JUDGMENT : His Honour Judge Cresswell :QBD. 28th October 1998.

1. There is before the Court an application by the plaintiffs for the following relief:
   1. An injunction restraining until trial or further order the second defendant (by themselves, their servants or agents) from taking any further steps to prosecute or otherwise continuing proceedings brought by the second defendant against the first to seventh plaintiffs in the Circuit Court of the State of Oregon, USA, or any other proceedings other than the proceedings herein.
   2. Further or alternatively, an order that the second defendant do forthwith discontinue the said proceedings.

Background

2. The plaintiffs are insurance companies constituting the primary and first excess layers and a proportion of the second excess layer of the global insurance cover provided to "Reed International plc, Elsevier NV, Reed Elsevier, Elsevier Reed Finance and/or subsidiary and/or associated/related companies" under policies numbered TG154930163, 551/H6A6052 and 551/H6A6552 ("the contracts of insurance"). The defendants are claimants under the contracts of insurance. The first defendant is a company incorporated in the State of Massachusetts, USA and is a former subsidiary of the second defendant. The second defendant is a company incorporated in the State of Massachusetts, USA and is a subsidiary of Reed Elsevier plc.

The underlying action

3. From about March or April 1991 the Oregon State Department of Treasury acting on behalf of the Oregon Public Employees' Retirement Board ("OPERB") retained the services of the first defendant ("Simat") to advise in relation to an investment proposal***241*** that had been put to the Treasury by Barclay Pacific Corporation ("Barclay"). The proposal related to a project to develop two wide body aircraft maintenance hangars at Portland International Airport in the State of Oregon. Barclay was seeking funding from a major investor to assist in the financing of the construction of the hangars, and approached the Treasury to see if it would consider investing assets in the project. The Treasury retained the services of the first defendant, *inter alia*, to analyse the proposal, conduct a due diligence exercise in respect of Barclay and in respect of the company which was to operate the completed maintenance facility, Pacific Aircraft Maintenance Corporation.

4. From time-to-time in the period between April 1991 and June 1992 the first defendant produced reports to the Treasury further to its retainer. In June 1992 the OPERB fund invested in the project by guaranteeing US$50 million of taxable special obligation revenue bonds that had been issued by the Port of Portland and by undertaking other obligations. The proposed hangar facility was substantially completed by the summer of 1993. However, by October 1993 the facility had ceased to operate.

5. On 31 October 1996 proceedings were commenced against the first defendant and others by the State of Oregon in the Circuit Court of Oregon for Multnomah County. The third amended complaint in the proceedings substituted the fund acting by its trustee as the plaintiff and alleged: (1) that in reliance upon the recommendations of the first defendant in pursuance of its retainer in June 1992 the fund guaranteed the said bonds and undertook other potential liabilities in connection with the transaction; (2) that "the [first defendant] failed to fulfil its contractual obligations to the fund, made reckless or negligent misrepresentations regarding the transaction, breached its fiduciary duties and was negligent in performing its professional duties"; (3) that as a result the fund has suffered loss and damage.

The Commercial Court action

6. The present action was commenced by the plaintiffs for negative declaratory relief by writ dated 4 August 1998. The plaintiffs then obtained on 7 August, by an order of Thomas J., leave to issue and serve a concurrent writ on the defendants out of the jurisdiction. The writ was re-issued on 12 August and served on Reed Elsevier Inc. on 18 August. On 6 October Reed Elsevier Inc. served points of defence and counterclaim, claiming indemnity under the contracts of insurance.

The Oregon proceedings

7. Simat and Reed Elsevier Inc. commenced the Oregon proceedings by a complaint number 98-08-05859 filed on 10 August against, among others, the plaintiffs in this action. The complaint was filed at a time when the underlying action between OPERB and the***242*** first defendant was still being litigated, mediation

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being then scheduled for 17 August. That underlying action was settled at the mediation on or about 19 August. Since then on 11 September the complaint has been amended by the first amended complaint which was filed on 11 September. Simat is not a party to the first amended complaint.

Reed's letter on 7 October and subsequent correspondence

8. In a letter dated 7 October D. J. Freeman, solicitors for Reed Elsevier Inc., wrote to Herbert Smith, solicitors for the plaintiffs as follows: *We have now taken instructions upon your clients' application for injunctive relief and can confirm that our client does not propose to take any further steps to prosecute or otherwise continue the proceedings brought against your clients in the Circuit Court of the State of Oregon ("the Oregon proceedings"), pending resolution of the proceedings in the Commercial Court (Folio No. 974), save to complete service. Should our client wish to resurrect the Oregon proceedings in the future at any time, they will only do so having given 14 days notice to you, via this firm.*

As you are aware, formal service of the Oregon proceedings upon your clients under the Hague Convention is already under way, but, following service, our client will take no further steps to continue the proceedings, in accordance with the terms outlined above.

Herbert Smith replied on the same day by facsimile as follows: *Your clients have now submitted [to] the jurisdiction of the English court and the only purpose in seeking to preserve the Oregon proceedings would be to flout the judgment of the English court in the event that it was unfavourable to your clients. Neither our clients, nor in our submission the English court, would countenance such a situation and your request is, in any event, wrong in principle. Accordingly, unless you confirm by return that your clients are taking steps to withdraw the Oregon proceedings (and in due course provide us with confirmation that the proceedings have been withdrawn), then our clients will continue to seek injunctive relief.*

D. J. Freeman responded on 22 October as follows: *We also note the response in your fax dated 7 October 1998 to our proposals advanced in a fax earlier that day for the adjournment of your clients' summons, pending resolution of the proceedings in England. These proposals were advanced in the light of our client's concerns that under the terms of the settlement term sheet (copy enclosed for ease) our client may be obligated to pursue the Oregon proceedings, as OPERB is entitled to share in* ****243*** *any recovery from the plaintiffs. As you will note, paragraph 4 of the agreement provides that the coverage action may be abandoned only if our client believes in good faith that there is a 70 per cent or greater chance of an adverse ruling regarding special clause C.*

Our client's U.S. attorneys advise that OPERB may contend that a voluntary withdrawal of the Oregon proceedings constitutes bad faith. Should the Settlement Czar concur, OPERB have the right to assume control of the action and retain two-thirds of any net recovery from the plaintiffs. Our client's U.S. attorneys are also concerned that the settlement term sheet has not yet been converted into a final integrated settlement agreement, and any allegations of bad faith based on the withdrawal of the Oregon proceedings may impede the execution of the final settlement agreement. While our client cannot predict with any certainty the response of OPERB to a request for their consent to the withdrawal of the Oregon proceedings, the possibility of a negative response and the support that this may give to any subsequent arguments of bad faith should our client consent to the withdrawal of the proceedings makes such an approach inadvisable. ...

In these circumstances, we would therefore urge you to reconsider with your clients their refusal to accept the proposals advanced in our letter to you dated 7 October 1998. We would add that if you agree to the proposals our client will not seek to place any reliance upon your clients' delay in pursuing their claim for injunctive relief.

Herbert Smith replied on 22 October by facsimile: *As to our injunction proceedings, you now appear to concede that in effect your resistance thereto is merely pursuant to your client's obligations under the settlement agreement and not by the way of the application of English law. In such circumstances the plaintiffs' application is bound to proceed and will do so.*

The relevant principles

9. In **Societe Nationale Industrielle Aerospatiale v. Lee Kui JAK** [1987] 1 A.C. 871 Lord Goff said at p. 896. *"In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English ... court and in a foreign court, the English ... court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English ... court must conclude that it provides the natural forum for the trial of the action;*

*and further, since the court is*244 concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him."*

In **Barclays Bank Plc v. Homan** [1993] B.C.L.C. 680Glidewell L.J. said at p. 701. *"In my view, in relation to the circumstances of the present case, the principles to be derived from the judgment of the Privy Council in Aerospatiale can be summarised as follows: (i) If the only issue is whether an English or a foreign court is the more appropriate forum for the trial of an action, that question should normally be decided by the foreign court on the principle of forum non conveniens, and the English court should not seek to interfere with that decision. (ii) However if, exceptionally, the English court concludes that the pursuit of the action in the foreign court would be vexatious and oppressive and that the English court is the natural forum, i.e. the more appropriate forum for the trial of the action, it can properly grant an injunction preventing the plaintiff from pursuing his action in the foreign court. (iii) In deciding whether the action in the foreign court is vexatious and oppressive, account must be taken of the possible injustice to the defendant if the injunction be not granted, and the possible injustice to the plaintiff if it is. In other words, the English court must seek to strike a balance."*

Each case will depend on its own circumstances. The English court is cautious in its approach when considering the grant of an injunction in respect of proceedings commenced outside its jurisdiction, such caution being applied in the interests of comity. The facts must be special if the English court is to be persuaded to grant an injunction--special in the sense of establishing both that England is the natural forum and that pursuit of the action in the foreign court would be oppressive and vexatious. In making an assessment of whether there is oppression or vexation, account must be taken of possible injustice to the plaintiffs if the injunction be not granted, and possible injustice to the defendants if it is". See, Waller J. (as he then was) in **Amoco v. T.G.T.L.,** unreported, 26 June 1996.

10. In **Pathe Screen Entertainment Limited v. Handmade Films (Distributors) Ltd**, (Unreported, 11 July 1989.) Hobhouse J. (as he then was) said in relation to Lord Goff's speech in Aerospatiale: *" ... But, reading the Opinion as a whole and having regard to the decision at which the Privy Council actually arrived, I consider that what they were doing was simply sounding two notes of caution to the application of the SPILIADA decision in the context of the grant of an injunction: first, that considerations of comity are involved which mean that it will not be appropriate to grant the injunction on ground (a) alone, (i.e. that England is the natural forum) and, secondly, that in the context of an injunction application ground (b) (i.e. that justice does not require that the action should nevertheless be allowed to proceed in the foreign court) really needs to be restated the other way round--"**that justice does require that the action should not be allowed to proceed in the foreign court**". It is also relevant that Brett M.R. in the course of the judgment to which Lord Goff refers treats foreign proceedings as vexatious if the English claimant "**could get no advantage whatever by the action abroad greater than he could get by the action in England**" (p. 238), a definition of vexation which is equivalent to Lord Scarman's second test. I therefore conclude that the law is that I should grant the injunction if I am satisfied that in the interests of doing justice between the parties it should be granted in all the circumstances. What is the relevant natural forum is a factor to be taken into account as are the elements of vexation and oppression that are or may be involved. The discretion has to be exercised having regard to the principles of comity. It has to be exercised with caution and, as has been pointed out by Parker L.J. in M. & R. v. A.C.L.I. [1984] 1 Lloyd's Rep. at 613, may call for a higher standard of proof than in the case of an application for a stay. I do not consider myself (pace Dillon L.J. in **Du Pont No. 2** [1988] 2 Lloyd's Rep. at 244) obliged to disregard what Lord Brandon said in the **Abdin Daver**, at 423: "*

> *In this connection it is right to point out that, if concurrent actions in respect of the same subject-matter proceed together in two different countries, as seems likely if a stay is refused in the present case, one or other of ... two undesirable consequences may follow: first, there may be two conflicting judgments of the two courts concerned; or, secondly, there may be an ugly rush to get one action decided ahead of the other in order to create a situation of res judicata or issue estoppel in the latter.*

*Lord Diplock said in the same case (at p. 412), "**comity demands that such a situation should not be permitted to occur as between courts of two civilised and friendly states**"; it would be, he said "**a recipe for confusion and injustice**". As Bingham L.J. said in Du Pont No. 1 the policy of the law must be to favour the litigation of issues only once in the most appropriate forum. The interests of justice require that one should take into account as a factor*

the risks of injustice and oppression that arise from concurrent proceedings in different jurisdictions in relation to the same subject-matter. See further, Dicey & Morris, Conflict of Laws (12th ed.), Vol. 1, pp. 408 et seq."

The plaintiffs' submissions

11. In his skeleton argument Mr Murray Rosen Q.C. for the plaintiffs submitted as follows:

(1) England is clearly the appropriate forum for the determination of the current dispute for the following reasons.

(2) The contracts of insurance, on which issues of construction arise, are governed by English law.

(3) The questions of construction (and the second defendant's counterclaim for rectification) involve evidence from those persons principally responsible for negotiating the terms of cover, those persons residing or working in this country.

(4) The second defendant has not only submitted to the jurisdiction of the English court but has also served a counterclaim seeking declaratory relief and damages. The***246** second defendant has thereby necessarily recognised and accepted that England is the appropriate forum for the determination of the dispute.

(5) It would be oppressive and vexatious for the second defendant to be allowed to prosecute the Oregon proceedings or otherwise have the opportunity so to do for the following reasons.

(6) The second defendant has accepted that the dispute is to be determined in the English proceedings. Given this, there can be no legitimate justification for the continuation of the Oregon proceedings. The only purpose for their continued existence would be to challenge the decision of the English court, assuming that decision turned out to be unfavourable to the second defendant. This would be an abuse.

(7) The prosecution of the Oregon proceedings will cause the plaintiffs substantial prejudice in the respects set out in Mr Mehigan's second affidavit paragraphs 6.2-6.4 as amplified in Mr Higgins' first affidavit by reference to the advice of Oregon Counsel, Mr Richard Kuhn--in particular: the expense and inconvenience of a jurisdictional challenge in Oregon. The pursuit of evidential steps in the meantime, including oral depositions in Oregon. Discovery and depositions on substantive issues. The second defendant's demand for a jury trial.

The second defendant's submissions

12 In his skeleton argument, Mr Richard Southern for Reed Elsevier Inc. submitted as follows:

In the light of D. J. Freeman's letter of 7 October 1998, the injunction sought is unnecessary.

(1) The relief claimed is (rightly) an interlocutory injunction until trial or further order. It (rightly) contemplates that circumstances may change which may make its discharge appropriate.

(2) The letter dated 7 October 1998 achieves the same objective. Unless a notice is given to revive the Oregon proceedings they will remain stayed by agreement. Furthermore, Reed have stated that they do not propose to take any further steps to prosecute or otherwise continue the Oregon proceedings pending resolution of the proceedings in the Commercial Court action. The letter therefore does not necessarily merely defer any decision on the jurisdictional issues in this matter, it may well mean that they never have to be litigated.

(3) Reed has offered an undertaking to the effect set out in D. J. Freeman's letter of 7 October 1998. If circumstances should*247* change and a notice of intention to proceed is given, that is the time for the plaintiffs to pursue this application. The application should then be decided in the circumstances then prevailing. If the objection is that 14 days may be too short a period for the plaintiffs to respond to any such notice, then a longer period should be requested.

   (1) Reed's conduct is neither unconscionable nor oppressive. Promptly after serving points of defence and counterclaim they indicated that, apart from completing the process of service of the Oregon proceedings they proposed not to take any further steps to prosecute or otherwise continue the Oregon proceedings, pending resolution of the Commercial Court action, and stating that if they wished to resurrect the Oregon proceedings in the future at any time, they would only do so on giving 14 days notice. That conduct is not fairly susceptible of criticism and is not deserving of any injunction.

   (2) In such circumstances there can be no question of the plaintiffs facing a default judgment in Oregon. For Reed to seek to enter such a default judgment would be plainly inconsistent with the terms of the 7 October letter.

(3) The plaintiffs are not presently in a situation where they are required to defend the Oregon proceedings and so will suffer no expense, inconvenience or injustice. Paragraphs 5-8 of Mr Higgins' first affidavit are all presently irrelevant in the light of the letter dated 7 October 1998.

(4) There is nothing oppressive about the present circumstances whereby the interests of justice require that an injunction be granted in the form of the first part of paragraph 1 of the summons.

Analysis and conclusions

The natural forum

13. It seems to me that the Commercial Court is the natural forum for the trial of this action. It appears to me that by virtue of Rule 186 of Dicey & Morris (12th ed.) Vol. 1. the law applicable to the contracts of insurance is English law. In reaching a view as to the natural forum, I have of course had regard to all the affidavit evidence before me.

Is the pursuit of foreign proceedings oppressive and vexatious?

14. Account must be taken not only of injustice to the insurers if Reed Elsevier Inc. is allowed to pursue the foreign proceedings but also of injustice to Reed Elsevier Inc. if it is not allowed to do so. In the**248* present case, as of today, it is not suggested that the dispute should proceed otherwise than in the Commercial Court. See the letter of 7 October.

15. It seems to me to be a fair inference from the evidence that, but for the terms of the settlement agreement, Reed Elsevier Inc. would not oppose the relief sought in paragraph 1 of the summons.

16. The settlement agreement was concluded on or about 19 August, the day after these proceedings were served on Reed Elsevier Inc. (For completeness I record that there was an exchange of correspondence between Herbert Smith and D.J. Freeman prior to the issue of these proceedings.)

17. It seems to me that it would be extremely surprising if there was any attempt by OPERB to dispute that a decision of the Commercial Court fell outside the terms of the settlement agreement.

18. As matters stand today, the pursuit of foreign proceedings would, in my opinion, be oppressive and vexatious.

19. The injunction sought in paragraph 1 of the summons is expressed to be "until trial or further order". If there is a material change of position it would in theory be open to Reed Elsevier Inc. to apply to discharge or vary the order that I propose to make. I emphasise that the policy of the law must be to favour the litigation of issues only once in the most appropriate forum. The interests of justice require that the court should take into account as a factor the risks of injustice and oppression that arise from concurrent proceedings in different jurisdictions in relation to the same subject-matter.

20. I direct that this matter be restored on Friday, 6 November so that directions may be given with a view to a speedy trial or the early resolution of the dispute between the parties by other appropriate means. I would have given such directions today but for the fact that Simat is not represented before me and has not yet served a defence and counterclaim. This court is always ready to give directions with a view to the early resolution of disputes between commercial parties where there is a plain commercial need for such early resolution.

21. I make an order in the terms of paragraph 1 of the summons, subject to a proviso as follows:

    Provided that nothing in this order shall prevent the second defendant from applying by motion to the Circuit Court of the State of Oregon for the county of Multnomah in the terms of the draft motion to stay proceedings dated 27 October 1998.

22. The plaintiffs' application in paragraph 2 of the summons will be stood over with liberty to restore. I order accordingly.

Injunction granted.

Murray Rosen Q.C. and Alan Gourgey, instructed by Herbert Smith, appeared for the plaintiffs.
The first defendant did not appear and was not represented.
Richard Southern, instructed by D. J. Freeman, appeared for the second defendant.