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Judgment: approved by the Court for handing down | *Delivered:* **29/11/2013**
*(subject to editorial corrections)**

No.12/128991

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

Between:

UP AND RUNNING (NI) LIMITED

Plaintiff;

AND

UP AND RUNNING (HARROGATE) LIMITED

Defendant.

Master McCorry

[1] By writ of summons issued 19 November 2012 the plaintiff claimed a variety of forms of relief, including declarations: that a previously subsisting commercial arrangement between the plaintiff and defendant was validly terminated by notice dated 24 October 2012; or in any case was at an end; and that the parties owed each other no further commercial obligations other than payment of £31,895.47 for stock. In addition the plaintiff sought injunctions to: prevent the defendant from making or publishing disparaging comments, accusations or defamatory remarks concerning

the plaintiff or preventing the defendant from contacting the plaintiff's trade suppliers in a manner that will or may damage its business and reputation. The plaintiff also sought damages for negligence, negligent misstatement, breach of contract, malicious falsehood and defamation and all necessary accounts and enquiries. This dispute arose from the breakdown of business relations between the parties variously described as a commercial arrangement (by the plaintiff) or a franchise agreement (by the defendant). The defendant applied for, and was granted leave to enter a conditional appearance to the writ of summons on 21 December 2012, followed by the present application by summons issued 15 April 2013 to set aside the writ of summons on grounds of lack of jurisdiction and further to stay the proceedings on the ground that Northern Ireland is a forum non conveniens.

[2] The defendant operates a chain of retail stores in England and the Isle of Man, dealing in sportswear and goods including running shoes and accessories under the name "Up and Running". The plaintiff operated two such stores in Northern Ireland under a franchise agreement or other commercial arrangement with the defendant which commenced in March 2005. A signed copy of a contract which the defendant describes as a franchise agreement was left with the directors of the plaintiff company on 17 March 2005, on the same date as the plaintiff's premises opened at 60-64 Wellington Place, Belfast. The plaintiff did not return a signed copy of the contract but from then until 24 October 2012 the parties carried on a commercial relationship in which the defendant says the plaintiff derived all the benefits of a franchise agreement and thereby, the defendant says, adopted the franchise agreement and all its terms. The plaintiff denies that it adopted the franchise agreement and contends that the commercial relationship between the parties was a buying arrangement only. Much of the affidavit evidence addresses the issue of whether or not their relationship was a franchise agreement, the significance for the purpose of this application being that if the plaintiff had in fact adopted the agreement then it is bound by its terms including an exclusive jurisdiction clause whereby the contract was to be governed by the jurisdiction of the English Courts.

The first issue: The Nature of the Commercial Relationship between the Parties?

[3] The defendant has adduced by affidavit a considerable body of evidence to support the proposition that despite the fact that the plaintiff failed to sign and return the franchise agreement in March 2005 their relationship was based on that agreement, the plaintiff deriving all the benefits of a franchise agreement including benefits which they could only have enjoyed under a franchise agreement, and acted in a manner, conducting their business and using terminology in correspondence and advertising which were consistent only with a franchise agreement. Mindful of the caution by which interlocutory courts must be guided when dealing with assessment or interpretation of factual material, some of which may be disputed, it is nevertheless necessary in this application to highlight some of the evidence to which the defendant refers.

[4] Chronologically the first matter upon which the defendant relies is the fact that the plaintiff paid the £5000 required to be paid upon execution of the agreement as provided for at clause 15.1.1., where it is described as an "initial fee". The plaintiff does not dispute this. The defendant (affidavits of Mr Macfarland) refers to various examples from correspondence passing between the parties over the succeeding years including an email dated 6 February 2006 from Mr Jenkins (plaintiff) to Mr Macfarland (defendant) wherein in the first paragraph Mr Jenkins says "…I went with the franchise because you made myself and Sharon feel very wanted." In the third paragraph he talks of taking "the business forward in the coming years … in or out of the franchise". He continues in the same vein in the fifth paragraph using the term: "you have been very very fair with many of the franchisees". Unfortunately neither party were able to explain to me the precise context in which the email was written which may or may not be significant. Moving forward until 20 November 2011 (which is beyond the five year franchise period provided for in the agreement, an issue to which I will return) the defendant refers to what is described as an article entitled "Hitting the ground running" published in the Belfast Telegraph but is probably more in the nature of a promotional exercise than an item of news. The second paragraph begins: "When owner Michael Jenkins began the business in 2005, he chose the franchise route." And then continues to quote Mr Jenkins saying: "We

decided to go on a franchise basis because we were buying into a level of expertise and a UK running network". However, in the following paragraph he is quoted as saying; "We are very much part of that network, but we look at it now as being part of a buying group. "We have complete control of the business in Northern Ireland."

[5] This of course is consistent with the position now adopted by the plaintiff, namely that he was not a franchisee but part of a buying group. The defendant would counter that by reference to the letter dated 24 October 2012, which for conveniences sake I will refer to as the "termination letter". This letter is written by Mr Jenkins to Mr Macfarlane approximately 7 years after the original relationship commenced at a time when the parties were parting ways, and once again is ambiguous when read in its totality. The defendant uses the letter to demonstrate that this was the first occasion when the plaintiff used the term "commercial arrangement" as opposed to "franchise agreement". The first paragraph of the letter reads:-

> "It is with regret that I am writing to you to give notice to terminate the commercial arrangement with Up & Running (Harrogate) Limited in Northern Ireland. Although there is no franchise agreement or contractual agreement in place between Up & Running (NI) Limited and Up & Running (Harrogate) Limited, in view of the relationship over the years it is only fair and reasonable that I write to you formally to give you notice and outline some of the reasons for this decision".

In the termination letter Mr Jenkins then sets out the reasons why the plaintiff is terminating the commercial arrangement. At reason 1, complaining about accounts with suppliers being placed on hold, Mr Jenkins observes: "This effects sales, ruins customer service and is a fundamental breakdown in the franchisor commitment to franchisees". At reason 2 he refers to giving the defendant £6000 - £7000 or more per month in franchise fees despite the fact that neither Mr Macfarlane nor his team had visited in 3 years. This of course could arguably assist an argument by the plaintiff that even if there had been a franchise agreement in operation it had not been renewed at five years as required by the terms of the agreement. At reason 6 he states

"There are numerous occasions where I strongly feel that as a franchisor you are a competitor and not a supporter of the stores.

[6] Whilst this letter does not unequivocally assist one party over the other it is useful in that it demonstrates, from the horse's mouth the benefits which the plaintiff derived from the franchise agreement/commercial arrangement, when Mr Jenkins sets out the effect of termination. These include:

> "1. My company will cease to operate the business of specialist running and fitness related products conducted under the Up & Running trademarks using the systems owned by Up & Running (Harrogate) Limited.
> 2. My company will cease to use in any way whatsoever any of the proprietary marks or logos, including the words "Up & Running".
> 3. We will return all Sub 4 clothing and accessories week commencing Monday 5th November 2012. We would like this accounted for in our final invoice from yourself.
> 4. We will remove all signs or advertisements."

The import of this is that the defendant argues that the plaintiff enjoyed benefits under the commercial relationship which could only be enjoyed in a franchisor-franchisee relationship as opposed to say membership of a buying group.

[7] It is not disputed by the plaintiff that the defendant did send them a signed copy of a franchise agreement for signing by Mr and Mrs Jenkins on behalf of the plaintiff company, and that they did not sign it. The question is what is the effect of an unsigned contract. At Halsbury's Laws, Volume 33 (2012 edition) Deeds and Other Instruments Part 1 (4) Effect of a Deed at 264 Accepting benefit without execution, states:

> "Where a person named in some deed, whether a party to it or not, has, without executing the deed, accepted some benefit thereby assured to him, he is obliged to give effect to all the conditions on which the benefit was therein

expressed to be conferred; and he must, therefore, perform or observe all covenants or stipulations on his part which are contained in the deed, and on the performance or observance of which the benefit conferred was meant to be conditional (McDonald v John Twiname Ltd [1953] 2 All ER 589 and Halsall and Others –v- Brizell and another [1957] 1 All ER 371.)

[8] In McDonald v John Twiname Limited the Court of Appeal held in relation to a deed of apprenticeship which was never executed by an employer that: "From the date of its execution by the plaintiff the defendants took the benefit of the agreement and of such services as the defendant rendered; they must be taken to have adopted the agreement…". In his lead judgment Evershed MR observed: "From the date of its execution, however, it seems to me plain that the defendants regarded themselves as governed in their relations with the plaintiff by the terms of the deed and took the benefit of it and of such services as he rendered….". In a brief concurring judgment Romer L.J. stated the general principle in these terms: Though execution of a deed is necessary to bind the grantor, yet a party who takes the benefit of a deed is bound by it though he does not execute it." This is reflected in the dictum of Upjohn J in Halsall and Others [1957] 1 All ER 371: "It is, however, conceded to be ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder".

[9] It is therefore clear what the well-established principle, indeed ancient law, are. The question is to what extent does the principle apply in the present case, and that I think turns to a large extent on whether the plaintiff derived benefits which could only arise under the franchise agreement as opposed to any other sort of commercial arrangement. Related to that is the question whether or not the plaintiff intended to be bound by the terms of the franchise agreement but simply omitted to return it signed, as opposed to taking exception to the terms of the agreement and intentionally deciding not to sign it. The plaintiff's position as stated in the affidavit of Mr Jenkins sworn 23 August 2013 at paragraph 4 is that it never accepted the unsigned agreement. He avers that by way of a telephone call in or around February 2005 between the directors he expressly indicated the plaintiff's refusal to accept the

defendant's terms, and the defendant's acceptance of this refusal is evidenced by the fact they did not insist upon the contract being signed. However, the defendant (Mr Macfarlane in his affidavit sworn 18 September 2013 at paragraph 4) specifically denies that such a telephone conversation ever took place and refers instead to an email from Mr Jenkins to Mr Macfarlane dated 16 February 2005 wherein there is no indication of the plaintiff's refusal of the terms of the defendant's franchise agreement. The plaintiff for its part contends that the natural and ordinary meaning of the email shows that the contract was clearly not being accepted in the, at that time, current format. The significant passage in the short email is in these terms:- "You said on Sunday about finalising the franchise agreement for once and all (and I totally agree with this). You also said that, at this stage, you welcome any questions, so I suppose that I am joining at just the right time if it means my solicitor can help on the franchise contract." Whilst Mr Jenkins does not specifically say that he is not accepting the franchise agreement on the defendant's terms, it seems to me that on any ordinary reading of the email, final agreement of the franchise terms was still a work in progress.

[10] In his replying affidavit sworn 5 June2013 Mr Jenkins for the plaintiff sets out a number of examples of breach of the franchise agreement by the defendant, for example failure to provide an operating manual. The argument would appear to be that as the defendant was breaching its own terms then the contract was not binding. The defendant denies that it breached the terms of the agreement and whether it did or not is precisely the sort of issue which an interlocutory court ought not to decide on the basis of affidavit evidence. However, the defendant also counters the plaintiff's argument by seeking to rely upon a Severability clause at 28.1 of the agreement which states that:-

> "Each of the restrictions and provisions contained in this Agreement and in each clause and sub-clause hereof shall be construed as independent of every other such restriction and provision to the effect that if any provision of this agreement … shall be determined to be invalid and unenforceable then

….such determination shall not effect any other provision of the Agreement…"

However, I think that this point provides limited assistance in terms of the issues which this court must decide because it begs the very question to be answered. That question is whether or not the franchise agreement binds the plaintiff, including the exclusive jurisdiction clause. The severability clause does not answer that question at all because if the plaintiff is not bound by the terms of the Agreement then it is not bound by the terms of the severability clause.

[11] It is important also to remind oneself at this stage that the whole purpose of the exercise of determining the basis of the contractual relationship between the parties, so far as this application is concerned, is to show that the plaintiff was bound by the terms of the franchise agreement which it did not sign, including crucially an exclusive jurisdiction clause contained at clause 33.1 of the agreement. It is not enough therefore to show that some arrangement akin to a franchise agreement was created. It must be that the plaintiff by accepting benefits under that specific franchise agreement became bound by all the terms therein including that jurisdiction clause (which provides: "This Agreement and all rights and obligations of the parties hereto shall be governed and construed in accordance with the Law of England and the parties hereby submit to the Jurisdiction of the English Courts."). The defendant has sought to show that the plaintiff by its conduct has been bound by the franchise agreement even though it was not signed by the plaintiff's directors and therefore is bound by all its terms including the jurisdiction clause. However, that requires an assessment of affidavit evidence much of which is disputed, and which requires this court to make findings of fact based on disputed affidavit evidence in relation to matters which would more properly, and fairly, require oral evidence. This court must approach such a task with circumspection. What can be said is that there is a significant body of evidence to show that the relationship which governed commercial relations between the parties had many of the characteristics of a franchise agreement, and the plaintiff derived many of the benefits which would ordinarily only accrue under a franchise agreement. However, that falls short of

satisfying this court that the plaintiff, by carrying on business with the defendant under what would clearly appear to be a franchise type of arrangement, evinced by that conduct an intention to be bound by all the terms of a specific franchise agreement which it had not signed. It may well be that a court trying this action, with opportunity to hear the evidence of the parties, as challenged in cross examination, might indeed conclude that the plaintiff by its conduct did bind itself to that agreement and all its terms, but that is not a determination which it would be fair or proper for this interlocutory court to make at this stage. Consequently the plaintiff cannot be deemed, for the purposes of this application, to have been bound by the clause 33 exclusive jurisdiction clause vesting jurisdiction in this case in the courts of England and Wales.

The second issue: Did the nature of the Commercial Relationship Change After 2010?

[12] In a sense this question is now academic, because if the plaintiff cannot at this stage be deemed to have bound itself to the terms of the unsigned franchise agreement it can be argued with some strength that it does not matter what happened after the five year period commencing 17 March 2005, during which the franchise agreement was to remain in operation, elapsed. If the franchise agreement did not bind the plaintiff in the first place, then it is difficult to see how it would be bound by its terms after the five years expired. However, what happened during that period from March 2010 until October 2012 is likely to be important in terms of determining the substantive issues in the case at trial, and may therefore be relevant to the issue of forum non conveniens, the second limb of the defendant's application to stay on grounds of jurisdiction. It is not disputed that the commercial relationship between the parties which commenced in March 2005 would have ended in March 2010, unless the parties followed the procedure stipulated at clause 4 which enabled the franchisee to extend the franchise for another 5 years at its option, or the plaintiff waived the renewal procedure or the relationship continued unchanged irrespective of what label is used to describe it. In determining which of these variables occurred

once again I remind myself of the limitations of an interlocutory court determining disputed facts.

[13] The defendant argues that the plaintiff in effect waived the renewal process provided in the agreement and continued to enjoy the benefits of the franchise. Chitty on Contract 31st Edn at 22-041 states: "A waiver may be oral or written or inferred from conduct even though the provision waived is found in a contract required to be made in or evidenced in writing". Goddard J in Besseler Waechter Glover & Co v South Derwent Coal Co [1938] 1 KB 408 at 416 sets out the applicable principles in the following terms:

> "If the parties agree to rescind their original contract and to substitute for it a new one, the latter must be evidenced by writing; so too, if as a matter of contract the parties agree that the terms of the original agreement shall be varied, the variation must be in writing. But if what happens is a mere voluntary forbearance to insist on delivery or acceptance according to the strict terms of the written contract, the original contract remains unaffected, and the obligation to deliver and accept the full contract quantity still continues … It does not appear to me to matter whether the request comes from one party or both. What is important is whether it is a mere forbearance or a matter of contract."

In the present case as the continuation of the business relationship beyond 2010 was not done by compliance with the contractual renewal term it follows that it had to have been done by forbearance or conduct.

[14] The principles applicable with respect to waiver by conduct were set out by Davis J in Msas Global Logistics Limited v Power Packaging Inc [2003] EWHC 1393 (Ch) at [50] – [53] and are quoted in full in defendant's counsel's skeleton argument at paragraph 23. They can be distilled as follows:-

(a) Whether it is referred to as waiver or forbearance is not important. What is required is a promise or representation which is unequivocal.

(b) The test is objective and what was in the mind of the promissor or representor is not determinative, the focus is on the likely effect (objectively speaking) of the words or conduct in question (Davis J Msas Global Logistics Limited v Power Packaging Inc [2003] EWHC 1393 (Ch) at [52}.

(c) There is no authority to support the proposition that, when one party has led another to believe that he may continue in a certain course without any risk of the contract being cancelled, the first mentioned party can cancel the contract without giving any notice to the other so as to enable the latter to comply with the requirement of the contract (Viscount reading CJ in Panoutsos v Raymond Hadley Corporation of New York [1917] 2 KB 473 at p 479)..

(d) Whether it is called waiver or forbearance …or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it (Denning LJ in Charles Rickards Ltd v Oppenheim [1950] 1 KB 616 at p623).

(e) Equitable estoppel occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; if in such circumstances the other party acts, or desists from acting, in reliance upon that representation, with the effect that it would be inequitable for the representor thereafter to enforce his legal rights inconsistently with the representation, he will to that extent be precluded from doing so (lord Goff of Chieveley in The Kanchenjunga [1990] 1 Lloyds Rep 391 at p 399).

[15] In the present case, the defendant asks the court to infer that there has been waiver of the renewal procedure provided for in the contract by conduct. Counsel refers to examples set out in the Affidavit of Mr Macfarlane sworn 24 June 2013 to demonstrate that the arrangement between the parties continued seamlessly after the original 5 year period elapsed in 2010. These include: (i) an email from Mr Jenkins dated 12 October 2010 about shop signage; (ii) a credit note dated 30 January 2011;

(iii) an email dated 2 November 2010 containing concerns by Mr Jenkins with regard to the enquiries about potential additional franchise in Northern Ireland. These are of course evidence of the same nature as the examples already adduced by the defendant to show that the relationship between the parties was that of franchisee and franchisor based on the franchise agreement. It seems to me to be a reasonable proposition that the plaintiff has waived the strict terms of the renewal clause in the agreement by his conduct in that the business relationship between the parties continued after the five years provided for in the contract elapsed and the parties continued to do business in the usual way. However, the plaintiff of course would say that this did not represent waiver of the renewal term of the contract by conduct, but merely a continuation of business as usual which was not and never was based on the contract. If the court finds that the relationship between the parties was that of franchisor and franchisee based on the franchise agreement which the plaintiff did not sign but was bound by the terms thereof by conduct, then it is difficult for the plaintiff to sustain an argument that it did not, again by conduct, waive the requirement for formal renewal according to the strict terms of the contract. However, if the court does not accept that the relationship between the parties was that of franchisor and franchisee under the terms of the franchise agreement, then what would appear to have happened is that the relationship between the parties, howsoever it is characterised, continued beyond 2010. Thankfully, it is not necessary for this court to arrive at a decision on this point.

The third issue: Forum Non Conveniens

[16] 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).

[17] 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.

[18] 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).

He conducted an analysis of the relevant authorities which it is worthwhile to quote in full. 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 -

> "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." "

[19] 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. The basic facts will be apparent from the foregoing and it is therefore useful to consider the relief sought in the Writ of Summons

because that will be indicative of the nature of the dispute and the evidence which will be required. The Plaintiff's claim, quoting directly from the Writ of Summons, is for:

> "1. A declaration that the previously subsisting commercial arrangement between the plaintiff and the Defendant was validly terminated by notice dated 24th October 2012;
> 2. Further, or in the alternative, a Declaration that in any case the previously subsisting commercial arrangement between the Plaintiff and Defendant is at an end;
> 3. A declaration that the parties owe each other no continuing commercial obligations, other than the payment of £31, 695.47 for stock, from 24th October 2012 or otherwise;
> 4. An injunction preventing the Defendant, its servants or agents from making or publishing, and encouraging or procuring any other persons(s) from making or publishing, any disparaging comments, accusations or defamatory remarks concerning the plaintiff, their servants, agents, officers or owners, in any way whatsoever;
> 5. An injunction preventing the Defendant, its servants or agents, from contacting the Plaintiff's trade suppliers or any other persons in any manner whatsoever which will or may damage Plaintiff's business and reputation;
> 6. Damages for negligence, negligent misstatement, breach of contract, malicious falsehood, and defamation;
> 7. All necessary Accounts and Enquiries."

[20] The defendant makes the point, with some justification, that the declarations sought at 1. and 2. are merely a rubber stamping of what has already occurred in practice, because clearly, one way or another, any commercial relationship between the parties, howsoever it is described, has long since come to an end. There is therefore unlikely to be much time

spent or disputed evidence heard at trial to deal with those issues, which therefore have little bearing on the most appropriate jurisdiction for the hearing of this case. No.3, the declaration as to what the parties owe each other following the end of their commercial relationship, seems to overlap with, or indeed largely replicate No.7 the prayer for all necessary accounts and enquiries. That is likely to involve evidence of an accountancy nature including analysis of stock records and the like and will therefore entail the calling of witnesses from both jurisdictions, and to that extent it seems to me is neutral so far as this application is concerned.

[21] The injunctive relief at No.s 4 and 5 relate to alleged defamation by the defendant by telling suppliers to put a stop on the plaintiff's account because they were consistently late in settling accounts. Publication was limited to the recipients on a closed email list, most of them domiciled in England, with only Mr and Mrs Jenkins of the plaintiff company seeing it in Northern Ireland. Counsel for the defendant argues that the case in defamation is weak in terms of liability and also given the limited publication any vindication in damages which the plaintiff might obtain would be so small as to be not worth the court time and therefore constitutes an abuse of process (See Jameel v Dow Jones & Co Inc [2005] EWCA Civ 75 and the line of cases following). However, it seems to me that in an interlocutory application of this sort whilst the court may consider what the case is about it would be inappropriate to embark upon an assessment, based on affidavit evidence, of the strength or weakness of various parts of the case. Much of the dispute would likely turn on consideration of the questions: whether the defendant's actions were capable of constituting defamation, which would be neutral in terms of establishing the most closely connected jurisdiction; whether the defences of justification or qualified privilege are available which would likewise appear to be neutral, and the proof of financial damage required in a case where a limited company sues in defamation (See Carter Ruck on Libel

and Privacy at 8.8) which would involve accountancy evidence by experts from both jurisdictions.

[22] Looking at the wider issues likely to arise in the case, to argue that determining the nature of the commercial arrangement is more connected with England because that is where the defendant operates its franchise and carries on business, in a sense begs the question which this court has to decide because the plaintiff says that this is not a franchise arrangement or at least not on the terms proposed by the defendant and the plaintiff has never done business outside Northern Ireland. The same applies in respect of the question whether the nature of the relationship between the parties changed after March 2010, when under the terms of the unsigned franchise agreement the 5 year franchise period terminated subject to whether or not it was renewed or extended using the mechanism provided in the agreement, or by way of waiver. I have considered that issue above without reaching, or being required to reach, any conclusion, and it is essentially a legal question which would require limited evidence from anyone other than Mr Jenkins (Plaintiff) or Mr Macfarlane (Defendant). As such it would have little practical bearing on the question of deciding with which jurisdiction this action is most closely connected.

[23] 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 England 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 England, 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 can be the fact, if established objectively by cogent evidence that the plaintiff will not obtain justice in the foreign jurisdiction.

[24] Applying principles (i) and (ii) to the facts of this case, as I have already indicated at paragraphs [20] and [21] above, by reference to the evidence in relation to the various forms of relief sought by the plaintiff and also the wider issues,

including accountancy evidence and the like in connection with the defamation based claims, there is little to favour England as opposed to Northern Ireland as being the most appropriate jurisdiction. So far as the law governing the transaction is concerned it is the same in both jurisdictions. Mindful of the requirement for the defendant to show that England is clearly or distinctly the more appropriate jurisdiction, rather than say the preferred jurisdiction on a balancing exercise, it seems to me that the defendant has not discharged the requisite burden.

[25] Proceeding then to (iii), given my conclusions in respect of (i) and (ii) I need devote little time to this stage of the process, and in relation to the single factor given as an example, namely that a plaintiff will not obtain justice in another forum, that it seems to me is a throwback to the time when forum non conveniens might have been argued in a case where the issue as to the more appropriate jurisdiction was between a United Kingdom jurisdiction and a foreign and non-Convention (Brussels or Lugano Convention) jurisdiction, and simply does not arise in the present case where the issue is between two United Kingdom jurisdictions.

[26] In conclusion, for the reasons given at paragraph [11] above, the plaintiff cannot be deemed, for the purposes of this application, to have been bound by the clause 33 exclusive jurisdiction clause vesting jurisdiction in this case in the courts of England and Wales. Further the defendant has not satisfied the burden of showing that England is clearly or distinctly the natural jurisdiction, or the jurisdiction with which the action has the most real and substantial connection. I therefore dismiss the defendant's application, with costs to the plaintiff and certify for counsel.