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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **10/06/2015**

No. 13/18860

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

Between:

ARTHUR BOYD AS ADMINISTRATOR OF
THE PRESBYTERIAN MUTUAL SOCIETY LIMITED

Plaintiff;

AND

ADRIAN STOTT, ALAN EDGAR, CHRISTOPHER GRINYER, CRAIG J BROWN, D NIALL GUNN, DARREN LEWIS, DAVID FERGUSON, DONAL HENRETTY, WEN S SPARKS, GEORGE BREWSTER, GERRY MCCLUSKEY, GRAEME STEWART, GRAEME MCDONALD, IAN F HANNON, IAN W CAMERON, IAN FERGUSON, JAMES RICHARDSON, JAMES STEWART, JAMES MCINTYRE, JASON BEGG, JONATHAN REID, KEVIN I ANGUS, LACHLAN MACFARLANE, MARTIN WAITE, MICHAEL HORNE, MURRAY SMITH, NEIL THOMPSON, PAUL TAYLOR, SANDY RENNIE, STEVEN W BARRETT, PRACTISING AS J & E SHEPHERD CHARTERED SURVEYORS AND WYG ENGINEERING LTD.

Defendants.

Master McCorry

[1] By writ of summons issued 18.02.13 the plaintiff claims damages for loss sustained as a result of the negligence and breach of contract of the defendants Stott et al practising as J&E Shepherd Chartered Surveyors (the first defendant) as surveyors and WYG Engineering Ltd (the second defendants) as planning consultants, in and about the valuation of lands at Brueacre Park, Wemyss Bay, Scotland. The first defendant entered an unconditional appearance on 24.02.14, the writ having just recently been served on the partners 6 days within the validity period, in circumstances described by Mr Joseph McGuigan, solicitor for the first defendant in his affidavit sworn 27.03.14, grounding an initial application by summons dated 28.03.14 for leave to withdraw the unconditional appearance and

enter a conditional appearance. He averred that it was the first defendant's intention to bring an application pursuant to Order 12, rule 8 to set aside the writ on the grounds of jurisdiction, relying upon an exclusive jurisdiction clause. An amended summons was served on 02.10.2014 in which the Order 24, rule 8 relief is sought in addition to an order staying the action on grounds of forum non conveniens.

[2] The plaintiff is a mutual society based solely in Northern Ireland. It went into administration by court order dated 04.07.11, under the terms of a scheme of arrangement pursuant to section 899 of the Companies Act 2006. The terms of the order included the appointment of Arthur Boyd of 12 Brunswick Street, Belfast and John Hanson of KPMG, James Street South, Belfast, as joint supervisors with Mr Boyd as administrator. It is not disputed that he is entitled to bring these proceedings in that capacity. The first defendant is a firm of chartered surveyors domiciled in Scotland which was retained by a Northern Ireland registered company known as Windyridge, a director in which was Mr Derek Harrison, to prepare a valuation report in relation to land that was to be used as security for a loan which Windyridge was requesting from the plaintiff. Mr Harrison resides in Richill, County Armagh. An initial report dated 13.12.06 was revised on 19.02.07. Relying on these valuation reports which were received at its offices at 3 Glengall Street, Belfast, the plaintiff issued a letter of offer to Mr Harrison on 23.01.07 in respect of a loan of £1,200,000. The funds were drawn down by him on 22.02.07 from the plaintiff's current account with the Bank of Ireland branch at High Street, Belfast. The plaintiff alleges that the valuation was erroneous in that it was an over valuation which did not take into account lack of access and planning issues in relation to the lands on which the loan was to be secured. There was no contract between the plaintiff and the first defendant so that the cause of action is primarily based on negligent misstatement.

[3] It is common case that the three issues before the court at this stage are:-

1. Whether the first defendant should have leave to withdraw its unconditional appearance and leave to enter a conditional appearance?

2. Whether the plaintiff is entitled to bring proceedings against the defendants in this jurisdiction under the Civil Jurisdiction and Judgments Act 1982, Schedule 4?

3. If the plaintiff is entitled to bring the proceedings in this jurisdiction, whether the court ought to stay those proceedings on the ground of forum non conveniens?

As any exclusive jurisdiction clause in the contract between Windyridge and the first defendant would not be binding on the plaintiff, the first defendant's initial intention to apply for a stay based on exclusive jurisdiction did not proceed, and it relies instead upon Schedule 4 of the1982 Act and Forum Non Conveniens.

1. Whether the first defendant should have leave to withdraw its unconditional appearance and leave to enter a conditional appearance?

[4] On this issue the first defendant's position, relying upon the dicta of Weatherup J in Craven v Bellanca & Others [2012] NIQB 58 at [9], is that if this court decides that the Courts in this jurisdiction do not have jurisdiction under the 1982 Act Schedule 4, paragraph 3, then this issue does not arise because the entering of an unconditional appearance to the writ of summons will not vest jurisdiction in a court where it does not otherwise exist. The plaintiff does not demure from that but it does dispute the first defendant's further contention that if the Northern Ireland Courts do have jurisdiction entry of an unconditional appearance would not prevent the defendant from seeking a stay on grounds of forum non conveniens. The plaintiff argues that if this court decides it does have jurisdiction pursuant to Schedule 4, paragraph 3, but goes on to consider a stay on grounds of forum non conveniens, the fact that the first defendant effectively submitted to the jurisdiction of the court is a factor which it ought to take into account in considering a stay, and weigh it in the balance in the plaintiff's favour.

[5] In Volkes v Eastern Health and Social Services Board and Another [1990] NI 388, Campbell held that the court had complete discretion to grant leave to withdraw an appearance, but that a distinction was to be made between cases where a party had taken a deliberate step and those cases where a mistake had been made. The plaintiff submits that the first defendant's solicitor took instructions from its client and entered an unconditional appearance and therefore this was an example of a deliberate step. However, that analysis does not really reflect what is contained in the averments by the first defendants' solicitor Mr McGuigan, in his initial affidavit sworn 27.03.14, which were not contradicted by the plaintiff. The circumstances described therein as to how an unconditional appearance came to be entered (but not served) are more characteristic of inadvertence than deliberate step, and bearing in mind that the court enjoys a complete discretion I am satisfied that this is a case wherein the first defendant is entitled to leave to withdraw that unconditional appearance and enter a conditional appearance. As the issue at its height is of peripheral significance only in the overall jurisdiction dispute before the court, I propose to deal with it thus, in short form.

2. Whether the plaintiff is entitled to bring proceedings against the defendants in this jurisdiction under the Civil Jurisdiction and Judgments Act 1982?

[6] Schedule 4, rule 1 of the Civil Jurisdiction and Judgments Act 1982 provides that "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." The defendants in this case are domiciled in Scotland and therefore under the general rule should be sued there. Rule 2 however provides that "Persons domiciled in a part of the United Kingdom may be sued in the courts of another part of the United Kingdom" but "only by virtue of rules 3 to 13 of this Schedule." The circumstances in which there may be departure from the general rule, referred to as the "Special jurisdiction" are

contained at Rule 3 and include: "(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; …. (c) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur; …. (h) in proceedings – (i) concerning a debt secured on immoveable property; …. in the courts of the part of the United Kingdom in which the property is situated." In this case, as has been seen, there is no contractual relationship between the plaintiff and the defendant, and therefore there is no cause of action in breach of contract. The plaintiff's claim is primarily in negligent misstatement, which is in tort, or in Scotland delict, where the plaintiff must sue in the place where the harmful event occurred. Whether the harmful event occurred in Northern Ireland or in Scotland is the main issue between the parties in this application, although the first defendant also argues that paragraph (h) (i) is also relevant, in that the action concerns a debt secured on immoveable property, namely the land at Wemyss Bay in Scotland which again places jurisdiction in that part of the United Kingdom. With respect I have some difficulty with that latter proposition because it seems to me that this is an action about a negligent valuation of land to be used as security for a loan, rather than the loan which is secured on land. Be that as it may the plaintiff's only basis for derivation from the general rule is under rule 3(c) and their interpretation of the term "where the harmful event occurred". If the harmful event occurred in Northern Ireland the plaintiff is entitled to sue in these courts, otherwise it is not so entitled and these courts do not have jurisdiction to entertain the claim.

[7] In Domicrest Limited v Swiss Bank Corp [1999] Q.B. 548, the plaintiff supplied electrical goods over a period of time to a number of companies to whom banking services were provided by the defendant bank at one of its branches in Switzerland. The method of payment agreed was that upon supplying the goods the plaintiff received a copy payment order authorising the defendant bank to pay the invoiced price from the companies' account. The plaintiff argued that transmission of a copy payment order by the bank constituted an assurance that payment would be made by the bank for the invoice price. In 1995 the bank refused to honour three copy payment orders in respect of goods supplied to the companies in Switzerland and Italy. The plaintiff sued the bank in the tort of negligent misstatement in the English courts. The bank applied for a stay on the grounds that as the harmful event causing damage occurred in Switzerland because that is where the bank allegedly failed to exercise care in respect of the representations made by it, jurisdiction was vested in the Swiss courts.

[8] Dealing with the issue as to where the harmful event occurred, at p 562 Rix J observed that

> *"It is clear that the expression "the harmful event" refers either to the event giving rise to the damage or to the damage itself : Handelskwekerij G.J Bier BV v Mines de Potasse d'Alsace S.A. (Case 21/76 [1978] Q.B. 708, 730, para 19: "Thus the meaning of the expression 'place where the harmful event occurred' in article 5(3) must be established in such a way as to acknowledge that the plaintiff has an option to*

commence proceedings either at the place where the damage occurred or the place of the event giving rise to it."

[9] At p563 G he goes on to cite Marinari v Lloyds Bank Plc. (case C-364/93) [1996] 2 A.C. 18 where at p229 the court notes:

> *"13. The choice thus available to the plaintiff cannot however be extended beyond the particular circumstances which justify it: such an extension would negate the general principle laid down in the first paragraph of article 2 of the Convention that the courts of the contracting state where the defendant is domiciled are to have jurisdiction and would lead to recognition , in cases other than those expressly indicated, of the jurisdiction of the courts for the plaintiff's domicile, which the Convention mitigates by excluding, in the second paragraph of article 3, the application of national provisions which make such jurisdiction available for proceedings against defendants domiciled in the territory of a contracting state.*
> *15. Consequently, that term cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial damage consequential on initial damage arising and suffered by him in another contracting state."*
>
> (The court is of course referring directly to the Lugano Convention which the 1982 Act gives force of law in the United Kingdom, the provisions of which are if not always identical are similar to the Act.)

[10] At page 576H referring specifically to cases of negligent misstatement Rix J held:

> *"Applying that formula, it seems to me that the place where the harmful event giving rise to the damage occurs in a negligent mis-statement is, by analogy with the tort of defamation, where the mis-statement originates. It is there that the negligence, even if not every element of the tort, is likely to take place; and for that and other reasons the place from which the mis-statement is put into circulation is as good a place in which to found jurisdiction as the place where the mis-statement is acted on, even if receipt and reliance are essential parts of the tort."*

[11] This approach was adopted by Weatherup J in McAteer v The Association of Chartered Certified Accountants [2012] NIQB 33 where at [16], referring to Domicrest he stated:

> *"The place where the harmful event giving rise to the damage occurs in a case of negligent misstatement was held to be, by analogy with the tort of defamation, where the misstatement originates. It is of note that in relation to negligence misstatement the tort comprises the negligence of the defendant and also the reliance by the plaintiff on the negligent advice, with such reliance usually occurring in the place where the plaintiff is domiciled. Nevertheless the place where the harmful event giving rise to the damage occurs is the place where the misstatement originates. Further, with negligent misstatement causing economic loss, the place where the damage occurs*

may be elsewhere than the place of the event giving rise to the damage and is quite likely to be the place where the misstatement is heard and relied on."

Weatherup J then goes on to cite Floyd J in Future Investments SA v FIFA [2010] EWHC 1019, [2010] All ER (D) 77 May and the note of caution wherein at [20] Floyd J expressed a note of caution in these terms:-

"One has to be cautious about claims in jurisdictional challenges …. That the claimant suffers loss in the state of its domicile because that is the place where it ultimately suffers loss to its bottom line …. The claimant will ultimately suffer all economic loss at the place where its books are made up, which is likely to be the place of its domicile. If this were sufficient to establish that the loss occurred there it would create a very large exception to the principle that a Defendant should be sued in the state of ***his*** *domicile. The special jurisdiction must accordingly be interpreted more strictly than this …"*

[12] Applying this principle to the facts in McAteer v Association of Chartered Certified Accountants, Weatherup J continues at [22] "In asking, in the present case, where the event giving rise to damage and entailing tortious liability directly produced its harmful effects on the Plaintiff the questions are, first what is the harmful event, second what is the harmful effect and third, where is the place where the harmful effect occurred." The McAteer case concerned the publication on the internet of a decision in relation to the plaintiff and documents which identified him pending an adjourned hearing by a disciplinary committee of the Association of Chartered Accountants, as a result of which he claimed to have suffered various heads of damages in different parts of the United Kingdom and in the Republic of Ireland. Weatherup J held that in relation to the particular head of loss to the plaintiff's accountancy practice in Northern Ireland the harmful event occurred here in the sense of it being the place where the damage occurred. However, even though the other items of loss whilst arising from publication by the defendant in London, originated in the actions of a third party in Northern Ireland and caused loss in both Northern Ireland and the Republic of Ireland, the plaintiff was permitted to carrying on the proceedings here to the extent that he established that the accountancy losses occurred here.

[13] The earlier case of Dumez France S.A. and Tracoba Sarl v Hessische Landesbank and Others [1990] I.L.Pr.299, before the Court of Justice of the European Communities, provides useful insight into the rationale behind the general principle that persons should be sued in their place of domicile. In that case the plaintiff companies had formed subsidiaries in Germany to carry out a property transfer. In 1973 the defendant bank terminated credit agreements with the result that German property developer, along with the plaintiff's German subsidiaries went into compulsory liquidation. The plaintiffs sued the Bank in an action for delictual liability before the Tribune de Commerce, Paris. The defendant objected that the Tribune de commerce had no jurisdiction on the ground that the damage suffered by the plaintiffs arose in Germany and not at its registered office in Paris, which the Tribune accepted, that decision being affirmed by the Cour d'Appel.

[14] On further appeal to the Cour de Cassation it sought a preliminary ruling based on the principles set down in Mines de Potasse D'Alsace as to the proper interpretation of the special jurisdictions provided by article 3(2) of the Convention. It was held:

> *"[17] …. These special jurisdictions, which can be chosen at the plaintiff's option, are based on the existence of a particularly close connection between the dispute and courts other than those of the defendant's domicile, which justifies conferring jurisdiction on those courts on grounds of the efficient administration of justice and proper organisation of the action.*
> *[18] To achieve this object, which is of fundamental importance in a convention which should promote the recognition and enforcement of judgments outside the State in which they are made, it is essential to avoid the multiplication of competent courts, which increases the risk of irreconcilable judgments, which is a ground for refusing recognition or enforcement pursuant to Article 27(3) of the Convention.*
> *[19] Furthermore, this object precludes any interpretation of the Convention which, apart from the cases expressly provided for, could lead to recognising the jurisdiction of the courts of the plaintiff's domicile and which would thus enable the plaintiff to determine the competent court by choosing his own domicile.*
> *[20] It follows from what has been said that although, according to the courts case law, the phrase 'the place where the harmful event occurred' in Article 5(30 of the Convention may refer to the place where the damage occurred, the latter should be taken to mean only the place where the causal event, giving rise to delictual or quasi-delictual liability, directly produced the harmful effects in relation to the person who is the immediate victim."*

This is precisely the point made by Floyd J in Future Investments S.A. v FIFA, cited and approved by Weathrup J in McAteer v The Association of Chartered Certified Accountants and urged upon this court by the first defendant.

[15] As to Dicey, Morris and Collins in their Conflict of Laws (15th Edition), at paragraph 11-287 they say:

> *"The place of damage connotes the place where the physical damage is done or the recoverable economic loss is actually suffered. Even though in one sense a claimant may suffer economic loss at the place of its business that is not of itself sufficient to confer jurisdiction on that place, for otherwise the place of business of the claimant would almost automatically become the basis of jurisdiction. In particular, a claimant cannot confer jurisdiction on the court of its domicile by alleging that, by suffering economic loss there, he was the victim of a harmful event committed abroad."*

In short, for a multiplicity of reasons a claimant will normally prefer to take proceedings in the courts of the jurisdiction in which it is domiciled, justifying it on the basis that even if the initial event leading to their loss or damage occurred outside their jurisdiction of domicile, the ultimate damage was to their bottom line (to borrow Floyd J's phrase) in their place of domicile. However, that flies in the face

of the general principle that persons should be sued in their place of domicile and the special jurisdictions ought not to be interpreted in a way which allows plaintiffs to determine the competent court by reference to their own domicile. This analysis, on its face, would not appear to assist the plaintiff in the current case.

[16] Drawing on the authorities counsel for the plaintiff, correctly in my view, sets out three propositions defining the meaning of the term "the place where the damage occurs". Firstly, it does not mean every place where a plaintiff suffers some damage. Secondly, if there is a series of places where a plaintiff suffers some damage, it does not mean that the plaintiff is entitled to sue in each of the series of places. Thirdly, again where there is a series of places, the plaintiff is only entitled to sue in the place where the initial damage is directly produced and not where the subsequent and consequential damage occurs. In this case, he submits, the first defendant contends that the direct or initial damage suffered was in Scotland and only indirect/consequential damage was suffered in Northern Ireland, but he maintains that contention is wrong because the only damage suffered by the plaintiff was in Northern Ireland; the only action taken by the plaintiff namely, acting on the valuation report the release of funds to Mr Harrison, was in Northern Ireland; and no-one including the plaintiff suffered any damage in Scotland. It cannot therefore be argued that the plaintiff suffered only indirect or consequential loss.

[17] In Dumez France S.A., the plaintiff argues, the harmful event was the liquidation of the plaintiff's German subsidiaries, who were damaged when they became insolvent, indirectly damaging the French parent companies. In the present case no damage was sustained by anyone in Scotland. The land, which in any event was not the plaintiff's, was not devalued by the first defendant, it was simply a case of its opinion as to value, upon which the plaintiff relied, being wrong. It is misconceived to say that the plaintiff received a charge over land in Scotland that was less than the true value because a charge has no intrinsic value. The case is not about the charge but the first defendant's wrongful valuation. Whether the value of the claim is based on "no transaction" (the plaintiff would not have entered into the loan agreement if it had been aware of the true valuation); or "different transaction" (the plaintiff would have entered into a different agreement and therefore suffered a proportionate loss), the loss was sustained not in Scotland but in Northern Ireland. The question of direct or indirect loss does not arise, the only loss was that suffered by the plaintiff in Northern Ireland. The plaintiff carried out a similar exercise in respect of the Domicrest Ltd v Swiss Bank Corp. and McAteer v The Association of Chartered Certified Accountants cases although submitting that the latter was more on all fours with the present case.

[18] In carrying out this exercise, I am not entirely clear as to whether the plaintiff is arguing that the principles in Dumez, Domicrest or McAteer do not apply in the present case, or rather that the particular factors in those cases which resulted in the principles being applied in the way that they were, are absent from the present case. I think the latter is the more sustainable argument because the principles are what

they are, and that is established law, but they must be applied according to the facts of each case, and that is a point which is particularly clear in the approach adopted by Weatherup J in McAteer. In considering the facts of the present case, and applying the principles to them, then this court should follow that approach and ask, and answer, the 3 questions which he posed, namely first what is the harmful event, second what is the harmful effect and third, where is the place where the harmful effect occurred.

[19] What was the harmful event? I think that the harmful event must be the provision of an inaccurate valuation of land at Wemyss Bay in Scotland. The physical inspection which would have been required in order for such a valuation clearly had to have taken place in Scotland and the same applies to the associated work such as considering comparators or matters including planning issues because it has not been suggested that that would have taken place other than in Scotland. However, it seems to me that the valuation resulting from that work was not provided as such until it was sent to, or reached, the plaintiff, because the first defendant could have prepared a report but for any number of reasons not forwarded it, in which case it could never have been said to have been provided to anyone and the plaintiff could never have acted in reliance upon it. I conclude from this that the harmful event was the providing of the valuation reports to the plaintiff in Belfast. Whilst as I have said the principles must be applied to the facts of each case, it is noteworthy that in McAteer v Association of Chartered Certified Accountants where the offending information was put onto the internet in London, nevertheless Weatherup J held that the harmful event was the publication of material about the plaintiff on the internet in London, but the plaintiff was still able to sue in Northern Ireland in respect of his accountancy losses sustained in this jurisdiction, which was just one of four heads of loss in respect of which he claimed.

[20] As to the second question, what is the harmful effect? The harmful effect was that the plaintiff relied upon the wrongful valuation in order to grant a loan of £1,200,000 the security for which was the land at Wemyss Bay which had been overvalued with the result that it did not provide adequate security for the loan resulting in economic loss to the plaintiff. In McAteer Weatherup found that the harmful effect was the economic loss sustained to the plaintiff's accountancy business. The third question, where did the harmful effect occur? The decision to grant the loan in reliance upon an undervalue would appear, on the basis of such evidence as is available, to have been taken in Belfast. The decision process would have involved underwriters who may or may not have been based in Northern Ireland: that information has not been provided to the court: but it seems to me that the decision to grant the loan must have ultimately been taken by the plaintiff through an officer or officers authorised to take such as decision, and there is nothing to suggest that that would have been done other than at the plaintiff's office in Belfast. The loan was drawn down from the plaintiff's current account in a branch of the Bank of Ireland in Belfast. If this analysis is correct then the only damage which was sustained was in Northern Ireland, and no other damage having occurred elsewhere that must be the damage resulting directly from the reliance

upon the undervalue as opposed to some consequential or indirect loss. In answering the third question in McAteer Weatherup J held that the harmful effect to the accountancy business was in Northern Ireland where it was based. He distinguished the other heads of loss which were not sustained in Northern Ireland and did not conclude that the courts here had jurisdiction.

[21] The answer to the second question posed, whether the plaintiff is entitled to bring proceedings against the defendants in this jurisdiction under the Civil Jurisdiction and Judgments Act 1982, is therefore in the affirmative, because the plaintiff has established that it is entitled to invoke the special jurisdiction provided for in Rule 3 (c) of Schedule 4 of the 1982 Act, which states that in matters relating to tort, delict or quasi delict, the plaintiff is entitled to sue in the courts for the jurisdiction where the harmful event occurred or may occur.

3. If the plaintiff is entitled to bring the proceedings in this jurisdiction, whether the court ought to stay those proceedings on the ground of forum non conveniens?

[22] 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)." 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).

[23] 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). The issue arose in the context of a personal injuries claim but the authorities and the principles established by them are equally apt in the present case. 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.

[24] 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 ensuring the ends of justice. The ship-owners appealed to the House of Lords who allowed the appeal, holding 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, the other members of the House concurring, 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 -

> *"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'."*

[25] Lord Goff in Spiliada Maritime Corp. v Cansulex Ltd observed that 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 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."

[26] The first stage in the application of these principles in order to identify the jurisdiction, with which the proceedings are most closely connected, is to establish what the proceedings are about and the relief sought. This has been considered in depth in the preceding course of this judgment at [6] to [20], where the court found that the harmful event causing economic loss to the plaintiff was the provision of an overvaluation of development lands in Scotland to the plaintiff in Northern Ireland, who relying on the wrongful valuation advanced monies to a developer in Northern Ireland, for which the lands in Scotland provide inadequate security.

[27] The principles applicable in deciding whether or not an action should be stayed on grounds of forum non conveniens can be distilled, and so far as the facts of this case are concerned applied, as follows.

(i) 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. In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. The burden resting on the defendant is not just to show that Northern Ireland is not the natural or appropriate forum for the trial, but to establish that there is another available forum, in this case England, which is "clearly or distinctly" (to use the words of Lord Goff in Spiliada Maritime Corporation v Cansulex Limited) more appropriate than the Northern Ireland forum. In short form, applying these three principles to the facts of this case, the burden is on the defendant to show that Scotland is clearly or distinctly a more appropriate jurisdiction than Northern Ireland.

(ii) Next, the court will look first to see what factors there are which point in the direction of another forum, in this case Scotland, being the more appropriate forum. These are the factors which tend to indicate that the other forum is the "natural forum" or that with which the action has "the most real and substantial connection" (words of Lord Keith of Kinkel in the Abidan Daver). 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, and the places where the parties respectively reside or carry on business.

(iii) If the court concludes that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. 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 (which does not arise in this case) can be the fact, if established objectively by cogent evidence that the plaintiff will not obtain justice in the foreign jurisdiction.

[28] In this case therefore, the burden rests on the first defendant not just to show that Northern Ireland is not the natural or appropriate forum for the trial, but to establish that there is another available forum, namely Scotland, which is "clearly or distinctly" (to use the words of Lord Goff in Spiliada Maritime Corporation v Cansulex Limited) more appropriate than the Northern Ireland forum. In short form, applying these three principles to the facts of this case, the burden is on the first defendant to show that Scotland is clearly or distinctly a more appropriate jurisdiction than Northern Ireland. In so doing the first defendant arguably starts out at a disadvantage in the sense that this court has already held that the plaintiff has entitlement as of right to sue in this jurisdiction (see paragraph (c) of Lord Goff's principles in Spilliada Maritime Corp v Cansulex Ltd), but I think that the disadvantage is already reflected in the principle already referred to namely that the defendant carries the burden of showing that there is another available forum distinctly more appropriate than Northern Ireland, in this instance Scotland.

[29] As noted at (b) of Lord Goff's principles, it is normal practice in forum non conveniens disputes for each party to seek to persuade the court, by reference to the issues in dispute in the action, i.e. what it is about, and the evidence that will be required in order to prove each parties case; that one or other jurisdiction is the one with which the action has the most real and substantial connection. In this instance some of this overlaps with the same factors considered by the court in relation to the question as to where the harmful event occurred, but forum no conveniens goes beyond this to encompass a consideration of the practicalities of the case, but that does not of course entail simply considering what is convenient to the parties.

[30] The first defendant places emphasis on the fact that the background to the case is land situated in Scotland, and issues will include the valuation of land in Scotland by Scottish valuers; the factors influencing valuation such as access issues and their implication for planning, giving rise to questions of Scottish valuation practice and Scottish land values at the time in question; Scottish land law and Scottish planning law and practice, all of which will involve Scottish witnesses. Counsel points specifically to a third party exclusion clause contained in the valuation reports which arguably might prevent the plaintiff from suing the first

defendant, which would turn on Scottish legal principles as to the applicability or effect of the exclusion clause in this case. However, his submissions did not go so far as to identify substantive differences in Scottish law from that applying in the rest of the United Kingdom on that issue or in respect of Scottish planning law or practice.

[31] In relation to the final stage in the application of the Spilliada principles; were the court to hold that Scotland is the most natural forum, whether there are any special circumstances which would nevertheless justify refusal of a stay; the first defendant submits that the only possible argument which could be raised is the different limitation periods applying in each jurisdiction, namely 6 years in Northern Ireland and 5 years in Scotland. Beyond pointing out that the affidavit of Mr Boyd sworn 04.03.2015 demonstrates that in suing in Northern Ireland the plaintiff was not motivated by an intention to forum shop because of the limitation point, which Mr McMahon for the first defendant accepted, Mr Colmer for the plaintiff did not pursue the limitation point. I think that he was correct in taking that position because the issue was specifically addressed by Lord Goff at pp. 383 - 384 in Spilliada Maritime Corp v Cansulex Ltd, where he held:

> *" . . . I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of a time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there".*

In those circumstances I do not propose to further consider the limitation point.

[32] The plaintiff, to demonstrate that the jurisdiction with which the action has the most real and substantial connection is Northern Ireland, placed emphasis on the fact that evidence will be required from internal Presbyterian Mutual Society witnesses as to how the valuation reports were procured and considered; and as to the effect on their deliberations if the reports had reflected the true value of the land where the loan sought was for £1,200,000. Would this have led to no transaction taking place or to a different transaction? The plaintiff also argued that internal evidence will be required in relation to any contributory negligence issue which might be raised by the first defendant, such as an allegation of imprudent lending of the sort which commonly arises in this type of case, although the first defendant points out no such defence has yet been raised. The plaintiff also emphasises the fact that the Society is a financial institution local to Northern Ireland, and that will result in reliance upon local banking experts, whose evidence will be set against the background of the local Northern Ireland market. In a sense this is just the counterpoint to the first defendant's points about Scottish planning law and practice, Scottish valuations and so forth.

[33] It is often the case where a defendant seeks to stay an action on grounds of forum non conveniens, that there are factors which support its stance and other

factors which support the plaintiff's stance. I find that this is such a case. For each factor to which the first defendant can point to show that there is a greater connection between the action and Scotland, the plaintiff can point to one demonstrating a greater connection with Northern Ireland. Some factors carry more weight than others, but in the overall balance it is for the first defendant seeking a stay on the basis that the clearly most appropriate jurisdiction for the hearing of the case is Scotland, to satisfy the burden of showing this is the case. Where the factors are as finely balanced as it seems to me they are in this case, that means that the first defendant has failed to discharge the burden placed upon it by the authorities, in that it has not demonstrated that Scotland is clearly the most appropriate forum for the trial of this action on the basis that it is the jurisdiction with which the action has the most real and substantial connection.

[34] I therefore allow the first defendant's application insofar as it relates to leave to withdraw its unconditional appearance and leave to enter a conditional appearance although in a sense those applications are now redundant. I dismiss its application to stay the action pursuant to Schedule 4 of the 1982 Act and on grounds of forum non conveniens. I will hear counsel on the issue of costs at their convenience.