



for the years ending 1998 and 1999. In the year 2000, the first Plaintiff commenced audit work on the financial statements for ASI but never completed it as irregularities were discovered by the 1 Plaintiff in the management of ASI's financial affairs.

5. By the time of this discovery by the & Plaintiff, AFG had already drawn down \$545,000 under a Private Placement Memorandum (PPM) for the sale of shares in AFG which the second Plaintiff had assisted AFG in preparing.

6. The Defendants' claim in the Texas Proceedings is based on the alleged participation by the Plaintiffs in a fraud perpetrated by the Atlas Group and relating to the collapse of ASI, which is in liquidation under the supervision of the TCI Court. The Plaintiffs in the Texas Proceedings claim that they suffered loss as a result of the tortious conduct of these Plaintiffs in Texas in deliberately and or negligently auditing AFG and misrepresenting the true financial state of the Atlas Group. At the time of this hearing, the Plaintiffs had not been served in the Texas Proceedings but notice had come to their attention via e-mail.

7. The Plaintiffs in the Texas Proceedings claim as follows:

- i. That they invested in trusts offered and promoted in the US, Canada and Texas by KPMG and the other Defendants in the TP.
- ii. That KPMG expressly represented that they would monitor the investments.
- iii. That KPMG assisted the Atlas Group in defrauding the Defendants by provision of false and misleading information prior and subsequent to their investments and this false and misleading information was provided by KPMG knowingly or at the very least negligently.
- iv. KPMG Ltd (1st Plaintiff) intentionally and negligently signed off the audits in breach of GAAP and GAAS audits, reports and the financial statements of the Atlas Group.
- v. KPMG Corporate Finance Limited (2nd Plaintiff) presented a prospectus and business plan which contained misleading information as to the value of AFG's shares and the profitability of AFG. At the time of presenting this business plan, the 2nd Plaintiff was aware that the financial affairs of AFG and ASI were being mis-managed. The 1st Plaintiff it is alleged, knew that funds provided to the Atlas Group for investment on behalf of the Defendants were used to finance the operations of the Atlas Group loans to the Turners and to fund margin loans to other clients of ASI. KPMG knew that the Defendants were sent statements showing credit balances in their account when no such credit balances existed.
- vi. The 2nd Plaintiff presented this misleading picture to induce the investors to invest in AFG
- vii. KPMG had an inherent conflict between its role as auditors and the role of the 2nd Plaintiff as financial advisers to AFG
- viii. KPMG carefully planned and covered up its involvement with AFG so as to shift its responsibility for its role in the collapse of ASI to the Turners.

8. In these proceedings, by way of Originating Summons issued on February 3, 2003 in CL6/03 and Originating Summons issued March 27, 2003 CI, 18/03, the plaintiffs claim a declaration of non-liability, a

declaration that liability, if any, is to be determined by the Supreme Court of the Turks and Caicos Islands and the injunctive relief which is now being considered.

#### Summary of the Plaintiffs' case

9. The Plaintiffs in this matter argue that TCI is the appropriate forum for the hearing and determination of the matters before it as there is no Texas connection and to use the Texas forum would be inter alia unconscionable and oppressive and accordingly the Defendants should be restrained from so-doing. They rely on the 1st and 2nd affidavits of 6-7-A-rj-3:1a\*id Brough in CL 6/03, the 1st and 21'd affidavits of James Charles Schwartz, the 1st affidavit of the Dmred Brough in CL 18/03 and the 1s' affidavit of Stephen Savage. 6zt4-tj-

10. They argue that TCI is the natural and appropriate forum for the hearing of the matters raised in the Texas Proceedings in that the Plaintiffs did no business in Texas neither did they promote the sale of shares in AFC there or consummate any transactions in that regard in Texas,

11. Further, all the parties are TCI companies subject to the jurisdiction of this court and have no connection with Texas. For the Defendants to seek the personal and juridical advantages of the Texas court is oppressive conduct and not in the interest of justice.

12. In short, TCI is the only forum for the determination of the issues and not Texas,

#### Summary of the Defendants' Case

13. The Defendants argue that this is a multi-forum case in which Texas is one of the alternative forum and accordingly the injunction should not be granted, in opposing the grant of the injunction they rely on the 1st and 2nd affidavits of James Pierce, Ben Hansel and the 1s' and 2nd Affidavits of Paul Mc Ateer.

14. The Defendants claim to jurisdiction of the Texas Courts is on the basis that Ben Hansel is a resident of Texas and therefore establishes the Texas connection. According to his affidavit, he did business via e-mail, facsimile, wire transfer and telephone from Texas. They also argued that this is a multi-forum case the shares having been marketed for sale in USA, Canada and Texas. Reference was made specifically to the PPM which is from AFG Ltd, has the imprimatur of RPIVIG and KPMG (TCI) Ltd and is addressed at page 5 thereof " For Texas Resident? under the section providing information for residents of certain states.

15. They also assert that the misrepresentations took place in Texas as Mr. Mc Ateer alleges that his only contact concerning purchase of shares was in Canada and the US with Robert Gass who purported to represent ICPMG as head of Corporate Finance as evidenced by his business card.

16. The Defendants also claim that KPMG New York (which according to the Plaintiffs is non-existent) assisted in the audit work and the issue of a prospectus for AFG. They therefore invoke the jurisdiction of the Texas Court as KPMG and its worldwide members are all one single entity and

the Defendants can avail themselves of the remedies under the Texas Securities Law.

17. The Defendants further say that shares were in fact marketed in the USA and the Plaintiffs were doing business there.

18. In opposing the application it was submitted that to make an order in terms of the Plaintiffs' application would be disruptive to the Texas Proceedings as it would handicap these 35 Defendants when there are 46 Plaintiffs in the Texas Proceedings. The Defendants say that the other Plaintiffs in the Texas Proceedings will continue to sue there and the Plaintiff in this matter will still have to submit to the Texas Court and therefore cannot say that the Texas proceedings are oppressive,

19. Accordingly, the TCI court should be careful not to interfere with the internal workings of the Texas court as it could be disruptive to those proceedings. The result of the grant of the order would not serve the ends of justice. The Defendants also distinguish this case from other anti-suit proceedings where the suit will normally come to an end if the parties are restrained from continuing the action. In this case however, the Defendants assert that the Texas Proceedings will continue as there are other parties in those proceedings who are subject to that jurisdiction. The Tel Court must be reluctant to grant such an order in the circumstances for reasons of comity — *Turner — Grovit & ors*, (2002) 1 WLR .207, HL (E)

20. The Defendants also submitted that in any event the Plaintiffs could avail themselves of the Special Appearance Provision under Texas Law, but they are not bound to do so.

21. It was submitted by the Defendants that the proceedings in this court which is a claim for declaratory relief do not amount to parallel proceedings as they are not as substantial in breadth or substantial at all when compared to the Texas Proceedings. The Defendants say that they are parasitic upon and reactive to the Texas Proceeding having regard to the fact that they were filed after the Texas Proceedings were issued. Therefore, the Defendants say, there is no legitimate interest in TCI that require protection by the grant of the order sought.

22. Further, the Defendants submitted that if it is found that this is a multi-forum case then the Defendants should not be denied the legitimate personal and juridical advantages available before the Texas Courts in terms of contingency fees, punitive damages and jury trial.

23. The Defendants concede however that they are all amenable to the jurisdiction of the TCI Court, but argue that the minds of the beneficial owners are all out of TCI and reside in Canada and the US. Mr. Green said, while the fact that Tel may be the natural forum is a very important factor for the Court to consider, that it is not sufficient of itself. I agree.

24. Mr. Green also referred the Court to the draft order in eL18/03 which refers to 6 affidavits which he suggests was within the contemplation of the Plaintiffs to bring before the Court. There was no full and frank disclosure at the hearing on March 27, 2003 seeking the grant of an interlocutory injunction as all these affidavits were not all brought to the attention of the Court and therefore the order could be set aside for material non-disclosure Order 29/1A/24 of The Supreme Court Practice 1999 ed.

Summary of ;swims

25. in short the issues to be considered are set out briefly as follows:

- i. Forum - this court. must decide whether it can decide the issue of forum and thereafter, which is the natural forum, whether Texas is also a forum and which is the appropriate forum.
- ii. Texas Connection: is there a connection between any of these parties and Texas.
- iii. Oppression: The court must consider whether by going to the Texas Court and obtaining personal and juridical advantages the conduct of the Defendants is oppressive, unconscionable or vexatious.
- iv. Comity: before grant of an injunction the court must be careful not to interfere with the internal workings of another court particularly in multi-party suits where „uch interference might result in an administrative nightmare for the foreign court.
- v. Parallel Proceedings: whether the applications before this court amount to proceedings that require the protection of the court by the grant of a restraining order.

THE LAW

Forum

26. In considering the issue of forum non conveniens, the Court looked at the case of ***General Star International Indemnity Limited Stirling Cooke Brown and anor unrep. Case no. 2002 Polio 1085 (QOD) January 17. 2003*** at paragraph 9 where I.-anglely J stated:

*I do not think the question of which Court should act first and the question of whether this Court is the appropriate forum cart sensibly be considered in isolation. The fact now is that this court is seized of the issues...in a case involving proceedings in this country between parties each of whom is and directly subject to this Court's jurisdiction it, absent some exceptional circumstance, for this court to address the questions of forum.*

According to Justice Langley in such circumstances, **it** would not be right for any Defendant, properly sued in England, to take proceedings on the same issues in another Court.

27. Further, the lo<sup>1</sup> affidavit of Charles Schwartz shows that for the Defendants to fall within the jurisdiction of the Texas Blue Sky Laws, they must establish that there was a breach either intentionally or negligently by the Plaintiffs. They must therefore show that the Defendants purchased shares in Texas as a result of the promotion of the sales of shares by these Plaintiffs in Texas and that there is a substantive cause of action to be tried in Texas.: ***Touche Ross & Co.v Bank Intercontinental Ltd (1987) MLR 268, Cayman Islands (7)269.***

28. The TM" court can therefore determine the issue of forum. In this case, all the parties before this Court are subject to TCI law. Further, the issues complained of in the Texas Proceedings are based on the same

allegations that must be determined by this court. It therefore follows that TCI is the natural forum.

#### Texas Connection

29. The Defendants have relied on the fact that Mr. Hansel lives in Houston, Texas in order to establish a connection. However, Mr. Hansel is not a Defendant in these proceedings and his affidavit does not reveal any transaction concluded between him and the Plaintiffs in Texas. Further there is no evidence put before this Court that Mr. Gaas or any one else purporting to act on behalf of the Plaintiffs were in Texas at all or in Texas marketing shares or consummating any agreement.

30. With respect to the Texas connection which the Defendants seek to establish through Mr. Hansel, as aforesaid, there is no evidence put before this court as to how and where he subscribed or that the transaction was entered into in or from Texas and in the absence of such evidence there is no tangible connection established save and except that he lives in Texas. It is interesting to note that Mr. Hansel is a lawyer and yet unable to even state in his affidavit which company or companies he invested in. Taken at its highest, the evidence with respect to Mr. Hansel conducting business in or from Texas with the Plaintiffs is vague.

31. According to the PI affidavit of Mr. Charles Schwartz, under Texas Law, the Plaintiffs must have a continuing and systematic contact with Texas and it must be shown that they were doing business in Texas or had done some purposeful act in Texas or consummated a transaction in Texas for that Court to have jurisdiction over them.

32. The Defendant: rely on the PPM but because the N.PMG logo is on the face of that document does not evidence that the Plaintiffs were doing business in Texas or engaged in any actions that would invoke the jurisdiction of the Texas Court. It only evidences that the document was prepared by the TCI company. By itself it is insufficient to create any connection with Texas or amount to the Plaintiffs 'doing business in Texas'.

33. In any event, the Defendants in this matter have not stated that they are Texas residents nor have they shown any contact between any of the Plaintiffs and themselves in Texas or that they received any documentation there.

34. The ***Societe Nationale Industrielle Aerospatiale v Lee Sul Jack & anor 11987) AC 871, PC*** case says the court must consider whether the closest connections with the parties and actions are in the domestic forum for it then to be deemed the natural forum.

35. In short, all the parties in this action are TCI Companies and or reside in TCI and therefore subject to the jurisdiction of this court and accordingly it would appear to be the natural forum.

36. Consideration must also be given to whether this is a single forum case or an alternative forum case. In this case, the issue is whether TCI and Texas may have jurisdiction. It is accepted by the Defendants that TCI have jurisdiction but they are also saying that Texas has jurisdiction but for the reasons given above, they have not presented sufficient evidence to show any connection with Texas and in the absence of such evidence, the only conclusion is that TCI is the only forum.

## Oppression

37. The court must also consider the issue of oppression, vexation and unconscionability before it grants an anti-suit injunction. In **Airbus Industrie WE v Patel & ors** (1999) 1 AC 119 (HL) (E) the House of Lords seated the general rule that it was contrary to the doctrine of comity for an English court to grant an anti-suit injunction to restrain proceedings in a foreign jurisdiction "unless the English forum had a sufficient interest in or connection with, the matter in question to justify such interference" (my emphasis). Accordingly, the appeal was allowed restraining continuation of proceedings in Texas as it was oppressive because in ter alia of the absence of the doctrine of forum non-conveniens in Texas at that time.

38. It is well established that a Court has jurisdiction to prevent persons domiciled in that country from being subjected to vexatious or oppressive litigation whether started or to be started in another country. As the Privy Council stated in **SM Aerospatiale** a court can restrain a person from pursuing proceedings in a foreign court where a remedy is available both in that country (Texas) and in the country of domicile (TCI) and will do so where pursuit of the foreign proceedings will be vexatious and oppressive. *See dicta of Lord Woolf MR, Fort Dodge V Macon Nobel (1998) Fari 222 @ 246*

39. The Privy Council in **SN1Aerospatiale** © 894 states as follows:

*Their Lordships refer, in particular to the fact that litigants may now be encouraged to proceed in foreign jurisdictions, having no connection with the Subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer great inducements, in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedy there. In normal circumstances, application of the now very widely recognized principle of forum non conveniens should ensure that the foreign court will itself, where appropriate, decline to exercise its own jurisdiction.*

Their Lordships went on to say that if the English court concludes that it is the natural forum for the adjudication of the dispute and that the Plaintiff in the foreign proceedings is acting oppressively, in the interest of justice, the English court may grant the injunction to restrain the Plaintiff from pursuing those proceedings.

40. There are personal and juridical advantages to the Defendants in Texas. However, the question as to whether they can avail themselves of these advantages rests entirely on determining which is the appropriate forum. The advantage in the Texas court is pre-trial discovery, punitive damages, trial by jury and speedy enforcement of judgements.

41. The question is whether the Defendants are entitled to these advantages which the Plaintiffs are saying will be oppressive as the Texas connection has not been established. It is now recognised that persons having no connection to a place can be attracted to the advantages available in a foreign court. *See Stiff Aersnatiatie*. In the **Airbus** case, the House of Lords recognized that punitive damages may amount to oppression.

42. The Defendants claim that they are entitled to the advantages and remedies under the Texas Securities Law on the basis that shares were

marketed by the Plaintiffs and others in Texas. Again, the Defendants must still show the court that the transactions took place in Texas and the Plaintiffs committed the tortious acts complained of in Texas.

#### Comity

43. With respect to the issue of comity, the general principle is that the court must exercise caution in granting anti-suit injunctions. This goes hand in hand with the equitable principles which must apply when considering the grant of an injunction and the focus is on the Defendant's conduct. ***Airbus @ p 134***. There must also be sufficient interest in or connection with the matter to justify interference with a foreign court which an anti-suit injunction entails. As all the parties to these proceedings are subject to TOI law and are Turks and Caicos Islanders, there is sufficient reason to justify the interference by the TCI Court. But, is the Tel Court really interfering where it is found that, based on the evidence, no connection with Texas has been established to justify the Texas court being considered as an alternate forum? In such a case there may be no infringement of the principle of comity.

44. The court also considered Mr. Chapman's submission that if a restraining order was made it would interfere with the internal workings of the Texas Court but, unlike the usual anti-suit case, such an order will not bring the Texas Proceedings to an end. However, it is trite law that this type of proceeding is not directed at the foreign court but only binds the party in personam *Turner v Grovie ec ors (2002) UK HZ 65*.

#### Parallel Proceedings

45. The Defendants claim that there are no parallel proceedings in the TCI that are in need of protection. In both matters, the Plaintiffs are seeking declarations of non-liability, by way of Originating Summonses, which the Defendants say are parasitic upon the Texas Proceedings and are derivative in nature. One of their reasons for advancing this argument is the fact that these applications were commenced after those in Texas. In *Touche Ross* and *British Airways u Laker*, there were claims for declarations of non-liability which constituted sufficient causes of action that needed to be protected. The issues to be determined before the Texas Court are founded on the same set of facts as in the TCI court. This therefore leaves this court to consider whether there is a legitimate interest to be protected and there is no reason not to find that these proceedings are substantial and in need of protection.

#### KPMG as a single entity

46. The issue of whether KPMG constitutes a single entity has been raised by the Defendants. But that issue can be properly determined by the Tel courts to which the Defendants and Plaintiffs are subject.

#### Non-disclosure at the hearing of the application for injunction

47. In considering Mr. Green's submission that there was material non-disclosure in CL18/03 when the interlocutory injunction was granted, the issue of whether to discharge the injunction had to be determined.

The Order was granted by the Chief Justice who was appraised of all the affidavits in both CL6/03, and CL18/03. His Lordship was fully aware that the matters were related, arose out of the same set of fact and the application in CL18/03 was in the same terms as that in CL6/03. To discharge the injunction in these circumstances on the basis of material non-disclosure would not serve the ends of justice as I believe the court had all the affidavits before it in matters that are clearly related.

SUMMARY

48. The overriding principle established by all the anti-suit cases is that the court must, in arriving at a decision, act in the interest of justice.

It is agreed by the Defendants that TCI is a proper forum (though not the only one) as all the parties are TCI companies incorporated under TCI law. Whether or not the incorporation in TCI is merely a vehicle to do business it still hinds them to be subject to TCI law, unless a connection can be shown to Texas, and this has not been done.

49, The Defendants cannot now say that TCI is not an appropriate venue for the hearing of a matter of this magnitude as the court room is small, there is insufficient hotel accommodation and that there are no judges in TCI who can handle this matter whereas Texas has judges who are experts on securities law.

50. In arriving at a conclusion, I duly cautioned myself as to the possibility of a multiplicity of suits arising from the same or similar facts perhaps resulting in conflicting decisions which would lead to confusion and injustice.

51. I concluded that this was a single forum case, the natural and appropriate forum being TCI. Any application by the Defendants in Texas to restrain these Plaintiffs from continuing these actions is a matter for the Texas court.

52. In summary, for these reason I granted the order sought by the Plaintiffs, namely as injunction restraining the Defendants and each of them whether by their directors, officers, agents, attorneys or otherwise howsoever until trial or further order from taking any further steps in the prosecution of their claims in the legal Texas Proceedings.

I reserved the costs of the applications.

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HELEN A ALI I  
ACTL6G JUDGE  
SUPREME COURT