CA on appeal from Commercial Court Before Hirst LJ; Robert Walker LJ; Mr Justice Harman. 21st January 1998.

HIRST L.J.

Introduction

1. This case raises a question of principle concerning the construction of RSC Order 6 rule 8(1) prior to its recent amendment which came into force on 16 December 1996, namely whether the rules required not only that a writ be served out of the jurisdiction within six months of its issue but also that leave to serve out be obtained within four months of the date of issue of the writ.

2. The point has been considered at first instance in the Commercial Court in a number of cases which, at any rate in the view of Moore-Bick J in the present case, are not altogether easy to reconcile.

3. The appellants are two associated companies Vitol Energy (Bermuda) and Vitol SA, whom I shall refer to in future collectively as Vitol, and who were respectively the charterer and the endorsee under the bill of lading issued under the charterparty dated 21 December 1994 of the vessel "Cross II" belonging to the respondent Pisco Shipping Co. Limited (Pisco) whose registered office is in Cyprus. Vitol's claim is for losses incurred by them as a result of alleged breaches by Pisco of it obligations under the charterparty and also under the bill of lading. The bill of lading contained an express English law and English jurisdiction clause; it also incorporated the Hague rules as enacted in the Carriage of Goods by Sea Act 1924, and was therefore subject to the one year time limit contained in Article III rule 6.

4. The cause of action arose on 28 January 1995, so the limitation period expired a year later on 28 January 1996. The writ was issued on 19 January 1996, (i.e. just within the limitation period); and was marked "*not for service out of the jurisdiction",* on the footing that Pisco was based abroad but leave to serve out had not been obtained.

5. Just under four months later, on 17 May 1996 Vitol sought an extension of the validity of the writ and leave to serve a concurrent writ out of the jurisdiction, and the application was supported by an affidavit by Miss Joanne Barton, an assistant solicitor employed by Messrs. Ince and Co., but the application was refused by Waller J. under Order 11 rule 4, on purely technical grounds, viz non-compliance with the requirement for a statement that the deponent believed the plaintiff had a good cause of action.

6. Just after the expiry of four months Vitol presented a second application dated 23 May 1996 supported by an affidavit of Mr. Denys Hickey which remedied the defect in the first affidavit, and on 6 June 1996 Vitol was granted leave by Waller J. to serve a concurrent writ out of the jurisdiction and also an extension of the writ's validity for a period of two months.

7. The writ was served on Pisco in Cyprus on 6 July 1996, i.e. after four months but within six months of its issue.

8. On 22 November 1996 Moore-Bick J ordered that Waller J's order dated 6 June 1996 should be set aside, and it is against this order that Vitol presently appeal with the leave of Saville L.J. as he then was.

9. The appeal turns entirely on the resolution of the point of principle which the judge decided against Vitol. The judge then proceeded to refuse the consequential application for an extension of the validity of the writ in the exercise of his discretion, and this part of his decision is not challenged should Vitol fail on the main point.

10. It should also be noted that there was a parallel application raising similar issues in relation to a writ issued by Vitol against Pisco in the Admiralty Court, which was refused by the judge and is not now under appeal.

RSC Order 6 rule 8

11. This rule in its form prior to its December 1996 amendment provided so far as relevant as follows:-

> *"8(1) For the purposes of service, a writ (other than a concurrent writ) is valid in the first instance -*
> *(a) if an Admiralty writ in rem , for 12 months;*
> *(b) where leave to serve the writ out of the jurisdiction is required under Order 11 or Order 75, rule 4, for 6 months,*
> *(c) in any other case, for 4 months*
> *beginning with the date of its issue.*
>
> *(1A) A concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ."*

12. This formulation of the rule originated from a recommendation of the Civil Justice Review, and superseded the previous regime, which laid down a 12 month period of validity across the board.

13. The amendment as originally framed (S.I. 1989 No.2427 which came into force on 4 June 1990) omitted the present sub-paragraph (a), relating to Admiralty actions, which was inserted later.

14. Unfortunately, this formulation had caused difficulties in Order 11 cases, as the present appeal and the other cases cited in this judgment demonstrate, and this is no doubt why the Rules Committee proposed the 1996 amendment quoted later in this judgment.

The Question at Issue.

15. The appeal turns essentially on the proper construction of sub-rule (b) above, both intrinsically and also having regard to the terms of RSC Order 6 rule 6(1) which provides as follows:-

"6. (1) One or more concurrent writs may, at the request of the plaintiff, be issued at the time when the original writ is issued or at any time thereafter before the original writ ceases to be valid."

16. In his judgment the judge concentrated on two very recent decisions in the Commercial Court to which I shall have to return in more detail later.

17. In ***Dong Wha Enterprise Co. Ltd. v. Crownson Shipping Ltd.*** [1995] 1 Lloyds Rep. 113, the original writ had been issued "not for service out of the jurisdiction", and an order granting leave to issue a concurrent writ for service out of the jurisdiction had been made just within the four month period after its issue. Mance J. concluded in effect that what matters for the purpose of sub-rule (b) is whether circumstances exist or have arisen where leave to serve out of the jurisdiction is required as a matter of practicality; and that in consequence the validity of the original writ extends for a period of six months once it is shown by obtaining leave to serve out that such is the case.

18. In ***Arab Business Consortium International Finance and Investment Co. v. Banque Franco Tunisienne*** [1996] 1 Lloyds Rep. 485 Waller J. had to consider a case where the leave to issue a concurrent writ for service out of the jurisdiction was only granted after the four months had elapsed from the issue of the original writ. He distinguished the ***Dong*** case primarily by reference to Order 6 rule 6(1), holding that the plaintiff had no right to issue a concurrent writ for service out of the jurisdiction (and therefore no right to apply for leave to issue or serve such a writ) unless the original writ is still valid. Since in his view, a writ marked "not for service out of the jurisdiction", ceased to be valid four months after its issue, it was no longer possible to issue a concurrent writ.

19. Moore-Bick J. held that the logic of Mance J.'s analysis in the ***Dong*** case "*might suggest that the requirement under sub rule (b) could be demonstrated just as well after as before the end of the four month period*", and that if that analysis was correct, obtaining leave to serve out does not extend the validity of the original writ, but only establishes that its original period of validity is six months rather than four months, so that a concurrent writ can be issued without any extension, properly so called, of the original period of validity. As a result, he concluded, as already noted, that he did not find it altogether easy to reconcile the two decisions. However, he decided that the correct course was for him to follow both decisions on what he regarded as difficult questions, noting that Mr. Geoffrey Gruder Q.C. on behalf of Vitol reserved the right to challenge either or both of them if the matter went to appeal.

20. Before us Mr. Gruder put his case on two alternative grounds viz:-

(1) That the writ was self-evidently one for which leave was required under sub-rule (b) to effect service out of the jurisdiction, and was therefore valid in the first instance for six months; or

(2) That, following the ***Dong*** case, the making of the application on 19 May 1996 (within the 4 month period), alternatively the actual grant of leave to serve a concurrent writ out of the jurisdiction on 6 June 1996, was a practical demonstration of the fact that leave to serve the writ out of the jurisdiction was required under sub-rule (b), and that consequently the period of validity of the writ was six months.

21. It was of course intrinsic in these submissions that the ***Arab Business*** case was wrongly decided.

22. Mr. Vernon Flynn on behalf of Pisco submitted that the answer to the problem was simple and clear, namely that on a proper construction of Order 6 rule 8(1) in the light of Order 6 rule 6(1), leave to serve a concurrent writ out of the jurisdiction must be obtained within four months of the issue of the original writ, which, until or unless leave to serve a concurrent writ is sought and granted, is only valid for service for four months, having regard to endorsement "not for service out of the jurisdiction".

23. In answer to Mr. Gruder's first argument, he relied on an earlier decision of Hobhouse J. (as he then was) in the ***Jay Bola*** [1992] 2 LLoyds Rep. 62, and on other cases cited hereafter which followed it, and submitted that they showed that this argument was erroneous.

24. On the second argument, he submitted that, on a proper interpretation, there was no conflict between the ***Dong*** and ***Arab Business*** cases, and that Waller J.'s decision in the latter was correct for the reasons he gave.

25. Mr. Flynn also submitted that, by the recent amendment of Order 6 rule 8(1) the Rules Committee in effect confirmed that the reasoning of Waller J. reflects the policy underlying the previous rule, having regard to its express requirement that a concurrent writ for service out of the jurisdiction must be issued within four months from the date of the issue of the original writ.

26. Mr. Gruder submitted that, at worst from his point of view the change in the rule is neutral, and that at best it could be said that the fact that the rule was changed indicates that the previous rule did not bear the interpretation on which Mr. Flynn relies.

27. The new rule, which came into force on 16 December 1996, (S.I. 1996 No.2892) provides as follows:-

"8 (1) For the purposes of service, a writ (other than a concurrent writ) is valid in the first instance -

(a) if an Admiralty writ in rem, for 12 months;

(b) where the writ has been issued either with leave to issue and serve the same out of the jurisdiction, or for service out of the jurisdiction and duly indorsed as complying with Order 6, rule 7(1)(a) and (b), for 6 months;

(c) in any other case, for 4 months,

beginning with the date of issue.

(1A)(a) A concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

(b) If an original writ has been issued not for service out of the jurisdiction, then provided a concurrent writ for service out of the jurisdiction (whether with leave of the Court or following indorsement as complying with Order 6, rule 7(1)(a) and (b)) has been issued within the period of 4 months from the date of issue of the original writ, such concurrent writ shall in the first instance be valid for service out of jurisdiction for a period of 6 months beginning with the date of issue of the original writ."

The Authorities in Chronological Order.

28. In the ***"Jay Bola*** [1992] 2 LLR 62 the plaintiffs issued a writ marked "*not for service out of the jurisdiction"* in relation to a contract subject to the Hague Rules time limit just before the expiry of that limit naming two foreign defendants. Over 4 months later they applied to renew the writ and to amend it by substituting another foreign company for one of the two original defendants.

29. Hobhouse J. stated that the plaintiff's argument was that the original writ was one where leave to serve out of the jurisdiction was required under Order 11, the essence of the submission being that one should look at the writ as issued in order to determine its validity, i.e., an argument similar to Mr. Gruder's first argument. Hobhouse J. went on to say that the argument was based upon a mis-understanding of the structure of the relevant rules and procedure of the court and upon a mis-reading of Order 6 rule 8 itself.

30. He then proceeded at page 68:-

"*The subject matter of r .8 is one of the validity of any service that is made. When the period of four or six months (formerly 12 months) has expired the writ does not become a nullity or cease to exist: it simply becomes a writ which unless some further order of the Court is obtained, cannot be validly served without the concurrence of the relevant party upon whom it is served. Thus service of an expired writ is an irregularity which can be waived by the party on whom such service has been made. A writ can be renewed even though it has already expired. Accordingly the question of the ´validity' of the writ cannot be separated from its service. If it is served upon a defendant within the jurisdiction or out of the jurisdiction without the need for leave, such service must be made within four months otherwise that defendant would be entitled to treat the service upon him as ineffective. If on the other hand, the writ is served after O.11 leave has been obtained to serve on that defendant, then the service on that defendant will only be ineffective if it takes place outside the period of six months. O.12.r.8 expressly provides that a defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of an irregularity in the service of the writ may apply for an order declaring that the writ has not been duly served on him."*

31. In ***Dong*** (supra) the original writ naming a foreign defendant was issued marked *"not for service out of the jurisdiction*" and, just under four months later, the plaintiff obtained an order that the writ be renewed for a further four months and also for leave to issue a concurrent writ and to serve it on the defendants in Hong Kong.

32. Mance J. cited and adopted Hobhouse J's reasoning quoted above in the "***Jay Bola***". He then proceeded at page 116 as follows:-

"What matters is whether leave to serve out of the jurisdiction proves in the event to be required, and this is what ought also to govern the length of time for which a writ is valid. Determination at the date of issue of any writ, whether or not is was in all circumstances valid for four or six months, would itself involve an uncertain exercise of assessment or prediction as at the date of the writ of the possibilities or likelihood of service being effected within the jurisdiction during the next four months."

33. Later he returned to the topic in a passage on p.118 where it must be borne in mind that his references to Order 6 rule 8(1)(a) refer to sub-rule (b) as it was then numbered:-

"In this connection, however, it is to be noted that the Editors of the White Book, (1993 ed.) have at par. 6/8/1 clearly expressed the view, which I share for the reasons given, that in order to justify a six month period under O.6 r.8, there must be a requirement that leave should be given under O.11 so that when, for example, a writ can be served without leave under O.11 r.1(2), the relevant period is four months. It follows that at least in the ordinary case those seeking to serve out of the jurisdiction must take reasonable steps to satisfy themselves that service cannot be effected without leave, before being entitled reasonably to assume that they have six months rather than four to effect service.

*I have to consider whether it is right that a concurrent writ issued with leave for service out of the jurisdiction where the original writ is and remains marked ´**not for service out of the jurisdiction**' has by force of O.6.r.8(1)(a) a validity of only four months from date of issue of the original writ. If this is so the rules involve to my mind a most surprising asymmetry. A plaintiff who obtains leave to serve out before issuing a writ has six months to serve it. ..... But a plaintiff who after issue of a writ with a notation ´**not for service out of the jurisdiction**' follows the usual and recommended procedure of applying for and obtaining a concurrent writ for service out has only four months for service, all these periods running from issue of the original writ. I do not believe that this is sensible or that an intention to achieve such a result can sensibly be imputed to the Rules Committee."*

34. He concluded on page 119:-

*"The enquiry under O,6.r.8(1)(a) is simply whether circumstances exist where leave to serve the writ out of the jurisdiction is required. Provided such circumstances exist it does not matter whether they or the requirement for service out are satisfied or met by leave being actually given in relation to the original writ or, as is the invariable practice when the original writ has been marked ´**not for service out of the jurisdiction**", in relation to the issue and*

*service of a concurrent writ. The requirement, in the sense of objective necessity justifying a grant of leave for service out, exists in relation to **´the writ'** in whatever sense that word is read. It exists although it may be satisfied or met by the use of a concurrent writ. Thus the validity of an original writ extends under O.6.r.8(1)(a) for six months once it is shown that circumstances exist where leave to serve out is required under O.11. whether that requirement is met by leave given (1) before issue of the original writ or (2) after its issue for service out (contrary to the usual practice) of the very same original writ or (3) after issue for service out (in accordance with the usual practice) of a concurrent writ. Accordingly, the period of validity of such a concurrent writ is in such circumstances also six months, as one would expect. ..... No doubt the rules could with advantage be made clearer, since the dichotomy introduced in 1990 between the periods for service within and outside the jurisdiction has proved capable of generating disputes and uncertainty. But I have no doubt that it was the underlying intention that there should be a six month period in cases where service out of the jurisdiction with leave proved to be required. The rules can and should in my judgment be read in a way which accords with that intention as well as with well established practice, contemplated by the rules, involving the use of concurrent writs."*

35. Meantime, in the **"Nova Scotia"** [1993] 1 LLR 154 Potter J. had also followed Hobhouse J's judgment in the **"Jay Bola"** .

36. In the **Arab Business** case the facts were to all intents and purposes similar to those in the Dong case, with the critical exception that the grant of leave to serve out of the jurisdiction and to issue a concurrent writ was given after the expiry of four months from the date of issue of the original writ though within six months thereof.

37. At the outset of his consideration of the point in issue Waller J. stated on page 493 as follows:-
"The writ was issued ´not for service outside the jurisdiction' and thus expired on May 11 1994" (emphasis added).

38. Pausing here, this sentence clearly shows that Waller J. treated the endorsement ´not for service outside the jurisdiction' as, in effect, confining the writ within the sub-rule (c) category.

39. He then cited the **Dong** case, and stated at page 491:-
*"In **Dong** Mance J. recognized the wording of O.6.r.8(1)(a) as posing some difficulty, but he felt that he was not driven by that wording to come to anything other than what was seen to be a just solution where leave to serve out was being sought after issue of a writ. But he was dealing with a situation where the application to issue and serve a concurrent writ was in fact made within the four month period of validity of the original writ issued.*
If the application for leave to serve out is made outside the four month period, there is a further rule which comes into play. By O.6.r.6(1), a concurrent writ can only be issued – "... at the time when the original writ is issued or at any time thereafter before the original writ ceases to be valid." (my emphasis). .....
***"Dong** was not dealing with the situation where the four month period had expired, and it does not seem to me a permissible extension of the reasoning of Mance J. in **Dong** to read O.6.r.6(1) as allowing a successful application for leave to issue a concurrent writ and serve the same out of the jurisdiction, as itself having extended the validity of the existing writ, with the effect of then being able to say that the application itself has been made within the period of validity of the original writ."*

40. He concluded his judgment as follows at page 497:-
*"In **Dong** Mance J. was construing the rules to prevent what he could see would be an injustice. That may be so where the application is made within the four month period. I do not however see that in a case where a plaintiff has allowed the four month period to expire without applying to issue and serve a concurrent writ, or at least to extend the validity of the writ so as to allow him so to do, that there is any injustice on insisting that he shows good reasons (a) why he had not made an application for leave to serve out during the four month period,and (b) why he should now have the validity extended so that he can issue and serve such a writ albeit limitation has in all probability expired.*
It may be that in providing reasons, difficulty in serving and late appreciation of the fact that leave to serve out was required would be relevant, but failure to appreciate the position within the four month period should, as it seems to me, never be easy to justify. The whole purpose of the change in the rules for shortening the periods for service, was to compel people to get on with the process of service. The fact that six months are given for service of a writ abroad does n mean that the party is entitled to wait four months before he considers whether or not he should apply for leave to serve out."

41. The **Arab Business** case went to the Court of Appeal ([1997] 1 LLR 531) but it was not necessary for the court to express a concluded view on the correct interpretation of Order 6 rule 8(1), though Neill L.J. giving the leading judgment said that he provisionally shared Waller J's conclusions as to the proper practice.

42. In **Fremont Insurance Co. Ltd. v. Fremont Indemnity Co.** [1997] CLC 1428, Mance J. considered a case governed by the new rule introduced in December 1996. However, he had occasion, in assessing the reasonableness of the plaintiff's conduct, to consider the **Arab Business** case, and stated that though he did not hear full argument on the point, he was far from sure that he would have come to the same conclusion as Waller J.; he indicated that he did not share the view that there was a crucial distinction between an application made before and one made after the expiry of the four month period, provided of course it was within the six month period. He also commented that the introduction in 1990 of different periods for the validity of writs had led to major difficulties for and disagreements between practitioners and courts, many of them because of problems in interpreting the rules.

Analysis and Conclusions.

43. It is convenient first to dispose of the arguments based on the recent amendment to the rule.

44. Undoubtedly the new provision, in contrast to its predecessor, clearly spells out the requirements, and in future, by virtue of the new rule 8(1)(b), the original writ will only be valid for six months if it had been issued either with leave to serve out of the jurisdiction, or (in cases under the Brussels or Lugano conventions), for service out of the jurisdiction duly endorsed as complying with Order 6 rule 7(1)(a) and (b); and, furthermore, under the new rule 8(1A)(b), for a concurrent writ to be valid for service out of the jurisdiction for a period of six months beginning with the date of the issue of the original writ, such concurrent writ must be issued within the period of four months from the date of the issue of the original writ. This latter provision undoubtedly brings the new regime into line with the views of Mance J. in the ***Dong case*** as interpreted and refined by Waller J. in the ***Arab Business case.***

45. However, it seems to me that, in the absence of any report or other material emanating from the Rules Committee themselves, there is no firm basis for a decision whether Mr. Flynn's or Mr. Gruder's explanation of the policy behind the new rule is the correct one. It follows that the proper approach is to construe the old rule on its own merits without regard to the amendment.

46. The starting point is to analyse the rule itself.

47. The root of the problem lies in establishing the correct relationship between sub-rules (b) and (c).

48. Clearly, whichever of the two rival interpretations is accepted, the two sub-rules are not in effect two separate watertight compartments, since it is common ground (following Waller J.'s interpretation of Mance J.'s analysis which Mr. Flynn adopts) that so long as leave is obtained for the issue of a concurrent writ for service out of the jurisdiction within the four months period, a writ originally endorsed "not for service out of the jurisdiction", and therefore apparently falling initially within sub-rule (c), will thereafter fall within sub-rule (b) and have a validity of six months.

49. I thus find it very difficult to accept Mr. Flynn's argument, based on Waller J.'s analysis, that the endorsement "*not for service out of the jurisdiction*" hallmarks the original writ as one confined within the scope of sub-rule (c), and consequently having no more than four months validity; indeed it would seem highly paradoxical that this endorsement, which is applied simply and solely because the address on the writ shows the defendant is based out of the jurisdiction, (thus flagging it as a writ for which leave to serve out of the jurisdiction will probably be needed), should be treated as having the effect of so confining it.

50. Thus to my mind the question whether or not a writ has six months validity depends entirely on whether *"leave to serve the writ out of the jurisdiction is required ...."* on the proper construction of those words in sub-rule (b).

51. Mr. Flynn goes so far as to submit that sub-rule (b) must be interpreted as if there was inserted the words "*and has been granted*" after "*required"* in order to give the rule the necessary certainty and clarity: however I am unable to see any proper basis for such a gloss. I therefore adopt Mr. Gruder's general approach, and proceed to consider his two alternative arguments.

52. On Mr. Gruder's first argument, I need say no more than that I propose to follow the strong and unanimous line of authority cited above, on the footing that it is, for the reasons given by Mance J. in the ***Dong*** case, premature to seek to determine at the very outset whether leave will be required.

53. However, on his second argument Mr. Gruder has the authority of Mance J. in both his cases, while Mr. Flynn has the authority of Waller J. in the ***Arab Business*** case.

54. Turning to the latter case first, Waller J. was strongly influenced by Order 6 rule 6(1), on the footing that, as in his view the writ was confined within sub-rule (c), it ceased to be valid after four months, so that there was no power under Order 6 rule 6(1) to issue a concurrent writ. With all respect, I cannot accept that analysis, since it seems to me to be based on the fallacy that the writ, simply by virtue of its endorsement "not for service out of the jurisdiction" was confined irretrievably within sub-rule (c); whereas, for the reasons I have given, I do not regard that endorsement as conclusive. On the contrary, in my view, in order to decide whether or not the original writ was still valid after the expiry of four months, the critical test is whether it could be demonstrated under sub-rule (b) that leave to serve out of the jurisdiction was required as a matter of practicability, irrespective of the endorsement, and at any time prior to the expiry of the six months period.

55. In the present case, it seems to me that the application on 17 May (within the four month period) self- evidently demonstrated that such leave was so required, and indeed leave would undoubtedly have been granted then and there but for the technical defect in the first affidavit; in reaching this view I reject as fanciful Mr. Flynn's suggestion that such requirement might have been belied by a last minute change of heart by the defendants to instruct their London solicitors to accept service, seeing that they had consistently declined any such suggestion hitherto.

56. A fortiori, of course, the actual grant of leave on 6 June, albeit outside the four months period, demonstrated the requirement beyond peradventure.

57. I would add that, bearing in mind Waller J.'s emphasis on the need to ensure that the plaintiff exercises due despatch in proceeding with his case and in making the necessary applications, the final deadline of no more than six months for actual service on the defendant remained intact.

58. It will be apparent that I am deeply indebted to Mance J. for his illuminating analyses in his two cases, and that I am satisfied that Moore-Bick J. was right in detecting a conflict between those two cases and the ***Arab Business*** case, which I think was wrongly decided.

59. I would therefore allow this appeal and reinstate Waller J's order of 6 June 1996.

Robert Walker LJ :

60. I agree that this appeal should be allowed for the reasons stated by Hirst LJ in his judgment, which I have read in the draft. I add a few comments in my own words.

61. The provisions of RSC O.6 r.8 with which this appeal is concerned were in force from 4 June 1990 until 16 December 1996 (with the intervening amendment in 1993 as the Admiralty writs *in rem*) and they have been the subject of uncertainty and controversy throughout their currency. The draftsman may have assumed that the category of writs "*where leave to serve the writ out of the jurisdiction is required under Order 11...*" was an adequate description enabling a plaintiff's advisers to know from the outset whether the initial period of validity for the service was six months (under what started as r.8(1)(a) and became r.8(1)(b)) or four months (under what started as r.8(1)(b) and became r.8(1)(c)).

62. But it became apparent that, for more than one reason, it could not be as simple as that. In the first place there was the case of multiple defendants, so that the writ had different periods of validity in respect of the different defendants : that was explained by Hobhouse J. in the ***Jay Bola*** 1992 2 LLR 62. Then there was the possibility of a defendant, non-resident at the time when the writ was issued, agreeing to accept service through English solicitors, or being served in England because he had become resident here, or happened to be physically present within the jurisdiction. In the ***Nova Scotia*** 1993 1 LLR 154 Potter J. followed the reasoning of Hobhouse J. in the ***Jay Bola*** and rejected the argument that a writ's period of initial validity must be capable of being decided once for all when it is issued. The same view was taken by Mance J. in ***Dong Wha Enterprise v Crownson Shipping*** 1995 1 LLR 113 (the report is marred by some unfortunate failures to distinguish between RSC.0.6 r.8(1)(a) and r.8(1A).) Mance J. said at p.116

"*What matters is whether leave to serve out of the jurisdiction proves in the event to be required, and this is what ought also to govern the length of time for which a writ is valid. Determination as at the date of issue of any writ, whether or not it was in all circumstances valid for four months or six months, would itself involve an uncertain exercise of assessment or prediction ...*"

63. I agree with my Lord, Hirst L.J., that there is no reason for this court to depart from this line of authority, which is unanimous and convincing.

64. There is therefore an element of "wait and see". A writ may (if regarded in an abstract way as the formal initiation of process) prove in the event to have an initial period of six months. It will in any event have an initial period of validity of at least four months. But it does not follow from that (again, if the writ is viewed in an abstract way) that it is a helpful approach to the problem to see the supplanting of the four-month period by the six-month period (as events unfold) as being equivalent to the sort of extension which may be granted in the exercise of judicial discretion under O.6, r.8(2). That is how Waller J. seems to have viewed it in ***Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne*** 1996 1 LLR 485 at pp 493-4 and again in his comments on *Dong Wha* at pp. 496-7.

65. Waller J. was influenced in that view by the provisions of O.6 r.6, relating to concurrent writs. A concurrent writ is, in short, a duplicate writ. O.6 r.6 provides as follows

(1) One or more concurrent writs may, at the request of the plaintiff, be issued at the time when the original writ is issued or at any time thereafter before the original writ ceases to be valid.

(2) Without prejudice to the generality of paragraph (1) a writ for service within the jurisdiction may be issued as a concurrent writ with one which is to be served out of the jurisdiction and a writ which is to be served out of the jurisdiction may be issued as a concurrent writ with one for service within the jurisdiction.

(3) A concurrent writ is a true copy of the original writ with such differences only (if any) as are necessary having regard to the purpose for which the writ is issued.

66. It is open for the plaintiff to apply for leave to serve out under O.11 r.1(1) before the writ is issued (the practice is summarised in notes in the Supreme Court Practice at 11/4/1 and following). But often a plaintiff wishes to issue a writ in haste, before the expiration of a limitation period, and does not apply under O.11 before the issue of the writ. If any defendant named in the writ appears to be a non-resident who has not an address for service within the jurisdiction, the writ will on issue be stamped "*Not for service out of the jurisdiction*". That stamped endorsement is never in practice cancelled (see the observations of Potter LJ on this point when this court refused leave to appeal in the ***Arab Business*** case 1997 1 LLR 531, 539) and so in practice the issue of a concurrent writ ceases to be optional and becomes essential if the writ is to be served out following on a successful application for leave. In such a case the concurrent writ will differ from the original (see O.6 r.6(3)) in that it will not have the endorsement "*Not for service out of the jurisdiction*" (but will be marked "*Concurrent*"). Both the original writ and the concurrent writ will however carry the standard note after the statement of the date of issue -

67. "*This writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with that date unless renewed by order of the court*".

68. There is therefore some disparity between the writ viewed in the abstract and the practicalities of the actual pieces of the paper constituting an original and a concurrent writ. This disparity was remarked on by Mance J. in ***Fremont Insurance v Fremont Indemnity*** 1997 CLC 1428, 1432. Mance J. referred to the decision of Waller J. in

Arab Business (commenting that he was far from sure he would have come to the same conclusion) and to his own decision in ***Dong Wha*** , in which

*"I considered that '**the writ**' in O.6 r.8(1) was a conception which could not be read rigidly as referring to a piece of paper or to the original writ".*

69. Plainly O.6 r.8(1) cannot be looking at the matter completely in the abstract , because of its reference to a concurrent writ. Nevertheless I agree with what I take to be Mance J's view that it is wrong to concentrate too much on the pieces of paper. To do so would (as my Lord Hirst L.J. points out) produce the paradoxical result that an original writ marked "*Not for service out of the jurisdiction*" - a clear indication of a case in which leave to serve out is likely to be required - should be treated as a hallmark of a four-month period of initial validity under r.8(1)(c).

70. I agree with Hirst L.J. that the endorsement on the original writ, "*Not for service out of the jurisdiction*" - an endorsement made as a routine matter on the basis of what appears on the face of the writ - cannot have the conclusive effect contended for by Mr Flynn. Once that argument has gone, it can be seen that under O.6 r.8 as it is stood at the material time, the validity of the writ against a non-resident defendant did not automatically expire at the end of the four-month period, but entered a sort of limbo during which its continued validity depended on leave for service out being required (and obtained within the six-month period).

71. I would therefore allow this appeal.

Harman J :

During the argument of this Appeal I had grave doubts about the correctness of Mr Gruder's submissions. However, the judgments of my Lords have convinced me that the decision which Hirst L.J. has expressed is the correct way of understanding the obscure wording of the former Rule. I therefore agree that this Appeal should be allowed.

Order: Appeal allowed with costs in the Court of Appeal; no order for costs in the court below; application for leave to appeal to the House of Lords refused. (Order not part of the judgment of the court)

MR. J. GRUDER (instructed by Messrs Ince & Co., London, EC3) appeared on behalf of the Appellant/Plaintiff.
MR. V. FLYNN (instructed by Messrs Holman, Fenwick & Willan, London, EC3) appeared on behalf of the Respondent/Defendant.