U. state such as Jersey. The first defendant did not raise any argument against the impact of this decision upon its application at hearing. Further, as forum non conveniens does not apply in the international sphere the first defendant cannot rely upon the principles of forum non conveniens to obtain a stay of the action in this jurisdiction by showing a greater connection with Jersey or England. Insofar as Jersey is concerned it seems to me that there is in fact little more connection demonstrated with respect to that jurisdiction than there is to Northern Ireland, although it is not for this court to determine whether the most appropriate jurisdiction is Jersey or England. The first defendant can of course argue along the lines of the principles based on The Eleftheria or even

Antec International Limited, although it was not cited or relied on by the first defendant, that the plaintiff must show a very strong reason to be allowed to depart from an exclusive jurisdiction clause. However it seems to me that such a strong cause is demonstrated by Owusu v Jackson, namely that in this instance this court cannot stay the plaintiff's action at the behest of a defendant based in Jersey, where the plaintiff is entitled to sue another defendant here. For this reason the first defendant's application fails.

[22] The second defendant's application is a pure forum non conveniens application, in which the only connection which the plaintiff can demonstrate between the jurisdiction in Northern Ireland as opposed to England, is the plaintiff's residence here, and more lately, the acquisition of medical reports from medical experts based here. The term "tilting the balance" was used by counsel at hearing, but with respect it is not a matter of balance but of establishing with which jurisdiction the action is most closely connected, with the onus upon the plaintiff to establish that the most closely connected jurisdiction is Northern Ireland. At paragraph [20] above I set out the arguments raised by counsel for the second defendant and it seems to me that without the necessity of rehearsing each point verbatim, he carries the day on each and every point, and it is for that reason that I say that this is not a matter of tilting the balance, because the plaintiff comes nowhere near demonstrating a connection between the action and this jurisdiction to counter the very clear connection with England demonstrated by the second defendant. For that reason the plaintiff's action is stayed at the behest of the second defendant.

[23] In order to deal with the issues raised in this application it was necessary for this court to consider the relative position of the 3 jurisdictions in question in order to determine whether or not there was particular jurisdiction more appropriate than Northern Ireland, but in the end a decision that Northern Ireland is forum non conveniens is simply a ruling that this jurisdiction is not the most appropriate, and it is for another court, in another jurisdiction, to determine which of the other two possible jurisdictions are most appropriate, and I make no ruling in respect of that issue.