prevent the English court having jurisdiction to proceed to commit for contempt.

By analogy, unless by some convention the United Kingdom had agreed that its courts would not exercise a jurisdiction, the English court had jurisdiction to decide the issue whether a non-party had taken such steps in relation to an action as should render him liable to pay the costs of that action.

Even more clearly, if what was alleged, as in this case, was that the non party in reality brought the main proceedings, the English court had jurisdiction to decide whether there had in effect been a submission to the jurisdiction by the non-party.

The English court did have jurisdiction to decide in relation to a non-party resident outside the jurisdiction whether they should be liable for costs under section 51.

The appropriate procedure under the old Rules of the Supreme Court was to issue a summons in the action which would be served on the plaintiff in the action and served on the non-party outside the jurisdiction, with leave in accordance with Order 11, rule 9(4) and (5). Order 11, rule 1 and rule 9(1) would not be material.

His Lordship shared Mr Justice Rix's anxiety as to whether there might be a lacuna in the Civil Procedure Rules (SI 1998 No 3132 (L 17)) where rule 48.2(1) was to apply in relation to a non-party outside the jurisdiction.

It was not clear whether the appropriate course under the rules was to issue an application for the joinder of a non-party and serve that application only on the other named parties, and then serve the amended proceedings in some way on the non-party, or whether the application to join should be served on the non-party.

His Lordship inclined to the latter view, in which event, so far as that application was concerned, Order 11, rule 9(4) and (5) would apply as they applied to a summons under the procedure applicable before the Civil Procedure Rules came into effect.

His Lordship also inclined to the view that at present there was an inherent power to give leave to join a party and to give leave to serve that party out of the jurisdiction once the hearing of the application to join had resulted in an order for joinder. But the matter was not fully argued and it would be of assistance to clarify the matter by specific provision in Order 11.

Did Mr Comninos's residence and domicile in Greece affect the position? Only if making an application under section 51 involved "suing" a non-party could Mr Comninos rely on article 2 of the Brussels Convention which prima facie entitled him to be sued only in the courts of his home state.

His Lordship inclined to the view that a summons issued in an action relating to costs did not "sue" the non-party. "Suing" contemplated pursuing a substantive cause of action. It did not relate to the making of orders ancillary to substantive proceedings pending before a particular court.

But if that was wrong, then article 6(2) would apply. That article allowed a person domiciled in a contracting state to be "sued" as a third party in an action on a warranty or guarantee or "in any other third-party proceedings, in the court seised of the originating proceedings,. . ."

The language of article 6(2) certainly seemed to cover the seeking of an order against a third party or non-party for an indemnity as to costs incurred under an express contract to indemnify. The wide words of "any other third-party proceedings" seemed entirely appropriate to cover a section 51 application.

Lord Justice Simon Brown and Lord Justice Tuckey agreed.

Solicitors: Waterson Hicks; Ince & Co.

Practice — delay before case does not count

October 15, 1999

Court of Appeal

MacDonald and Another v Thorn plc

Before Lord Justice Brooke and Lord Justice Robert Walker

[Judgment September 1]

On an application to set aside a judgment in default for failure to serve a defence on time, a court was not entitled to take into account delay before the initiation of proceedings and consolidate such period with delay after proceedings were begun.

The Court of Appeal so held allowing the appeal of the defendant, Thorn plc, against the judgment of Judge Trigger in Birkenhead County Court on March 30, 1999, when he dismissed its appeal against the dismissal by District Judge Travers on March 16 of its application to set aside judgment in default of filing a defence entered on January 29 in favour of the claimants, Kathleen and Peter MacDonald.

A letter before action was sent to the defendant's insurers on October 6, 1998, in respect of a traffic accident on September 25 inquiring if liability was disputed. The insurers sent a holding letter on November 22 which was acknowledged.

Proceedings were served by post on the defendant on January 9, 1999. No reply having been received, judgment in default was entered on January 29. A defence was filed on February 3.

Mr Nigel Gilmour, QC, for the defendant; Mr Nigel Lawrence for the claimants.

LORD JUSTICE BROOKE said that the judge, while accepting that the defendant had a defence on the merits and that any prejudice to the claimants was minimal, found in the claimants' favour because of the defendant's lack of explanation for the delay, and considered he could take account of the period of delay up to the issue of proceedings.

Mr Gilmour contended, inter alia, that while the length of any delay should be taken into account, any pre-action delay was wholly irrelevant.

The primary consideration was whether the defence had any merits in the sense that there was a real prospect of success, and that justice should be done, see *Mortgage Corporation Ltd v Sandoes* (*The Times* December 27, 1996; [1996] TLR 751).

Moreover, the failure to provide a good explanation for the delay was not always a reason for the court to exercise its wide discretion against the delay (*Finnegan v Parkside Health Authority* ([1997] TLR 668; [1998] 1 WLR 411, 420–421)) and therefore the court should exercise its discretion in the defendant's favour.

Mr Lawrence relied heavily on the failure to give an explanation for the delay since service of the letter before action.

If the judge thought such delay was a relevant consideration and exercised his discretion in the claimant's favour, there was no basis for the court to impugn his decision, and he relied on *Savill v Southend Health Authority* ([1994] TLR 675; [1995] 1 WLR 1254).

His Lordship considered Mr Gilmour's submissions to be sound. It was well known that *Savill* caused much difficulty