IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

BETWEEN: COMMERCIAL BANK PLATINA a Commercial Trading Bank with its principal place of business at Ulista Sadovincheskaya (Osipenko) 13, 113035 Moscow, The Russian Federation, Russia

Applicant/Plaintiff

A N D: MYTISCHINKI COMMERCIAL BANK a Commercial Trading Bank with its principal place of business at Novomytischinsky Prospekt, 30/1, 141008 Mytischinky, Moscow, The Russian Federation, Moscow

Respondent/Defendant

Counsel: C J Nelson for plaintiff
R Drake for defendant

Judgment: 19 March 1997

JUDGMENT OF SAPOLU, CJ

The essential facts alleged in this case may be briefly stated. The plaintiff and the defendant are two commercial trading banks whose principal places of business are in Moscow, Russian Federation. Both exist under the laws of the Russian Federation and are legal entities under those laws capable of suing and being sued. Pursuant to an interbank loan agreement dated 14 April 1995, the plaintiff advanced the sum of US$1.5 million to the defendant. Of that sum, the outstanding principal sum of US$486, 154.96 plus accrued interest remain

owing by the defendant to the plaintiff.

The plaintiff believes that an international company registered as such in Western Samoa and carrying on off-shore banking business here holds funds in Western Samoa and/or Austria in Europe on behalf of the defendant. For convenience I will hereinafter refer to that international company as "X company". So the plaintiff commenced proceedings in Western Samoa against the defendant in September 1995 by filing a summons and statement of claim. At the same time the plaintiff filed an ex parte motion for a domestic as well as a worldwide Mareva injunction against the defendant, its bankers, agents or otherwise, and for an ancilliary order for discovery of information. An order to effect service of the summons and statement of claim on the defendant at its principal place of business in the Russian Federation was also sought in the same motion. In effect the Court granted the motion for a domestic Mareva injunction. The Court also granted an order for service of proceedings on the defendant outside of jurisdiction. When the defendant failed to file a statement of defence or other response within the period of 30 days allowed to it to do so after service, counsel for the plaintiff moved for judgment by way of formal proof and judgment was entered accordingly for the plaintiff.

After the entering of judgment, counsel for the plaintiff further moved for a charging order against all funds held by X company to the defendant's credit. It is one of the terms of that charging order that any funds held by X company should be transferred to the Registrar of this Court for satisfaction of the plaintiff's judgment. The charging order was granted. Counsel for X company has now informed the Court that her client does not hold funds in Western Samoa on

behalf of the defendant but in a foreign bank and those funds have been frozen. The defendant has also filed a protest against the decision of the Court granting the charging order. Essentially it says that the Russian Federation Central Bank had issued orders to the defendant to transfer the funds it has in other banks to the Russian Federation Central Bank for the purpose of paying the defendant's creditors including the plaintiff, in the order of priority as defined under Russian law.

It must be said that the remedy of Mareva injunction, let alone a worldwide Mareva injunction, is a very novel creature in the law of this country. As I understand it, the concept of Mareva injunction is still in the process of development under English law, and that is particularly more so in respect of worldwide Mareva injunctions. With those considerations in mind I will move on.

Jurisdiction to grant Mareva injunction:

The jurisdiction of a Western Samoan Court to grant a Mareva injunction may be found in two sources. The first is the Court's inherent jurisdiction to ensure that its judgments or orders are effective : see ***Hunt v BP Exploration Co (Libya) Ltd [1980] 1 NZLR 104***; ***Leucadia National Corporation v Wilson Neill Ltd (1994) 7 PRNZ 701; Fitzherbert v Faisandier (1995) 8 PRNZ 701.*** The second source of jurisdiction is section 31 of the Judicature Ordinance 1961. Section 31 provides :

> "The Supreme Court shall possess and exercise all the jurisdiction, power "and authority, which may be necessary to administer the laws of Western "Samoa".

In *Beddaw v Beddaw (1878) 9 Ch. D. 89*; Sir George Jessel MR stated at p.93 :

> "I have unlimited power to grant an injunction in any case where it would "be right or just to do so; and what is right or just must be decided, not "by the caprice of the judge, but according to sufficient legal reasons or "on settled legal principle".

The question then is, in what circumstances would it be "fair or just" to grant an injunction. Obviously the Courts in other jurisdictions have decided that circumstances in which a defendant may dissipate, secrete or remove his assets in order to frustrate or render less effective a judgment or order the Court may make or has made, can be the subject of an injunction, a Mareva injunction.

<u>Basis of jurisdiction</u>:

It is now clear that the basis of the Mareva jurisdiction is to restrain a defendant or debtor from dissipating, secreting or removing his assets in order to frustrate or render less effective any judgment or order made, or may be made, by a Court against him. In *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva [1980] 1 All E R 213* which is the case from which the name of the new remedy is derived, Lord Denning MR stated at p.215 :

> "If it appears that the debt is due and owing - and there is a danger that "the debtor may dispose of his assets so as to defeat it before judgment - "the Court has jurisdiction in a proper case to grant an interlocutory "judgment so as to prevent him disposing of his assets".

And in *Polly Peck International v Nadir (No.2) [1992] 4 All E R 769* Lord Donaldson of Lymington MR at p.785 :

"So far as it lies in their power, the Courts will not permit the course "of justice to be frustrated by a defendant taking action, the purpose of "which is to render nugatory or less effective any judgment or order which "the plaintiff may thereafter obtain".

It is now also clear that a Mareva injunction may be granted before or after judgment. These are referred to as pre-judgment or post-judgment injunctions.

<u>Exercise of jurisdiction</u>:

A Mareva injunction, whether domestic or worldwide, is an equitable remedy. As such, it is discretionary. On the basis of English and New Zealand authorities, I would suggest the following approach to be adopted by the Court when dealing with a motion for a pre-judgment domestic Mareva injunction which applies to assets within jurisdiction.

(a) Does the plaintiff have a good arguable case against the defendant? : See for example ***Rasu Maritima SA v Perusahaan (Pertamina) [1977] 3 all E R 324*** per Lord Denning MR; ***Third Chandris Shipping Corporation v Unimarine SA [1979] 2 All E R 972***; per Mustill J p.975 and Lord Denning MR p.984; ***Wilsons (NZ) Portland Cement Ltd v Gatx-Fuller Australasia Pty Ltd [1985] 2 NZLR 11*** per Hillyer J p.21.

(b) Does the defendant have assets within the jurisdiction and there is a serious risk that he will remove his assets out of the jurisdiction or dispose of them within the jurisdiction in order to

frustrate or render less effective any judgment the plaintiff may subsequently obtain against him : see for example ***Mareva Compania [1980] 1 All E R 213***, per Lord Denning MR; ***Wilsons (NZ) Portland Cement v Gatx-Faller Australasia Pty Ltd [1985] 2 NZLR 11*** per Hillyer J (HC); ***Polly Peck International v Nadir (No 2) [1992] 4 All E R 769*** per Lord Donaldson of Lymington MR.

As for the approach to be adopted to an application for a post-judgment domestic Mareva injunction, I think the Court would only have to consider whether the defendant has assets within the jurisdiction and whether there is a serious risk that the defendant will remove those assets out of the jurisdiction or dispose of them within the jurisdiction in order to frustrate or render less effective the judgment the plaintiff has obtained against him. But as for the approach to be adopted to an application for a worldwide Mareva injunction, whether it is pre-judgment or post-judgment, English law in this respect is still very much a developing area, and I think it will not be wise to suggest an approach for the exercise of the exercise of discretion in the worldwide Mareva jurisdiction at this stage. That is particularly more so, as the issue was not argued in this case, and Mareva relief is in a stage of infancy in this country. One thing which can be stated with confidence at this stage is that the requirement of a good arguable case against the defendant also applies to an application for a pre-judgment worldwide Mareva injunction.

<u>Worldwide Mareva Injunctions</u>:

In the late 1980's and 1990, the English Court of Appeal in a series of important cases established and developed the Court's jurisdiction to grant a

worldwide Mareva injunction which applies to assets outside of the jurisdiction. In *Babanaft International Co S.A. v Bassatne [1990] 1 Ch 13* where the Court was concerned with a post-judgment worldwide Mareva injunction, Kerr LJ said at p.28 :

> "I therefore proceed on the basis that in appropriate cases, though these "may well be rare, there is nothing to preclude our Courts from granting "Mareva type injunctions against defendants which extend to their assets "outside the jurisdiction".

Neill LJ in the same case said at p.39 :

> "I am satisfied, however, that the Court has jurisdiction to grant a "Mareva injunction over foreign assets, and that in this developing branch "of the law the decision in *Ashtiani v Kashi [1987] Q.B. 888* may require "further consideration in a future case".

In the next case of *Republic of Haiti v Duvalier [1990] 1 Q B 202* Staughton LJ after refering to the judgment by Kerr LJ in *Babanaft's* case said at p.215 :

> "For my part, if the point had not been conceded before us, I would have "agreed with the view expressed by Kerr LJ, for the reasons given in his "judgment, that there is jurisdiction to grant a Mareva injunction, "pending trial, over assets worldwide; and that cases where it will be "appropriate to grant such an injunction will be rare - if not very rare "indeed".

And in *Derby & Co Ltd v Weldon (Nos 3 and 4) [1990] 1 Ch 65* where the Court was again concerned with a pre-judgment worldwide Mareva injunction, Lord Donaldson of Lymington MR said at p.79 :

"In my judgment, the key requirement for any mareva injunction, whether or "not it extends to foreign assets, is that it shall accord with the "rationale upon which Mareva relief has been based in the past. That "rational, legitimate purpose and fundamental principle I have already "stated, namely, that no Court should permit a defendant to take action "designed to frustrate subsequent orders of the Court. If for the "achievement of this purpose it is necessary to make orders concerning "foreign assets, such orders should be made, subject, of course, to "ordinary principles of international law".

Neill LJ in the same case said at p.93 :

"It seems to me that the time has come to state unequivocally that in an "appropriate case the Court has power to grant an interlocutory injunction "even on a worldwide basis against any person who is properly before the "Court, so as to prevent that person by the transfer of his property "frustrating a future judgment of the Court".

And finally, in ***Derby & Co Ltd v Weldon (No 6) [1990] 1 WLR 1139*** Dillon LJ said at p.1149 :

"The jurisdiction of the Court to grant a Mareva injunction against a "person depends not on territorial jurisdiction of the English Court over "assets within its jurisdiction, but on the unlimited jurisdiction of the "English Court in personam against any person, whether an individual or a "corporation, who is, under English procedure, properly made a party to "proceedings pending before the English Court".

This last passage from the judgment of Dillon LJ, in my view, clearly brings out the true equitable basis of the jurisdiction exercised by the Courts in granting worldwide Mareva injunctions. It is often said that equity acts in personam. A Mareva injunction, whether domestic or worldwide, is an equitable remedy and therefore applies in personam. That means the injunction is addressed to the defendant as a person, notwithstanding where his assets may be located, ordering him to do something or to refrain from doing something. Sanctions against

disobedience would be contempt of Court or the defendant being debarred from defending proceedings.

I am of the view that our Courts have jurisdiction to grant worldwide Mareva injunctions. That jurisdiction is derived from the Court's inherent jurisdiction or section 31 of the Judicature Ordinance 1961. The real difficulty in this area is how the Court is to exercise its discretion. Safeguards for the position of the defendant and third parties are an important consideration in the exercise of the discretion. I need not go into those matters in this case. But a diligent lawyer will find them all in the English cases I have cited.

<u>Exercise of discretion</u>:

It appears to me that the principal authority that the plaintiff relies on in its application for a worldwide Mareva injunction is the ***Republic of Haiti v Duvalier [1990] 1 Q B 202.*** Having carefully considered that case, I am of the view that it is not directly relevant. What was involved in that case was that the plaintiff initiated proceedings in France and then sought interim relief in England by way of a pre-judgment worldwide Mareva injunction and an order for discovery of information. That the English Court granted the relief sought was made possible by the fact that England has domestic legislation in place in the Civil Jurisdiction and Judgments Act 1982 which applies to England the provisions of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. And both England and France are Contracting States to the Brussels Convention. It also appears to me from the relevant provisions of the Brussels Convention cited in the English cases that they provide for an element of international reciprocity and cooperation amongst the

Contracting States to the Convention.

This case is different, even though there may be a similartiy in the motive of the present plaintiff in seeking relief in the Western Samoan Court and the motive of the plaintiff in *Duvalier's* case in seeking judicial assistance in England in respect of an action initiated in France, there is a marked difference between the two cases. This difference between the two cases is that the present plaintiff has commenced his action in Western Samoa and sought a worldwide Mareva injunction from this Court. There is also no Convention, such as the Brussels Convention, between Western Samoa and the Russian Federation, or a statutory regime whereby the Western Samoan Court is given jurisdiction to grant interim relief, such as a domestic or worldwide Mareva injunction, in respect of an action initiated in the Russian Federation. On this point, I would refer to the judgment of Lord Diplock in the case of ***Siskina v Distos Compania Naviera S.A. [1979] AC 210*** which was decided before the application of the Brussels Convention to England by the enactment of the English Civil Jurisdiction and Judgments Act 1982. Lord Diplock made it clear in that case that a right to an interlocutory injunction is not a cause of action and the Court has no jurisdiction to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment. That position has been altered in England by the 1982 Act but Western Samoa does not have similar legislation.

In *Rosseel v Oriental Commercial Shipping (UK) Ltd [1990] 1 WLR 1387* the plaintiff made application in England for a worldwide Mareva injunction in support of an arbitration award that was made in New York, United States of

America. In the Court of first instance, Hirst J refused to grant the worldwide Mareva injunction sought by the plaintiff. He said :

> "With regard to the application for a worldwide Mareva, the Court clearly "has power (see ***Babanaft International Co SA v Bassatne [1990] Ch 13)*** to "make such an order. If it was a case of enforcing an English judgment it "would have followed ***Babanaft.*** If it were an English arbitration award "then it would seem the same applies but this concerns the Act of 1975. "What has been asked is to enforce the award in England and Wales and "I am not persuaded to enforce a New York arbitration award beyond England "and Wales. The appropriate Court is the New York Court or the foreign "Court where assets are to be found and therefore I will not carry this "order beyond the jurisdiction. I will however order an affidavit of all "the UK assets".

That passage is to be found in the judgment of the Court of Appeal in the same case wherein the plaintiff's appeal from the judgment of Hirst J was dismissed. In the Court of Appeal, Lord Donaldson of Lymington MR in a judgment concurred in by Parker LJ, distinquished ***Duvalier's*** case as "very unusual" and "very special" and said at pp 1388-1389 :

> "Where this Court is concerned to determine rights, then it will, in an "appropriate case, and certainly should, enforce its own judgment by "exercising what would be described as a long arm jurisdiction. But where "it is merely being asked under a convention or an Act of Parliament to "enforce in support of another jurisdiction, whether in arbitration or "litigation, it seems to me that save in an exceptional case, it should "stop short of making orders which extend beyond its own territorial "jurisdiction".

A little further on at p.1389 His Lordship continued :

> "It seems to me that, apart from the very exceptional case, the proper "attitude of the English Courts - and, I may add, Courts in other "jurisdictions - is to confine themselves to their own territorial area, "save in cases in which they are the Court or tribunal which determines

"the rights of the parties. So long as they are merely being used as "enforcement agencies they should stick to their own last".

It was those kind of considerations including the absence of any conventional or statutory regime for international reciprocity and cooperation between Western Samoa and the Russian Federation in respect of judicial proceedings, that influenced this Court to refuse the worldwide Mareva injunction sought and granted only a domestic injunction. After all what the plaintiff has done is to try to litigate in Western Samoa a cause of action that had arisen in the Russian Federation and then use the Western Samoan Court as an enforcement agency for any judgment it may give in favour of the plaintiff in order to obtain worldwide relief for the plaintiff. But there is no connecting factor between Western Samoa and the cause of action, unless, it can be argued that the funds which is the subject matter of the dispute were held in Western Samoa and thus provide the necessary connecting factor. However this issue was not argued, and therefore I express no conclusive view on it. In any event it is now clear that there are no funds held on the defendant's behalf in Western Samoa.

Worldwide charging order:

The plaintiff also sought a worldwide charging order on any funds held by X company, which is registered in Western Samoa, in any other country. For the reasons already given in refusing any worldwide Mareva injunction, I think the charging order should be limited in its application only to any funds held for the defendant in Western Samoa. In fact it is not clear at this stage whether in Western Samoa there is any jurisdiction to grant a worldwide charging order on a defendant's assets as there is jurisdiction for a worldwide Mareva injunction. Another important aspect of the worldwide charging order by the

plaintiff is that it effectively seeks to transfer any funds held by X company for the defendant in any other country to Western Samoa. This is a major assumption of jurisdiction. However there seems to be support for it in ***Derby & Co Ltd v Weldon (No 6) [1990] 1 WLR 1139*** in relation to a worldwide Mareva injunction. It was emphasised in that case that orders for the transfer of assets from one foreign jurisdiction to another, or to restrain the transfer of assets from one foreign jurisdiction to another, or to return to England assets from a foreign jurisdiction, are highly exceptional orders. See also ***Dicey & Morris : The Conflict of Laws 12th ed, vol. 1, p.193.***

The case of ***Choice Investments Ltd v Jeromaimon [1981] 1 All E R 225*** cited for the plaintiff was concerned with a garnishee order issued by an English Court against an English bank situated in England to attach the bank account of the judgment debtor in the English bank in satisfaction of an English judgment debt. There was nothing worldwide about that garnishee order and the case is no authority for a claim for a worldwide charging order. This case was also decided before worldwide relief by way of a Mareva injunction was born in the late 1980's.

I am therefore of the view that the charging order granted in this case should apply only domestically and not worldwide to any funds held by X company for the defendant in a foreign country.

Discovery:

A motion or application for a Mareva injunction is usually accompanied by an application for discovery of documents or information regarding the

defendant's assets and their whereabouts. The Court's jurisdiction to order discovery is well-established. However, in an application for discovery which concerns documents or information held by an international company carrying on business as an offshore-bank in Western Samoa, counsel must be prepared to present proper submissions regarding the secrecy provisions of the off-shore banking legislations which are Western Samoan legislations.

Service outside of jurisdiction:

Rule 28 of the Supreme Court (Civil Procedure) Rules 1980 provides for service of proceedings out of jurisdiction. Sub-rule (1) of Rule 28 provides :

> (1) A summons may be served out of Western Samoa, by leave of the Court, -
>
> (a) Where the cause of action or some material part thereof has arisen in Western Samoa;
>
> (b) Where the subject-matter of the action is property situated in Western Samoa.

Now neither the cause of action for this case, nor any material part of it, had arisen in Western Samoa. The cause of action arose out of an interbank loan made in the Russian Federation between the plaintiff and the defendant. So sub-rule (1)(a) of Rule 28 does not apply. Secondly, in the affidavits filed in support of the exparte motion for a Mareva injunction, the plaintiff asserted the belief that X company, which is registered under the laws of Western Samoa, holds funds in Western Samoa on behalf of the defendant. Since the Court made the order for service of proceedings on the defendant outside of jurisdiction, X company

through its counsel, has informed this Court that it does not hold funds within Western Samoa for the defendant. Counsel for the plaintiff has not been able to offer any evidence to contradict what X company says. So sub-rule (1)(b) of Rule 28 does not apply. In other words the order for service of proceedings out of jurisdictions on the defendant should not have been made. The only basis on which service out of jurisdiction might have been ordered is now shown not to exist.

There are two other relevant matters of great importance which have not been argued but are most important particularly in view of the indication from counsel for the plaintiff that the present motion for a worldwide Mareva injunction is likely to be the forerunner of many more similar motions in the future which involve foreign defendants. Those two matters are the questions of ***forum conveniens*** and ***forum non conveniens***. I deal first with the question of *forum conveniens* as it is closely related to the question of service of proceedings out of jurisdiction which is presently under discussion.

Rule 28 of the Supreme Court (Civil Procedure) Rules 1980 which relates to service of proceedings out of jurisdiction is expressed in discretionary terms. Therefore the Court's jurisdiction to make an order for service of proceedings out of jurisdiction is discretionary. The criterion for the exercise of that jurisdiction is ***forum conveniens***, that is, service of proceedings out of jurisdiction will only be permitted if the Court is satisfied that Western Samoa is clearly the most appropriate forum in the interests of the parties and the ends of justice for trial of the action. In determining what is clearly the most appropriate forum, the fundamental principle to be applied is which forum the

case can be suitably tried for the interests of the parties and the ends of justice : see the judgment of Lord Goff of Chieveley in *Spiliada Maritime Corporation v Consulex Ltd [1987] 1 AC 460, pp 480-483.* At page 480 Lord Goff said :

> "It seems to me inevitable that the question in both groups of cases must "be, at bottom, that expressed by Lord Kinnear in ***Sim v Robinson 19 R 665, "668***, viz, to identify the forum in which the case can be suitably tried "for the interests of all the parties and for the ends of justice".

The two groups of cases referred to in that passage are cases of ***forum conveniens*** and ***forum non conveniens***. And at p.482 of his judgment His Lordship went on to say :

> "The key to the solution of this problem lies, in my judgment, in the "underlying fundamental principle. We have to consider where the case may "be tried suitably for the interests of all the parties and for the ends "of justice".

And at p.483 His Lordship continued :

> "But the underlying principle requires that regard must be had to the "interests of all the parties and the ends of justice; and these "considerations may lead to a different conclusion in other cases".

All the other members of the House of Lords presiding in the ***Spiliada*** case concurred in the judgment of Lord Goff.

The question of *forum conveniens*, or more accurately, appropriate forum, would arise where a plaintiff who has commenced proceedings in Western Samoa

applies for leave to serve those proceedings out of jurisdiction on a foreign defendant. Here the burden of proof that leave be granted for service of proceedings out of jurisdiction rests on the plaintiff who is seeking leave, and the plaintiff must show clearly that Western Samoa is the most appropriate forum for trial of the action : see p.481 of Lord Goff's judgment in ***Spiliada's*** case.

As to the factors to be taken into consideration in the exercise of the Court's jurisdiction whether to grant to the plaintiff leave to serve proceedings out of jurisdiction, some of those factors were stated by Lord Wilberforce in ***Amin Rasheed Shipping Corporation v Kuwait Insurance Co [1984] 1 AC 50 at p.72*** where he said :

> "R.S.C. Ord.11.4.1 merely states that given one of the stated conditions, "such service is permissible, and it is still necessary for the plaintiff "(in this case the appellant) to make it 'sufficiently to appear to the "'Court that the case is a proper one for service out of the jurisdiction "'under this Order' (r.4(2)). The rule does not state the considerations "by which the Court is to decide whether the case is a proper one, and I "do not think that we can get much assistance from cases where it is "sought to stay on action started in this country, or to enjoin the "bringing of proceedings abroad. The situations are different : compare "the observations of Stephenson LJ in ***Aratra Potato Co. Ltd v Egyptian "Navigation Co. (The Al Amria) [1981] 2 Lloyds Rep. 119, 129.*** The "intention must be to impose upon the plaintiff the burden of showing good "reasons why service of a writ calling for appearance before an English "Court, should, in the circumstances, be permitted upon a foreign "defendant. ***In considering this question the Court must take into account "the nature of the dispute, the legal and practical issues involved, such "questions as local knowledge, availability of witnesses and their "evidence and expense***" (italics mine).

It must be noted here that in ***Spiliada's*** case, Lord Goff remarked at p.480 of his judgment that the principle stated by Lord Wilberforce in the passage I have just cited, bears a marked resemblance to the principles applicable in *forum non*

conveniens cases. Other factors which may be taken into consideration in the exercise of discretion are those mentioned by Lord Diplock in ***Amin Rasheed Shipping Corporation v Kuwait Insurance Co***, namely, cost, delay, inconvenience and whether the plaintiff will obtain justice in the alternative forum. There may, of course, be other relevant factors, but it is not necessary in this judgment to go through all of them.

Forum Non Conveniens:

I refer to the question of ***forum non conveniens*** because the defendant in these proceedings has filed a protest to the decision of this Court. The question of ***forum non conveniens*** would arise where service of proceedings have been effected on a defendant and the defendant applies for an order to stay proceedings as there is an available forum elsewhere, which is the appropriate forum in the interests of the parties and the ends of justice, for trial of the action. So whereas the question of ***forum conveniens*** would arise when a plaintiff applies for leave to serve proceedings out of jurisdiction, the question of ***forum non conveniens*** would arise when a defendant who has been served applies for a stay of proceedings.

In England it seems to be the practice that only a defendant who has been served with proceedings within the jurisdiction, rather than outside of the jurisdiction, applies for a stay of proceedings on the ground of ***forum non conveniens***. In the absence of any Western Samoan authority, on the point, I am of the view that a defendant who has been served with proceedings out of the jurisdiction may also apply for a stay of proceedings relying on *forum non conveniens*, that is, there is a forum available elsewhere, which is the most

appropriate forum in the interests of the parties and the ends of justice for the trial of the action. My reasons are these. An order which is made ex parte for service out of jurisdiction is an order made without having heard the other party, the defendant, on the question of appropriate forum for trial of the action. There is also the risk that the plaintiff may not have made a full disclosure of all the relevant information or issues. Or there may be information relevant to the exercise of the Court's discretion, but beyond the knowledge of the plaintiff at the time of the application for service out of the jurisdiction, which only come to the surface afterwards and which the Court must take into consideration. For instance, the assets which the plaintiff had believed exist within the jurisdiction and is the subject of the proceedings, may turn out not to exist within the jurisdiction, as it has happened in this case. Moreover, if the real concern of our inquiry is to determine what is the appropriate forum in the interests of the parties and the ends of justice, shutting out a defendant who has been served out of the jurisdiction, only because he resides out of the jurisdiction, from giving the Court information which in his opinion may be relevant to that inquiry, would not be consistent with the interests of the defendant or the ends of justice. There may also be borderline cases, where hearing the defendant will assist the Court to reach the right decision with the appropriate degree of confidence.

The basic principle in respect of the so-called *forum non conveniens* cases was stated by Lord Goff of Chieveley in ***Spiliada Maritime Corporation v Consulex Ltd [1987] 1 AC 460*** where His Lordship said at p.476 :

"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 suitably for the interests of all the parties and the ends "of justice".

So it is clear that the basic criterion which the Court applies in the exercise of its discretion whether to grant an application by a defendant for stay of proceedings is the same as the basic criterion applicable to an application by a plaintiff to effect service of those proceedings out of jurisdiction.

As to proof in ***forum non conveniens*** cases, the burden of proof rests on the defendant to show that there is another forum which is clearly or distinctly more appropriate than Western Samoa for trial of the action. Here proper regard must be given to the fact that leave has already been granted to serve proceedings out of the jurisdiction and therefore jurisdiction has already been founded in Western Samoa. The "connecting factors" which the Court will look for in determining whether Western Samoa is the appropriate forum will include convenience or expense (such as availability of witnesses), the law governing the relevant transaction, and the respective places of residence or of carrying on business of the parties. There must be a real and substantial connection between the case at hand and Western Samoa. If at this stage the Court concludes that there is no other available forum which is clearly more appropriate for the trial of the action, then stay of proceedings will be refused. But if the Court concludes at this stage that prima facie there is clearly another more appropriate forum for trial of the action, then a stay of proceedings will ordinarily be granted unless there are circumstances which require that it will nevertheless not be just to grant a stay. One such circumstance is where it is

established objectively by cogent evidence that the plaintiff will not obtain justice in the foreign forum. For all this see pages 476-478 of Lord Goff's judgment in *Spiliada's* case. I do recommend to counsel that that case deserves to be read in full.

What should now be done:

I am now of the clear view that leave to serve these proceedings out of the jurisdiction should not have been granted to the plaintiff. The reason is that the appropriate forum in the interests of the parties and the ends of justice for trial of the plaintiff's action is the Russian Federation. The loan agreement from which the cause of action had arisen was made in the Russian Federation. So the proper law of the agreement must be the law of the Russian Federation. The relevant witnesses, including any expert witnesses on the relevant Russian laws, must be in the Russian Federation. And so is the evidence. It will also be much less expensive if the case is tried in the Russian Federation than in Western Samoa. Both parties to this case also have their places of business in the Russian Federation. Perhaps it should be added that it is now also clear that there are no funds held on behalf of the defendant in Western Samoa. I am also of the view that caution must be taken in allowing foreigners to bring their cases which have no real and substantial connection with Western Samoa to be tried in our Courts, especially where there is no conventional or statutory reciprocity between Western Samoa and the country where the cause of action had arisen. If the plaintiff in this case, for some reason, cannot bring his action in the Russian Federation, then that is not, on its own, a sufficient reason for using the Western Samoan Courts to try his cause of action and to enforce it.

As leave had been granted ex parte in this case to serve proceedings out of the jurisdiction, and service has been effected on the defendant, and judgment has been entered by formal proof against the defendant, counsel for the defendant has asked the Court as to what should now be done. The defendant may now file motions to stay any further proceedings and to set aside the judgment by formal proof which has been entered against him. If those motions succeed, then the defedant to further consider whether to go on to apply to set aside the Mareva injunction and charging order. I leave those matters in the hands of counsel.

In view of what has been said in this judgment, counsel for the plaintiff may also wish to consider what would be the least costly way for the plaintiff to go about this matter now.

TFM Sapolu
....
CHIEF JUSTICE