

**ANGUILLA**

**IN THE HIGH COURT OF JUSTICE**

Claim No. AXA HCV 2001/0002

BETWEEN:

**ROBERT CONRICH**

**(a.k.a. Bob Conrich)**

**Claimant**

**AND**

**ANN VAN DER ELST**

**(a.k.a. Alyzee-Anne Van der Elst)**

**First Defendant**

**CHRISTIAN LAUBRESSAC**

**Second Defendant**

**FREDERIC VAN DER ELST**

**Third Defendant**

**Appearances:**

On the 3<sup>rd</sup> day of May 2002

Mr. Patrick Patterson for the Claimant

Ms. Lisa Bass for the First Defendant

Mrs. Palmavon Webster, with her Ms. Deborah John-Woodruffe for the Second and Third Defendants

On the 16<sup>th</sup> day of July 2001

Mrs. Birnie Stephenson-Brooks for the Claimant

Ms. Lisa Bass for the First Defendant

Ms. Jenny Lindsay for the Second and Third Defendants

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2002: May 3

July 16

2003: February 13

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**JUDGMENT**

- [1] **RAWLINS, J.:** This decision comes on the hearing of three (3) Applications. The first in time of filing is an Application by the Claimant that was filed on the 12<sup>th</sup> day of July 2001. Thereby, the Claimant applied to strike out various Paragraphs of the Defence of the First

Defendant. The second and third are Applications that were filed by the First Defendant, on the one hand, and the Second and Third Defendants, on the other, on the 16<sup>th</sup> day of October 2001. They prayed in those Applications for Orders pursuant to **Part 26.3 of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000** (hereinafter referred to as "the Rules") to strike out the Statement of Claim. In the alternative, they prayed for a stay of proceedings on the ground of *forum non conveniens*. Solicitors for the First Defendant have subsequently withdrawn their prayer to strike out the Statement of Claim under **Part 26.3 of the Rules**. The decision on these Applications will be considered against the background to the case.

### **The Background**

- [2] The proceedings in this case were instituted on the 18<sup>th</sup> day of January 2001. On that date, Solicitors for the then Intended Claimant filed an *ex parte* Application for leave to issue and serve a Notice of Writ out of the jurisdiction. This was made pursuant to **Order 11 Rule 1 of the Rules of the Supreme Court 1970**. They stated, as one (1) ground for the Application, that the Intended Defendants were not resident or ordinarily resident within the jurisdiction. They also stated that the intended action was founded on the tort of deceit committed within the jurisdiction and it was impracticable to serve the intended Notice of the Writ on them. The Application was supported by an Affidavit deposed by the Claimant on even date. The Court granted leave on the 22<sup>nd</sup> day of January 2001 to the then Intended Claimant to issue the Writ and to serve it out of the jurisdiction by registered post. The Writ, specially indorsed with Statement of Claim, was issued on the 24<sup>th</sup> day of January 2001.
- [3] Subsequently, the Claimant gave further and better particulars of the Claim at the instance of the Defendants. He also amended the Statement of Claim on the Order of the Court issued by Hariprashad-Charles J. on the 12<sup>th</sup> day of June 2001. The Claimant filed an Amended Statement of Claim on the 19<sup>th</sup> day of June 2001. That Order also granted leave to the Defendants to file and serve Amended Defences, if necessary. The matter was

adjourned to the 12<sup>th</sup> day of July 2001 for Report. The First Defendant filed an Amended Defence on the 11<sup>th</sup> day of July 2001.

[4] The tenor of the claim is that the First Defendant was the personal friend of the Claimant. The Second and Third Defendants were respectively the boyfriend and brother of the First Defendant. Between January 1995 and December 1999, the Defendants, acting in concert and with intent to cheat and defraud him (the Claimant), made and or caused various representations to be made to him. In essence, he alleged that they represented or caused representations to be made to him that the First Defendant suffered from life threatening medical conditions, which required certain medical procedures that could have led to her cure. The representations allegedly included statements that she had a tumour located near a vital nerve, which required several operations. The statements also allegedly included representations that the First Defendant was partially paralyzed but was on the mend, and that she had cancer of the kidneys but it was necessary for her to wait for a kidney.

[5] The Claimant also alleged in the Statement of Claim that it was represented to him that the Defendants did not have the necessary funds to pay for the required medical procedures. He further alleged that he was told that as a result of the death of a sister of the First Defendant, she had inherited an apartment in France that was valuable property. He said that the Defendants represented or caused representations to be made to him that the property could be sold for a sum of between 500,000 and 800,000 French Francs. They further represented or caused representations to be made that 90,000 French Francs had to be paid for the "Right of Succession" in order to enable the First Defendant to inherit the property and obtain the title to it. The Claimant said that he was told that if he gave the 90,000 French Francs to the First Defendant he could recover three times that amount. He alleged that he gave that sum to the First Defendant as a result of those representations.

[6] The Claimant maintained that the statements that were made to him were false and were made fraudulently. He alleged that the First Defendant was not suffering from any life

threatening medical condition and did not require any medical procedure. She was not partially paralyzed as she had represented. She had not been left any valuable property in France and there was no requirement for money to be paid in order to inherit the property. He claimed that he acted on the faith and with the belief that these representations were true. The result, he stated, was that he was induced to and did pay over substantial sums of money to the Defendants. The Claimant also alleged that the Defendants, whom he said are not without personal funds, have not repaid him the amount that he advanced, and did not intend to repay him either. He said that at the time that they made the representations which caused him to advance the money, they knew that the statements were false and untrue, but made them fraudulently or recklessly not caring whether they were, with intent to defraud him.

- [7] The Claimant further alleged that as a result of the foregoing allegations he suffered loss and damage in the sum of US\$304,046.79. He particularized the loss and damage allegedly suffered as follows:

**“PARTICULARS**

<b>Item</b>	<b>Date</b>	<b>Amount</b>	<b>US\$ Equivalent</b>
(i)	10/95-5/96	US\$2,000.00	2,000.00
(ii)	12/97-3/98	US\$4,277.07	4,277.07
(iii)	1998	FF200,000	33,726.81
(IV)	9/98-12-98	FF8,000	1,452.62
(v)	10/2/99	FF120,000	20,726.82
(vi)	31/3/99	FF80,000	13,110.67
(vii)	10/5/99	FF160,000	26,201.59
(viii)	14/6/99	FF160,000	25,538.30
(ix)	3/99-6/99	FF320,000	53,449.14
(x)	14/7/99	FF160,000	24,830.84
(xi)	1/11/99	FF600,000	98,732.93
		<b>Total</b>	<b>US\$304,046.79”</b>

- [8] Solicitors for the Defendants entered Appearance on their behalf on the 23<sup>rd</sup> day of February 2001. On the 2<sup>nd</sup> day of May 2001, Solicitors for the Defendants applied by way of Summons for further and better particulars. The Application was supported by an Affidavit of even date deposed by John Benjamin, Solicitor.
- [9] Webster, Dyrud and Mitchell, Solicitors, filed a Notice of Change of Solicitors on the 31<sup>st</sup> day of May 2001. This permitted that Firm to appear as Solicitors for the Second and Third Defendants. On that same date, two (2) Defences were filed - one on behalf of the First Defendant and the other on behalf of the Second and Third Defendants.
- [10] In her Defence, the First Defendant stated that she is now married to the Second Defendant. The gist of the Defence is that the First Defendant and the Claimant became acquainted in 1992. This developed into "a highly unusual, intimate long distance relationship". During that relationship, the Claimant exploited her youth and vulnerability and exercised control over her. He gave her large sums of money as gifts in return. His demands caused her to become fearful of him. The result was that she assumed the names and identities of the Second and Third Defendants from time to time without their knowledge or consent. She made excuses to avoid visiting Anguilla. She made no statements or representations to the Claimant with any intention to cheat or to defraud him. Any alleged representations to the Claimant were made as part of role-play sequences in order to satisfy his sexual fantasy and to avoid meeting him. She did, in some instances, before October 1997 make statements that were not true to the Claimant. However she confessed to him. He in turn encouraged her to continue to assume such roles. Therefore, any representations that she made to the Claimant after October 1997 were made with his full knowledge and consent in furtherance of the role-playing sequences between them. She did not admit that she promised to repay any money to him. She denied that the Second or Third Defendants ever made any acquaintance with the Claimant, or received any money from him. She stated that she intercepted the Claimant's correspondence to them "at the appropriate times".

[11] The Application of the Claimant on the 12<sup>th</sup> day of June 2001 was to strike out Paragraphs 2, 3, 4, 5, 24 and 25 and that part of Paragraph 14 that states “the plaintiff in order to feed his own sexual fantasy of someone similar to the First Defendant sharing his bed”. In the Amended Statement of Claim, these became Paragraphs 3, 4, 5, 6, 15 (the relevant part thereof), 29 and 30. They are now set out verbatim for their full effect and purport.

[12] Paragraph 3 states:

“The First Defendant says that it was within the Plaintiff’s knowledge that the First Defendant was of a very insecure and weak personality. The Plaintiff exploited the First Defendant’s youth and vulnerability by exercising complete control and dominance over the First Defendant by bombarding and intimidating her with numerous sexual advances and sexually explicit material. The Plaintiff further exploited the First Defendant by causing her to enter into various role-playing fantasies, including the creation of a number of depraved sexual acts.”

Paragraph 4 states:

“The First Defendant further states that these sexual acts included extensive references to incest and pedophilia by the Plaintiff and would require the First Defendant to call the Plaintiff ‘Daddy’. To further exercise his control of the First Defendant, the Plaintiff would send extensive sums of money as gifts of encouragement to the First Defendant to comply with his fantasies.”

Paragraph 5 states:

“The First Defendant as a result of this novel experience had serious reservations about meeting the Plaintiff in person for several years and did everything possible to avoid such meeting, for even though she admits to paying attention to some of the Plaintiff’s philosophies, his fundamental beliefs in regards to sexuality struck a basic fear in her.”

Paragraph 6 states:

“The First Defendant says that as a result of this fear, there were times that she assumed the names and identities of the Second and Third Defendants, who have negligible proficiency in the English language, without their knowledge or consent, and made excuses not to come to Anguilla. The First Defendant says that she used the names of the Second and Third Defendants in varying scenarios in her communication with the Plaintiff over the

years, all without the knowledge or consent of either the Second or Third Defendants.”

Paragraph 15 states:

“The First Defendant denies that the statement in Paragraph 2(g) of the Statement of Claim was made with any intent or at all to cheat and/or defraud the Plaintiff. This statement was made by the First Defendant to the Plaintiff as part of their role-playing sequences and such role-playing was encouraged by **the Plaintiff in order to feed his own sexual fantasy of someone similar to the First Defendant sharing his bed**. The Plaintiff at all times knew that the First Defendant did not have a sister at any time or at all.” (Emphasis added).

Paragraph 29 states:

“The First Defendant says further that in order to foster the relationship between the Plaintiff and herself as referred to in Paragraphs 1, 3 and 4 of the Defence, the Plaintiff sent to the 1<sup>st</sup> Defendant huge amounts of pornographic material including photographs, art work and writings.”

Paragraph 30 states:

“The First Defendant contends that the sending of pornographic material by the Plaintiff was illegal as contrary to Section 17(1)(b) of the post Office Act (CAP 201) and Section 10(g) of the Customs Ordinance 1981 and/or alternatively contrary to public policy and this Honourable Court ought to decline to grant any relief to the Plaintiff on the basis of the maxim ‘ex turpi causa non oritur actio’.”

- [13] In their Defence, the Second and Third Defendants admitted that they were the husband and the brother respectively of the First Defendant. They also stated that it was within their knowledge that the Claimant knew the First Defendant. They averred that the Claimant had no grounds for alleging that they made any representations to him with intent to defraud him. As far as they were concerned, the Claim discloses no cause of action against them. They denied that they made any false or untrue representations to the Claimant or instructed anyone else to do so. They averred that the Claimant had failed to plead any cause of action for reckless or fraudulent misrepresentation. They further averred that the Claimant had failed to show the existence of a contractual relationship

with them. The result, they stated, was that the **Misrepresentation Act 1967** would fail to apply as no cause of action exists. They denied that they received the benefit of any money from the Claimant. In particular, they stated that they did not receive any payment of \$2,000.00 from the Claimant as alleged in Paragraph (b) of the further and better particulars supplied by him on the 9<sup>th</sup> day of May 2001. They insisted that they did not know the Claimant and they did not on any occasion communicate with the Claimant prior to the time that he made the allegations.

[14] The case came before me on the 23<sup>rd</sup> day of October 2001. Solicitors for the Parties were ordered to file and serve Affidavits touching the Applications to strike out the Statement of Claim and on the issue of *forum non conveniens*. These were to be filed and served on or before the 18<sup>th</sup> day of January 2002. They were also ordered to file and serve written submissions on the said issues on or before the 25<sup>th</sup> day of January 2002. Further hearing on the Applications was scheduled for the 8<sup>th</sup> day of February 2002. When the matter came before Edwards J. on that day, the parties had not complied with the Order of the 23<sup>rd</sup> day of October 2001. She ordered compliance by the 18<sup>th</sup> day of March 2002 and adjourned the case to the 26<sup>th</sup> day of March 2002. On the 8<sup>th</sup> day of March 2002, the Claimant deposed an Affidavit in Opposition to the Applications of the Defendants to strike out his Statement of Claim. Skeleton Arguments on behalf of the First Defendant and the Claimant were filed on the 21<sup>st</sup> day of March 2002. Solicitors for the Second and Third Defendants filed Skeleton Arguments on the 22<sup>nd</sup> day of March 2002.

[15] When the matter was heard on the 3<sup>rd</sup> day of May 2002, Counsel for the First Defendants withdrew those aspects of the Application with respect to the striking out of the Statement of Claim. These were contained in Paragraphs 1 and 2 of the Application of the 16<sup>th</sup> day of October 2001. The Claimant was granted leave to file and serve a further Affidavit in Opposition to the forum challenge by the end of the day. Time was also extended for the parties to file and serve written submissions by the 5<sup>th</sup> day of July 2002. The Claimant duly complied with the Order. Solicitors for the First Defendant filed submissions on the 15<sup>th</sup> day of July 2002 on the Claimant's Application to strike out various paragraphs of the Defence of the First Defendant. They also filed submissions on the issue of *forum non*

*conveniens* on the 16<sup>th</sup> day of July 2002. When the matter was heard on that day, time was again extended to permit Solicitors for the Second and Third Defendants to file and serve their written submissions. They filed the submissions on the 30<sup>th</sup> day of July 2002.

### **The Issues that Arise for Consideration**

- [16] First, I shall consider the Application on behalf of the Claimant to strike out various paragraphs of the Defence of the First Defendant. Second, the Application on behalf of the Second and Third Defendants to strike out the Statement of Claim and, finally, the issue of *forum non conveniens*.

### **The Application to strike out various paragraphs of Defence**

- [17] **Part 26.3 of the Rules** empowers the Court to strike out a statement of case or a part thereof. The Court may do so under **Part 26.3(1)(b)** if it appears that the impugned part does not disclose any reasonable ground for bringing or defending the claim. It may also do so under **Part 26.3(1)(c)** if the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings. It may also strike out a part of the statement of case under **Part 26.3(1)(d)** if that part is prolix or does not comply with **Part 8 of the Rules** which relates to the commencement of actions, or **Part 10** for Defences.
- [18] What are the bases for the Application by the Claimant to strike out the various Paragraphs of the Defence of the First Defendant? The grounds are that the Paragraphs disclose no reasonable cause of Defence, are scandalous, frivolous, vexatious, abusive of the process of the Court and/or tend to prejudice or embarrass the fair trial of the action. The paragraphs that the Claimant has sought to impugn are set out at Paragraph 12, foregoing. A reading of them reveals that they perhaps fly in the face of generally accepted wholesome morals. That of course does not render them scandalous, frivolous or vexatious or abusive of the process of the Court within the meaning of **Part 26.3 of the Rules**.

[19] In this case, the Claim claims that by fraudulent misrepresentations, the Defendants, acting in concert, caused him to transfer sums of some \$304,046.79, United States currency to them. He alleged that they promised to refund these monies to him, but they have not. The Defence of the First Defendant is that she had entered into a relationship with the Claimant. She alleged that the relationship culminated in her creation of sexual fantasies for his gratification. Any statement that she made during the tenure of the relationship was a part of the role-play which were inherent parts of that relationship. She has insisted that the Claimant encouraged the entire scenario and sent money to her in the result. Her case is that she did not receive the sums involved as a result of any statements that she made to the Claimant with the intent to defraud him.

[20] These are contested facts. The paragraphs that the Claimant has complained of are, in my view, an integral part of the facts that she presented in the Defence. It is necessary at this stage of the proceedings to resist any temptation to conjecture or to surmise that the Defence proffered by the First Defendant is itself in the realm of fantasy. The veracity of the Claim in this case as well as her Defence can only be tested on evidence given at a trial and tested on cross-examination. In the premises, the Application by the Claimant to strike out the various parts of the Defence of the First Defendant is hereby dismissed.

### **Should the Claim be struck out Against the Second and Third Defendants?**

[21] We have seen the grounds for the Application on behalf of the Second and Third Defendants to strike out the Statement of Claim against them. They rely mainly on **Part 26.3 of the Rules**. The purport of this Rule is considered at Paragraph 17 foregoing. In their grounds for their Application, Solicitors for the Second and Third Defendants stated that the matters pleaded in the Amended Statement of Claim are unreasonably vague, incoherent, vexatious and do not amount to a legally recognizable Claim. They also stated that the Claimant's case as pleaded is an abuse of the Court's process in that it is using the process in a way that is significantly different from its ordinary and proper use. They have submitted first, that it discloses no cause of action or reasonable ground for bringing a claim against the Second and Third Defendants. They said, second, that its primary purpose is to extend the issue of liability to third parties on a wholly unsubstantiated basis.

- [22] The thrusts of the submissions by Counsel in support of the Application on their behalf are first, that in **Letang v. Cooper [1965] 1 Q.B. 232, at page 242**, Diplock L.J. stated that a fundamental principle of natural justice is that each party should have due notice of the case that he has to meet and a reasonable opportunity to answer a claim or defence. Thus, the details of pleadings in this case must be sufficient to enable the Defendants to know precisely the case that they have to meet. Counsel submitted, therefore, that the vague and general content of the Amended Statement of Claim did not allow each of the Defendants to know precisely what case he or she has to meet. With respect to the Second and Third Defendants, Counsel submitted that there are no precise allegations of any representations made by them to the Claimant. The Statement of Claim, they said, simply states that they acted at all material times in concert with the First Defendant.
- [23] Counsel for the Second and Third Defendants submitted, second, that it is not clear whether the action was brought in tort or in contract. They insisted that neither an action in the tort of deceit nor an action in contract can be established on the claim and the essential elements have not been sufficiently particularized. In particular, they said, it is not clear from the Statement of Claim who made the representations, or upon what bases the Defendant acted in concert, clearly particularizing the individual roles played by each Defendant.
- [24] Third, Counsel for the Second and Third Defendants asserted that the Claim is silent as to the form that the alleged representation took, whether directly and physically, and the necessary particulars thereof. It was also silent as to whether the representations actually reached and influenced the Claimant and, if so, how. They said that it was also silent whether a relationship of principal or partner existed, since the law will not imply this relationship. Additionally, they asserted, the Claim gives no details whether the representations were made in writing verbally, by implication of words or conduct. It has not set out precisely, the time when each representation took place. It simply states "Between January 1995 and December 1999...". The precise times of the representation are critical because a representation must be shown to have been false at the date when

the representee altered his position because of it. They cited as authority, **Briess v. Woolley [1954] A.C. 333, at page 354; [1954] 1 All E.R. 909, at page 918.**

[25] Counsel for the Claimant responded in the following terms:

1. In light of the request for further and better particulars and the filing of the particulars thereto, the particulars of the Claim are constituted by the Statement of Claim and the matters set out in the further and better particulars of claim.
2. The Claim is based essentially on the tort of fraudulent misrepresentation in which fraud is an essential element. The action when brought at common law is frequently referred to by its old name, deceit.
3. When brought in the Chancery Court, this type of claim was described as an equitable claim for Damages in the nature of and analogous to an action for deceit. However, the two (2) forms of proceedings are precisely the same and governed by the same principles. **See Halsbury Laws of England 3<sup>rd</sup> Edition Vol.26 Para 1602 Notes B & E** referring inter alia to **Arkwright v Newbold (1880) 17 Ch. 301 at page 320.**
4. Although fraudulent misrepresentation is also a significant element in cases of contract (and on which basis, if established, rescission of the contract may be obtained) a claim for damages for misrepresentations does not have to be based on contract but can be based on tort.
5. Halsbury's Laws of England indicates that the essential ingredients to be established in proof of the action are as follows:
  - (a) That the alleged representation consisted of something said written or done which amounts in Law to a misrepresentation
  - (b) The Defendant was the person who made the representation
  - (c) The Claimant was the person to whom it was made
  - (d) The Representation was false (not only false but fraudulent)
  - (e) Inducement and materially
  - (f) Alternation of position
  - (g) Fraud
  - (h) Damage

6. The Defendants' assertion that the pleading "lacks particularity" is essentially an allegation that the Defendants are entitled to further particulars and/or that the element of fraud is not properly pleaded.
7. In relation to the issue of pleading fraud, it is submitted that the following principles apply:
  - [i] Where a Party pleads fraud or misrepresentation, that Party must supply the necessary particulars in his pleading see **Halsbury's 4<sup>th</sup> Edition Volume 36, Paragraph 36**. Thus, general allegations of fraud are not permitted and the party must set out the facts, matters and circumstances relied upon to show that the party charged had or was actuated by fraudulent intention. (**See Re Rica Gold Washing Co (1879) 11 Ch. 36; Davey v Garrett (1878) 7 Ch. 473, at 479**).
  - [ii] **In Re Rica Gold Washing Co.**, Jessel MR stated, at page 43,

"The petition contains vague allegations of fraud but I have always understood it to be a rule in equity that where you allege fraud you must state the facts which constitute the fraud. You are not entitled ... to say to the other side 'you have defrauded me; you have obtained money by fraud you must state the facts which you say amount to fraud so that the other side may know what he has to meet. I agree that it is not necessary to state that evidence which shows the fraud but you must state the facts which constitute the fraud".
8. What is intended by these rules of pleading and authorities, is that it is not sufficient to simply assert in a pleading that the conduct was fraudulent, without pleading that there was knowledge of falsity and inducement which caused the loss.
9. The Claimant's Statement of Claim alleged that the Defendants, acting in concert, made or caused representations to be made knowing that they were untrue, with the intent that the Claimant should act upon the said representations. It also alleged that the representations were made with intent to cheat and defraud the Claimant and to induce the Claimant to pay over monies to the Defendants. It also alleged that the Claimant was so induced and did act on the faith of the representations and suffered loss. It sets out facts requisite to support the allegations but not evidence.
10. The pleadings sufficiently plead the facts and matters alleged for the purpose of pleading fraud. The complaint of the Defendants is tantamount to asserting that the Claimant has not pleaded sufficient evidence.

11. In the event that the Court considers the particulars insufficient, it is submitted that the Court should not strike out the Statement of Claim, but permit the Claimant to amend the pleadings to provide the requisite detail.

[26] The English Court of Appeal afforded some consideration to the approach of the courts to strike out pleadings under the dispensation of the new civil procedure rules in the case **Biguzzi v. Rank Leisure plc [1999] 4 All E. R. 934**. It is important to note, first, that the court indicated that a court should not behold to cases decided on the old Rules as authoritative. It also noted that the **English Rules of Civil Procedure, 1999** confer a very wide discretion upon judges to strike out statements of case. It made it clear, however, that while judges should not tolerate infringements or defaults and should act at the instance of Counsel or on their own initiative to prevent default in pleadings and to curtail unnecessary delay, they should not be too strident in taking “the draconian step” of striking out cases. (See in particular the judgment of Lord Woolf, M.R. at pages 939 to 941.). It seems clear that it is only where a statement of case does not amount to a viable claim or defence, or is beyond cure that the court may strike out. Justice to the Parties in all of the circumstances should be the aim of the judicial role in this regard.

[27] The Claim in this case is based essentially on the tort of fraudulent misrepresentation. This was made clear on the pleadings. The issue of misrepresentation in contract therefore does not arise. The elements are stated in Paragraph 25(5) foregoing. It is my view that the Claimant has set out sufficient facts that to meet the prosecution of his case. This of course is cognizant of the difficulties that actions on the tort of fraudulent misrepresentation present to precise pleading. That difficulty is a function of the very nature of the tort. Additionally, some of the particulars which Counsel for the Defendants require is evidential rather than facts to be pleaded. I am aware that it is usual in these pleadings to set out particulars under a separate heading “PARTICULARS OF FRAUD”. There is, however, nothing magical in that formulation. It is my view that the particulars set out in the Amended Statement of Claim and, in particular, in Paragraphs 2 and 3, are reasonable. In the end, whether the Claimant will actually prove his case on evidence given under oath and tested on cross-examination is to be determined at the trial. The

result is that I hereby dismiss the Application on behalf of the Second and Third Defendants to strike out the Statement of Claim under **Part 26 of the Rules**.

*Forum non conveniens*

[28] **Part 9 of the Rules** is under the rubric "**Acknowledgement of Service and Notice of Intention to Defend**". The procedure for disputing the jurisdiction of the Court is set out in **Part 9.7 of the Rules**. **Part 9.7(1)** requires a Defendant who disputes the jurisdiction of the court to try a claim or who wishes to move the court to refrain from exercising its jurisdiction to apply for a declaration to that effect. **Part 9.7(2) of the Rules** requires a Defendant who wishes to make such an Application first to file an acknowledgement of service. This requirement was complied with in this case. **Part 9.7(3)** states that an Application under this rule must be made within the period for filing a Defence.

[29] We have seen that the Writ, specially indorsed, was filed herein on the 24<sup>th</sup> day of January 2001. Appearance was entered on behalf of the Defendants on the 23<sup>rd</sup> day of February 2001. The pleadings have gone through the stages to the filing of an Amended Defence by the First Defendant on the 11<sup>th</sup> day of July 2001. The Applications with respect to *forum non conveniens* were filed on the 16<sup>th</sup> day of October 2001. The time for the filing of Defence had long expired.

[30] In her submissions, Counsel for the First Defendant sought to explain and to excuse the delay in making the forum challenge. She stated that the Claimant was requested by letter dated the 20<sup>th</sup> day of March 2001 to give further and better particulars of the claim. She said that the Claimant's reluctance occasioned an Application in that regard by the First Defendant. It was heard in Chambers on the 2<sup>nd</sup> day of May 2001. She said, however, that the Court ordered the Defendants to file Defence before the Application could be heard. The Defendants therefore had no choice but to file their Defences. She said that after the Defences were filed, the Claimant gave further and better particulars and amended the Statement of Claim to reflect those particulars. The first Defendant thereupon had to amend the Defence. She submitted that the Claimant's defective

pleadings caused the various Applications and amendments in order to clarify the case before the Court. This, she said, was responsible for the late forum challenge.

[31] In my view, however, these submissions are not convincing. Whether under the 1970 Rules or the 2000 Rules, forum challenge is a threshold process. The further and better particulars that were sought were not materially referable to the question of jurisdiction. They sought particulars which related to the mode and time of the payments allegedly made by the Claimant to the Defendants. The particulars that were provided on the 8<sup>th</sup> day of June 2001 were in response to those questions. Second, when the direction was given on the 2<sup>nd</sup> day of May 2001 to file the Defence, Counsel for the Defendants should have been alert even at that late stage to inform the Court that a forum challenge was forthcoming. In any case the time for making the application for forum challenge is not prior to the filing of a Defence. Rather, it **must** be made within the period for filing the Defence.

[32] **Part 9.7(5)(b) of the Rules** provides, specifically, that a Defendant who files an acknowledgement of service and who does not apply to challenge the jurisdiction of the Court within the time limited is treated as having accepted that jurisdiction. In the foregoing premises, the Applications fail on the forum challenge.

[33] The result will not be different, in my view, even if the actual merits of the issue were to be considered under the principles from the leading case **Spiliada Maritime Corp v. Cansulex Ltd. The Spiliada [1986] 3 All E.R. 843**. The basic principle is, of course, that the court would choose that forum in which the case could be tried more suitably for the interest of the Parties and the ends of justice.

[34] Substantively, the submissions that were made on behalf of the Defendants on this issue may be summarized thus: -

1. France is the appropriate forum for the trial because the Defendants are not familiar with the Caribbean. The First Defendant paid only two (2) visits to Anguilla between 1997 and

2000. Both visits were at the expense of the Claimant. The Second and Third Defendants have never been to the Caribbean.
2. Ninety-nine percent (99%) of the communications between the First Defendant and the Claimant occurred when the First Defendant was in her home territory, France.
  3. All of the Parties, except the Claimant, reside in France and Belgium, the neighbouring State. All of the potential witnesses, except the Claimant, also reside in these two (2) countries. The Defendants will experience exceptional financial hardship in defending the case in Anguilla because they will have to bring other witnesses to Anguilla. The attendant expenses for the Defendants for outweigh any expenses that the Claimant would incur by instituting proceedings in France.
  4. All of the Parties in the case have a basic knowledge of the French language. Of the Defendants, however, only the First Defendant speaks basic English. The language barrier poses serious difficulties for all of the Defendants in their communications with their Counsel and would significantly affect their ability to properly present their cases.
  5. The Claimant has himself said in his Statement of Claim that he sent all of the funds to the First Defendant in France. He even alleged that he sent some money to her from England, a European country.
  6. Any fraudulent activities commenced in France. Any misrepresentations were allegedly made in France. The payment of money was allegedly made to the First Defendant in France.
  7. The French legal system is efficient, sustaining and credible. It has stood the test of time and has greater resources to facilitate foreign litigants. Situated as it is in Continental Europe, language barriers can more easily be overcome.

[35] The substantive submissions on behalf of the Claimant may be summarized thus:

1. Anguilla is the natural forum and the one with which the action has the most substantial connections. There is no other forum that is more appropriate than Anguilla.
2. The Claimant is a permanent resident of Anguilla. He has lived here for over fourteen (14) years.
3. The Defendants are not in one (1) but in two (2) jurisdictions, France and Belgium.

4. The law that governs the transactions is the law of Anguilla. On the authority of **Diamond v. Bank of London and Montreal [1997] 1 ALL E.R. 561**, the tort of fraudulent misrepresentation, when made by way of telex or telephone, is committed at the place where the messages were received and acted on, not the place from which they were sent.
5. The majority of the Bank transactions in the case originated in Anguilla. Most of the witnesses of the Claimant are therefore in Anguilla. It will be financially oppressive for the Claimant to institute proceedings in France.
6. The participation of the Defendants in the litigation process thus far confirms that they are sufficiently proficient in the English language to properly instruct Counsel.
7. The Claimant does not understand the French legal system; does not speak or understand French well and will have difficulties instructing Counsel in France.

[36] The Defendants have not discharged the burden to show that France is clearly and distinctly a more appropriate forum for the trial than Anguilla. It is my view that it will not be just to stay the proceedings herein and to ask the Claimant to commence and now pursue his Claim in France.

### **ORDER**

[37] These Applications came for determination on the Case Management Conference. Therefore, in addition to the Orders on the Applications, I shall also give directions for the case to proceed to Pre-trial Review during the month of May 2003. The Trial window will be July 2003. Premised on the foregoing, the following is the Order on the Application herein:

1. The Application filed on behalf of the Claimant on the 12<sup>th</sup> day of July 2001 and the Applications filed on behalf of the Defendants on the 16<sup>th</sup> day of October 2001 are hereby dismissed.
2. This case is hereby adjourned to Pre-trial Review before a Judge of the High Court to be held during the month of May 2003, on a date to be set by the Registrar.

3. The Parties each to file and serve a list of documents that will be relied upon at the trial, the same to be filed with verifying Affidavit on or before Wednesday the 19<sup>th</sup> day of February 2003.
4. Exchange and inspection of documents to be on or before Thursday the 27<sup>th</sup> day of February 2003.
5. The Parties to agree on the documents that will be admitted with consent on or before Monday the 10<sup>th</sup> day of March 2003.
6. Solicitors for the Claimant to prepare, file and serve a core bundle of the documents agreed by the Parties to be admitted with consent at the trial, on or before Monday the 24<sup>th</sup> day of March 2003.
7. Solicitors for the Claimant to prepare, file and serve a list of documents not agreed on or before Monday the 24<sup>th</sup> day of March 2003.
8. The Parties to prepare, file and serve a list of witnesses who will be called to give evidence at the trial on or before Monday the 31<sup>st</sup> day of March 2003.
9. The Parties to prepare, file and serve Witness Statements of the persons who will be called to give evidence in this case on or before Monday the 28<sup>th</sup> day of April 2003, Witness Statements to be the evidence in chief at the trial, the Parties reserving the right to cross-examine thereon.
10. Pre-trial Memorandum in accordance with Part 38.5 to be filed and served by the Parties.
11. The Parties to file a Listing Questionnaire at least 10 days prior to the hearing of the Pre-trial Review.
12. The Parties may apply for Directions or Orders at least 10 days prior to the conduct of the Pre-trial Review.
13. Costs of and incidental to these Applications to be costs on the cause.

**Hugh A. Rawlins**  
**High Court Judge**