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[COURT OF APPEAL]

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MULTINATIONAL GAS AND PETROCHEMICAL CO. *v.* MULTINATIONAL GAS AND PETROCHEMICAL SERVICES LTD. AND OTHERS

[1980 M. No. 1769]

1983 Jan. 11, 12, 13, 14, 17, 18; Feb. 16 — Lawton, May and Dillon L.JJ.

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Practice—Writ—Service out of jurisdiction—Breach of duty of care alleged against English company in advising plaintiff—Plaintiff alleging its foreign shareholders and directors negligently acting on advice—Whether tort committed within jurisdiction—Plaintiff and English company both in liquidation—Whether company, shareholders or directors "proper party" to action—R.S.C., Ord. 11, *r.* 1 (1) (*h*) (*j*)

G

Company—Director—Action against—Directors committing solvent company to future financial liabilities—Shareholders approving decisions—Whether company having cause of action in negligence

Three oil companies, which had been incorporated in the United States of America, France and Japan respectively, decided to join together in a commercial enterprise for the purchase, storage, transportation and sale, inter alia, of liquefied petroleum gas and liquefied natural gas. To carry out that joint venture they formed the plaintiff company which was to be incorporated in England but, on receiving advice on

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taxation, it was decided to incorporate the plaintiff in Liberia and to form an English company S., to act as the plaintiff's adviser and agent. The plaintiff's shareholders were the oil companies and they appointed its directors, who were all resident abroad. The plaintiff had no place of business in the United Kingdom and all its meetings were held abroad. The plaintiff began to trade and by 1974 it was trading profitably. S. was acting as its adviser and agent. Between 1973 and January 1975, the plaintiff's directors made a number of decisions resulting in the plaintiff chartering or acquiring interests in some 20 tankers and incurring future financial liabilities. A fall in the market resulted in the plaintiff being in financial difficulties and by September 1977 it had to cease trading. Both the plaintiff and S. went into liquidation.

The plaintiff obtained leave from the Companies Court to bring an action against S. for breaches of its duty of care to the plaintiff under the agency agreement in connection with the information and advice it supplied to the plaintiff and on which the plaintiff had acted. It also sought to claim against the oil companies and one of their subsidiaries for breaches of the duty of care which they owed the plaintiff as persons exercising the powers of management and direction in connection with the plaintiff's decisions and also against the plaintiff's directors for their negligence in making the decisions that had resulted in the plaintiff becoming insolvent. The plaintiff applied for leave to issue concurrent writs and serve notice of the writs out of the jurisdiction, under R.S.C., Ord. 11, r. 1 (1) (*h*) and (*j*),[1] on the foreign defendants. The master granted leave but, on appeal, the judge set aside the order.

On appeal by the plaintiff:—

Held, (1) that for the purposes of Ord. 11, r. 1 (1) (*h*) it was the place where in substance the plaintiff's cause of action arose that determined whether the tort was committed within the jurisdiction of the court; that, since the plaintiff's claim was based on allegations of S.'s negligence in supplying information from this country to the plaintiff's directors abroad and the alleged negligence of the plaintiff's directors in acting on that information abroad, the substance of the cause of action arose from acts committed abroad and, therefore, since the action was founded on a tort committed abroad for the purposes of rule 1 (1) (*h*), the court had no jurisdiction to grant leave to serve notice of the writ on the foreign defendants (post, pp. 267G, 272A–G, 284D–F).

Dictum of Lord Pearson in *Distillers Co. (Biochemicals) Ltd.* v. *Thompson* [1971] A.C. 458, 468, P.C. applied.

(2) Dismissing the appeal (May L.J. dissenting), that, although the court had jurisdiction under Ord. 11, r. 1 (1) (*j*) to grant leave for notice of the writ to be served on a foreign defendant where an action had been properly brought against a defendant within the jurisdiction, an order would not be made where the foreign defendant had a good defence to the

[1] R.S.C., Ord. 11, r. 1: "(1) . . . service of a writ out of the jurisdiction is permissible with the leave of the court in the following cases . . . (*h*) if the action begun by the writ is founded on a tort committed within the jurisdiction; . . . (*j*) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto; . . ."

R. 4: "(2) No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order."

action; that, although the plaintiff had a separate existence from its shareholders, it existed for their benefit and provided they acted intra vires and in good faith they could manage its affairs as they chose while it was solvent; that the shareholders, who owed no duty to third parties or to future creditors, by approving the directors' acts had made those acts the acts of the plaintiff and it could not now complain of the lack of commercial judgment of the directors in making the decisions (post, pp. 269A–E, 287C–D, 288C–F, 291F–H).

Salomon v. *A. Salomon and Co. Ltd.* [1897] A.C. 22, H.L.(E.); *The Hagen* [1908] P. 189, C.A.; *Sharples* v. *Eason & Son* [1911] 2 I.R. 436 and *The Brabo* [1949] A.C. 326, H.L.(E.) applied.

In re Horsley & Weight Ltd. [1982] Ch. 442, C.A. considered.

Per May and Dillon L.JJ. Although the predominant reason for making S. a party to the action was to bring an action in this country against the foreign defendants, S. was a "proper party" to the action within the meaning of rule 1 (1) (*j*) (post, pp. 279C–F, 285D, 287B–C).

Per Lawton L.J. The judge's finding that the predominate reason for bringing the action against S. was to enable an application for leave to serve the defendants out of the jurisdiction was sufficient to dispose of the appeal (post, p. 268D–E).

Per Lawton and May L.JJ. The defence of volenti non fit injuria was not available to the defendants (post, pp. 269G–H, 282B–C).

Per May L.J. A company as a separate legal entity could complain of the negligence of its directors and, although there was little likelihood of the plaintiff complaining of those acts while it was controlled by the defendant shareholders, the shareholders' restraint on it did not amount to a release by the plaintiff of its cause of action and, since all the defendants were proper parties to the action, the court should exercise its discretion under Ord. 11, r. 4 (2) and grant leave to serve notice of the writ on the foreign defendants under the provisions of Ord. 11, r. 1 (1) (*j*) (post, pp. 279G, 280E—281A, 283E–H).

Decision of Peter Gibson J. affirmed.

The following cases are referred to in the judgments:

Attorney-General for Canada v. *Standard Trust Co. of New York* [1911] A.C. 498, P.C.

Brabo, The [1948] P. 33; [1947] 2 All E.R. 363, C.A.; [1949] A.C. 326; [1949] 1 All E.R. 294, H.L.(E.).

Castree v. *E. R. Squibb & Sons Ltd.* [1980] 1 W.L.R. 1248; [1980] 2 All E.R. 589, C.A.

City Equitable Fire Insurance Co. Ltd., In re [1925] 1 Ch. 407, C.A.

Cooney v. *Wilson* [1913] 2 I.R. 402.

Distillers Co. (Biochemicals) Ltd. v. *Thompson* [1971] A.C. 458; [1971] 2 W.L.R. 441; [1971] 1 All E.R. 694, P.C.

Duomatic Ltd., In re [1969] 2 Ch. 365; [1969] 2 W.L.R. 114; [1969] 1 All E.R. 161.

Express Engineering Works Ltd., In re [1920] 1 Ch. 466, C.A.

Foss v. *Harbottle* (1843) 2 Hare 461.

Hagen, The [1908] P. 189, C.A.

Horsley & Weight Ltd., In re [1982] Ch. 442; [1982] 3 W.L.R. 431; [1982] 3 All E.R. 1045, C.A.

Johnson (B.) & Co. (Builders) Ltd., In re [1955] Ch. 634; [1955] 3 W.L.R. 269; [1955] 2 All E.R. 775, C.A.
Lee, Behrens and Co. Ltd., In re [1932] 2 Ch. 46.
Massey v. *Heynes & Co.* (1888) 21 Q.B.D. 330, C.A.
North-West Transportation Co. Ltd. v. *Beatty* (1887) 12 App.Cas. 589, P.C.
Parker and Cooper Ltd. v. *Reading* [1926] Ch. 975.
Pavlides v. *Jensen* [1956] Ch. 565; [1956] 3 W.L.R. 224; [1956] 2 All E.R. 518.
Rosler v. *Hilbery* [1925] Ch. 250, Russell J. and C.A.
Ross v. *Eason & Son Ltd.* [1911] 2 I.R. 459.
Salomon v. *A. Salomon and Co. Ltd.* [1897] A.C. 22, H.L.(E.).
Sharples v. *Eason & Son* [1911] 2 I.R. 436.
Witted v. *Galbraith* [1893] 1 Q.B. 577, C.A.
Yorkshire Tannery and Boot Manufactory Ltd. v. *Eglinton Chemical Co. Ltd.* (1884) 54 L.J.N.S. 81.

The following additional cases were cited in argument:

Bailey, Hay & Co. Ltd., In re [1971] 1 W.L.R. 1357; [1971] 3 All E.R. 693.
Gee & Co. (Woolwich) Ltd., In re [1975] Ch. 52; [1974] 2 W.L.R. 515; [1974] 1 All E.R. 1149.
Halt Garage (1964) Ltd., In re [1982] 3 All E.R. 1016.
Hutton v. *West Cork Railway Co.* (1883) 23 Ch.D. 654, C.A.
Newman (George) & Co., In re [1895] 1 Ch. 674, C.A.

APPEAL from Peter Gibson J.

The plaintiff, Multinational Gas and Petrochemical Co., a company incorporated in Liberia and now in liquidation, issued a writ on April 25, 1980, for damages for breaches of care owed to it by the defendants in respect of decisions taken by the plaintiff and contracts entered into by it whereby it suffered damage. The first defendant, Multinational Gas and Petrochemical Services Ltd. ("Services"), was a United Kingdom company with offices in London and it, like the plaintiff, was in liquidation. The 2nd, 3rd and 4th defendants, Herman Sauer, Masataka Tamaki and Pierre Daridan, had been nominated by the 5th, 9th and 12th defendants as directors of Services. The 5th defendant, Phillips Petroleum Co., was a company incorporated in the State of Delaware in the United States of America; the 6th defendant, Philtanker Inc., was a subsidiary of the 5th defendant and incorporated in the Republic of Liberia; the 9th defendant, Société Anonyme de Gérance et d'Armement known as "S.A.G.A.," was incorporated in the Republic of France; and the 12th defendant, Bridgestone Liquefied Gas Co. Ltd., was a company incorporated in Japan. The 5th, 9th and 12th defendants were multinational oil companies and were the plaintiff's shareholders (referred to as the "joint venturers" and in the case of the 5th defendant when acting through its subsidiary, the 6th defendant Philtanker Inc.). The 7th, 8th, 10th, 11th, 13th and 14th defendants were persons nominated by the joint venturers to act as the plaintiff's directors at the material times and they were all resident outside the United Kingdom.

The plaintiff applied for leave, under R.S.C., Ord. 11, r. 1, to issue concurrent writs of summons against the 5th to 13th defendants (the 14th

defendant having died) and to serve notice of those writs on the defendants outside the jurisdiction. On February 27, 1981, Master Dyson granted leave. The 5th to 13th defendants appealed and, on December 21, 1981, Peter Gibson J. set aside the order of the master.

The plaintiff applied for leave to appeal on the grounds (1) that the judge in considering the question of the locus of the torts alleged against the 5th to 13th defendants erred in law in following the Court of Appeal in *George Monro Ltd.* v. *American Cyanamid and Chemical Corporation* [1944] K.B. 432, in that the comments of the court were obiter and could not stand with the flexible approach indicated by the Board in *Distillers Co. (Biochemicals) Ltd.* v. *Thompson* [1971] A.C. 458 and/or were applicable to the straightforward facts and issues before the Court of Appeal but were not applicable to the facts and issues in the present case which, as a result of the deliberate policies of the 5th, 6th, 9th and 12th defendants when organising the way in which the plaintiff's business was to be conducted, raised serious problems not susceptible of determination by the application of a fixed rule. (2) That the judge was not justified in his finding that in a significant respect, the plaintiff's business was not conducted in London or in his findings (a) that the duties of care owed to the plaintiff by the 5th to 13th defendants and/or (b) that the breaches of those duties and/or (c) that the damages to the plaintiff resulting from those breaches were not, and none of them were, located within the jurisdiction, in that those findings were wrong and against the weight of evidence. (3) That the judge erred in law in holding that, because the predominant motive of the plaintiff in bringing the action against Services was to support an application to serve other defendants out of the jurisdiction, the action was not properly brought against Services within the meaning of R.S.C., Ord. 11, r. 1 (1) (*j*) and/or that the judge when determining that the action had not been properly brought against Services (i) wrongly took into account the plaintiff's motives in and its reasons for bringing the action and the fact that, if successful in its action, the plaintiff had no prospect of making any substantial recovery against Services alone; (ii) failed to give any or any sufficient weight to the fact that the action had been brought by the plaintiff against Services (since Services was in liquidation) by the leave of the Companies Court; and (iii) erred in law by holding that the defence of volenti non fit injuria was available to Services as a complete defence to the plaintiff's claim. (4) That the judge, when considering whether or not the 5th to 13th defendants were proper parties to the action against Services within the meaning of R.S.C., Ord. 11, r. 1 (1) (*j*), misdirected himself by taking into account the plaintiff's motives in and reasons for bringing the action and erred in law by holding that the defence of volenti non fit injuria was available to the 5th to 13th defendants and each of them as a complete defence to the plaintiff's claim and, accordingly, erred in holding that the 5th to 13th defendants were not proper parties to the action against Services. (5) That the decision of Brandon J. in *The Theodohos* [1977] 2 Lloyd's Rep. 428 (which the judge followed and applied), in which it was held that, unless a foreign corporation was carrying on business within the jurisdiction, service of process on the president of that corporation while within the jurisdiction was not service on that

corporation within R.S.C., Ord. 65, r. 3, was wrong. (6) That so far as concerned the exercise of his discretion as required by R.S.C., Ord. 11, r. 4 (2), (i) the judge failed to give sufficient consideration to the suitability and convenience of England as the forum for investigating the plaintiff's claims in that he failed to give weight to the fact that the 5th, 6th, 9th and 12th defendants when incorporating the plaintiff and Services had agreed to submit disputes inter se to arbitration in London and to the fact that all or substantially all the documents relating to the conduct of the plaintiff's business by Services were in England and both companies were in the course of being wound up by the High Court in England under the Companies Acts 1948 to 1981; (ii) the judge's finding that the action had very little to do with England was against the weight of evidence; (iii) the judge's holding that the torts alleged by the plaintiff against Services were not committed within the jurisdiction was against the weight of the evidence; (iv) the judge should not have taken into account the fact that if the action were litigated in England it would be expensive since that must be the case wherever it was litigated; and (v) he failed to give any or any sufficient weight to the fact that the action had been brought by the plaintiff bona fide in the belief that it had a good prospect of succeeding in its claim against Services and (since Services was in liquidation) by leave of the Companies Court.

By a respondent's notice the defendants gave notice that they would contend that the order of Peter Gibson J. should be affirmed on the further or alternative ground that the judge ought to have held that the plaintiff had no reasonable or probable cause of action or arguable case against the defendants in that the plaintiff's claim against the defendants, as set out in its draft statement of claim, was founded upon alleged acts, defaults and/or omissions which were said to have been procured, done or made by all the members of the plaintiff.

The facts are stated in the judgment of Lawton L.J. and May L.J.

John Chadwick Q.C. and *Martin Keenan* for the plaintiff.

The first four defendants were not represented.

Allan Heyman Q.C. and *Robin Hollington* for the 5th, 6th, 7th and 8th defendants.

Andrew Bateson Q.C. and *Michael Tugendhat* for the 9th, 10th and 11th defendants.

Donald Nicholls Q.C. and *Richard McCombe* for the 12th and 13th defendants.

The main submissions of counsel are indicated in the judgments (see post, pp. 267H, 268E–H, 269F–H, 270D–G, 274A–E, 280E, 281E, 286B, 290B).

Cur. adv. vult.

February 16. The following judgments were read.

LAWTON L.J. The issue in this appeal is whether nine out of 13 defendants named in the writ of summons issued on April 25, 1980,

should be served out of the jurisdiction, being resident outside. When the writ was issued there were 10 defendants outside the jurisdiction, but one of them, a Mr. Michio Dio, has died and the plaintiff has not asked for leave to serve his personal representatives.

On February 27, 1981, Master Dyson granted leave to issue concurrent writs in the United States, Liberia, France and Japan against these nine defendants. On December 21, 1981, Peter Gibson J. set aside Master Dyson's order and refused the plaintiff leave to appeal. The plaintiff applied to this court for leave to appeal and gave notice of appeal if leave were granted. With the consent of counsel we heard the application and the appeal together. We grant leave to appeal.

The plaintiff was incorporated in Liberia on August 14, 1970. There was evidence before us that the law of Liberia relating to companies is substantially the same as English law. The plaintiff's registered office was in Monrovia. Its existence was due to a decision by three multinational oil companies, Phillips Petroleum Co., a company incorporated in the state of Delaware, U.S.A. (Phillips), Société Anonyme de Gérance et d'Armement (S.A.G.A.), a company incorporated in France, and Bridgestone Liquefied Gas Co. Ltd. (Bridgestone), a company incorporated in Japan. These three oil companies intended to join together in a commercial enterprise for the purchase, transport, storage and sale of liquefied petroleum gas and liquefied natural gas and similar products. They contemplated chartering and acquiring suitable tankers. So far as Phillips were concerned this aspect of the enterprise was to be conducted by their wholly-owned subsidiary Philtankers Inc. (which was incorporated in Liberia) for the purposes of the joint enterprise. Shares in the plaintiff were allotted 40 per cent. to each of Phillips and S.A.G.A. and 20 per cent. to Bridgestone. The original plan was for these three oil companies to appoint an executive committee to run the plaintiff's business from London. English tax counsel advised, however, that an arrangement of this kind would probably have the result of making the plaintiff's profits, wherever earned, liable to British taxation. In order to avoid this consequence the three oil companies decided to form, and did form in December 1970, a company in the United Kingdom which was to act as the plaintiff's agent. This company was given the name of Multinational Gas and Petrochemical Services Ltd. (" Services "). Services had offices in London and as agent advised the plaintiff about business prospects, gave the plaintiff financial information, performed routine management work and put into effect any decisions made by the plaintiff who had no place of business in the United Kingdom or anywhere else. The members of the plaintiff's executive committee resigned as such in November 1970 and became the first directors of Services. After November 1970 the plaintiff had no formal executive committee. According to the statement of claim (from which I have taken the history of this case up to 1977) the three oil companies from time to time nominated certain of their employees or officers to act as the plaintiff's directors. At the times material to this action the individuals named in the writ after Philtankers Inc. were directors. Paragraph 11 of the statement of claim made the following allegation:

A "Further . . . the Multinational directors acted at all material times in all relevant matters in accordance with the directions and at the behest of the joint venturers"—that is, the three oil companies—"and, accordingly, the powers of directing and managing the affairs of Multinational in relation to the matters hereinafter complained of were vested in and were exercised by the joint venturers."

B Save on two occasions, which are irrelevant for the purposes of these proceedings, the plaintiff's directors never met within the jurisdiction of this court to make any decisions. When they did meet it was in New York, or Paris or Copenhagen.

The plaintiff started trading in 1971. It had a capital of U.S. $25,000,000 but only one million was in cash, the remainder being represented by vessels or interests in vessels. At first their operations were C on a smallish scale for oil companies and ran at a loss; but by 1974 they were making a profit. The plaintiff alleges that between 1973 and January 1975 the directors changed their trading policy. They decided to acquire gas tankers for employment on the spot market. To do this the plaintiff had to undertake substantial future liabilities which were not offset by forward charters. The market turned against the plaintiff. It found D itself in financial difficulties. In September 1977 it had to cease trading. On October 6, 1977, the estimated deficiency as regards creditors was shown as £113,853,857. The only assets within the jurisdiction of the court were bank accounts which were in credit to between £300,000 and £400,000. The existence of these assets justified, pursuant to section 399 of the Companies Act 1948, the making of a winding up order on January 25, 1978. The plaintiff, however, has not suggested that its E directors and the three oil companies who told them what to do at any material time knew or suspected that the plaintiff was insolvent.

There has been a financial disaster for the plaintiff's creditors. Those affected by five decisions made by the plaintiff's directors and particularised in paragraph 97 of the statement of claim were alleged to have suffered loss to the extent of about £75,416,000. The three oil companies F did not offer to discharge the plaintiff's liabilities. The disaster which befell the plaintiff put Services into difficulties too. That company was ordered to be wound up on February 7, 1978. Services' assets were worth about £34,000. We were not told what its liabilities were; but whatever they were, the liquidator of Services was unlikely out of the assets to be able to finance litigation of the kind which was started by the writ issued on April 25, 1980.

G During the autumn of 1979 and the early months of 1980 the plaintiff's liquidator consulted accountants and lawyers for the purpose of being advised whether the plaintiff could recover from its directors and the three oil companies the losses, or part thereof, which it had sustained as a result of the unsuccessful trading, particularly during the period November 1973 to January 1975. A substantial proportion of its creditors H wanted action taken if a successful outcome was possible.

The liquidator was advised that there was evidence that Services, as the plaintiff's agent, had acted negligently in providing financial information for the plaintiff and that its directors and the three oil companies

had negligently failed to appreciate that Services was giving them inadequate financial information and had made decisions negligently. The decisions complained of, so it was alleged, had been highly speculative and could not properly be regarded as falling within the scope of reasonable business judgment. The making of these decisions had caused a large proportion of the losses sustained by the plaintiff.

The liquidator was willing to accept this advice but he seems to have appreciated at least until April 21, 1980, that there were difficulties in the way of getting any worthwhile result from starting litigation. Services would be unable to satisfy any judgment given against them. In any event leave to commence an action against Services would have to be obtained from the Companies Court and if given there was likely to be the usual condition that no monetary judgment in such action was to be enforced without the leave of the court. All those who would be able to satisfy a monetary judgment were resident out of the jurisdiction. Leave to serve them out of the jurisdiction would not be granted unless the plaintiff could satisfy the court that its claim came within either, or both, R.S.C., Ord. 11, r. 1 (1) (*h*) and (*j*).

On April 21, 1980, there was a meeting between Services' liquidator and solicitor and the plaintiff's liquidator and solicitor. There was a discussion about the need, because of the Limitation Act 1939, to start any litigation, if there was to be any, before April 28, 1980, because the first alleged negligent decision had been made on April 29, 1974. During that discussion someone suggested (it was likely to have been the plaintiff's solicitor) that if a writ was issued against someone who was resident within the jurisdiction there would be no difficulty in joining the non-residents. The plaintiff's solicitor on being questioned by Services' solicitor said that he did not think a successful action would necessarily be of benefit to Services. Services' liquidator was also told by someone representing the plaintiff that the plaintiff's liquidator "would not actually be looking to Services for any satisfaction." Before this court the plaintiff, by its counsel, did not suggest that this was not the attitude of the plaintiff's advisers on or before April 21, 1980. It was suggested, however, that between April 21, 1980, and April 25, 1980, those same advisers appreciated better than they had done previously that Services might have some rights over against its directors and the three oil companies. Unless those persons and corporations were before the court, Services would have to start third party proceedings against them and as all those worth suing were resident out of the jurisdiction the same problems of service would face Services as have always faced the plaintiff. On April 25, 1980, an application was made by the plaintiff to Mr. Registrar Bradburn for leave to commence an action against Services. He was told that Services might have claims against those to whom the plaintiff was looking for relief. The order asked for was made on the usual terms. Services, being within the jurisdiction, were promptly served.

Having considered the relevant affidavits and the exhibits to them I am of the opinion that Services was put into the writ as defendant without the plaintiff having any reasonable expectation of being able to get satisfaction from any judgment which it might obtain against Services

A and for the purpose of being able to submit that the action was properly brought against a person duly served within the jurisdiction. This is one of the grounds upon which the plaintiff says it is entitled to an order for service out of the jurisdiction: see R.S.C., Ord. 11, r. 1 (*j*). The other is that the action which they began by the writ is founded on a tort committed within the jurisdiction: see R.S.C., Ord. 11, r. 1 (*h*). On whatever grounds the application was founded, the plaintiff had to make B sufficiently clear to the court that its claim was a proper one for service out of the jurisdiction under Order 11: see r. 4 (2). Peter Gibson J. judged that the plaintiff had failed to establish any of the matters which it had to do in order to be given leave. The plaintiff has submitted that he misdirected himself in coming to this conclusion.

I start my examination of the plaintiff's case by asking these questions: C first, why has the plaintiff started this action? Secondly, what is the essence of its case? Some of its creditors, acting through the liquidator, wanted to make the oil companies discharge at least some of the plaintiff's liabilities, the plaintiff being their creature. The oil companies, particularly Phillips, and possibly some of their nominee directors on the plaintiff's board, had enough assets to do so. They knew, or would have been advised, that the oil companies as the plaintiff's shareholders owed D them no duty to ensure that the plaintiff discharged its liabilities. The only way they could get at the oil companies was by alleging that they and their nominee directors had failed to perform some duty which they owed to the plaintiff. They were not interested in Services, who were just as much a creature of the oil companies as the plaintiff was, save perhaps as a route by which they could reach the oil companies. Any worthwhile claim had to be founded on what the oil companies had done. E What had they done which caused loss to the plaintiff and through it to the creditors? They had made what were alleged to have been highly speculative decisions which could not properly be regarded as falling within the scope of reasonable business judgment. Those decisions had not been made within the jurisdiction and as far as I can discover from the statement of claim the damage which it is said was caused by these F decisions did not occur within the jurisdiction. It was submitted that the decisions made outside the jurisdiction were the end product of negligence which began within the jurisdiction in that the plaintiff's directors negligently allowed Services in London to provide (by which was meant prepare) financial estimates and forecasts which were inadequate. Following what Lord Pearson said in *Distillers Co. (Biochemicals) Ltd.* v. *Thompson* [1971] A.C. 458, 468, I look back over the series of events G alleged to constitute the tort and ask myself the question: "Where in substance did this cause of action arise?" The answer is clear: wherever the plaintiff's directors made the relevant alleged decisions. In my judgment, the plaintiff has not established that its action is founded on a tort committed within the jurisdiction.

The question whether, the action having been properly brought against H a person duly served within the jurisdiction, as Services was, the parties sought to be served are proper parties thereto is more complicated. Our attention has been invited to a long line of authorities, starting with *Yorkshire Tannery and Boot Manufactory Ltd.* v. *Eglinton Chemical*

Co. Ltd. (1884) 54 L.J.N.S. 81. I do not intend to review them in this judgment. Most of them have been gone over many times before. Nor do I intend to rely upon forms of words used in some of the judgments. Lord Porter warned against doing so in *The Brabo* [1949] A.C. 326, 340. In my judgment the principles which have to be considered in this case are these: first, that the court should "be exceedingly careful before it allows a writ to be served out of the jurisdiction": see *The Hagen* [1908] P. 189, *per* Farwell L.J. at p. 201. Secondly, that leave ought not to be given if the sole, or predominant, reason for beginning the action against a party duly served within the jurisdiction is to enable an application to be made to serve parties outside the jurisdiction: see *Sharples* v. *Eason & Son* [1911] 2 I.R. 436. Thirdly, that the *mere* fact that the party within the jurisdiction will be unable to satisfy a judgment does not of itself mean that the action was not properly brought against that person. Fourthly, that an action is not properly brought against a party within the jurisdiction if it is bound to fail: see *The Brabo* [1949] A.C. 326. All the defendants, being the non-resident parties to whom Master Dyson's order referred, submitted that the plaintiff's claim against them was bound to fail as a matter of law. Peter Gibson J. was not satisfied that this was so.

On the evidence before him, Peter Gibson J. found, and in my judgment was right to find, that the predominant reason for bringing the action against Services was to enable an application to be made to serve the defendants out of the jurisdiction. The fact that Services were in liquidation was a factor which he was entitled to take into consideration in coming to this conclusion even if, by itself, it was not conclusive against the giving of leave. This view of the case is enough to dispose of this appeal in favour of the defendants. I consider it advisable, however, to make a finding on the defendants' arguments that the plaintiff's claim against them and against Services was bound to fail.

The submission in relation to the defendants was as follows. No allegation had been made that the plaintiff's directors had acted ultra vires or in bad faith. What was alleged was that when making the decisions which were alleged to have caused the plaintiff loss and giving instructions to Services to put them into effect they had acted in accordance with the directions and behest of the three oil companies. These oil companies were the only shareholders. All the acts complained of became the plaintiff's acts. The plaintiff, although it had a separate existence from its oil company shareholders, existed for the benefit of those shareholders, who, provided they acted intra vires and in good faith, could manage the plaintiff's affairs as they wished. If they wanted to take business risks through the plaintiff which no prudent businessman would take they could lawfully do so. Just as an individual can act like a fool provided he keeps within the law so could the plaintiff, but in its case it was for the shareholders to decide whether the plaintiff should act foolishly. As shareholders they owed no duty to those with whom the plaintiff did business. It was for such persons to assess the hazards of doing business with them. It follows, so it was submitted, that the plaintiff as a matter of law, cannot now complain about what it did at its shareholders' behest.

This submission was based upon the assumption, for which there was evidence, that Liberian company law was the same as English company law and upon a long line of cases starting with *Salomon* v. *A. Salomon and Co. Ltd.* [1897] A.C. 22 and ending with the decision of this court in *In re Horsley & Weight Ltd.* [1982] Ch. 442. In my judgment these cases establish the following relevant principles of law: first, that the plaintiff was at law a different legal person from the subscribing oil company shareholders and was not their agent: see the *Salomon* case [1897] A.C. 22, *per* Lord Macnaghten at p. 51. Secondly, that the oil companies as shareholders were not liable to anyone except to the extent and the manner provided by the Companies Act 1948: see the same case at the same page. Thirdly, that when the oil companies acting together required the plaintiff's directors to make decisions or approve what had already been done, what they did or approved became the plaintiff's acts and were binding on it: see by way of examples *Attorney-General for Canada* v. *Standard Trust Co. of New York* [1911] A.C. 498; *In re Express Engineering Works Ltd.* [1920] 1 Ch. 466 and *In re Horsley & Weight Ltd.* [1982] Ch. 442. When approving whatever their nominee directors had done, the oil companies were not, as the plaintiff submitted, relinquishing any causes of action which the plaintiff might have had against its directors. When the oil companies, as shareholders, approved what the plaintiff's directors had done there was no cause of action because at that time there was no damage. What the oil companies were doing was adopting the directors' acts and as shareholders, in agreement with each other, making those acts the plaintiff's acts.

It follows, so it seems to me, that the plaintiff cannot now complain about what in law were its own acts. Further I can see no grounds for adjudging that the oil companies as shareholders were under any duty of care to the plaintiff. In coming to this conclusion I have kept in mind the doubts expressed by Cumming-Bruce and Templeman L.JJ. in *In re Horsley & Weight Ltd.* [1982] Ch. 442, 455–456. Their comments were obiter. Both Cumming-Bruce and Templeman L.JJ. were thinking of "misfeasance" which probably does not cover "an ordinary claim for damages for negligence simply": see *In re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634, 648. Having regard to the long line of authorities to which I have referred and the examples I have mentioned I do not share their doubts.

Mr. Bateson, on behalf of the French interests, submitted that the plaintiff's claim against Services was also bound to fail because Services could plead "volenti non fit injuria." This submission was based on an allegation in the statement of claim that those responsible for the management and direction of the plaintiff's affairs "knew or ought to have known" that Services had acted negligently. The argument was that if they knew of negligence they impliedly consented to it. There are three short answers to this submission. First, knowledge of negligence does not necessarily amount to consent to negligence. Secondly, Services have in its defence denied that it acted negligently as alleged or at all. Thirdly, the volenti defence would not apply to "ought to have known."

I would dismiss the appeal.

MAY L.J. Although the substantial number of defendants and the length of the statement of claim make it clear that if and when this action has to be tried it will be an extremely complicated one, I think that for the purposes of this judgment I need refer to very little of the detail.

The plaintiff was incorporated in Liberia for the purpose of the business in which it did thereafter principally engage, namely, that set out in paragraph 6 of the statement of claim, that is to say, the worldwide purchase, sale, transportation and passing to and through seaport terminals of liquefied petroleum gas, anhydros ammonia and other light hydrocarbons (including liquefied natural gas). It was originally intended that the plaintiff should carry on that business in and from London. For tax reasons the plaintiff's affairs in London were managed by Services, a company which was incorporated in England for that purpose. The board meetings of the plaintiff, however, were for the same reason and in so far as is material always held outside the United Kingdom.

Both these companies were incorporated by the joint venturers, who became and remained throughout the relevant period the sole shareholders in each. Further, the directors of both the plaintiff and Services were employees and the nominees of each of the three joint venturers respectively and were so appointed with the intent that all of them should run each of the two companies for and in the interests of the joint venturers.

In this action it is contended that these respective directors were all of them negligent in their respective capacities, and that for that negligence the joint venturers are vicariously liable. It is said that the directors of Services were negligent in carrying out their duties with the result that budgets, forecasts and information prepared for the directors of the plaintiff, to enable the board of that company to make its decisions in and about carrying on its business, were inadequate and insufficient, at best unreliable and at worst wholly incorrect. It is contended that the directors of the plaintiff were in their turn also negligent in that actually knowing or in circumstances in which they ought to have known of the deficiencies in the material with which they were being provided by Services, they nevertheless failed to appreciate those deficiencies, as they ought to have done and not only failed to require Services to rectify the material, but indeed acted upon it when making the five decisions to build or acquire the tankers specified in paragraph (A) of the particulars of damage to paragraph 97 of the statement of claim, which they should not have done had they been properly and efficiently advised by Services and had exercised proper care on their own part. It is finally alleged that as a result of making those five decisions the plaintiff suffered damage to the extent of the net liabilities which their participation in such contracts involved, namely, about £75,000,000.

As I have said, Services was an English company, carrying on business in London and has been duly served with the writ in this action within the jurisdiction. We are concerned with whether the plaintiff should have leave to serve notice of the writ upon the other defendants out of the jurisdiction of this court.

To obtain such leave, it is common ground that the plaintiff must show

both that it can bring its claim against the defendants, other than Services, within one of the sub-paragraphs of R.S.C., Ord. 11, r. 1 (1) and also that in all the circumstances of this case it is a proper one for the court to exercise its discretion and grant the appropriate leave: this last requirement will be found in rule 4 (2) of the same Order. It is also I think common ground that the general approach of the court in these cases should be that set out in the well known passage from the judgment of Farwell L.J. in *The Hagen* [1908] P. 189, 201:

> "During these present sittings Vaughan Williams L.J., and myself have on more than one occasion had to consider Order 11, and we have had many authorities discussed and fully considered by the court, and the conclusion to which the authorities led us I may put under three heads. First we adopted the statement of Pearson J., in *Société Générale de Paris* v. *Dreyfus Brothers* (1885) 29 Ch.D. 239, 242, that 'it becomes a very serious question, and ought always to be considered a very serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the court to be invoked, and whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.' The second point which we considered established by the cases was this, that, if on the construction of any of the sub-heads of Order 11 there was any doubt, it ought to be resolved in favour of the foreigner; . . ."

Further, we must remember that sub-paragraph (*j*) of Ord. 11, r. 1 (1) is anomalous, in that, different from the other sub-paragraphs, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts. This requires one to look particularly closely at any application founded upon this sub-paragraph. As Lord Porter, in his speech in *The Brabo* [1949] A.C. 326, 338, said:

> "My Lords, where all the facts necessary for a decision are set out by one side or the other and not contradicted, I think that the tribunal must make up its mind on the hearing of the summons, at any rate where the law is plain. Primarily the jurisdiction of the courts in this country is territorial in the sense that the contract or tort sued upon must have some connection with this country or the defendant must be served here. To this principle Ord. 11, r. 1 (*g*) [now R.S.C., Ord. 11, r. 1 (1) (*j*)] is an exception and enables foreigners domiciled abroad to be impleaded in this country provided an action is properly brought against someone duly served within the jurisdiction and the party outside the jurisdiction is a necessary or proper party to that action. The rule is not only an exception to but also an enlargement of the ordinary jurisdiction of the court and should not, in my opinion, be given an unduly extended meaning. The observation of Farwell L.J. in *The Hagen* [1908] P. 189, 201, and of Lord Sumner in *John Russell & Co. Ltd.*

v. *Cayzer, Irvine & Co. Ltd.* [1916] 2 A.C. 298, 304, both quoted by Scott L.J. [1948] P. 33, 39, point out the care which should be taken before the jurisdiction is exercised."

In the present appeal the plaintiff first relies upon sub-paragraph (*h*) of rule 1 (1), namely, that the action is founded upon a tort committed within the jurisdiction. It seems to me quite clear on the facts that if tort or torts there were, these were committed partly within and partly outside the jurisdiction of this court. In such circumstances the appropriate approach is that stated by Lord Pearson in the judgment of the Privy Council in *Distillers Co. (Biochemicals) Ltd.* v. *Thompson* [1971] A.C. 458, 468 recently applied in this court in *Castree* v. *E. R. Squibb & Sons Ltd.* [1980] 1 W.L.R. 1248. In the *Distillers* case Lord Pearson said, at p. 468:

> " The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise? "

In the instant case I think that the facts and circumstances as alleged in the statement of claim need careful analysis, remembering the three components of the tort of negligence, namely, the existence of a duty of care owed to the plaintiff, a breach of that duty by the defendant and, thirdly, damage to the plaintiff resulting from that breach. One must also remember that the joint venturers' liability to the plaintiff (if any) can only be a vicarious one.

Now in my opinion there is no doubt that a director of a limited company owes such a degree of care to that company as a reasonable man might be expected to take in the circumstances on his own behalf. Consequently the defendants who were directors of the plaintiff owed that duty to that company. The statement of claim pleads and particularises breaches by those directors of that duty to take care and damage to the plaintiff resulting therefrom. Quite clearly, however, all those components of that tort, if in the event it can be shown to have been committed, occurred outside the jurisdiction. Consequently in so far as the defendant directors of the plaintiff are concerned, and the joint venturers allegedly vicariously liable for their tort, I am quite satisfied that the plaintiff cannot show any ground for service out of the jurisdiction under sub-paragraph (*h*).

Similarly the directors of Services owed a like duty to it, but I do not think that this is relevant for present purposes because even if those directors did commit breaches of it and those breaches resulted in some damage, the tort so constituted would have been committed against Services and not against the plaintiff.

One then must ask whether there is any question on the material before us that the directors of Services owed any duty of care to the plaintiff. This is not so pleaded in part VI or VII of the statement of claim and it is noticeable that the negligence complained of in, for instance, paragraph 42 of the statement of claim is that of " Services, the [plaintiff's] directors and the joint venturers." My opinion is that no duty was owed to the plaintiff at any material time, if at all, by the directors of Services. It follows that even if the Services' directors

failed to exhibit the degree of care that a reasonable man might have been expected to exhibit in the circumstances on his own account, this was not a failure of which the plaintiff can take advantage in these proceedings and constituted no component of any tort by Services' directors against the plaintiff. Consequently again, but for a different reason, I do not think that the plaintiff can rely on sub-paragraph (*h*) either in respect of the directors of Services nor, consequently, against the joint venturers vicariously in that connection.

I should add, however, that if I could be satisfied that the directors of Services had owed a duty of care to the plaintiff, then I would also take the view that there is on the material before us certainly a good arguable case that those directors committed a breach of that duty of care and that that breach caused damage to the plaintiff. Further, in such circumstances and applying Lord Pearson's test I would have concluded, looking back over the series of relevant events and asking myself where in substance did the cause of action arise, that it arose in London, within the jurisdiction.

In the result, however, and for the reasons which I have indicated, I do not think that the plaintiff can succeed in this appeal in so far as its application is based upon sub-paragraph (*h*).

I turn now to consider the terms of sub-paragraph (*j*) of R.S.C., Ord. 11, r. 1 (1). This provides that one of the circumstances in which leave can be given to serve a writ out of the jurisdiction is

> " if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto; . . ."

This sub-paragraph thus requires the court to be satisfied of two matters before any question of the exercise of its discretion under R.S.C., Ord. 11, r. 4, arises. First, on the assumption that the writ has been duly served upon a person within the jurisdiction, that the action begun by that writ was " properly brought " against that person so served. Secondly, that the person out of the jurisdiction sought to be served is " a necessary or proper party " to the action already begun against the English defendant.

It is not, I think, disputed that there is ample authority in the speeches of the members of the House of Lords in *The Brabo* [1949] A.C. 326 that an action is not " properly brought " against an English defendant if that action is in any event bound to fail, either on the facts if these are ascertainable by the court hearing the application for leave to serve out of the jurisdiction, or on the law. Equally, I think that if it can be shown that the action would be bound to fail against the potential foreign defendant were he made a party to it, he could be described neither as a necessary nor proper party to it. Whether it can be said that this action is bound to fail in either of these two respects as a result, first, of the argument based upon general principles of company law to which I shall refer hereafter, or on the basis that the doctrine of volenti non fit injuria applies, are matters with which I shall have to deal later in this judgment.

Apart, however, from actions which are bound to fail, it was sub-

mitted that an action cannot be said "properly" to be brought against an English defendant if the only or predominant purpose for which that defendant has been joined and served is to found an application under sub-paragraph (*j*) for leave to serve other defendants out of the jurisdiction. In my opinion this submission can be analysed in this way. If one can demonstrate that the action against the defendant within the jurisdiction is bound to fail and that it is on this ground alone that one can say that he was only joined to provide a peg for an application to serve others who are out of the jurisdiction, then of course the action cannot be said to be properly brought for the reason I have already mentioned. Thus, I think that I must then consider this second submission under this head in the context of there being a good arguable case against the English defendant, and an action brought bona fide but in which any judgment obtained against that defendant may or will not be met owing to his lack of funds. In such circumstances, and if the main or predominant purpose of keeping the English defendant in the proceedings is to enable the plaintiff to seek and obtain leave to join and serve persons out of the jurisdiction because they are likely to be able to satisfy a judgment which one may obtain against them, is this a ground for saying that the proceedings are not properly brought in the first place against the English defendant? Of course, if this first question is answered in the negative, it still remains to be determined whether the foreign defendants sought to be joined are necessary or proper parties to the litigation already started, and then finally whether in the exercise of the court's discretion leave ought to be granted.

We were referred to a number of authorities on this point, but I think that it is only necessary for me to mention some of them. The first was *Massey* v. *Heynes & Co.* (1888) 21 Q.B.D. 330. In that case London shipbrokers were sued for breach of warranty of authority to enter into a charterparty on behalf of Austrian principals. They denied the want of authority with the result that the plaintiffs applied for leave to join the principals and to serve them out of the jurisdiction. This was granted. Of necessity, the action had to fail either against the English agents or the foreign principals. The case was principally concerned with whether in such circumstances the latter could be said to be proper parties to the action against the former. However, upholding the grant of leave in the Court of Appeal, Lord Esher M.R. said, at p. 338:

> "The question, whether a person out of the jurisdiction is a 'proper party' to an action against a person who has been served within the jurisdiction, must depend on this—supposing both parties had been within the jurisdiction would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction."

In agreeing Lindley L.J. said, at p. 338:

> "When the liability of several persons depends upon one investigation, I think they are all 'proper parties' to the same action, and, if one of them is a foreigner residing out of the jurisdiction, rule 1 (*g*)" —now 1 (1) (*j*)—" of R.S.C., Ord. 11 applies."

Lopes L.J. also agreed on the same basis as Lord Esher M.R.

The next case was *Witted* v. *Galbraith* [1893] 1 Q.B. 577. That was an action brought to recover damages for the death of the plaintiff's husband under the Fatal Accidents Act 1846. He had been killed when he fell down a hatchway whilst a stevedore about to take part in the unloading of a ship in Glasgow by a Scots firm. The English defendants were shipbrokers carrying on business in London and all that they had done relevant to the accident was to apply to the dock company in Glasgow to have the vessel unloaded. The writ was served on the brokers within the jurisdiction and the plaintiff then obtained an order giving leave to serve the writ out of the jurisdiction on the shipowners under what was then R.S.C., Ord. 11, r. 1 (*g*), but is now r. 1 (1) (*j*). This writ was served accordingly, but not surprisingly perhaps the Scottish shipowners took out a summons to set aside the writ and service. The Divisional Court refused to make that order and the shipowners appealed. In the course of his judgment, echoing what had been said in *Massey* v. *Heynes & Co.*, Lindley L.J. suggested that there was a very easy method of testing whether the case then before the court came within the relevant rule. He said, at p. 579:

> "Supposing that both the defendant firms were resident within the jurisdiction, would they both have been joined in the action? I cannot think so; there is no plausible cause of action against the brokers. I come to the conclusion that the brokers have been brought into the action simply to enable the plaintiff to bring the other defendants within the jurisdiction. It is not a bona fide case of an action properly brought against a person who has been served within the jurisdiction. Consequently there is no right to proceed under the order, and the appeal must be allowed."

Kay L.J. agreed that the appeal should be allowed and said, at pp. 579–580:

> "Looking at the pleading, as I have done very carefully, it seems to me plain that the pleader felt the very great difficulty of framing a pleading showing any liability on the part of the brokers. I agree that everything shows that the brokers have been joined as defendants only for the purpose of bringing in the Scotch owners so that they may be sued in these courts. This is not within the Order, and the appeal must be allowed . . ."

In both judgments, therefore, there are dicta which if read in isolation are to the effect that where the English defendant is brought into the action simply to enable the plaintiff to apply to join the defendants from outside the jurisdiction, then that is not an appropriate case for the application of the relevant rule. However, both members of the court took the view that there was no plausible or indeed possible cause of action against the brokers, notwithstanding the ingenuity of the pleader, and that the only persons against whom the plaintiff could recover were the Scottish shipowners. In other words, this was also a case in which the claim alleged against the English defendants was bound to fail. I do not find it surprising that in those circumstances the court came to the conclusion that

leave ought not to have been given to serve out of the jurisdiction. I do not think that this case is any authority for the proposition that where there does exist a cause of action against the English defendant, but one which is unlikely to be satisfied because of his lack of funds, then the action against the English defendant is not "properly brought" because the real reason for including that defendant in the proceedings is in order to found an application under the rule. Still less if the desire to be in a position to join defendants out of the jurisdiction is only one of the reasons why the action is brought against the English defendant in the first place.

In *Ross* v. *Eason & Son Ltd.* [1911] 2 I.R. 459 the Irish plaintiff's principal complaint was against the publishers of a newspaper in London in respect of an alleged libel in that newspaper. It is quite clear that there was substantial correspondence between those parties before litigation and ultimately the plaintiff's solicitors asked the proposed English defendants to nominate a solicitor in Ireland to accept service of a writ. The very day upon which the plaintiff's solicitors received a reply from the English defendants refusing to do this, the former issued a writ against Eason & Son Ltd., well known newsagents in Dublin, and then applied and obtained leave to serve the English newspaper out of the jurisdiction. The Irish newsagents were joined without there having been any letter before action and indeed without any communication at all between the plaintiff's solicitors and them. The English defendants applied to set aside the order for service out of the jurisdiction. The Divisional Court set aside the order granting leave and the matter then went to the Court of Appeal. There the Lord Chancellor of Ireland said, at p. 463:

> "We are all of opinion that this appeal must be dismissed. From a consideration of the correspondence which passed between the plaintiff's solicitor and the publishers and printers of the 'Winning Post' in London, I am driven to the conclusion that the action instituted against Eason & Son was not a bona fide action. The very day on which the plaintiff's solicitor received the letter from the English defendants refusing to nominate a solicitor in Ireland to accept service of a writ on their behalf, and pointing out that the action could only be instituted in England, the plaintiff, without any complaint of the alleged libel, or any intimation of his intention to make them defendants, issued a writ against Eason & Son. In my judgment that was an evasion, an abuse of the rule that should not be sanctioned. On the evidence and the particular facts of this case I have arrived at the conclusion that the action was not one properly brought against Eason & Son within the jurisdiction, and I agree with the judgment of the King's Bench Division, on the short ground stated by Gibson J., that the defendants, Eason & Son, were introduced merely for the purpose of bringing the other defendants within the jurisdiction—a judgment which is fully supported by the case of *Witted* v. *Galbraith* [1893] 1 Q.B. 577, referred to during the argument."

Holmes L.J. would have been content to dismiss the appeal on the same basis, namely, that Easons were introduced merely for the purposes of

bringing the English publishers within the Irish jurisdiction, but as a number of other arguments had been raised in the course of the appeal, namely, whether the London publishers were a proper party to the action and whether there was a cause of action against Easons, he dealt with these arguments also. In so far as the latter was concerned I think that it is clear that he had substantial doubts, but he felt that in all the circumstances the matter ought to be left to a jury. His judgment then continued, at p. 467:

> "Therefore if the plaintiff's solicitor, when instructed to seek redress for the alleged libel, had at once determined to sue the Irish newsvendors and the London publishers and printers jointly, I should have been prepared to hold that the action was brought against them in good faith, and that, having served the writ on Eason & Son, he was entitled to an order for service on the co-defendants out of the jurisdiction. But the evidence is clear that for some reason —and I assume for a good reason—the solicitor never contemplated making Eason & Son defendants until he found that without joining them he could not sue in the Irish courts the companies whom he regarded as really responsible; and that Eason & Son were brought into the action simply to enable the plaintiff to bring the other defendants within the jurisdiction. For this reason, and on the authority of *Witted* v. *Galbraith* [1893] 1 Q.B. 577, I concur in the view taken by Gibson J."

Cherry L.J. reached the same result by applying the test suggested by Lindley L.J. in *Witted* v. *Galbraith*, taking the view that if both the defendants had been resident within the jurisdiction there would have been no question of joining Easons in the proceedings.

It is not clear whether the Court of Appeal's decision in that case was founded upon the basis that it was not one within the then equivalent of R.S.C., Ord. 11, r. 1 (1) (*j*), or whether the circumstances in which Eason came to be joined led the court as a matter of discretion to refuse the appropriate leave. In any event it was clearly a case decided upon its own facts and cannot I think be any authority for the proposition contended for by the defendants in this appeal. For the purposes of the present argument one must assume that there is a good arguable case against Services, and that there are no mala fides in the sense in which the court in *Ross* v. *Eason* clearly thought that there were, even though the only or predominant reasons why Services were sued was to enable the plaintiff to apply for leave to join the foreign defendants as parties and as more likely to satisfy any judgment that may be obtained.

In *Sharples* v. *Eason & Son* [1911] 2 I.R. 436, the facts were that the plaintiff sued Eason in another libel action and having done so obtained leave to join as a second defendant the publisher of a London newspaper in which the alleged libel had been published. But then, on the same day as serving notice of trial on the foreign (in that case, English) defendant, the plaintiff gave Eason notice of discontinuance. It is not surprising that upon due application the Court of Appeal in Ireland took the view that the plaintiff by his own act had made it clear that Eason had

not been properly joined in the first place. As Holmes L.J. said in the course of his judgment, at p. 449: A

> "The only inference I can draw is that the plaintiff had never any cause of action against Eason & Son, and only sued them for a collateral object, namely, to get the order to serve this defendant resident in London."

I think that *Sharples'* case underlines the fact that in the cases to which B we were referred the substantive basis for setting aside the original leave to serve out of the jurisdiction was that when the matter was investigated there was in truth no plausible cause of action against the defendant originally served. Clearly such a defendant could not be said to be a proper party to the proceedings, or alternatively the court in the exercise of its discretion in those circumstances was not prepared to grant leave to C serve out of the jurisdiction. Viewed in this light, I think that these cases are but tenuous, if any, authority for the proposition that in other circumstances, even though a defendant against whom there is a good cause of action has only been joined in order to enable an appropriate application for leave to serve out of the jurisdiction to be made, this by itself should require the court to refuse leave.

Cooney v. *Wilson* [1913] 2 I.R. 402 was another case concerning D libels upon an Irish resident written by an English resident, who employed a billposter resident in Ireland to post them there. As the report says, at p. 403: "Henderson was a working billposter, and no mark for damages or costs." However, he was sued and leave was then obtained under the equivalent of R.S.C., Ord. 11, r. 1 (1) (*j*), to serve the English tortfeasor out of the jurisdiction. It was argued that as Henderson, the pauper, was sued merely to found jurisdiction to grant leave to serve E the other defendant out of the jurisdiction, he was a sham defendant and no proper party to the litigation. The Court of Appeal in Ireland, however, accepted the argument of counsel for the plaintiff that notwithstanding Henderson's lack of resources there was a good cause of action against him, that if one applied the test suggested in *Massey* v. *Heynes & Co.*, 21 Q.B.D. 330, the action would have lain against both defendants had each F been within the jurisdiction and thus Henderson was a proper party. After discussing *Ross* v. *Eason & Son Ltd.* [1911] 2 I.R. 459 and saying that in that case the court had been of the opinion that on the evidence there had been no real cause of action against Eason, O'Brien L.C. ended his judgment, at p. 407:

> "If there is a real substantial cause of action against both defendants, G it would be most dangerous to hold that the mere fact that the one within the jurisdiction is a pauper can make any difference."

The other members of the court took the same view, clearly indicating that the ratio of the earlier decisions in the *Eason* cases was that there had really been no cause of action against them when they were joined. The position in *Cooney's* case then before them, however, was different and as H Cherry L.J. said, at p. 409: "Principal and agent usually and properly are sued together in such cases as this."

Rosler v. *Hilbery* [1925] Ch. 250 was also a different case. Russell J.

refused leave in the exercise of his discretion on the basis that a Belgian court was without question the forum conveniens rather than an English court: in any event he doubted whether any good cause of action existed against the English resident Hilbery. The Court of Appeal took the same view.

As Lord du Parcq said in *The Brabo* [1949] A.C. 326, 350:

> ". . . I have no intention of paraphrasing in my own language the apparently simple words 'properly brought.' One is unlikely to find other words which are precisely synonymous with them, and it is useless to substitute for them words which may have a slightly different meaning. I will confine myself to considering what effect ought to be given to these precise words, in their context, with reference to the case before the House."

I will accept that at least the predominant reason for suing Services in England was to provide a ground for applying for leave to pursue litigation in England against the other defendants. In my opinion, however, this consideration is much more relevant, to put it no higher, when the court is considering whether to exercise its discretion under Ord. 11, r. 4 (2), than when it is considering whether an action is properly brought against the English resident and whether the foreign defendants are proper parties—in the present case no question of them being "necessary" parties arises. Even though that was at least the predominant reason for suing Services, I think that on the evidence a substantial, plausible or arguable cause of action has been shown against Services: indeed, subject to the company law point and the argument on the availability to the defendants of a defence based upon the maxim volenti non fit injuria, the contrary was not argued. Further, there is no suggestion of any mala fides in the commencement of this litigation. In my judgment an action brought against an English defendant against whom a substantial, plausible, pleadable or arguable cause of action is shown, use whatever epithet one may wish, whom an injured plaintiff is fully entitled to sue, even though any money judgment which he obtains will or may not be satisfied, cannot be described, in the absence of mala fides, as one which has not been properly brought. How can one realistically criticise the plaintiff for suing Services? On the evidence the former's rights against the latter had been under consideration for some time before the writ was issued. In my opinion, the facts that Services is a pauper and that the motive for suing it in England is to enable the plaintiff to pursue legitimate litigation against those who cannot be so described are irrelevant to the question whether the action was properly brought against Services.

If, therefore, the plaintiff satisfies the first part of the requirement in sub-paragraph (*j*), are the other defendants sought to be served proper parties to this litigation? Although Lord Porter in *The Brabo* made it clear that the tests suggested by Lord Esher M.R. in *Massey* v. *Heynes & Co.*, 21 Q.B.D. 330, and Lindley L.J. in *Witted* v. *Galbraith* [1893] 1 Q.B. 577 are not of universal application, I think that they are convenient and useful ones to apply in many cases and certainly in the present one. Whichever test one does apply to all the facts and circumstances of the instant case, in my opinion it becomes clear that if the action against

Services is properly brought, then the other defendants are proper parties to it.

For my part, therefore, subject to the company law point and to volenti non fit injuria, the plaintiff is able to bring itself within the provisions of R.S.C., Ord. 11, r. 1 (1) (*j*). I will return to consider the question of discretion at the end of this judgment.

I turn now to what has been referred to in the course of the argument as the company law point. The respective contentions of the two sides on this issue are clearly set out by the judge in his judgment and I need not repeat them. It is well established by such authorities as *Salomon* v. *Salomon and Co. Ltd.* [1897] A.C. 22 and the many authorities to like effect to which we were referred that a company is bound, in a matter which is intra vires and not fraudulent, by the unanimous agreement of its members or by an ordinary resolution of a majority of its members. However, I do not think that this line of authority establishes anything more than that a company is bound by the legal results of a transaction so entered into: that is to say, for instance, by the terms of contract which is so approved; or that neither it nor for that matter its liquidator can challenge the legal consequences, such as a transfer of title, of a transaction to which its members have agreed to the extent that I have mentioned.

This, however, is very different from saying that where all the acts of the directors of a company, for instance, Services, have been carried out by them as nominees for, at the behest and with the knowledge of all the members of the company, namely, the joint venturers, then forever the company as a separate legal entity is precluded from complaining of the quality of those acts in the absence of fraud or unless they were ultra vires. If we assume for the purposes of this argument that the directors of the plaintiff did commit breaches of the duty of care that they owed that company, as a result of which it suffered damage, then I agree with the submission made by Mr. Chadwick on behalf of the plaintiff that the company thereby acquired a cause of action against those directors in negligence. The fact that all the members of the company knew of the acts constituting such breaches, and indeed knew that those acts were in breach of that duty, does not of itself in my opinion prevent them from constituting the tort of negligence against the company nor by itself release the directors from liability for it. Of course, in the circumstances of the present case, whilst the joint venturers retained effective control of the company they would be extremely unlikely to complain of the negligence of their nominees. But such restraint on their part could not and did not in my opinion amount to any release by the company of the cause of action which ex hypothesi had become vested in it against its directors. *Salomon's* case and the subsequent authorities make it clear that a limited company is a person separate and distinct from its members, even though a majority of the latter have the power to control its activities so long as it is not put into liquidation and whilst they remain members and a majority. Once, however, the joint venturers ceased to be able to call the tune, either because the company went into liquidation or indeed, though it is not this case, because others took over their interests as members of the company, then I can see no legal reason why the liquidator

A or the company itself could not sue in respect of the cause of action still vested in it. I agree with counsel's submission that that cause of action was an asset of the company which could not be gratuitously released in the absence of a substantive object in its memorandum of association unless the two conditions stated by Eve J. in his judgment in *In re Lee, Behrens and Co. Ltd.* [1932] 2 Ch. 46 were satisfied, namely: (i) was the release reasonably incidental to the carrying on of the com-
B pany's business and (ii) was it made bona fide for the benefit and to promote the prosperity of the company? That a shareholder knows that a director has been negligent and yet does nothing about it, or that an act is done by a director with his approval which is later shown to have been negligent, does not preclude the company from then suing in respect of it provided that properly authorised and constituted proceedings can be started in respect of it. I need only mention two or three cases to which
C we were referred on this particular point. In *In re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634 two questions arose; first, whether a receiver and manager of a company's property appointed by a debenture holder was neither an "officer" of the company within section 455 of the Companies Act 1948 nor a "manager" within section 333; secondly, whether misfeasance proceedings could be taken in respect of common law
D negligence under section 333. The first question is immaterial for present purposes. On the second it was held that common law negligence did not fall within the scope of section 333, but the Court of Appeal made quite clear that that section was merely procedural creating no new causes of action nor, on the other hand, preventing a company or, for instance, its liquidator from enforcing established causes of action outside the scope of section 333 otherwise as the law permitted.

E The decision in *Pavlides* v. *Jensen* [1956] Ch. 565 was also relied on by the defendants on this point. In my opinion, however, the claim in that case failed solely upon well-known *Foss* v. *Harbottle* principles: (1843) 2 Hare 461.

Finally, although their comments were clearly obiter, I think that in their judgments in *In re Horsley & Weight Ltd.* [1982] Ch. 442 Cumming-
F Bruce and Templeman L.JJ. were certainly not ruling out claims by a company against its directors based on negligence in the corporate circumstances which existed in the instant case. I agree with Cumming-Bruce L.J. that it would surprise me if the law is to be so understood. In so far as the judgment of Templeman L.J. is concerned, I respectfully agree with Peter Gibson J. in our case that the distinction which the former drew between gross and ordinary negligence is not easy to reconcile with the
G comments of Evershed M.R. in *In re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634, 648. Be that as it may, I think the correct interpretation to place upon the latter part of the judgment of Templeman L.J. in *In re Horsley & Weight Ltd.*, which concerned a misfeasance summons under section 333 of the Companies Act 1948 is, first, that he took the view that on the facts it was difficult to say that the directors had been guilty of
H negligence; secondly, that it was impossible to hold them guilty of gross negligence on that summons because the allegation had never clearly been made, the directors had not even been so accused by the liquidator and did not give evidence at the hearing of the summons. However, and

thirdly, that had it been otherwise proper to find the directors guilty of gross negligence Templeman L.J. was not satisfied that they could excuse themselves because they held all the issued shares in the company and as shareholders had ratified their own gross negligence as directors. I then add that if as a matter of law they could not have ratified their own gross negligence, the position can be no different if one removes " the opprobrious epithet."

For the reasons I have given, I do not think that what has been described as the company law point does provide the defendants herein with such a defence to the plaintiff's claims that it can be said that these are bound to fail. Consequently it cannot be said on this ground either that the action was not properly brought against Services or that the other defendants are not proper parties to it.

Similarly in so far as the like argument based on the principle of volenti non fit injuria is concerned, I think that there are a number of reasons why it cannot be said that the plaintiff is bound to fail in these proceedings against the defendants.

First, I stress as did counsel that knowledge alone is not enough: the maxim is volenti non fit injuria not scienti. Secondly, as is pointed out in *Salmond & Heuston on Torts*, 18th ed. (1981), p. 469, the traditional form of the question, namely, did the plaintiff assume the risk, tends to disguise the fact that the burden of proving this defence lies on a defendant. Thirdly, subject to the ultimate question of discretion, it is only if one can say that the defence of volenti is bound to succeed in the circumstances of the present case as we so far know them that it follows that either the action was not properly brought against Services, or that one or more of the proposed foreign defendants are not proper parties thereto, as the case may be, and thus the application to serve out of the jurisdiction cannot succeed to the extent that it is based upon R.S.C., Ord. 11, r. 1 (1) (*j*).

If, therefore, one postulates for the purpose of this argument that Services were negligent in preparing the relevant information, advice and recommendation for the plaintiff, that the directors of both companies knew this and that each were the nominees of the joint ventures, the question which has to be asked and answered is whether the only inference to be drawn from all the facts and circumstances of the case is that it was a term of the relationship between the plaintiff and Services that the risk of injury to the former by any misconduct of the latter was required by the latter to be accepted by the plaintiff with no right of recourse against Services and that this risk, without any right of recourse, was in fact accepted by the plaintiff. My answer is that that inference cannot be drawn, let alone is it the only possible inference.

Alternatively, if one considers the plaintiff's claim against its own directors, for the principles embodied in the maxim to provide the latter with a defence one has to postulate a consent to assume the risk being given by the very people who ex hypothesi are committing the material negligence. I confess I find this fanciful in the extreme and indeed, although Mr. Chadwick did not so contend, I doubt whether the concept of volenti non fit injuria has any reality in the particular circumstances of this litigation.

A Finally, the relevant pleas in the statement of claim are that the various defendants "knew *or ought to have known*" (my emphasis) this or that. If in the ultimate event the plaintiff fails on the first part of these pleas but succeeds on the second, no question of volenti can arise and I for my part am not prepared to speculate about the possibility canvassed in argument before us and the court below by Mr. Bateson for the French interests, that all the defendants apart from Services might serve defences B admitting actual knowledge of all matters complained of against them and pleading volenti. For reasons which it is unnecessary to elaborate, I think that such a course is most unlikely.

I turn finally to the question of discretion. I remind myself that foreigners resident outside the jurisdiction ought only to be impleaded in litigation within our jurisdiction in clear cases. I also remind myself of C the limited circumstances in which this court is entitled to interfere with the exercise by a judge of a discretion in cases of this nature. However, with all respect to Peter Gibson J. I think that it is apparent from his judgment, and indeed when pressed Mr. Nicholls on behalf of the Japanese interests was inclined to accept, that the former failed to take into account when exercising his discretion that the underlying agreements between the joint venturers setting up the plaintiff and Services included provisions D for arbitration in London. I think that in this he erred and that this was a matter which he ought to have taken into account.

On a related point, I think with respect that the judge was wrong in stating as a fact, which he did take into account, that this action has very little indeed to do with this country. As is clear from the recital of the facts in the judgment of Lawton L.J., at the beginning the joint venturers E intended that the plaintiff should carry on business in London. It was merely in an attempt to reduce the incidence of United Kingdom taxation upon their operations that they incorporated Services to act as their agents in this country. The plaintiff itself so far as we know, had no office nor office staff; all that it did, apart from hold board meetings and take decisions at them, it did in London by and through Services. Differing from Lawton L.J., as I have said, I take the view that the torts alleged F against Services and its directors were largely committed by it and them within the jurisdiction. Clearly this litigation ought to be conducted in its entirety in one forum. When I ask myself whether this should be Japan, I find France and the state of Delaware coming forward as equal contenders with no more real connection with the events sought to be litigated than that these are the jurisdictions within which the international joint G venturers were respectively incorporated. I think that this action does have a substantial connection with this country. In all the circumstances I do not think that one can justly criticise the liquidator of the plaintiff for suing and serving Services within the jurisdiction principally or solely to seek leave to serve the other defendants out of the jurisdiction. In my judgment, with the great majority of a mass of the relevant documents H being physically in London, in all the circumstances the latter is the most convenient and likely to be the most economical forum for these matters to be litigated. Thus I reach the conclusion that this case is a proper one for service out of the jurisdiction.

For the reasons I have given, whilst differing both regretfully and respectfully from Lawton and Dillon L.JJ., I would allow this appeal.

DILLON L.J. The plaintiff has to establish that its causes of action against the foreign defendants fall within one or other of the sub-paragraphs of R.S.C., Ord. 11, r. 1, and it has further to establish, under Ord. 11, r. 4 (2) that the case is a proper one for service out of the jurisdiction under Order 11. The plaintiff submits that the case is within sub-paragraph (*h*) or sub-paragraph (*j*) of Ord. 11, r. 1.

For sub-paragraph (*h*) to apply it has to be shown that the action is founded on a tort or torts committed within the jurisdiction.

The plaintiff is faced, however, with this difficulty that at a very early stage in its existence it was advised by leading tax counsel that it should not carry on business itself within the jurisdiction and its directors should not hold their meetings within the jurisdiction. As a result of that advice, and in accordance with it, Services were incorporated in England to carry on the day to day running of the business under an agency agreement, the members of the former executive committee of the plaintiff resigned from its board and became directors of Services instead, and the directors of the plaintiff held all their relevant board meetings, including the three at which the decisions challenged in this action were taken, outside the jurisdiction.

It is not suggested that Services was a sham or that the corporate veil can be torn aside so as to treat the activities of Services as activities of the plaintiff. In the circumstances of this case, that, as it seems to me, is fatal to the attempt to bring this case within sub-head (*h*) as against the 5th to 13th defendants. Where the tort relied on is the tort of negligence the right approach, as Lord Pearson stated in *Distillers Co. (Biochemicals) Ltd.* v. *Thompson* [1971] A.C. 458, 468, is to look back over the series of events constituting the tort and ask the question where in substance did this cause of action arise? To substantially the same effect, the question as put by this court in *Castree* v. *E. R. Squibb & Sons Ltd.* [1980] 1 W.L.R. 1248 by Ackner L.J. at p. 1252 is "where was the wrongful act, from which the damage flows, in fact done?" So far as the 5th to 13th defendants are concerned, all their allegedly wrongful acts were done abroad and the cause of action against each of them substantially arose abroad, in New York or Paris where the directors met or in the United States of America, France or Japan where the joint venturers (that is to say, the 5th or 6th, 9th and 12th defendants) reside. Therefore the attempt to rely on sub-paragraph (*h*) must fail.

As for sub-paragraph (*j*), the plaintiff has duly served the proceedings on Services within the jurisdiction. To be within (*j*), therefore, the plaintiff has to show first that the action has been "properly brought" against Services and secondly that the 5th to 13th defendants are "proper" parties, although admittedly not necessary parties, to that action against Services. The plaintiff has also to satisfy the court, as I have mentioned, that the case is a proper one for service outside the jurisdiction. This latter point is a matter primarily for the discretion of the judge at first instance.

It is well established that an action is not properly brought against a

A defendant within the jurisdiction if that defendant has been made a party to the action solely in order to found an application under what is now sub-paragraph (*j*) of R.S.C., Ord. 11, r. 1, to serve the proceedings out of the jurisdiction on foreigners who could not otherwise be sued in the courts of this country. The most common instances are where the plaintiff has as a matter of law or on the undisputed facts no valid claim at all against the defendant within the jurisdiction, as in *The Brabo* [1949] A.C. 326 B and *Witted* v. *Galbraith* [1893] 1 Q.B. 577. But the decisions of the Court of Appeal in Ireland in the *Eason* cases, *Ross* v. *Eason & Son Ltd.* [1911] 2 I.R. 459 and *Sharples* v. *Eason & Son* [1911] 2 I.R. 436 show, as I understand those cases, that even if the plaintiff technically has a cause of action against a defendant within the jurisdiction in circumstances in which the probably successful defence of that defendant depends C on facts which would have to be proved by that defendant at the trial, yet the action is not to be regarded as properly brought against the defendant within the jurisdiction for the purposes of Order 11 if the true inference from all the facts is that the sole reason for suing the defendant within the jurisdiction is to found an application under what is now sub-paragraph (*j*) of Ord. 11, r. 1, to join foreign defendants in the action: see the judgment of the Lord Chancellor of Ireland Sir Samuel Walker in D *Ross* v. *Eason & Son Ltd.* [1911] 2 I.R. 459, 463.

In the present case there is no doubt that if Services was a solvent company this action would have been properly brought against it. The difficulty is that Services is in compulsory liquidation. Such assets as it has will be entirely exhausted in meeting the costs and expenses of liquidation, including its own costs of defending this action. It is therefore frankly E admitted that the plaintiff, which is itself insolvent and brings these proceedings by its English liquidator, would not for a moment have contemplated bringing such an action as this against Services if there had been no other potential defendants to this action from whom substantial recovery might be made.

In *Cooney* v. *Wilson* [1913] 2 I.R. 402 where a libel action was sought to be brought against the first defendant, the author of the libel who was F not within the jurisdiction of the Irish court, as being a proper party to an action properly brought against the second defendant, a bill poster who had disseminated the libel in Ireland and was resident in Ireland, it was held that the action was " properly brought " against the second defendant in Ireland, notwithstanding that the second defendant was a pauper. O'Brien L.C., the then Lord Chancellor of Ireland, said, at p. 407, that if G there was a real substantial cause of action against both defendants it would be most dangerous to hold that the mere fact that the one within the jurisdiction is a pauper can make any difference. Holmes L.J. referred to the assertion that the Irish defendant was too poor to pay damages, and expressed the view that that was no reason for holding that the plaintiff was not justified in suing him for what was prima facie a most serious H libel, and for joining with him another person equally responsible. Cherry L.J. expressed a view similar to that of Holmes L.J. It is not clear whether it was a factor in the minds of the court that the plaintiff might reasonably have wanted to sue the second defendant in Ireland despite the latter's

poverty, as the most obvious way of clearing the plaintiff's name in Ireland from a very grave libel. Unless, however, the court did have some such factor in mind, I find it difficult to support *Cooney's* case. Whether an action is properly brought against a particular defendant within the meaning of sub-head (*j*) must surely depend on the substance of the matter in the light of all the circumstances, and not on the mere form of the pleading and whether there is technically a cause of action.

It is suggested that, by the time the writ was issued, there was a fresh factor which justified the plaintiff in suing Services in this action, in that it had been appreciated by the liquidator and his advisers that Services might, if sued, bring third party proceedings or serve contribution notices against the 5th to 13th defendants or some of them. I cannot think that this can assist the plaintiff under sub-heading (*j*) because the argument is circular: it comes down to this that the action is properly brought against Services under sub-heading (*j*) so as to enable the foreigners to be made defendants because Services would wish to make claims against the foreigners for which, if they are not made defendants, Services would itself require leave under Order 11.

Until December 1979 or thereabouts, the 5th defendant, Phillips Petroleum Co., was registered as an overseas company under Part X of the Companies Act 1948. It was thus unnecessary at that stage for the plaintiff to make Services a defendant in order to found jurisdiction against the 5th defendant or any of the other foreign defendants. The evidence shows, however, that from the outset it had been contemplated by the liquidator and advisers of the plaintiff that Services would be a defendant in the proposed action.

By the time the writ came to be issued in April 1980, the 5th defendant had been deregistered, and I have no doubt that the judge was right in his conclusion that by the time the writ was issued the predominant reason why Services was joined as a defendant was not to recover damages from Services but to enable the foreign defendants to be joined in one action in England. The attendance note of Mr. Hodge, the assistant to the liquidator of the plaintiff, of a meeting with the liquidator of Services on April 21, 1980, four days before the issue of the writ, contains the following paragraph:

> "Basically it was necessary to issue a writ for negligence against Mr. Sauer and Services and subsequently to join the directors of Multinational and its shareholders as proper parties to the action and obtain leave to serve a writ outside the jurisdiction. Whilst it was clear that there was no great profit in pursuing litigation against Services for its own sake it was necessary to go this route and sue Services otherwise it would not be possible to join the directors and shareholders and it was from the latter that one expected to make any substantial recoveries."

The reference to Mr. Sauer, the second defendant, does not matter as he has not been served and is now out of the jurisdiction. The very experienced solicitors for the plaintiff would be bound to have had Order 11 very much in mind. Nevertheless, it does not follow, in my

judgment, that the joining of Services as a defendant in the action was not bona fide or that the action has not been properly brought against Services in this country.

I lay aside, since it has not been relied on in any of the affidavits filed on behalf of the plaintiff, the procedural convenience of being able to obtain discovery against Services in this action, instead of having to bring the equivalent of a bill of discovery against Services, or to claim against Services in separate proceedings to produce all documents which came into its possession as a former agent of the plaintiff.

Bearing in mind, however, how closely Services was involved in all the matters of which complaint is made in the action and bearing in mind the evidence as to the preparation of the plaintiff's claims, I conclude that this action has been brought properly and in good faith against Services. There is a genuine desire to establish the claim against Services.

It is then necessary to consider whether the 5th to 13th defendants are proper parties to the action. By analogy to *The Brabo* [1949] A.C. 326 they cannot be proper parties who should be hailed before the English court although they owe no allegiance here, if they have a good defence in law to the plaintiff's claim on facts which are not in dispute. In my judgment they have such a defence.

The 5th to 13th defendants were the only shareholders in and the only directors of the plaintiff when the three board meetings of the plaintiff were held, two in New York and one in Paris, on May 23, 1974, October 8, 9, 1974, and January 28, 1975, at which the decisions were made, allegedly negligently, to commit the plaintiff to contracts and arrangements for the building, purchase, or chartering on long term time charter of ships, carriers of liquid petroleum gas or other gases. The term "joint venturers" is, as I have mentioned used in the statement of claim to mean the 5th or 6th, 9th and 12th defendants and they at all times held all the issued shares in the plaintiff.

The case against the 5th to 13th defendants is summarised in paragraph 11 of the statement of claim:

> "the business and affairs of Multinational were, at all times material to this action, under the control of the joint venturers. Further (as is pleaded more particularly in paragraph 32 below) the Multinational directors acted at all material times in all relevant matters in accordance with the directions and at the behest of the joint venturers; and, accordingly, the powers of directing and managing the affairs of Multinational in relation to the matters hereinafter complained of were vested in and were exercised by the joint venturers. In the alternative, such powers were vested in and exercised by the Multinational directors as the employees and nominees of the joint venturers and the joint venturers are liable to answer for the acts or defaults of Multinational directors in the direction and management of the affairs of Multinational."

The plaintiff is a Liberian company, but such evidence of Liberian law as is before us indicates that Liberian company law is the same as English

and American company law, and for the purposes of this appeal all parties have been content to treat it as the same as English law.

Certain fundamental facts are not in dispute, viz.: 1. It is not alleged and could not be alleged that the making of any of the contracts or arrangements authorised at the three board meetings of which complaint is made was ultra vires the plaintiff or in any other way illegal. On the contrary they were well in line with the plaintiff's main objects. 2. It is not alleged that the plaintiff was insolvent when the board meetings were held. On the contrary on the figures pleaded in the statement of claim the plaintiff traded profitably in the calendar years 1973 and 1974 and the forecast, available to the joint venturers and directors, although in the event not borne out and much criticised in the statement of claim, predicted that the plaintiff would continue to make profits in 1975. It is said that the plaintiff suffered a shortage of working capital from and after the end of 1975. 3. It is not alleged that the joint venturers or the directors of the plaintiff acted fraudulently or in bad faith in any way or were guilty of fraudulent trading. What is alleged is that they all acted negligently in that they made five speculative decisions in relation to the ships, when they knew or ought to have known that they did not have sufficient information to make sensible business decisions. The decisions which they took in good faith went, it is said, outside the range of reasonable commercial judgment.

The heart of the matter is therefore that certain commercial decisions which were not ultra vires the plaintiff were made honestly, not merely by the directors but by all the shareholders of the plaintiff at a time when the plaintiff was solvent. I do not see how there can be any complaint of that.

An individual trader who is solvent is free to make stupid, but honest commercial decisions in the conduct of his own business. He owes no duty of care to future creditors. The same applies to a partnership of individuals.

A company, as it seems to me, likewise owes no duty of care to future creditors. The directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future, or to individual shareholders. The duties owed by a director include a duty of care, as was recognised by Romer J. in *In re City Equitable Fire Insurance Co. Ltd.* [1925] Ch. 407, 426–429, though as he pointed out the nature and extent of the duty may depend on the nature of the business of the company and on the particular knowledge and experience of the individual director.

The shareholders, however, owe no such duty to the company. Indeed, so long as the company is solvent the shareholders are in substance the company. The most commonly cited passage as to the position of the shareholders is in the decision of the Privy Council in *North-West Transportation Co. Ltd.* v. *Beatty* (1887) 12 App.Cas. 589 delivered by Sir Richard Baggallay who said, at p. 593:

> "The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in

A the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, *and consequently upon the company*, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different from, the general or particular interests of
B the company." (My emphasis).

He went on to contrast the position of a director who owed a fiduciary duty to the company. Thus in *Pavlides* v. *Jensen* [1956] 1 Ch. 565, where the directors were alleged to have been guilty of negligence in effecting a sale of a valuable asset of the company at a price greatly below its market value, but there was no allegation of fraud, Danckwerts J. was,
C in my judgment, right when he said, at p. 576, that it was open to the company on the resolution of the majority of the shareholders to sell the asset at a price decided by the company in the way the price had been decided. It was also open to the company by a vote of the majority to decide that if the directors by their negligence or error of judgment had sold the company's mine at an undervalue proceedings should not be
D taken by the company against them. Therefore, on a preliminary issue it was held that a minority shareholder's action, seeking to complain of the negligent sale, was not maintainable and it was dismissed.

Mr. Chadwick has submitted that the real analysis of *Pavlides* v. *Jensen* is that the plaintiff's claim was dismissed because it was premature. He ought to have waited until the company had purportedly carried a resolution to absolve the directors and ought then to have challenged that
E resolution as ultra vires or not passed bona fide in the interests of the company as a whole. But there is no suggestion of that in the judgment of Danckwerts J.

Mr. Chadwick has put before us some very interesting submissions on what the shareholders ought to have in mind if they seek to release a director from liability to the company for breach of duty, and the release
F is not to be ultra vires the company, and as to the extent of knowledge of the facts which the shareholders must have before they can validly release a director from such liability, i.e. they must know that there is said to have been something wrong with what the director did. It seems to me, however, that in the present case we never get to that point. The case set up is that all the shareholders, the joint venturers, made the impugned decisions at the outset. In so far as the decisions were made at the three meetings
G in New York and Paris referred to in the statement of claim, it matters not that these meetings were called board meetings, rather than general meetings of the plaintiff: see *In re Express Engineering Works Ltd.* [1920] 1 Ch. 466. It would equally matter not if the decisions were made by all the shareholders informally and without any meeting at all: *Parker and Cooper Ltd.* v. *Reading* [1926] Ch. 975 and *In re Duomatic Ltd.* [1969]
H 2 Ch. 365.

The well known passage in the speech of Lord Davey in *Salomon* v. *A. Salomon and Co. Ltd.* [1897] A.C. 22, 57 that the company is bound in a matter intra vires by the unanimous agreement of its members

is, in my judgment, apt to cover the present case whether or not Lord Davey had circumstances such as the present case in mind.

If the company is bound by what was done when it was a going concern, then the liquidator is in no better position. He cannot sue the members because they owed no duty to the company as a separate entity and he cannot sue the directors because the decisions which he seeks to impugn were made by, and with the full assent of, the members.

To get out of this difficulty, Mr. Chadwick points to certain dicta which he admits were obiter, of Cumming-Bruce and Templeman L.JJ., in *In re Horsley & Weight Ltd.* [1982] Ch. 442. In that case a company which at the material time had three directors, two of whom held all the issued shares of the company, had with the approval of all three expended a substantial sum of the company's money in buying a pension annuity for the director who had no shares. Subsequently the company went into compulsory liquidation. The liquidator then made claims against the recipient of the pension. The primary claim was that the purchase of the pension for a director was in all the circumstances ultra vires the company. That claim was rejected by the court after examination of a number of decisions at first instance to which I need not refer. The liquidator claimed in the alternative that the taking out of the pension for a director was a misfeasance on the part of the directors which was not cured or validated by the fact that two of the directors were the only shareholders of the company. Buckley L.J. took the view that the assent to the transaction of the two directors who held all the shares made it binding on the company and unassailable by the liquidator. He cited the passage to which I have just referred in the speech of Lord Davey, and also *In re Express Engineering Works Ltd.* [1920] 1 Ch. 466 and *Parker and Cooper Ltd.* v. *Reading* [1926] Ch. 975.

Cumming-Bruce L.J. said that the ratification by the shareholders was effective unless the decision of the directors was proved to have been misfeasance on their part. He commented that the evidence fell far short of proof that the directors should at the time have appreciated that the payment for the pension was likely to cause loss to creditors. It was therefore unnecessary to decide whether, had misfeasance by the directors been proved, it was open to them in their capacity as shareholders to ratify their own negligence so as to prejudice the claim of creditors, but he said he would be surprised if it was open to them.

Templeman L.J., while agreeing that the claims of the liquidator failed, held that even in the absence of fraud there could have been negligence on the part of the directors if the company could not afford to spend the relevant sum on the grant of a pension having regard to problems of cash flow and profitability, and there could have been gross negligence amounting to misfeasance if—as I understood what he said—the company was doubtfully solvent and so the expenditure threatened the continued existence of the company. On the facts, neither negligence nor gross negligence was made out but Templeman L.J. was not satisfied that directors who were guilty of such misfeasance, even without any fraudulent intent, could excuse themselves because two of them held all the issued shares in the company.

A Several points arise in relation to these observations of Templeman L.J. (and I take it that in his briefer comments Cumming-Bruce L.J. meant much the same as Templeman L.J.).

In the first place there is in the statement of claim in the present case no allegation of misfeasance against the directors of the plaintiff.

In the second place, Templeman L.J. draws a distinction between negligence and what he calls "gross negligence amounting to misB feasance." It is only if misfeasance is alleged and proved that he has doubts whether the fact that the delinquent directors are also the shareholders can absolve them. It is clear from the judgment of Sir Raymond Evershed M.R. in *In re B. Johnson & Co. (Builders) Ltd.* [1955] Ch. 634 in which Jenkins L.J. concurred that a claim based exclusively on common law negligence, an ordinary claim for damages for negligence, is not a C claim for misfeasance: see p. 648. That is of course in line with what Templeman L.J. said. It is more difficult to discern what he meant by "gross negligence amounting to misfeasance." Indeed, in *In re B. Johnson & Co. (Builders) Ltd.*, Sir Raymond Evershed M.R. commented that an ordinary claim for negligence is not brought into the field of misfeasance by the mere expedient of adding epithets to it such as "gross." The D distinction between mere negligence—failure to satisfy a director's duty of care to his company—on the one hand and misfeasance or "gross negligence amounting to misfeasance" on the other hand, must, I apprehend, lie in the state of mind of the director. It seems to me that what Templeman L.J. had in mind when he used the phrase "gross negligence amounting to misfeasance" was what is often called "recklessness." E Recklessness, however, which is conduct nearly approaching fraud, is not alleged against any of the defendants in the present case.

In the third place, Templeman L.J.'s comments are concerned with a situation where directors guilty of misfeasance are themselves or include all the shareholders. In the present case, the shareholders in the plaintiff are the joint venturers who are not directors and owe no duty to the F company. For my part, therefore, I find nothing in the dicta of Cumming-Bruce and Templeman L.JJ. in *In re Horsley & Weight Ltd.* [1982] Ch. 442 to assist Mr. Chadwick, and I conclude that the plaintiff has failed to make out that the 5th to 13th defendants are proper parties within the meaning of sub-heading (*j*) to this action.

It remains to consider the question of discretion. Had I taken the G same view as the judge on the company law point and on the question whether this action was properly brought against Services, I would have agreed with his exercise of his discretion against the granting of leave to serve the foreign defendants outside the jurisdiction, and indeed I would have had no valid ground for interfering with his exercise of his discretion. Taking a different view from him on the question whether the H action was properly brought against Services, I would still exercise discretion against granting leave to serve the foreign defendants outside the jurisdiction.

The factors which favour granting leave under Order 11 in order that the action may be tried here as between all parties are, as I see them, (1) that by the arrangements with the joint venturers, Services, which is at the very heart of the matters in issue, carried on its business in London, with the result that, as we are told, an enormous number of documents relevant, or possibly relevant, to the matters in issue are in London; (2) that the liquidator has been properly constituted to represent the plaintiff in this country, but he has as yet no locus standi to act for the plaintiff in any other jurisdiction; (3) that Liberian company law is the same as English or American company law and so it would be more convenient to decide the issues of law involved in this action in England than in, for instance, France or Japan; and (4) that the agreements made by the joint venturers to incorporate the plaintiff and Services provided for the arbitration of disputes in London.

As against these factors, however, it has been often emphasised that the courts should exercise great care before they subject to the jurisdiction of these courts a foreigner who owes no allegiance here. This is, in part at least, for reasons of the comity of nations and to avoid invasion of the sovereignty of the state within which leave to serve is granted. In so far as the reluctance of the courts to bring foreigners before the English courts is also due to a recognition of the inconvenience to the foreigner that would be involved, it has been submitted that the inconvenience is greatly reduced by modern methods of communication. But that argument cuts both ways, in that modern methods of communication would make it much less difficult for the plaintiff to bring this action in any other jurisdiction, e.g. in that part of the United States where the 5th defendant is resident. I cannot assume that it is impossible for the creditors of the plaintiff to achieve effective representation of the plaintiff in other jurisdictions.

In the next place, even if it is putting it too high to say, as I do, that the company law point provides a complete answer to all the plaintiff's claims and has the effect that the foreign defendants would not be proper parties to be joined in this action, the position must be that to succeed the plaintiff must break new ground in company law. The foreign defendants would therefore be faced with an action in this country involving novel propositions of law as well as lengthy and expensive investigation of the facts. It seems probable that all the principal witnesses, other than accountants investigating ex post facto, would have to come from abroad and would have to remain in this country for many weeks.

The wrongs alleged against the 5th to 13th defendants in the statement of claim were not committed here and in so far as this action is, in substance, a dispute between the creditors of the plaintiff on the one hand and the shareholders and directors of the plaintiff on the other hand, it is, on the information before us, a dispute between foreigners over the affairs of a foreign company. These factors outweigh, in my judgment, those which would favour granting leave to serve outside the jurisdiction.

I agree that, as such full argument has taken place, the plaintiff should be granted leave to appeal to this court but I would dismiss the appeal.

Appeal dismissed with costs.
Leave to appeal refused.

April 4. The Appeal Committee of the House of Lords (Lord Diplock, Lord Bridge of Harwich and Lord Brandon of Oakbrook) dismissed a petition by the plaintiff for leave to appeal.

Solicitors: *Stephenson Harwood; Freshfields; Jaques & Lewis; Linklaters & Paines.*

L. G. S.

DAVENPORT (INSPECTOR OF TAXES) *v.* CHILVER

1983 March 7, 8; April 14 — Nourse J.

Revenue—Capital gains tax—Disposal of assets—Compensation for confiscated property—Statutory order conferring right to compensation—Payments in respect of property owned by taxpayer in own right and as beneficiary of deceased mother's estate—Whether payments in 1973 *"derived from assets" confiscated in* 1940*—Whether capital sums received as compensation for loss of assets—Whether amounting to asset acquired otherwise than by way of bargain made at arm's length—Finance Act* 1965 (*c.* 25), *ss.* 19, 22 (1) (3) (4) (*a*)

The taxpayer, who was born in the United Kingdom in 1920, had prior to 1940, with her parents and her sister, owned property in Latvia. In 1939 her father died intestate and according to the Latvian law then in force his estate passed in equal shares to his widow and two daughters. In 1940 all private property in the Baltic states was confiscated. That included the taxpayer's family property, the bulk of which was then owned by her mother. In 1966 the taxpayer's mother who had been domiciled in England and Wales, died and under the terms of her will left any compensation due to her in respect of the confiscation of her Latvian property to her two daughters in equal shares. In 1967 an agreement was reached between the governments of the United Kingdom and the U.S.S.R. concerning long-standing disputes as to various territories ceded to the U.S.S.R. between 1940 and 1951. By the Foreign Compensation (Union of Soviet Socialist Republics) Order 1969 funds were made available to the Foreign Compensation Commission so that payment could be made to all applicants who could establish a claim to compensation under the Order. The taxpayer and her sister made claims in respect of the Latvian property on behalf of the estates of their parents and in their own rights. The taxpayer established claims of £60,332 in respect of which in 1973 she received