

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

**Phillips and another (suing as administrators of the estate of
Christo Michailidis) (Appellants) v Symes and others
(Respondents) and others**

Appellate Committee

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Mance

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HOUSE OF LORDS

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(Appellants) v Symes and others (Respondents) and others**

[2008] UKHL 1

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in full agreement with it and would, for the reasons which he gives, allow the appeal and make the order which he proposes.

LORD RODGER OF EARLSFERRY

My Lords,

2. I have the advantage of considering the speech of my noble and learned friend, Lord Brown of Eaton-under-Heywood, in draft. I agree with it and, for the reasons he gives, I too would allow the appeal and make the order which he proposes.

BARONESS HALE OF RICHMOND

My Lords,

3. I agree that this appeal should be allowed, for the reasons given by my noble and learned friend, Lord Brown of Eaton-under-Heywood. It is not strictly necessary, therefore, to express a view on the issues discussed by my noble and learned friend,

Lord Mance, in paragraphs 42 to 53 of his opinion. But they were fully canvassed in argument before us. I feel it only fair, therefore, to confess that I share Lord Mance's views upon those issues. In my view the English court is seised of proceedings for the purpose of the Lugano Convention when the claim form is issued or when the court first makes an order against the defendant in connection with them, whichever is the earlier.

4. The particular facts of this case happen to provide a good illustration of the artificiality of a different solution. These proceedings were a by-product of the estate's proceedings against Mr Symes, in which Mrs Nussberger had already been involved as a witness. They were effectively begun by a worldwide freezing order against her of which she rapidly became aware. In the county courts, the general rule has always been that the court itself effects service of the claim form, a rule which now applies throughout the civil justice system. In this particular case, the court itself accepted the documents for service outside the jurisdiction in accordance with the Hague Convention. It is unsatisfactory if a claimant who has in fact begun his proceedings first in a court of competent jurisdiction can be excluded from that jurisdiction as a result of the vagaries of a service procedure over which he has no control. There is no compelling reason for English law to adopt a service rule, given the lack of a concept of *lis pendens*. All of this adds up to a powerful case for holding that the English court was seised of these proceedings long before 19 January 2005. But, for the reasons Lord Brown has explained, it was certainly seised of them no later than that.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

5. The appellants are the administrators of the estate of Christo Michailidis who before his death was in partnership with Robin James Symes (now bankrupt) dealing in antiquities. Following Mr Michailidis' death the appellants took proceedings against Mr Symes and various court orders were made. On 14 February 2003, in breach of those orders, Mr Symes sold a rare statue (an inlaid alabaster statue of the Egyptian Pharaoh, Akhenaten) to the second respondent for US\$3m, no part of which has been paid. The second respondent is a Swiss company, Galerie Nefer AG ("Nefer") whose sole proprietor and sole officer is the first respondent, Frieda Nussberger ("Mrs Nussberger"), herself of Swiss nationality. Nefer seeks to justify the non-payment of the statue's purchase price by reference to various claims exceeding US\$3m which Mrs Nussberger asserts against the appellants and seeks to set off.

6. By the present proceedings, begun by claim form issued out of the High Court on 16 December 2004 (the English proceedings), the appellants claim US\$3m against the respondents and in the alternative certain lesser sums or damages against four further defendants, including Mr Symes and his joint trustees in bankruptcy, whom I shall call simply “the English defendants.”

7. Subsequently, on 3 February 2005, in circumstances which I must shortly recount in some detail, the respondents themselves issued proceedings against the appellants in Switzerland (the Swiss proceedings), claiming negative declaratory relief in respect of exactly the same facts as those the subject of the English proceedings.

8. The question for the House is whether, in the light of the Swiss proceedings, the English court must itself now decline jurisdiction over the English proceedings and impose a stay. This in turn depends upon which court was first seised of proceedings within the meaning of article 21 of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 (“the Lugano Convention”) scheduled to the Civil Jurisdiction and Judgments Act 1982 (“the 1982 Act”). Article 21 provides:

“Where proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting states, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.”

9. It is common ground that the English proceedings (at any rate as between the appellants and the respondents) and the Swiss proceedings (at least in so far as they seek declarations relating to the Akhenaten statue and the sale and proceeds of sale thereof) involve “the same cause of action” and are “between the same parties.”

10. The European Court of Justice held in *Zelger v Salinitri* [1984] ECR 2397 that a court’s obligation under article 21 to decline jurisdiction in favour of another court only arises if it is established that the parallel proceedings have been “definitively brought before a court in another state” (para 14 of the Court’s judgment) and that it is for each state to determine when this is:

“...the Court ‘first seised’ is the one before which the requirements for proceedings to become definitively pending are first fulfilled, such

requirements to be determined in accordance with the national law of each of the courts concerned.” (para 16 of the Court’s judgment)

11. English law has hitherto determined that proceedings become “definitively pending” only when they are served on the defendant—see particularly *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502 (the Court of Appeal decision which first so decided) and *Neste Chemicals SA v DK Line SA (The Sargasso)* [1994] 3 AER 180 (a subsequent Court of Appeal decision holding that there could be no exceptions to the rule). Under Swiss law, however, proceedings are held to be “definitively pending” as soon as they are issued.

12. In this case, therefore, the Swiss court became seised of the Swiss proceedings on 3 February 2005 when the respondents’ claim was issued. Had there already by then been service of the English proceedings upon the respondents such as to make the High Court “the court first seised”? That logically is the first question for your Lordships’ determination.

13. The detailed circumstances of the case as to service are as follows. On 15 December 2004, the day before the English claim form was issued, the appellants sought and obtained from Peter Smith J a worldwide freezing order against the respondents, restraining them from disposing of their assets up to a value of US\$3m. The appellants undertook through counsel to issue a claim form and serve it on the respondents together with particulars of claim and various other documents underlying and including the order itself.

14. On 16 December 2004, as already stated, the Court issued the appellants’ claim form against the respondents and the English defendants. In issuing the form, the staff at the Court Registry of the High Court erroneously stamped it “Not for service out of the jurisdiction”. This was a plain mistake because the claim form had expressly been rendered eligible for service out of the jurisdiction by a statement upon it, verified as true, stating that the High Court had power under the 1982 Act to hear the claim and that no proceedings concerning it were pending in any other relevant country.

15. Mrs Nussberger resides in the canton of Aargau in Switzerland, Nefer’s registered office being in Zurich. The proceedings, therefore, had to be served on them in accordance with the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (Cmmd 3986) (“the Hague Convention”). Articles 2 and 3 of the Hague Convention require each contracting state to designate a “central authority” to effect service of such documents as are forwarded to it with a request in the appropriate form by the “authority or judicial officer competent under the law of the state in which the

documents originate.” The competent judicial officer for English proceedings is the senior master of the Queen’s Bench Division, and the relevant Swiss central authority is, in Mrs Nussberger’s case, the Obergericht of Aargau; in Nefer’s case, the Obergericht of Zurich.

16. On 18 December the appellants filed requests for attachment (akin to freezing orders in England) with the Zurzach Court in Aargau and attachments were duly granted ex parte on 20 December.

17. On 21 December 2004 Mrs Nussberger was served by the authorities in Zurich with the ex parte attachment orders together with Peter Smith J’s order of 15 December and (untranslated) particulars of claim in the English proceedings dated 17 December (a fully detailed claim extending to 22 pages).

18. All the documents required by the order of 15 December 2004 to be served had first to be translated. On 31 December, when this had been done, the appellants’ solicitors presented these documents to the foreign process section of the High Court for service on the respondents. Included in these documents was the claim form, erroneously stamped “Not for service out of the jurisdiction” (and the German translation of the form including the stamp), an error noticed both by the appellants’ solicitors and by the official at the foreign process section who nonetheless accepted the document for service. The senior master then arranged for the documents to be forwarded to the relevant legal authorities in Switzerland for service under the Hague Convention.

19. On 7 January 2005 the proceedings were served on the English defendants.

20. On 19 January 2005, at the end of a hearing in the Zurzach court held to review the Aargau attachment order made on 20 December, the Zurzach judge (deputed by the Aargau Obergericht to effect service on Mrs Nussberger under the Hague Convention) in the presence of the appellants’ solicitors handed her a package of documents for which she signed a receipt. By then, however, unknown to anyone else, the judge or his clerk had in fact inspected the documents, removed from the package the English language claim form because of the words erroneously stamped upon it, and resealed the package without it.

21. On 24 January 2005 Mrs Nussberger and her lawyers learned that the claim form (although not the German translation of it) had been removed from the package of documents served upon her and on 3 February 2005, as already stated, she and Nefer issued their own proceedings against the appellants in the Swiss court.

22. Only on receipt of a letter from the respondents' Swiss lawyers dated 9 February 2005 did the appellants become aware that the claim form had been removed from the package of documents served upon Mrs Nussberger and that the respondents had themselves now commenced proceedings in Zurich.

23. In a Hague Convention certificate dated 11 March 2005 an official of the Obergericht Aargau recorded that all the documents sent to the Zurzach court had been served on Mrs Nussberger except only the claim form, this document not being served because of the stamp it bore.

24. In March 2005 the appellants also learned that no documents had been served on Nefer because of an error on the part of the Swiss Post Office.

25. Having learned of the errors made in serving the respondents and the subsequent issue of Swiss proceedings, the appellants sought orders designed to ensure that the English proceedings had priority over the Swiss proceedings under article 21 of the Lugano Convention. Following a five-day hearing, Peter Smith J on 19 August 2005 gave judgment ([2005] EWHC 1880 (Ch)) allowing the appellants' application, dispensing with service of the claim form upon the respondents pursuant to CPR r.6.9 and declaring that the High Court had become seised of the proceedings as against the respondents on 19 January 2005. Consequential directions were given and orders made to provide for further service of documents including acknowledgment of service forms to enable the action to proceed.

26. On 19 May 2006 the Court of Appeal (Pill, Neuberger and Wilson LJJ) allowed the respondents' appeal, discharged the judge's order, set aside the further service of documents effected pursuant to it, and stayed the proceedings pursuant to article 21 ([2006] 1 WLR 2598). The principal argument had centred upon CPR r.3.10 and CPR r.6.9 which provide as follows:

3.10: "Where there has been an error of procedure such as a failure to comply with a rule or practice direction—

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error."

6.9: "(1) The court may dispense with service of a document."

27. Put shortly, the court held that it would be ineffective (or, if effective, inappropriate) to invoke r.6.9 to enable the English proceedings to enjoy article 21 priority: ineffective, because dispensing with the necessary service of the claim form could not take effect earlier than when the dispensing application was made (or perhaps, indeed, granted) and by then the Swiss proceedings had already obtained article 21 priority; inappropriate, because in any event it would be wrong to apply r.6.9 retrospectively specifically to disturb an already established order of priority. (The court in addition rejected the appellants' contention, pursuant to a respondent's notice, that the English court becomes seised of proceedings under article 21 when the claim is filed at the High Court's foreign process section rather than when thereafter it is actually served upon the defendant abroad.)

28. Before your Lordships the appellants have advanced a series of alternative arguments essentially as follows:

- (i) *Dresser* was wrongly decided and English proceedings should be held "definitively pending" as soon as they are issued;
- (ii) *The Sargasso* was wrongly decided and the *Dresser* rule admits of exceptions, one of which should be that English proceedings are "definitively pending" once the court makes an interlocutory order against the defendant (as here the freezing order against the respondents) on the claimant's undertaking to serve the proceedings;
- (iii) proceedings are "definitively pending" once the claimant delivers the required documents to the foreign process section for service;
- (iv) in a case involving multiple defendants, service on any of them (as here service on the English defendants on 7 January 2005) is sufficient for the English court to be seised of the proceedings against *all* the defendants for the purposes of article 21;
- (v) the court below should have found that the service effected upon the respondents on 19 January 2005 was sufficient to satisfy the *Dresser* rule so as to confer first seisin upon the English court.

As I have already suggested, it is logical to address that final issue first.

29. It is clear that the claim form should have been included amongst the documents served upon the respondents on 19 January 2005. That is provided for by CPR r.7.5 which dictates the period within which the claim form "must be served on the defendant" (six months if it is to be served out of the jurisdiction). It is no less clear, however, that (i) but for the error made by the Swiss judge or his clerk in removing the claim form from the package of documents sent to the Swiss authorities under the Hague Convention specifically for service, it would have been served, (ii) the documents in fact served included both the German translation of the claim form and (served again in English and this time in German translation too) the particulars of claim which set out in altogether greater detail than the claim form itself the nature of

the appellants' case, and (iii) the respondents accordingly suffered no prejudice from the omission of the English language claim form from the package of documents served but rather used the omission as the opportunity to seek to achieve first seisin in Switzerland.

30. In these circumstances essentially two questions fall for your Lordships' consideration: first, is there power in the court by virtue of CPR rr.3.10 and 6.9 to determine that the service of documents actually effected on 19 January 2005 constituted sufficient service for the court then to be seised of the proceedings as definitively pending before it under the *Dresser* rule? Secondly, if so, ought the court in its discretion to exercise that power?

31. I have already set out the relevant rules. It seems to me at least arguable that even without resort to r.6.9 the court could simply order under paragraph (b) of r.3.10 that the respondents are to be regarded as properly served, certainly for the purposes of seisin. The "error of procedure" here was, of course, the omission of the English language claim form from the package of documents served: there was in this regard "a failure to comply with the rule (r.7.5)." But that, says paragraph (a) of r.3.10, "does not invalidate any step taken in the proceedings unless the court so orders". The relevant "step" taken here was service of the proceedings out of the jurisdiction.

32. It seems to me that this was essentially the view taken by the majority of the Court of Appeal (McCowan LJ and Sir John Megaw, Lloyd LJ dissenting) in *Golden Ocean Assurance Ltd v Martin (The Goldean Mariner)* [1990] 2 Lloyd's Rep. 215. Several defendants were there served out of the jurisdiction with copies of the writ, but in each case the wrong copy, addressed not to him but to a different defendant. Another defendant, by an oversight, was served with no writ at all, only a form of acknowledgment of service. The court's procedure at that time was governed by the RSC and the rule in point was O.2. r.1. For present purposes I can see no material differences between that rule and CPR r.3.10. All three members of the court accepted that O.2. r.1 was a most beneficial provision, to be given wide effect. The majority held that service, the step in the proceedings which had plainly been attempted, was to be regarded as valid in the case of all of the above defendants. In the case of the defendants served with the wrong copy writs, Lloyd LJ accepted that the court had a discretion: "The service was grossly defective. But service, or purported service, it remained." Unlike the majority, however, he would not have exercised that discretion in the claimant's favour. As to the defendant served only with an acknowledgment of service, Lloyd LJ thought it "an omission which is so serious that...[i]t cannot be described as a failure to comply with the requirements of the Rules by reason of something left undone....The service of the form of acknowledgment cannot make up for the absence of the writ." The majority thought otherwise. There was, be it noted, no rule at that time akin to r.6.9. For my part I regard the errors and omissions

committed in the process of effecting service there as if anything more, rather than less, serious than the error here (given the documents that *were* served here).

33. The Court of Appeal thought *The Goldean Mariner* “simply not in point” because “there was no question in that case of the retrospective validation of an ineffective attempt to serve the writ operating to affect, let alone to alter, the priority between English and foreign proceedings under an international Convention”. With respect, I cannot accept this reasoning. The question in the *The Goldean Mariner*, just as the question here, is whether the “attempt to serve the writ” was or was not “ineffective”. It was held there to have been, not ineffective, but effective. That was not a “retrospective validation”. Why should service not similarly be declared to have been effective here? The question is purely one for our domestic law, just as the question of when an English court is seised of proceedings is purely one for domestic law (and, indeed, the question of precisely what documents have to be served to achieve effective service out of the jurisdiction under the Hague Convention is purely one for domestic law).

34. As I have said, therefore, it may not be necessary to invoke r.6.9 at all in order to declare the service of documents effected on 19 January 2005 to have been valid and effective. But assume, as both courts below clearly thought, that it is necessary for the court actually to dispense with service of the claim form under r.6.9 before the service in fact effected can be declared valid. Is that within the court’s power? The court below concluded not, on the basis that an order under r.6.9 would by its very nature involve the retrospective validation of what *ex hypothesi* would otherwise fall to be regarded as ineffective service. And this essentially is the argument by which the respondents now seek to uphold the Court of Appeal’s judgment.

35. There are, however, as it seems to me, two complete answers to this argument. The first is this. In making the order pursuant to rule 6.9, Peter Smith J was not thereby declaring valid and effective service which had previously been ineffective; rather he was holding the previous service to have been valid and declaring that it was unnecessary to have served the English language claim form to make it so. It was in this sense that he was dispensing with service. There was no more question here, therefore, than in the *The Goldean Mariner* of “retrospective validation”. The second answer is that even if a dispensing order under r.6.9 was properly to be regarded as retrospectively validating what would otherwise have been ineffective service, in my judgment it would have been within the court’s power to make such an order. True, its effect would then be to alter the jurisdictional precedence under an international Convention. But if, as is uncontested, your Lordships could now overrule *Dresser* (just as the Court of Appeal in *Dresser* itself departed from the ruling at first instance that English courts are seised of proceedings at the date of issue), the question of seisin being purely one for the national court, so too can an English court, applying its own procedural rules to dispense with service of a particular document, make an order

which is effective retrospectively to validate what would otherwise have been an invalid form of service. I do not believe that this conclusion involves any exception to the *Dresser* rule: the rule surely is that the English court is seised of proceedings at the date of effective service, whatever that date may eventually be declared to have been. If, however, it does constitute an exception, so be it: to this limited extent I would if necessary qualify the decision in *The Sargasso*.

36. So much for the court's power to dispense with service under r.6.9. Should the court in its discretion exercise such power? That the court would do so in a purely domestic context is surely clear beyond argument, and this notwithstanding that the exercise of the power would operate to defeat a prospective Limitation Act defence. Is it, however, appropriate to make an order which has the effect of altering the priority of the seisin of proceedings under an international Convention?

37. On any view the power is one to be exercised sparingly and only in the most exceptional circumstances. It is difficult to suppose, for example, that it could ever properly be exercised if there had been no process of service whatever. Consider in this regard article 27(2) of the Lugano Convention:

“A judgment shall not be recognised...(2) where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence.”

There can be no question here but that the respondents were served with “an equivalent document”: they had not only the German translation of the omitted claim form but the detailed particulars of claim (in both English and German) as well.

38. In my judgment the circumstances here were indeed exceptional, the call on the exercise of the court's discretion compelling. As stated, the respondents plainly suffered no prejudice whatever by the failure to serve the original claim form but rather sought to exploit it, to steal a march on the appellants. And the essential faults here were those of the Swiss authorities: of the judge or his clerk at the Zurzach court (however well-intentioned) in mistakenly removing the form from the package of documents for service and the Swiss Post Office in failing to find Nefer's post-box (in each case substantially delaying notification of the problem to the appellants). If, moreover, the respondents are correct in their arguments under articles 21 and 22 of the Lugano Convention that, if the Swiss court here is properly to be regarded as first seised of the proceedings as between the appellants and the respondents, then neither the English court (in respect of the appellants' claim against the English defendants) nor the Swiss court (in respect of the respondents' claim against the appellants) has

even a discretion to stay those respective claims, that would provide yet a further compelling reason for declaring the English court to be first seised of the whole action.

39. In short, the facts of this case could hardly be further from those of *Knauf UK GmbH v British Gypsum Ltd* [2002] 1 WLR 907 which involved a naked attempt to use CPR r.6.8 to subvert the Brussels Convention. I for my part have no doubt that discretion under r.6.9 should (if necessary) be exercised here in the appellants' favour and that the service effected on the respondents on 19 January 2005 should be declared valid and effective. If your Lordships share my view, it follows that none of the other issues needs to be considered. Given, moreover, that a completely new regime has now been put in place both by the EU (see the Jurisdiction and Judgment Regulation No. 44/2001 of 22 December 2000) and by the Lugano Convention states (see the new Lugano Convention signed on 30 October 2007 and expected shortly to be ratified)—whereby the time of seisin is defined autonomously instead of by the member states themselves—it is surely inappropriate to review cases like *Dresser* and *The Sargasso* which will imminently lose all relevance.

40. In the result I would allow this appeal, set aside the judgment of the Court of Appeal, restore paragraphs 1 and 4 of the order of the judge at first instance, and order that the questions of costs in this House be adjourned for the parties to make written submissions within 14 days.

LORD MANCE

My Lords,

41. I have had the benefit of reading in draft the opinion of my noble and learned friend, Lord Brown of Eaton-under-Heywood. For reasons appearing in his opinion, I agree with him that, for the purposes of both English law and the Lugano Convention, effective service of the proceedings out of the jurisdiction was, and falls to be regarded as, made on Mrs Nussberger on 19th January 2005 without any retrospective validation. The English court was thus on any view definitively seised of the proceedings as served on her on that date.

42. I would, for my part, also be prepared to go further and review the decisions of the Court of Appeal in *Dresser v. Falcongate Freight Management Ltd.* [1992] QB 502 and *Neste Chemicals SA v. DK Line SA (The Sargasso)* [1994] 2 Ll. R. 6. I would conclude, having done so, that the English court was definitively seised of the whole

proceedings from a still earlier date, being the date either of issue (16th December 2004) or of the freezing order (15th December 2004). In deciding whether to review those previous Court of Appeal decisions, the imminent replacement of the Lugano Convention would seem to me at best a neutral factor, once permission was given, as it was, to appeal to this House. I would not be deterred from such a review by the suggestion that it might affect any other current cases where jurisdiction in one state or another had been accepted on the basis of *Dresser* and *The Sargasso*. If such cases exist, then, unless they are at a sufficiently early stage for issues of jurisdiction to be raised and argued in the ordinary course, it would probably be too late to raise them at all, but, even if not, it could well be possible for any decision by the House on this appeal to be so framed as to ensure that the settled course of such other cases was not disturbed.

43. The Court of Appeal in *Dresser* was faced with a choice, which it resolved in a different way to Hobhouse J at first instance who had taken the issue of the writ as the moment of seisin. In my view, the choice made by Hobhouse J is, and would have been, preferable on several grounds.

44. First, the Court of Appeal's contrary solution in *Dresser* was influenced by a view of the Advocate General's reasoning in *Zelger v. Salinitri* (Case 129/83) [1984] ECR 2397 and of the significance of the European Court's use in its judgment in that case of the word "definitively", which were the subject of a, to my mind convincing, critique in the judgment of my noble and learned friend Lord Hoffmann in *Canada Trust Co. v. Stolzenberg (No. 2)* [2002] 1 AC 1, 18B-19F.

45. Second, the Court in *Dresser* never contemplated the rigid rule later laid down by the Court in *The Sargasso* – indeed, one may even speculate that, if it had, then the advantages in this respect of issue over service might have prevailed. The important qualification which Bingham LJ stressed in his leading judgment in *Dresser* in 1991 was that it would be wrong, at so early a stage in the life of the Convention, "to attempt to formulate any rule which will govern all problems which may arise in the future", and in this regard Bingham LJ said at p.523F that "the most obvious exception is where an actual exercise of jurisdiction (as by the granting of a *Mareva* injunction or the making of an *Anton Piller* order or the arrest of a vessel) precedes service: plainly the court is seised of proceedings when it makes an interlocutory order of that kind". Yet in *The Sargasso* in 1994 the Court of Appeal was prepared to re-examine this qualification and to reject the existence of "any genuine exceptions to the rule that the date of service marks the time when an English court becomes definitively seised of proceedings" (per Steyn LJ at pp 11-12; and see per Peter Gibson LJ and Sir Tasker Watkins at pp 12-13). It adopted the argument (with which I would respectfully disagree) that the power, under article 24 of the former Brussels and present Lugano Convention, to give interim relief in aid of foreign proceedings militates against Bingham LJ's view in *Dresser* that an English court giving such

relief in aid of its own substantive proceedings is definitively seised of such proceedings.

46. Third, Bingham LJ in *Dresser* (at p.523A-C) indicated seven respects in which service had possible significance in English procedural law. These were that:

“(1) the court’s involvement [in the issue of a writ is] confined to a ministerial act by a relatively junior administrative officer; (2) the plaintiff has an unfettered choice whether to pursue the action and serve the proceedings or not, being in breach of no rule or obligation if he chooses to let the writ expire unserved; (3) the plaintiff’s claim may be framed in terms of the utmost generality; (4) the defendant is usually unaware of the issue of proceedings and, if unaware, is unable to call on the plaintiff to serve or discontinue the action and unable to rely on the commencement of the action as a *lis alibi pendens* if proceedings are begun elsewhere; (5) the defendant is not obliged to respond to the plaintiff’s claim in any way, and not entitled to do so save by calling on the plaintiff to serve or discontinue; (6) the court cannot exercise any powers which, on appropriate facts, it could not have exercised before issue; (7) the defendant has not become subject to the jurisdiction of the court.”

47. Even under English procedural rules as they stood in 1991, I cannot share the Court of Appeal’s view that these constitute clear pointers towards service rather than issue as the appropriate moment for the purposes of seisin under the then Brussels regime. Hobhouse J’s choice provided, as Steyn LJ said in *The Sargasso*, “a perfectly defensible solution, which yielded a readily comprehensible point of time when the Court becomes seised” (p.10). And, if the qualifications stressed by the Court of Appeal in *Dresser* are rejected (as the Court in *The Sargasso* considered that they should be), this alone affects several of the pointers.

48. The procedural significance attaching to issue and service in these pointers is also no longer the same under the Civil Procedure Rules: thus, as to the first respect, the court’s involvement is often not confined to issue, but extends to effecting service, unless the claimant opts to undertake this (cf CPR 6.3); as to the second, fifth and seventh respects, the procedure now generally applicable under CPR 7.4 and 7.5 provides that a claim form *must* after issue be served on the defendant, and under these rules and CPR 15.4 it is no longer service of the claim form, but only the service of particulars of claim (which need not appear on the claim form and are not required to be served until 14 days after its service), that imposes on a defendant any obligation to defend; as to the fourth respect, the defendant’s potential lack of awareness of English proceedings until service must be seen in the light of the reality that

defendants are very often aware of such proceedings and have often (as in the present case) sought to use the inevitable delay in foreign service to try to avoid them (see further the fourth ground below); and as to both the sixth and seventh respects, the corollary of the Court of Appeal's view in *Dresser* that issue gave rise to no new powers over a defendant was its view (rejected in *The Sargasso*) that, where powers were exercised over the defendant before issue, the court was then seised.

49. Fourth, the decisions in *Dresser* and *The Sargasso* have proved to generate considerable scope for pre-emptive forum shopping, and were also reached without consideration of the particular implications for multi-defendant proceedings. These points are evidenced by a number of cases, including *Grupo Torras S.A. v. Al-Sabah* [1995] 1 L.L.R. 374; [1996] 1 L.L.R. 7 (CA), *Tavoulareas v. Tsavlaris* [2004] 1 L.L.R. 455 (CA) and the present. Pragmatic considerations of this nature were, in contrast, influential in the House's decision in *Canada Trust Co. v. Stolzenberg (No. 2)* to take the date of issue as the relevant date at which to ascertain whether the defendant was domiciled in a contracting state for the purpose of establishing jurisdiction under article 2 of the Brussels Convention: see especially at pp. 9H and 12 B-E per Lord Steyn (with whose speech Lord Cooke of Thorndon, Lord Hope of Craighead and Lord Hobhouse of Woodborough all agreed) and pp.22F-23C per Lord Hoffmann.

50. Fifth, there is a natural conjunction between the moment of seisin and the date relevant for the purpose of establishing domicile. Yet *Dresser* and *The Sargasso* on the one hand and *Canada Trust Co. v. Stolzenberg (No. 2)* on the other take different dates for these two purposes. Indeed, to reconcile the result reached in *Canada Trust Co. v. Stolzenberg (No. 2)* with the decisions in *Dresser* and *The Sargasso*, article 52 (which, in the case of a party not domiciled in the state "whose courts are seised of the matter", requires such courts to apply the law of state B in order to determine "whether the party is domiciled" in state B) had to be treated as if the word "is" read "was" (cf pp.9H-10A per Lord Steyn). Otherwise, as Lord Steyn said, the "absurd consequence" would follow that the date relevant to domicile depended on various fortuitous consequences. But such consequences are avoided, more convincingly and consistently with the language, by judging both seisin and domicile as at the date of issue of proceedings.

51. I would therefore, so far as it may be necessary in order to resolve this appeal, adopt a general test of issue as the relevant date for seisin under article 21 of the Lugano Convention. That moment has the advantage, which the Court identified in *The Sargasso*, of offering a single certain and easily ascertainable date. But, if that were not to be accepted, then I would revert to the more nuanced test of seisin which the Court adopted in *Dresser* itself, which in the present case would be satisfied by virtue of the interim injunction granted against the respondents in aid of the substantive English proceedings.

52. Had I accepted neither of those solutions, I would have been prepared to look carefully once again at the principles which should under the present Lugano regime cover a multi-defendant case such as the present once one defendant has been effectively served. If it were possible to treat a court at least as seised of the whole proceedings once one of the parties to, or at least one of the parties common to, the two sets of proceedings had been served, that would recognise that this event and moment have real significance (cf my observations in *Grupo Torras* [1995] 1 Ll.R. 374, 419); it would assist to ensure the integrity of proceedings and counter the possibility of procedural manoeuvring by co-defendants.

53. There can be little doubt, and Mr Martin QC for the respondents accepted, that article 22 requires a single date of composite seisin, which would on the basis of *Dresser* be ascertained by reference to the date when the first party was served in either set of proceedings. For article 21 to apply there must be proceedings in different contracting states between parties at least some of whom are identical on each side, and article 21 then applies, and only applies, as between those who are identical: *The Tatry v. The Maciej Rataj* (Case C-406/92) [1999] QB 515. It does not necessarily follow that the court should then be regarded as seised by considering, on an identical party to identical party basis, which party was first served. *The Tatry* did not concern or consider any such situation. But I need not go so far down a chain of hypotheticals as to express any view on any aspect of the area of multi-party litigation, save that it would have merited at least some further thought.

54. The conclusions reached in paragraphs 41 to 51 above mean that I would allow this appeal, set aside the judgment of the Court of Appeal, restore the order of the judge at first instance and order that the questions of costs in this House be adjourned for the parties to make written submissions within 14 days.