

Kuwait Asia Bank E.C.

Appellant

v.

National Mutual Life Nominees  
Limited

Respondent

FROM

THE COURT OF APPEAL OF NEW ZEALAND

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REASONS FOR REPORT OF THE LORDS OF THE  
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL  
OF THE 30TH NOVEMBER 1989, DELIVERED THE  
21ST MAY 1990  
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*Present at the hearing:-*

LORD KEITH OF KINKEL  
LORD BRANDON OF OAKBROOK  
LORD TEMPLEMAN  
LORD GOFF OF CHIEVELEY  
LORD LOWRY

*[Delivered by Lord Lowry]*

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This is an appeal by Kuwait Asia Bank E.C. ("the Bank") from a judgment of the Court of Appeal of New Zealand (Cooke P., Somers, Casey, Hardie Boys and Wylie JJ.) delivered on 7th June 1989, whereby that court dismissed the Bank's appeal from a judgment given on 8th March 1989 by Henry J., who had refused the Bank's application to the High Court under Rule 131 of the New Zealand High Court Rules for an order that proceedings served on the Bank outside the jurisdiction by the plaintiff, National Mutual Life Nominees Limited ("NMLN") the present respondent, should be dismissed. At the conclusion of the hearing their Lordships announced that they had agreed humbly to advise Her Majesty that the appeal ought to be allowed for reasons which they would deliver later. This they now do.

AIC Securities Limited ("AICS") was a New Zealand company which carried on business in Auckland as a money broker. Part of its business was the taking of deposits and, in order to protect the depositors, by a deed of trust dated 5th March 1985 NMLN was appointed trustee for AICS's depositors pursuant to the statutory requirements of New Zealand law contained in the Securities Act 1978. Under the trust deed AICS

covenanted with NMLN, as the trustee, to furnish it with monthly and quarterly certificates on behalf of the AICS directors.

In August 1986 AICS became insolvent and went into liquidation and its unsecured depositors have been unable to recover in full their deposits and interest from AICS. One of the depositors, a Mr. Fletcher, brought a representative action against NMLN for breach of trust, alleging that NMLN had failed to perform its duties under the trust deed with diligence and competence. The sum claimed by the depositors amounted to \$14.5m, and NMLN thought it prudent to dispose of the litigation by paying \$6.75m on the basis that, when added to recoveries already made, the settlement payment would return to each depositor a sum equal to 75 to 80 cents in the dollar excluding interest and costs. The legal expenses of NMLN incurred in connection with the litigation brought against it by the depositors amounted to \$503,555 plus interest and costs.

In these proceedings NMLN seeks contribution from several defendants towards the sum of \$6.75m and \$503,555 plus interest and costs. Originally its claim was in third party proceedings against Deloitte, Haskins and Sells, the auditors of AICS. Later it started separate actions against Messrs. Worn, Wright, Scott, House and August, the directors of AICS and Mr. Gilmour, the company secretary. That action was subsequently consolidated with the original proceedings. Later still, in July 1988, NMLN obtained leave to join the Bank as sixth defendant in the consolidated proceedings. That leave was granted and it is the subsequent service of proceedings on the Bank outside New Zealand that is the subject of the present appeal.

The Bank is incorporated under the laws of Bahrain. It operates internationally but has no branch or place of business in New Zealand. Its connection with the action against NMLN and with these proceedings arises from the fact that the Bank had a 49.9% shareholding in a New Zealand company called Australasia Investment Corporation Limited ("AICL") incorporated in 1982. The other shares in AICL, amounting to 50.1%, were held by Kumutoto Holdings Limited ("Kumutoto"), a New Zealand company. AICL then became the owner of between 75% and 81% of the shares in a company originally called AIC Finance Limited and subsequently re-named AIC Corporation Limited ("AICC"). One of AICC's wholly owned subsidiaries was AICS, already mentioned. The Bank was therefore beneficially interested in about 40% of the shares in AICS. By agreement between the Bank and Kumutoto there were five directors of AICS, three nominated by Kumutoto and two by the Bank. They were Messrs. House and August, both of whom were employed by the Bank.

As against the five directors, NMLN pleaded four causes of action:-

- (1) that the directors owed a duty of care to NMLN as trustee for the unsecured depositors of AICS to exercise due diligence in relation to the provision of certain monthly and quarterly certificates to ensure that the statements in those certificates were correct in so far as they related to matters of fact and were reasonably and honestly made in so far as they related to matters of opinion, which duty they breached;
- (2) that these certificates contained various express or implied representations as to AICS's financial position, and that the representations were false and misleading, and made fraudulently and/or negligently;
- (3) that the directors owed a statutory duty to NMLN and to other creditors of AICS pursuant to the provisions of ss.151 and 319 of the Companies Act 1955 to keep proper accounting records of AICS, which duty was breached; and
- (4) that the directors owed a duty to NMLN and to other creditors of AICS pursuant to the provisions of s.320 of the Companies Act to refrain from allowing AICS to contract debts without any reasonable prospect of repayment and to refrain from allowing AICS to carry on any business in a reckless manner, which duty was breached.

As against the Bank, NMLN also pleaded four causes of action:-

- (1) that House and August were employees of the Bank and that their acts or omissions (as summarised above) were committed or omitted by them in the course of their employment, and accordingly that the Bank was vicariously liable for those acts or omissions as their employer;
- (2) that the relationship of the Bank to House and August in respect of their appointment to and performance of the office of directors of AICS was such as to amount in law to a relationship of principal and agent so that the Bank was responsible for all acts of or omissions by House and August in respect of their office as directors of AICS, the acts or omissions being within the scope of their authority - whether actual, implied or ostensible - as agents for the Bank;
- (3) that the Bank, 'a substantial shareholder in AICL which was the holding company which exercised power of ownership and control over

AICS, ' owed a duty of care to NMLN as trustee for the unsecured depositors of AICS and to the unsecured depositors themselves to ensure that the business of AICS was not conducted negligently or recklessly or in such manner as to materially disadvantage the interests of those unsecured depositors, which duty the Bank breached; and

- (4) that House and August were persons occupying a position of directors of AICS who were accustomed to act in accordance with the Bank's directions, and that therefore the Bank was a director of AICS within the meaning of s.2 of the Companies Act, and was accordingly liable for any loss occasioned to NMLN by the acts or omissions of House and August.

The Bank being resident outside New Zealand, NMLN had to justify the service which had been effected and for that purpose originally relied on three grounds:-

- (1) an act or omission for or in respect of which damages were claimed was done or occurred in New Zealand (Rule 219(a));
- (2) the subject matter of the proceeding is land, stock or other property situated in New Zealand, or any act, deed, will, instrument, or thing affecting such land, stock, or property (Rule 219(e));
- (3) where any person out of New Zealand is a necessary or proper party to a proceeding properly brought against some other person duly served or to be served within New Zealand (Rule 219(h)).

In the Court of Appeal and before the Board NMLN relied only on the first and third grounds as set forth in paragraphs (a) and (h).

The disposal of the appeal involves two main questions. The first was concerned with the proper interpretation of the relevant High Court Rules; and, in the light of the Rules as so interpreted, the second question was whether NMLN, as plaintiff, had made out a case against the Bank, as the defendant outside New Zealand, which justified the court in entertaining the plaintiff's claim against that defendant.

The question whether service of the proceedings on the Bank outside New Zealand ought to be set aside has to be considered against the background of the new High Court Rules which came into operation on 1st January 1986. Rule 219, so far as directly relevant, reads:-

"219. When allowed without leave - Where in any proceeding a statement of claim or counterclaim and the relevant notice of proceeding or third party notice cannot be served in New Zealand under these rules, they may be served out of New Zealand without leave in the following cases:

(a) Where any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand:

...

(h) Where any person out of New Zealand is a necessary or proper party to a proceeding properly brought against some other person duly served or to be served within New Zealand:

..."

This rule for the first time allowed service out of the jurisdiction of the statement of claim (which replaced the writ of summons as the originating document) in 13 specified cases, two of which are now relied on by NMLN, and replaced the procedure contained in Rules 48, 49 and 50 of the old Code of Civil Procedure which, like the English Order 11 rules 1 and 4, required leave for such service to be obtained and which, so far as material, provided:-

"48. When allowed - The writ of summons may be served out of New Zealand by leave of the Court or a Judge -

(a) Where any act for which damages are claimed was done in New Zealand:

(b) Where the contract sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any action, or for the breach whereof damages or other relief is demanded in the action -

(i) Was made or entered into in New Zealand: or

(ii) Was made by or through an agent trading or residing within New Zealand: or

(iii) Was to be wholly or in part performed in New Zealand: or

(iv) Was by its terms or by implication to be governed by New Zealand law:

(c) Where there has been a breach in New Zealand of any contract, wherever made:

...

(h) Where any person out of New Zealand is a necessary or proper party to an action brought against some other person duly served or to be served in New Zealand:

...

49. How discretion to be exercised - Upon any application to serve a writ of summons under paragraph (b) or paragraph (c)" (this is why those paragraphs are included above) "of the last preceding rule, the Court or a Judge in exercising its or his discretion as to granting leave to serve such writ shall have regard to the amount or value of the property in dispute or sought to be recovered, and to the existence, in the place of residence of the defendant, of a Court having jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in New Zealand or in the place of such defendant's residence; and in the above-mentioned cases no such leave shall be granted without an affidavit stating the particulars necessary for enabling the Court or a Judge to exercise its or his discretion in manner aforesaid, and all such particulars (if any) as it may require to be shown.
50. Applications to be supported by evidence- Every application for an order for leave to serve a writ out of New Zealand shall be supported by evidence, by affidavit or otherwise, showing in what place or country the defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds on which the application is made."

It will be noted that Rule 49, which was directed towards the question of *forum conveniens*, referred to only two kinds of case (both arising out of contract) out of a total of 10. Rule 50, on the other hand, was comprehensive and required in all cases what might be called an affidavit of merits: *Great Australian Gold Mining Co. v. Martin* (1877) 5 Ch.D. 1.

The new Rule 220 provides as follows:-

"220. When allowed with leave - (1) In any other proceeding which the Court has jurisdiction to hear and determine, any document may be served out of New Zealand by leave of the Court.

(2) An application for leave under this rule shall be made on notice to every party other than the party intended to be served.

(3) A sealed copy of every order made under this rule shall be served with the document to which it relates.

(4) Upon any application for leave under this rule, the Court, in exercising its discretion, shall have regard to -

- (a) The amount or value of the property in dispute or sought to be recovered; and
- (b) The existence, in the place of residence of the person to be served, of a Court having jurisdiction in the matter in question; and
- (c) The comparative cost and convenience of proceeding in New Zealand or in the place of residence of the person to be served.

(5) Every application for leave under this rule shall be supported by an affidavit -

- (a) Stating the particulars referred to in subclause (4); and
- (b) Showing -
  - (i) In what place or country the person to be served is or possibly may be found; and
  - (ii) Whether or not the person to be served is a New Zealand citizen."

In cases to which this rule applies the old Rule 49 criteria with regard to *forum conveniens* are applied generally.

Rule 131, which has an affinity with the English Order 12 Rule 8, provides:-

"131. Appearance under protest to jurisdiction - (1) A defendant who objects to the jurisdiction of the Court to hear and determine the proceeding in which he has been served may, within the time limited for filing his statement of defence and instead of so doing, file and serve an appearance stating his objection and the grounds thereof.

(2) The filing and serving of an appearance under subclause (1) shall not be or be deemed to be a submission to the jurisdiction of the Court in the proceeding.

(3) A defendant who has filed an appearance under subclause (1) may apply to the Court to dismiss the proceeding on the ground that the Court has no jurisdiction to hear and determine it.

(4) On hearing an application under subclause (3), the Court -

(a) If it is satisfied that it has no jurisdiction to hear and determine the proceeding, shall dismiss the proceeding; but

(b) If it is satisfied that it has jurisdiction to hear and determine the proceeding, shall dismiss the application and set aside the appearance.

(5) At any time after an appearance has been filed under subclause (1), the plaintiff may apply to the Court by interlocutory application to set aside the appearance.

(6) On hearing an application under subclause (5), the Court -

(a) If it is satisfied that it has jurisdiction to hear and determine the proceeding, shall set aside the appearance; but

(b) If it is satisfied that it has no jurisdiction to hear and determine the proceeding, shall dismiss both the application and the proceeding.

(7) The Court, in exercising its powers under this rule, may do so on such terms and conditions as may be just and, in particular, on setting aside the appearance may enlarge the time within which the defendant may file and serve a statement of defence and may give such directions as may appear necessary regarding any further steps in the proceeding in all respects as though the application were an application for directions under rule 437 or rule 438.

(8) Where the appearance set aside has been filed in relation to a proceeding in which the plaintiff has applied for judgment under rule 136 or rule 137, the Court -

(a) Shall enlarge the time within which the defendant may file and serve -

(i) A notice of opposition; and

(ii) An affidavit by or on behalf of the defendant in answer to the affidavit by or on behalf of the plaintiff; and

(b) May, under subclause (7), give such other directions as appear necessary regarding any further steps in the proceeding."



This is the rule pursuant to which the Bank appeared and applied under sub-clause (3) to dismiss NMLN's proceeding. It may be noted that, once a defendant outside the jurisdiction has appeared under protest in accordance with sub-clause (1), there are two courses open: either, as happened in the present case, the defendant may apply under sub-clause (3) to dismiss the proceeding or the plaintiff may apply under sub-clause (5) to set aside the defendant's appearance. If the latter application succeeds, the appearance is set aside and the defendant will be given a time within which to serve a statement of defence. Either way, according to the wording of sub-clauses (4) and (6), the Court's duty is to decide whether it has or has not jurisdiction and to proceed accordingly; the rule does not deal with any other question.

The judgment of the Court of Appeal, delivered by the President, shows how the court dealt with the procedural issue. Pointing out that the defendant can apply under Rule 131, the President said:-

"On hearing such an application the Court, if satisfied that it has no jurisdiction, shall dismiss the proceeding but, if satisfied that it has jurisdiction, shall dismiss the application and set aside the appearance."

Having described the English procedure under Order 11 rule 1, he continued:-

"That is not so under the New Zealand rule 219 and the English cases about what must be shown to obtain leave in the first place are not directly in point. But they provide help, we think, in deciding how far the New Zealand court should go under rule 131 in considering the strength of the plaintiff's case."

(Their Lordships note that the Court of Appeal there recognised as relevant a point which does not on the face of it go to jurisdiction, namely, the strength of the plaintiff's case.)

The President noted a second difference from the English procedure: Order 12 rule 8 ("which is the equivalent of the New Zealand rule 131 insofar as it enables a defendant who wishes to dispute jurisdiction to apply to the court for an order setting aside the service of the writ") expressly empowers the court to give directions for the disposal of the matter in dispute including directions for its trial as a preliminary issue, but rule 131 does not. The judgment continued:-

"It happens in the present case, for the reasons appearing hereinafter, that the question arising under rule 219(a), whether any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand" (it may be noted that the word is 'claimed', and not 'claimable') "is

another way of putting what will be a major issue at the trial if the Kuwait Bank is a party. That issue is whether the bank is responsible for the acts or omissions in New Zealand of the fourth defendants. Similarly, as to rule 219(h), although that paragraph has the less (sic) exacting language 'proper party' and 'properly brought', the matters falling for consideration go to the heart of the case against the bank.

So we now have to decide how far the Court should go at this preliminary stage towards determining major issues in the litigation ... We accept that if the necessary facts are sufficiently before the Court a foreign defendant may be able to satisfy the Court that on the true view of the law there cannot possibly be jurisdiction over him. For instance it may be plain that the action cannot succeed against the local defendants, as in *The Brabo* [1949] A.C. 326. In that event the foreign defendant can obtain an order dismissing the proceeding if service abroad has to be based on (h). Again, if the bank here could show that in law the acts or omissions of the fourth defendants in New Zealand could plainly not be attributed to the bank, the Court could and should determine that there is no jurisdiction under (a)." (emphasis added) "Where the case is not plain at the preliminary stage the test to be applied by the Court in deciding whether it will accept jurisdiction." (emphasis added) "has been variously stated."

The President then referred to *The Brabo (supra)*, *Vitkovice Horni v. Korner* [1951] A.C. 869 and *Metall Und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc.* [1988] 3 W.L.R. 563, all well-known Order 11 authorities. He went on:-

"It has to be remembered that in New Zealand the issue arises on an application to dismiss the proceeding, whereas in England it can arise on an application for leave, but probably that makes no significant difference; in England it commonly arises on application to set aside service. Neither the question of *forum conveniens* nor that of *lis alibi pendens*, questions dealt with in this Court in *McConnell Dowell Constructors Ltd. v. Lloyd's Syndicate* 396 [1988] 2 N.Z.L.R. 257, arise in the present case."

(Their Lordships must later make further reference to the point that the question of *forum conveniens*, of which *lis alibi pendens* is a particular example, does not raise the issue of jurisdiction.)

Having adverted to the "established principle" that a foreigner resident abroad will not lightly be subjected to the local jurisdiction, the President said:-

"Finally, the two-fold tests posed by the English Court of Appeal, a good arguable claim on the merits and a strong probability that the claim falls within the letter and spirit of the rule about service abroad, relate to questions that at least under rule 221(a)" (this must be 219(a)) "merge into one in the present case. At least under that paragraph, on which the argument in this Court was mainly centred, whether the New Zealand court has jurisdiction depends on the strength of the plaintiff's case against the bank on the merits" (emphasis added) "... The ultimate issue under rule 131 is whether the Court is satisfied that there are sufficient grounds for it properly to assume jurisdiction." (emphasis added) "The strength of the plaintiff's case against the party served abroad and all the circumstances of the case have to be weighed."

There is in this passage an unresolved contrast between the two phrases "has jurisdiction" and "assume jurisdiction" (the latter, but not the former, involving the exercise of a discretion).

Having commented on the rival submissions of the parties, the President came back to the point of principle, saying:-

"As explained earlier in this judgment, the good arguable case test seems to us right; and we have no doubt that the plaintiff satisfies it for the purposes of rule 219(a). The argument ... is sufficiently strong to warrant the New Zealand Court in accepting jurisdiction under that paragraph."

At first instance the approach of Henry J. had been different. Having described the new regime, he said:-

"The important change made by the High Court Rules is that the existence of jurisdiction over a person served outside New Zealand does not now necessarily depend upon the exercise of the Court's discretion on application, but will arise if the particular case falls within one or more of the categories enumerated in R.219. That is not to say a plaintiff has an absolute right to have the Court exercise jurisdiction simply by invoking or purporting to invoke R.219; a defendant may still challenge the validity of such invocation because clearly if the case on proper consideration is shown not to come within one of the specified categories, then service outside New Zealand in reliance on the rule would be ineffective for jurisdictional purposes. It is also clear that the Court's power to consider the principle of forum non conveniens and if appropriate to stay or to decline jurisdiction on that ground remains, as has been discussed by the Court of Appeal in *McConnell*

*Dowell Constructors Limited and Anor v. Gardner-Roberts & Ors* (CA.170/86, 17 December 1987) where the dual questions of jurisdiction arising from R.219 and forum non conveniens were considered."

Having contrasted Order 11 with the current New Zealand procedure and having questioned the value of considering the English practice for the purpose of construing Rule 219, he continued:-

"In my judgment there is no obligation on a plaintiff who invokes R.219 to satisfy the Court by affidavit evidence that factually there is a meritorious claim. On the contrary the merits are I think in such a case irrelevant to the issue of jurisdiction, and to embark on a consideration of the factual basis for the claim in the way envisaged quite inappropriate and contrary to the intent of the rule. In each case coming within R.219 there is a strong territorial content to the proceeding, and as I apprehend it the philosophy of the new rule is to vest jurisdiction in the Court in such cases as a matter of course rather than as a matter of discretion."

The learned judge held that the "good arguable case" test applied only when considering the question whether the claim came under Rule 219 and that the question whether the plaintiff had a good arguable case on the factual and legal merits did not arise. He went on:-

"It would therefore appear at first sight that this issue is really whether the proceeding should be struck out because no cause of action is disclosed, which is something not related directly to the issue of jurisdiction to hear and determine. However, on balance I think the issue could be appropriate for consideration on an application under R.131(3) for two reasons. First, it can be argued that if the claim has no proper basis in law, there is in a broad sense no jurisdiction to entertain it. Secondly, and perhaps of more importance, the Courts have always regarded as serious the question whether a 'foreigner should be brought to contest his rights in this country' (*Societe-Generale de Paris v. Dreyfus Bros* [1885] 29 Ch.D. 242).

If it is clear the claim is ill-founded, or in the words of Lord Simonds in *The Brabo* [1949] A.C. 326, 348, bound to fail, then to decline jurisdiction may perhaps be proper. Such an inquiry may involve a detailed consideration of the relevant law, as is sometimes conducted for example on an application to strike out (*Gartside v. Sheffield Young & Ellis* [1983] N.Z.L.R. 37) or on an application for summary judgment. (*Pemberton v. Chappell* [1987] 1 N.Z.L.R. 1)."

The judge then considered the submission that all the plaintiff's causes of action against the bank were demonstrably bad in law and, although sceptical of the propositions advanced by the plaintiff, decided that it would be inappropriate, in the absence of full knowledge and findings on the facts, to embark on a detailed consideration of the arguments in an endeavour to reach a conclusion on the questions of law involved. He concluded:-

"I do not think that the claims although arguable are so unlikely to succeed as to warrant the Court as a matter of overall discretion (if that power were available) now renouncing jurisdiction in respect of this foreign defendant, whose admitted employees are properly before the Court on this very proceeding, and whose actions as such are brought in question as against Kuwait."

(It seems that "arguable" in this context must mean "questionable" or "debatable".)

Thus the position reached on the Bank's application was that Henry J. ruled against it because the plaintiff had come within Rule 219 and its claims could not be said at that stage to disclose no cause of action. The Court of Appeal, while observing that there would be no jurisdiction under paragraph (a) if the Bank could show that in law the acts or omissions of the fourth defendants could plainly not be attributable to the Bank and also no jurisdiction under paragraph (h) if the action could not succeed against House and August (as in *The Brabo* [1949] A.C. 326), set up (despite the strict wording of Rule 131(4)) an additional hurdle for the plaintiff, namely, that the test of a good arguable case must be satisfied before the court will accept jurisdiction. There is another point not covered by this summary: under paragraph (h) not only must the action be viable against the parties within the jurisdiction, but the party outside the jurisdiction has to be "a necessary or proper party"; if there were no cause of action against the Bank, grounded on its own negligence, there would again, according to both Henry J. and the Court of Appeal, be no jurisdiction under paragraph (h).

As was said recently in *Cheah Theam Swee v. Equiticorp Finance Group Ltd. and Equiticorp Nominees Ltd.* (Privy Council Appeal No. 6 of 1989), their Lordships would be most reluctant to differ from the Court of Appeal on a matter of procedure under the New Zealand rules and indeed, since they consider that the plaintiff has no cause of action under any heading against the Bank, they need not for present purposes try to resolve the difference of opinion as to the right test between the Court of Appeal and Henry J. It may, however, prove helpful to consider further the powers of the court under Rule 131.

That rule expressly deals with jurisdiction and nothing else; yet the Court of Appeal contemplated that jurisdiction would not be accepted if the plaintiff did not make out a good arguable case, and both Henry J. and the Court of Appeal recognised the principle (which in England has often involved the exercise of the court's discretion) "that a foreigner resident abroad will not lightly be subjected to the local jurisdiction". The authority cited by Henry J. for this proposition was, not surprisingly, *Société Générale de Paris v. Dreyfus Brothers* (1885) 29 Ch.D. 239, in which Pearson J., after carefully considering the merits of the claim, refused to discharge an order, based on the plaintiff's claim for an injunction, giving leave under Order 11 rule 1(f) for service of a writ out of the jurisdiction. The judge there said at page 243:-

"It is urged on one side that whenever a case occurs that comes within any one of the sub-sections of the rule the Court really has no discretion, but is bound to order the writ to be served. It is urged on the other side, and as I think correctly, that the Court has discretion whether or not a writ shall be served even in those cases; and, as in the old cases, the Court looked through the bill in order to see whether or not the statements in the bill shewed a reasonable case for granting the writ, so I conceive on the present occasion, when I am dealing simply with the granting of an injunction, I am bound to look into the circumstances of the case to see whether or not there is any sufficient justification to authorize the Court in its discretion to allow service out of the jurisdiction. I am perfectly aware that when I lay down the rule in that way I am laying it down most indistinctly and most indefinitely, but I cannot help doing so. It is said, and said I have no doubt with perfect accuracy, that in these cases you cannot go into the merits of the case, that all you have to do is to ascertain properly whether or not the jurisdiction for the trial of the action is here or elsewhere. But I do not see how in a great number of cases you can go into that question without ascertaining, to some degree at all events, what appear to be the merits of the case."

The Court of Appeal [1888] 37 Ch.D. 215 reversed this decision, the French court having by that time decided the action, but did not differ in principle. Lindley L.J. said at page 225:-

"... Order XI enumerates certain circumstances under which, and under which alone, the Court can give leave to serve writs out of the jurisdiction. It does not say that when those circumstances occur the Court is bound to give leave. On the contrary, the language is that service out of the jurisdiction 'may be allowed by the Court or a Judge' in certain specified events. This shews that the Court has a

discretion and is bound to exercise its discretion. This becomes still plainer by turning to rule 2, which states certain matters which the Court is bound to have regard to when it is asked for leave to serve a writ in *Ireland* or *Scotland*. It is not that you are entitled to have leave simply because you bring your case within one or the other of the eleven rules of Order XI. You cannot get the leave unless you do, but it does not follow if you do you are to have the leave. The Court has a discretion, and that discretion must of course be exercised judicially, and upon proper grounds.

Then it is said you cannot go into the merits. That is quite true. Of course you cannot properly upon an application to serve a writ try the action. The object in giving leave to serve the writ is to put the parties in a position to try the action bye-and-bye, but at the same time a judge cannot perform the duty imposed upon him by this Order unless he so far look into the matter as to see whether the plaintiff has a probable cause of action or not."

Their Lordships agree with the approach which commended itself to the Court of Appeal and consider that, notwithstanding the right conferred by Rule 219 to serve proceedings without leave out of New Zealand and the ostensibly narrow ground of objection embodied in Rule 131, the court retains a discretion to set aside service on the same principles as governed the granting of leave under the former Rule 48 and the setting aside of service before 1986. Their Lordships have been assisted towards this conclusion, which happily accords with the Court of Appeal's view of New Zealand procedure, by a number of considerations.

The English Order 11, which has served as the model in most Commonwealth countries for service of process out of the jurisdiction, does not spell out the entirety of the court's discretion to refuse leave, even where the case falls within rule 1, but that the discretion exists is not in doubt: see *Johnson v. Taylor Bros. & Co. Ltd.* [1920] A.C. 144 per Lord Birkenhead L.C. and Viscount Haldane at page 153 and Lord Dunedin at page 154, where he said:-

"I think it is legitimate to begin by considering the genesis of the rule. I understand that jurisdiction according to English law is based on the act of personal service and that if this is effected the English law does not feel bound by the Roman maxim 'Actor sequitur forum rei'. It is far otherwise in other systems where service is in no sense a foundation of jurisdiction, but merely a sine qua non before effective action is allowed. Now service being the foundation of jurisdiction, it follows that that service naturally and normally would be service within the jurisdiction. But there

is an exception to this normal rule, and that is service out of the jurisdiction. This however is not allowed as a right but is granted in the discretion of the judge as a privilege, and the rule in question here prescribes the limits within which that discretion should be exercised."

For further statements of principle one may refer to *The Brabo supra*, *Vitkovice Horni v. Korner supra*, *Siskina (Cargo Owners) v. Distos Compania Naviera S.A.* [1979] A.C. 210, *The Hagen* [1908] P.189 and *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460 and, for a recent example, see *Kloeckner & Co. A.G. v. Gatoil Overseas Inc.* [1990] 1 Ll.L.R. 177.

An application to discharge an order giving leave to serve the writ out of the jurisdiction is brought under Order 12 rule 8(1)(c), which reads:-

"8.(1) A defendant who wishes to dispute the jurisdiction of the court in the proceedings by reason of any such irregularity as is mentioned in rule 7 or on any other ground shall give notice of intention to defend the proceedings and shall, within the time limited for service of a defence, apply to the Court for -

(c) the discharge of any order giving leave to serve the writ on him out of the jurisdiction, ..."

It is, however, recognised that not only the question of forum conveniens (which does not affect jurisdiction) but all the factors relevant to the grant or refusal of the order are to be canvassed on the hearing of this application: Supreme Court Practice (1988) Vol. 1 page 90. It is noteworthy that both Cooke P. in his judgment and McGechan on Procedure have regarded Rule 131 as comparable to Order 12 rule 8. McGechan also states:-

"Rule 131 empowers a defendant who objects to the jurisdiction of the court to enter an appearance under protest and it will be in the context of that rule that forum non conveniens questions will become relevant."

Their Lordships are grateful to have been furnished with a copy of "The First Report to the Rules Committee by the Supreme Court Procedure Revision Committee" (April 1978) but the report contains only one reference to the proposed new procedure for service abroad, which does not assist the interpretation of either Rule 219 or Rule 131. Nor is any real help to be found in New Zealand cases decided under the new regime. Because it had been mentioned in both courts below, their Lordships carefully considered *McConnell Dowell Constructors Ltd. v. Lloyd's Syndicate* 396



[1988] 2 N.Z.L.R. 257 in which the Court of Appeal applied the *Spiliada* case (*supra*) but although the judgment of Cooke P. contains a most instructive discussion of forum conveniens, the report does not assist for present purposes. In *Cockburn v. Kinzie Industries Inc.* (1989) 1 PRNZ 243 a statement of claim was served under Rule 220 by leave (although it might have been served under Rule 219) on helicopter manufacturers in Oklahoma, U.S.A. The report contains a valuable historical survey by Hardie Boys J. and their Lordships take note of the fact that, the defendant Kinzie's objection to jurisdiction being refused, its appearance under Rule 131 was set aside and that, its objection on the ground of forum non conveniens being upheld, the plaintiff's action against it was stayed.

It can be seen that the analogy with Order 12 rule 8 provides what may be the answer to a narrow interpretation of the court's power on an application under Rule 131, but that still leaves the effect of Rule 219 for consideration. New Zealand, however, is not the only English-derived jurisdiction to have adopted service abroad without leave and, with McGechan on Procedure again pointing the way, their Lordships have had the benefit of reading a most helpful article by Elizabeth Edinger, a member of the Faculty of Law of the University of British Columbia in that University's Law Review (1982) Vol. 16 No. 1, in which the author notes the adoption in British Columbia, Manitoba, Ontario and Nova Scotia, being common law provinces of Canada, of the new procedure of serving process "ex juris" without leave and considers *inter alia* "the existence of a discretion after service 'ex juris' as of right".

As at the date of the article the position appeared uncertain. In Manitoba the Court of Appeal in 1960 affirmed without reasons the judge's decision that no discretion exists, the court's only function being to see whether the facts fall within the prescribed grounds. British Columbia in 1980 came down on the side of discretion in *Petersen et al v. Ab Bahco Ventilation et al* 107 D.L.R. (3d) 49, but the value of this decision as a guide is minimised by a rule which virtually decides the issue. That is Rule 14(6) which provides:-

"Where a person served with an originating notice has not entered an appearance and alleges that

- (a) the process is invalid or has expired,
- (b) the purported service of the process was invalid, or whether or not he has entered an appearance, alleges that
- (c) the Court has no jurisdiction over him in the proceeding or should decline jurisdiction, he may apply to the Court for a declaration to that effect."

The most valuable discussion of the principles, and also the clearest guidance, is found in Ontario, where the Court of Appeal ruled clearly in favour of discretion in *Singh et al v. Howden Petroleum Ltd. et al* (1979) 100 D.L.R. (3d) 121 in which the headnote reads:-

"The intended effect of the 1975 amendments (O.Reg. 106/75) to the Ontario Rules relating to service *ex juris* was merely to remove as unnecessary the initial *ex parte* application before the Master for leave to serve out of Ontario. This procedural change does not alter or remove from the Court the discretion to control its own process. The Court retains the power and discretion, in addition to the question of *forum conveniens*, to set aside service *ex juris* in appropriate cases. While the realities of interprovincial and international trade are such that businessmen are constantly engaged in commercial activities which cross borders, Courts must respect the sovereignty of independent States with the same solicitude and care that was exercised prior to 1975."

The judgment of the Court was delivered by Arnup J.A., who began as follows at page 122:-

"In 1975 the Rules of Practice respecting service out of Ontario were drastically changed. On this appeal we are asked to decide whether the amendments were merely intended to simplify the procedure, or to both simplify the procedure and change the principle underlying its application. The Divisional Court took the latter view."

He then traced the history of the old procedure, which closely resembled that of Order 11 and the old New Zealand Rule 48, referring en route to *Société Générale de Paris v. Dreyfus Brothers (supra)*, *Johnson v. Taylor Brothers (supra)* and *George Monro Ltd. v. American Cyanamid & Chemical Corporation* [1944] K.B. 432.

The new Ontario Rule 25 closely resembles Rule 219 and Ontario Rule 29 allows the parties served to apply for an order setting aside service. This rule, unlike British Columbia Rule 14(6), provides no clue as to the discretionary powers of the Court hearing the application. Having noted the new procedure, Arnup J.A. referred to *John Ewing & Co. Ltd. v. Pullmax (Canada) Ltd.* (1976) 13 O.R. (2d) 587, in which Southey J., referring to the court's discretion under the old practice, said at page 590:-

"The weight to be attached to those considerations under the circumstances in which international and interprovincial business is now conducted has been questioned in recent cases. It appears that the persons enacting the 1975 amendments decided that such considerations should give way completely to the need for simplifying our procedure and avoiding time-consuming and wasteful interlocutory proceedings.

The party served out of Ontario may still move to set aside service under Rule 29, as amended [O.Reg. 106/75, s.8], but that Rule, in my judgment, does not restore the judicial discretion which formerly existed under Rule 25. Such a motion would succeed in a case in which it could be shown that the claim did not fall within any of the subclauses of Rule 25(1). The absence of an affidavit, verifying the essential facts in the plaintiff's claim is not now, in my judgment, a ground for setting aside service outside Ontario."

Robins J. took a different view in *Roger Grandmaitre Ltd. v. Canadian International Paper Co. et al* (1977) 15 O.R. (2d) 137, 140-1:-

"I do not construe the amended Rules as removing the discretion which the Court has long exercised in matters of this nature. In my view, even if the facts disclose a case which falls within the terms of Rule 25, the Court is not bound to allow service to stand. *Forum conveniens* is a common law doctrine applying generally to cases involving problems of conflict of laws. I do not understand how a change in Rules of Practice and Procedure can operate to modify the Court's power to exercise a discretion founded on this doctrine. Rule 29 does not purport to limit or restrict the principles on which service may be set aside and it seems to me that those factors which were taken into consideration on applications for *ex parte* orders for service out of Ontario or on applications to set aside or rescind such *ex parte* orders remain relevant to applications under Rule 29. In other words there is, in my opinion, no distinction to be drawn between the cases in which service *ex juris* required leave of the Court and those in which service *ex juris* may be effected without a Court order - in either situation the plea of *forum conveniens* may be invoked and the Court may, notwithstanding that jurisdiction is conferred by the Rules, still exercise its discretion to determine whether jurisdiction should be assumed or declined."

*Forum conveniens* was the actual point in issue and the Court of Appeal affirmed the judge's decision to set aside service. Estey C.J.O., said in a brief oral judgment (18 O.R. (2d) 175n, 176):-

"It became apparent during the argument of this appeal, however, that a judgment of the Ontario Supreme Court by Southey, J., in *John Ewing & Co. Ltd. v. Pullmax (Canada) Ltd. et al.* [*supra*] had not been drawn to the attention of the learned Justice sitting in Weekly Court. We have had the advantage of examining the reasons of Southey, J., in that case, and, of hearing an explanation put upon that case by all counsel on this appeal, and, nonetheless, we see no reason to dispose of this

matter otherwise than has been done by Mr. Justice Robins sitting in Weekly Court."

After referring to two other judgments in the High Court and setting out the facts of the case under appeal, Arnup J.A. stated his conclusion on the question of principle at page 132:-

"In my view the Rules Committee did not intend to remove from the Court its discretion to control its own process, and to place that control solely in the hands of the bar. The contrary view, in my respectful opinion, is tantamount to saying that if the solicitor drawing the documents uses all the right words, no judicial officer has any right to interfere with the service of the process out of the jurisdiction. All of the repeated warnings as to the 'great care' which is to be exercised by the Court in permitting its process to be served anywhere else in the world would, on the basis of the judgment of the Divisional Court, become obsolete. Moreover, there is no express language in either the old or the new Rule dealing with the question of *forum conveniens*, but that question, as already noted, was constantly dealt with on motions to set aside service of Ontario process outside the jurisdiction, yet no one has suggested in this or any of the other cases decided after the amendments that consideration of *forum conveniens* has been abolished. Since that consideration formed a part of the exercise of the former discretion, its acknowledged continuance strengthens my view that the discretion of the Court survived the amendments.

I quite agree with the view of Southey J., that the realities of interprovincial and international trade are such that businessmen are constantly engaged in commercial activities which cross our borders, and as a matter of course, cross continents and oceans as well. The fact is, however, that there are now more independent States in the world than there ever were, and the Courts of this Province must respect their sovereignty with the same solicitude and care that was exercised prior to 1975. Form 3 is not a command of the Queen of Canada, as a writ of summons is, but although signed by the plaintiff's solicitor only, it notifies the defendant to come into the Ontario Court or suffer the consequences.

Without saying that this Court is in terms bound by the earlier judgment of the Court of Appeal in the *Roger Grandmaitre* case, I find it difficult to believe that the Court would have passed over in silence the observations of Robins J., as to the effect of the 1975 changes if they had been of the view that those observations were wrong. In my respectful view, the judgment of Robins J., was

correct and *John Ewing & Co. Ltd. v. Pullmax (Canada) Ltd. supra*, was wrongly decided in its holding as to the effect of the 1975 amendments.

In the result, I am of the opinion that the Divisional Court erred in the approach that it took and that the service out of Ontario in this case must be looked at by the Court having in mind the same principles which governed the scrutiny by the Court of process issued under the old Rules when the Court was hearing an application to set aside the order allowing service *ex juris*."

Their Lordships find these observations to be strong and convincing arguments in support of the approach of the New Zealand Court of Appeal to Rule 131.

A defendant's submission that the plaintiff's choice of venue is *forum non conveniens* can of course be presented as an application for a stay. This method was adopted in *McConnell Dowell Constructors Ltd. v. Lloyd's Syndicate* 396 *supra* and *Cockburn v. Kinzie Industries Inc. supra*. Indeed in *Wendell v. Club Méditerranée* (affirmed at [1987] 1 PRNZ 292) and *Kingsway Industries Ltd. v. John Holland Engineering Pty. Ltd.* (1986 unreported) Hillyer J. took the view that a *forum conveniens* objection must be so dealt with and not under Rule 131. Their Lordships consider that, as with Order 11 and Order 12 Rule 8 (see *Mackender v. Feldia* [1967] 2 Q.B. 590), and consistently with the view of the Court of Appeal of Ontario, *forum conveniens* (like every other discretionary objection) can be raised on a Rule 131 application, but also think that it is for the Courts of New Zealand to follow their own preferred procedure in this respect.

The fact that, unlike Order 11, Rule 219 does not require a supporting affidavit is partly offset by the need under that Rule for a statement of claim, and not merely a writ; and the absence from Rule 131 of power to direct trial of a preliminary issue contrasts much more in theory than in practice with the Order 12 Rule 8 procedure. Their Lordships therefore do not regard these points as strong indications against the continuing existence of discretion on an application under Rule 131. That Rule and Rule 219 have not abrogated the court's inherent discretion to decline jurisdiction.

Their Lordships now proceed to consider the causes of action pleaded by NMLN against the Bank. Two general principles may first be stated. (1) A director does not by reason only of his position as director owe any duty to creditors or to trustees for creditors of the company. (2) A shareholder does not by reason only of his position as shareholder owe any duty to anybody.

In *Ferguson v. Wilson* (1866) 2 Ch.App. 77 Cairns LJ. said at page 89:-

"What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company. This being a contract alleged to be made by the company, I own that I have not been able to see how it can be maintained that an agent can be brought into this Court, or into any other Court, upon a proceeding which simply alleges that his principal has violated a contract that he has entered into. In that state of things, not the agent, but the principal would be the person liable."

In *In re Wincham Shipbuilding, Boiler and Salt Co.* (*Poole, Jackson and Whyte's Case*), [1878] 9 Ch.D. 322, three directors paid the amounts due on shares issued to them into the overdrawn account of the company which had been guaranteed by the directors. The liquidator of a company failed in an action against the directors for breach of their fiduciary duties. In the Court of Appeal Sir George Jessel M.R., reversing Sir James Bacon V.C., said at page 328:-

"The Vice-Chancellor decided the question on this ground, that the directors were trustees of all their powers. So, no doubt, they were. But it is further said that they exercised their powers in breach of trust and for their own benefit, and, therefore, that the act which they did was nugatory. But it appears to me that the question is, for whom were they trustees? It does not appear that the Vice-Chancellor considered this point; but it makes all the difference whether they were trustees for the persons who were injured by what had been done in this case, namely, the other creditors of the company. It has always been held that the directors are trustees for the shareholders, that is, for the company. They are the managing partners of the company, and if they abuse their powers, which they hold in trust for the company, to the damage of the company, for their own benefit, they are liable to make good the breach of trust to their cestuis que trust like any other trustees. But directors are not trustees for the creditors of the company. The creditors have certain rights against a company and its members, but they have no greater rights against the directors than against any other members of the company. They have only those statutory rights against the members which are given them in the winding-up."

In *Wilson v. Lord Bury* (1880) 5 Q.B.D. 518, a company borrowed £1,000 from the plaintiff and covenanted to secure payment by assigning a mortgage to him. The mortgage was paid off and the redemption monies paid in to the funds of the company which then became insolvent. The plaintiff sued the directors of the company alleging negligence on their part. Brett L.J. said at page 525:-

"... it is clear that there was at least a contract between the company and the plaintiff, that the company would on payment off of the mortgage debt ... to the company give to the plaintiff another mortgage security ..., that such contract had been broken by the company, that the plaintiff would at least have been entitled to sue the company, if it had remained solvent, for such breach, ... It is clear that there was no contract between the plaintiff and the defendants personally to the like effect. It is equally clear that there was no contract of principal and agent between the plaintiff and the defendants personally. These matters have been too often decided to require further discussion. It was strenuously urged on behalf of the plaintiff that the defendants were as a necessary consequence of their position as directors of the company, personally trustees of the plaintiff and had been guilty of a breach of trust. Being clearly of opinion, as above stated, that there was no contract between the plaintiff and the defendants, ... the question is whether there was the relation between the cestui que trust and trustee. I know of no principle or authority for saying that such a relation can be constituted by any agreement or any intercourse between the parties less direct than the agreement or intercourse, which forms the relation of principal and agent. As the agent of an agent is not thereby the agent of the original principal, so is neither the agent or trustee of a trustee thereby the trustee of the original cestui que trust."

After citing the views of Cairns L.J. in *Ferguson v. Wilson* (*supra*), Brett L.J. continued at page 527:-

"This seems to me to shew that Lord Cairns, dealing with the procedure of a court of equity, was of opinion that the same want of direct intercourse which prevents any remedy at common law by the dealer with a company against the directors personally of such company, on the mere ground of their being directors, equally prevents any remedy against them by the same party in respect of the same relation in a court of equity."

But although directors are not liable as such to creditors of the company, a director may by agreement or representation assume a special duty to a creditor of the company. A director may accept or assume a duty of care in supplying information to a creditor analogous

to the duty described by the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 456. In that case, but for an express disclaimer of liability, a bank which supplied a reference of creditworthiness in respect of a customer of the bank would have been under an implied duty of care towards the person who sought and relied upon the reference.

In the present case, a duty of care owed by House and August to the trustees can only be sought in the trust deed entered into between AICS and NMLN. The statement of claim contains the following allegations:-

"10. Pursuant to the provisions of clause 3.5.1. of the trust deed, A.I.C.S. was required to furnish NMLN with monthly reports certified as true and correct by two of its directors in relation to the matters set out in the said clause 3.5.1. ('the Monthly Certificates')."

The statement of claim annexes particulars of the names of the directors of AICS who signed monthly certificates. House and August did not sign any of the monthly certificates. A duty of care in relation to the monthly certificates was only assumed by the directors who signed the certificates. The statement of claim continues:-

"11. Pursuant to the provisions of clause 3.5.2. of the trust deed, AICS was required within twenty business days after the end of each financial quarter to furnish to NMLN a report by two directors of AICS on behalf of all of its directors relating to the matters set out in the said clause 3.5.2. ('The Quarterly Certificates')."

15. Each of the Quarterly Certificates ... contained a statement or statements by or on behalf of all the defendants (by virtue of the express provisions of clause 3.5.2. of the trust deed), that (inter alia):

- (i) AICS had duly observed and performed all of the covenants, conditions, agreements and provisions binding upon it under the trust deed;
- (ii) No event had happened which had caused or could have caused the deposits placed with AICS to become repayable."

NMLN intends at the trial to show that House and August must have known or ought to have known that the quarterly certificates were furnished on behalf of all the directors of AICS including House and August, and that in those circumstances House and August assumed and accepted a special duty owed to NMLN and the depositors to take reasonable care to see that the statements in the quarterly certificates were accurate. NMLN also proposes to show that House and August did not exercise reasonable care, the quarterly certificates



were not accurate and NMLN relied upon the quarterly certificates and therefore did not take timely action under the trust deed to protect the interest of the depositors and is entitled to a contribution from House and August to meet the liability incurred and settled by NMLN for the sum of \$6.75m.

Of course, NMLN may fail to show either the existence or the breach of the duty alleged to have been accepted by House and August. It may be that House and August relied, and were entitled to rely, upon information received from their co-directors or from Deloittes. House and August might be able to show that NMLN received sufficient information and that the loss to the depositors could have been averted or reduced if NMLN had properly evaluated the information and facts supplied to them. There are other allegations against House and August in the statement of claim, and there may be other defences open to House and August. There is no doubt that NMLN, by its statement of claim, has established an arguable case against House and August arising out of the fact that the quarterly certificates were furnished on behalf of all the directors of AICS.

As against the Bank, the statement of claim pleaded that the Bank was liable to contribute to the loss suffered by NMLN in settling the claims of the depositors against NMLN for all or any of the following reasons:-

- (1) House and August were appointed to the Board of Directors of AICS by the Bank, were employed by the Bank and carried out their duties as directors in the course of their employment by the Bank.
- (2) House and August were, as directors of AICS, the agents of the Bank which was the principal.
- (3) As a substantial shareholder in AICL which was the holding company that controlled AICS, the Bank owed a duty of care to NMLN and to the depositors "to ensure that the business of AICS was not conducted negligently or recklessly, or in such a manner as to materially disadvantage the interests of those unsecured depositors".
- (4) House and August were persons occupying a position of directors of AICS who were accustomed to act in accordance with the Bank's directions, and therefore the Bank was a director of AICS within the meaning of section 2 of the Companies Act 1955.

As to (1) the power of appointing a director of a company may be exercised by a shareholder or a person who is not a shareholder by virtue of the articles of association of the company, or by virtue of the control of the majority of the voting shares of the company, or

by virtue of the agreement or acquiescence of other shareholders. In the present case, the Bank and Kumutoto, who together controlled AICS, decided that the Bank should nominate two directors. In the absence of fraud or bad faith (which are not alleged here), a shareholder or other person who controls the appointment of a director owes no duty to creditors of the company to take reasonable care to see that directors so appointed discharge their duties as directors with due diligence and competence. One shareholder may lock away his paid up shares and go to sleep. Another shareholder may take an active interest in the company, insist on detailed information and deluge the directors with advice. The active shareholder is no more liable than the sleeping shareholder. In *Salomon v. Salomon & Co. Ltd.* [1897] A.C. 22, at page 35, Lord Watson said:-

"Any person who holds a preponderating share in the stock of a limited company has necessarily the intention of taking the lion's share of its profits without any risk beyond loss of the money which he has paid for, or is liable to pay upon, his shares; ..."

In *Rainham Chemical Works Limited v. Belvedere Fish Guano Company Limited* [1921] 2 A.C. 465, where it was argued that shareholders were liable for a tort committed by a company, Lord Buckmaster L.C. said, at page 475:-

"It not infrequently happens in the course of legal proceedings that parties who find they have a limited company as debtor with all its paid up capital issued in the form of fully paid shares and no free capital for working suggest that the company is nothing but an alter ego for the people by whose hand it has been incorporated, and by whose action it is controlled. But in truth the Companies Acts expressly contemplate that people may substitute the limited liability of a company for the unlimited liability of the individual, with the object that by this means enterprise and adventure may be encouraged."

The liability of a shareholder would be unlimited if he were accountable to a creditor for the exercise of his power to appoint a director and for the conduct of the director so appointed. It is in the interests of a shareholder to see that directors are wise and that the actions of the company are not foolish; but this concern of the shareholder stems from self-interest, and not from duty. The House of Lords, in the recent case of *J.H. Rayner Limited v. Department of Trade* [1989] 3 W.L.R. 971 (the International Tin Council Case), reiterated that a corporation is a legal person, that no-one can sue on a contract save the parties to the contract, and that therefore the members of a corporation are not liable as members for the debts of

the corporation. It does not make any difference if the directors appointed by a shareholder are employed by the shareholder and are allowed to carry out their duties as directors while in the shareholder's employment. House and August owed three separate duties. They owed in the first place to AICS the duty to perform their duties as directors without gross negligence; the liability of a director to his company is set forth in the judgment of Romer J. in *In re City Equitable Fire Insurance Company Limited* [1925] Ch. 407. They owed a duty to NMLN to use reasonable care to see that the certificates complied with the requirements of the trust deed. Finally, they owed a duty to their employer, the Bank, to exercise reasonable diligence and skill in the performance of their duties as directors of AICS.

If House and August did not exercise reasonable care to see that the quarterly certificates were accurate, they committed a breach of the duty they owed to NMLN and may have committed a breach of the duty they owed to AICS and a breach of the duty they owed to the Bank to exercise reasonable diligence and skill. But these duties were separate and distinct and different in scope and nature. The Bank was not responsible for a breach of the duties owed by House and August to AICS or to NMLN any more than AICS or NMLN were responsible for a breach of duty by House and August. If House and August committed a breach of the duty which was imposed on them and the other directors of AICS and was owed to NMLN under and by virtue of the trust deed they did so as individuals and as directors of AICS and not as employees of the Bank; House and August were not parties to the trust deed, nor was the Bank. House and August were allowed by the Bank to perform their duties to AICS in the Bank's time and at the Bank's expense. It was in the interests of the Bank that House and August should discharge with diligence and skill the duties which they owed to AICS, but these facts do not render the Bank liable for breach by House and August of the duty imposed on them by the trust deed. In the performance of their duties as directors and in the performance of their duties imposed by the trust deed, House and August were bound to ignore the interests and wishes of their employer, the Bank. They could not plead any instruction from the Bank as an excuse for breach of their duties to AICS and NMLN. Of course, if the Bank exploited its position as employers of House and August to obtain an improper advantage for the Bank or to cause harm to NMLN then the Bank would be liable for its own misconduct. But there is no suggestion that the Bank behaved with impropriety. Its duty to refrain from exploiting its influence over its employees is no different in principle from the duty of a father not to exploit his influence over a son who is a director or the duty of a businessman not to exploit his influence over a business associate who is a director. The

employment of House and August could have given the Bank the opportunity to injure AICS and NMLN but it did not make the Bank responsible for negligence of House and August in the discharge of their duties under the trust deed.

(2) Then it is said that House and August were the agents of the Bank. But, as directors of AICS, they were the agents of AICS and not of the Bank. As directors of AICS, House and August were agents for AICS for the purposes of the trust deed and, by the express terms of the trust deed, responsibility for the accuracy of the quarterly certificates was assumed by the directors of AICS. House and August accepted responsibility for the quarterly certificates as directors of AICS and not as agents or employees of the Bank.

(3) Next it was said that the Bank owed a personal duty of care to NMLN. For the protection of the depositors NMLN stipulated for and obtained by the trust deed a duty of care in the preparation of the quarterly certificates by the directors of AICS. NMLN may or may not have known that two of the directors of AICS were employed by the Bank and that the Bank would allow those two directors to carry out their duties as directors while in the employment of the Bank. Any of these circumstances, even if known, could change at any time. NMLN may or may not have known that the bank was beneficially interested in 40% of the shares of AICS. That circumstance also could change at any time. NMLN did not rely on any of these circumstances. By the terms of the trust deed or by agreement supplemental to the trust deed NMLN might have attempted to impose a duty of care on third parties such as the Bank, but NMLN neither intended nor attempted expressly or by implication to impose on employers, shareholders or any other third parties liability for the acts or omissions of the only persons who by the trust deed were charged with the duty to see that the quarterly certificates were accurate. An employer who is also a shareholder who nominates a director owes no duty to the company unless the employer interferes with the affairs of the company. A duty does not arise because the employee may be dismissed from his employment by the employer or from his directorship by the shareholder or because the employer does not provide sufficient time or facilities to enable the director to carry out his duties. It will be in the interests of the employer to see that the director discharges his duty to the company but this again stems from self-interest and not from duty on the part of the employer. NMLN's counsel referred to *Ryde Holdings Limited v. Sorenson* [1988] 2 NZLR 157, but in that case the employer interfered with the affairs of the company by instructing the director to sell the assets of the company to a subsidiary company of the employer at an undervalue. None of the other authorities cited, New Zealand, English or Australian supported the

submission that the Bank is vicariously liable to NMLN either as employer or as principal or personally liable for its own negligence. In two authorities, *John Shaw and Sons (Salford) v. Peter Shaw and John Shaw Limited* [1935] 2 K.B. 113 and *Scott v. Scott* [1943] 1 All.E.R. 582 it was held that majority shareholders are not liable to creditors of a company; management is vested in the directors who are liable to the company for gross negligence.

(4) Finally NMLN relied on section 2 of the Companies Act 1955 in which a "director" is defined as "a person in accordance with whose directions or instructions the persons occupying the position of director of a company are accustomed to act". In the present case House and August were two out of five directors, the other three being appointees of Kumutoto. And there is no allegation (and it is also inherently unlikely) that the directors in these circumstances were accustomed to act on the direction or instruction of the Bank.

The only rights and remedies of NMLN were against AICS for breach of contract and against the directors of AICS who owed a duty to NMLN. By the trust deed, the quarterly certificates were rendered on behalf of the directors and nobody else. Even if NMLN knew that House and August had been appointed by the Bank, that the Bank controlled a substantial shareholding in AICS and that House and August were bound to perform their duties as directors of AICS while employed by the Bank, NMLN by the trust deed was only entitled to be furnished with quarterly certificates on behalf of the directors. House and August were directors but the Bank was not a director. The Bank never accepted or assumed any duty of care towards NMLN. In the absence of fraud or bad faith on the part of the Bank, no liability attached to the Bank in favour of NMLN for any instructions or advice given by the Bank to House and August. Of course, it was in the interests of the Bank to give good advice and to see that House and August conscientiously and competently performed their duties both under the trust deed and as directors of AICS. But such advice is not attributable to any duty owed by the Bank to NMLN, which was only entitled to the protection which the trust deed provided, namely quarterly certificates furnished on behalf of all the directors of AICS. By the trust deed the directors of AICS accepted and assumed responsibility for the quarterly certificates, and the directors did not include the Bank. The Companies Act 1955 cannot alter the construction of the trust deed or impose on the Bank a duty assumed by House and August but never assumed by the Bank.

Thus the statement of claim does not disclose any cause of action against the Bank. The pleading would therefore be fit to be struck out on the application of the defendant. It complies, in their Lordships' opinion

with the test enunciated in *Takaro Properties v. Rowling* [1978] 2 NZLR 314, 316-7, namely, that the cases pleaded as causes of action are so clearly untenable that they cannot possibly succeed. The fact that applications to strike out may raise difficult questions of law requiring extensive argument does not exclude the jurisdiction to do so: *Gartside v. Sheffield Young & Ellis* [1983] NZLR 37, 45 and the same principle applies to applications under Rule 131 and Order 12 Rule 8. There is no need for the circuitry of procedure which would be involved in an application to strike out the statement of claim in a case like the present, since "no cause of action" provides the ultimate example of failing to show a good arguable case. Having regard to their Lordships' conclusions and to the terms of rule 131, the appropriate order, by analogy with successful applications to set aside service under Order 12 Rule 8 (which is on its face concerned with absence of jurisdiction), is to dismiss the proceeding as against the Bank.

Finally there is the matter of costs. In the light of the conclusions which they have reached on the appeal, their Lordships are of the opinion that the Bank is entitled against NMLN to its costs in the courts below and before their Lordships' Board. And, because for good reasons the date of trial of the action was fixed for the month of February 1990, the Bank will also receive all its costs necessarily incurred in preparing for that trial, but not the costs of preparing and presenting a petition to this Board for leave to appeal.