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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 211 OF 1976

BETWEEN	Rose Hall Ltd., Rose Hall (Developments) Ltd.,	Plaintiffs
A N D	Chase Merchant Bankers Ja. Ltd., Rose Hall (H.I.) Ltd.,	Defendants

(Motion for stay of proceedings)

Heard: Nov. 27 & 28)
Dec. 2 - 4) 1980

Richard Mahfood,Q.C., & Dr. L. G. Barnett for the Plaintiffs the applicants;
David Muirhead,Q.C., & J. Leo Rhynie for the Defendants the respondents.

February 12, 1981

Parnell, J:

On the 19th December, the Court ordered that all proceedings in the above action be stayed pending the hearing and determination of Civil Action 79-182 brought by Rose Hall Ltd., and Rose Hall (H.I.) Ltd., against Chase Manhattan Overseas Banking Corporation and Holiday Inns Inc., in the United States District Court of Delaware. The question of costs was reserved. I promised to put my reasons in writing. This I now proceed to do.

I shall begin with an outline of the facts in so far as I regard them as material.

The matter was listed for hearing in Chambers but I directed that the arguments be heard in open Court in obedience to section 48(e) of the Judicature (Supreme Court) Act. To this section I shall refer in due course. Owing to a slight lapse on the part of the parties filing the relevant documents in support of the relief sought, the usual judge's bundle was not prepared. As a result, I have been forced to wade through a mountain of documents in the form of a "Supreme Court file." However, my efforts were somewhat assuaged by the able arguments of Counsel. Even in areas where I detected more ingenuity than soundness, I still obtained some guidance in traversing the labyrinth which the corpulent file contains.

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Certain material facts outlined

1. Rose Hall Ltd., is a company incorporated in the Cayman Islands but does its business in St. James, Jamaica. All its assets are in Jamaica.

2. Rollins Jamaica Ltd., is a company incorporated in Delaware, U.S.A. and controlled by Mr. John Rollins, a citizen of that state.

3. Rose Hall (Developments) Ltd., is a company incorporated under the laws of Jamaica with registered offices in Kingston.

4. Rose Hall (H.I.) Ltd., was a subsidiary of Rose Hall Ltd., up to February 1976.

5. Up to February 20, 1976, Mr. John Rollins controlled the three companies mentioned at 1. 3 & 4. As I have mentioned, he owned the company mentioned at 2.

6. Chase Merchant Bankers Jamaica Ltd., was at the material time, a company incorporated in Jamaica but regarded as a branch or agency of Chase Manhattan Overseas Banking Corporation. Chase Overseas has its home office in Newark, Delaware and is permitted to operate an overseas banking interest by a Federal Reserve Act known as the "Edge Act". Under the Edge Act, Chase Overseas is liable for the act or default of its overseas banking interest committed in the course of its business or operation.

7. Holiday Inns Inc., is a company incorporated in the United States of America. It controls a chain of hotels operating in several countries under the name of "Holiday Inn". Holiday Inns Inc., is qualified to do business in Delaware and has designated a resident agent for the receipt of service of process in the state of Delaware.

Holiday Inn Hotel built

8. Rose Hall (H.I.) Ltd., obtained a loan of U.S.$5.5M from the Bank of Nova Scotia Trust Company Ltd., to finance the construction of a hotel known as Rose Hall "Holiday Inn". A further sum of U.S.$3/4M was lent to Rollins Jamaica Ltd., by the Bank of Nova Scotia, Toronto, to finance the construction of the hotel. Rollins Jamaica Ltd. lent this sum to Rose Hall (H.I.) Ltd.

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Lease executed

9. On the 30th December 1971, under an indenture made between Rose Hall (H.I.) Ltd., the lessor and Holiday Inns of the Bahamas Ltd., the lessee, the hotel was leased for a period of 20 years from June 10, 1970. In a 19 page document, the terms and conditions of the lease are outlined. Paragraph 16 of the agreement shows that the persons to whom notices are to be sent are as follows:

"Lessor: c/o Mr. John W. Rollins, Sr.,
Devon Apartments - Room 110,
2401, Pennsylvania Avenue,
Wilmington, Delaware.

Lessee: Secretary,
Holiday Inns, Inc.,
3742, Lamar Avenue,
Memphis, Tennessee 38118."

Subsequently, the lease was assigned to Holiday Inns (Ja.) Ltd., a wholly-owned subsidiary of Holiday Inns Inc. In both cases, the obligations of the lessee under the lease were guaranteed by Holiday Inns Inc.

Loan agreement executed

10. Under an agreement made on or about May 28, 1974, the first defendant (hereinafter called Chase Jamaica), loaned Rose Hall Ltd., the sum of U.S.$3M. The parties to this agreement were:

(1) Rose Hall Ltd. (the borrower);

(2) Rollins Ja. Ltd.,

(3) Rose Hall (Developments) Ltd.; and

(4) Chase Jamaica (the lender)

As a security for the loan, Rose Hall Ltd. gave Chase Jamaica a mortgage on approximately 3,000 acres of land which it owned and a pledge of all the stock of Rose Hall (H.I.) Ltd.

Default under the agreement

11. There was a depression which hit the tourist trade in Jamaica between the middle of 1974 to about the first half of 1976. In addition, the Euro-dollar had escalated. The interest rate on the loan increased steeply. During this period, it appears that the borrower (Rose Hall Ltd.) fell into arrears. The lender (Chase Jamaica) pressed for payment and intimated that it would resort to its power of sale under a mortgage

agreement executed in pursuance of the loan agreement.

12. In early 1976, Chase Jamaica decided to close down its Jamaican operation and liquidate as early as possible, all of its loans in Jamaica.

Holiday Inn up for sale

13. In or about mid 1975, Rose Hall Ltd begain neogitating with a view to a disposal of its Hotel Asset to the Government of Jamaica. And by October 29, 1975, Mr. Rollins informed the Manager of Chase Jamaica that subject to Government approval, the Hotel was to be sold for $14½M.

Mr. Rollins warned the Manager (Mr. Chris Brown) that if any action was taken by Chase Jamaica which would result in any interference with or disruption of, the state of the negotiations, Chase Jamaica would be held liable for the loss.

A wholly owned Government Company (U.D.C.), was negotiating with Mr. Rollins. The offer of sale was made to Mr. Moses Matalon the Chairman of U.D.C. The sale price was eventually reduced to U.S.$13M.

Revision of lease agreement demanded

14. About April, 1976, Holiday Inns Inc. sought certain concessions in its lease agreement. A re-negotiation of the 20 year lease was requested. Rose Hall Ltd. refused to grant the concessions or to vary the lease agreement.

Quick events in 1976

15. There were certain events which developed in quick succession in 1976. The most important were:

(a) On February 20, 1976, all the shares except one in Rose Hall (H.I.) Ltd. were transferred to Chase Jamaica. This was a result of a resolution passed at a Director's meeting held on November 12, 1975.

(b) On or about August 3, 1976, Chase Jamaica wrote a letter to Holiday Inns Inc. inviting a discussion on proposals for a re-negotiation of the Hotel lease. A meeting was held. For all practical purposes, Chase Jamaica controlled Rose Hall (H.I.) Ltd. in August 1976.

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(c) Chase Jamaica wrote to Mr. John Rollins and warned him not to take any further part in the negotiations touching the sale of the hotel. A copy of the letter was sent to U.D.C.

(d) As a result of the action of Chase and Holiday Inns, the Jamaica Government terminated its efforts to conclude the purchase of the Hotel. This decision was made in August 1976. Holiday Inns Inc. had taken a strong stand, namely, without a variation of the lease in its favour, no assurance could be given that its obligations under the lease would be honoured.

(e) In September 1976, Chase Jamaica offered to sell the Hotel Asset and approximately 3,000 acres of land to the Jamaican Government at a price which is described as

"greatly reduced and grossly inadequate"

and in disregard of the interest of Rose Hall Ltd. It is claimed that Chase Jamaica was only interested to recoup its loan and to support the motive and interest of Holiday Inns Inc. to obtain major concessions in its lease. To put it bluntly, Rose Hall Ltd. claims that a conspiracy between Chase and Holiday Inns Inc. resulted in substantial damage to itself and to the benefit of the conspirators. The offer for sale was interesting. It was in these terms:

(1) The Hotel Asset, subject to a mortgage of U.S.$6.25M but free of Chase security interests at a price of U.S.$2.255M.

(2) 3,000 acres of land more or less and held as security at a price of U.S.$1M.

This parcel of land i.e. 3,000 acres is part of a 5,500 acre tract owned by the plaintiff Rose Hall Ltd. If a sale did go through, there would have been a substantial impairment to the market value of the remaining portion of the land.

The estimated damage under this head alone is put at U.S.$12M.

Parent Company offered facilities

In order to induce the Jamaican Government to accept the offer and generally, so as to facilitate the sale, the parent company of Chase Jamaica offered the Jamaican Government a loan of U.S.$5M.

The deal went through. In December 1977, Chase Jamaica transferred to the Urban Development Corporation (U.D.C.), the stock of Rose Hall (H.I.) Ltd. for U.S.$2.255M and the 3,000 acres for U.S.$1M.

Legal battle waged

(1) Rose Hall filed an action in the state of Georgia on September 30, 1976 against Holiday Inns Inc. It claimed damages amounting to $6.75M for the tortious action of the defendant in interfering with negotiations between the plaintiff and the Jamaican Government touching the sale of the hotel asset. I have already referred to this aspect of the complaint.

In the Georgia Action, there was at least an implied suggestion that there was collusion between Chase Overseas and Holiday Inns Inc. in order to bring about the disruption in the dialogue between the plaintiff and the Jamaican Government concerning the sale. But no count or charge of conspiracy was made in the action in Georgia. Chase was not a defendant in Georgia.

The action against Holiday Inns failed in Georgia on the simple ground that the claim alleged should have been brought by or on behalf of Rose Hall (H.I.) Ltd. and not as a direct action by the plaintiff Rose Hall Ltd. The judgment was delivered on October 19, 1977.

(2) On the 4th October, 1976, Rose Hall Ltd. and Rose Hall (Developments) Ltd. filed a writ in the Supreme Court against Chase Jamaica and Rose Hall (H.I.) Ltd. The plaintiffs sought certain declarations and asked for an injunction to restrain the defendants "until after judgment or until further order" from selling, transferring or otherwise disposing of any of the property named and held under a mortgage to which I have referred earlier in this judgment.

A lengthy statement of claim was filed on October 27, 1976. By

October 29, the defendants obtained an order for security of costs amounting to $30,000. The plaintiffs provided the security on December 6.

Both defendants filed their defences on November 11. The first defendant in its defence entered a counter-claim. By this move, to which I shall later refer in more detail, the plaintiffs are made defendants in the same action. The counter-claim is deemed to be a separate action in which the defendants are the plaintiffs and the plaintiffs are the defendants.

(3.) An interim injunction was granted by a judge in chambers on October 4. It was to last for ten days. For four days, namely, November 2,3,4 & 22, 1976, arguments were advanced before Rowe, J on an application seeking an order to continue the interlocutory injunction until the trial of the action.

On January 27, 1977, the learned judge delivered a written judgment. He refused to extend the injunction against the defendants. They were then made free to sell or dispose of the mortgaged property in order to satisfy the outstanding debt owed to Chase Jamaica. At page 15 of the judgment Rowe, J had this to say:

> "In the matters at issue between the plaintiffs and the defendants, I am clearly of the view that damages would be an adequate remedy.
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> The evidence is that the first defendant's assets in Jamaica total approximately J$10M..... The first defendant stated that it proposes to continue in business in Jamaica. In the circumstances, I am of the view that the first defendant is in a position to pay whatever damages might be awarded to the plaintiffs in the action."

What was before Rowe, J was this question; having regard to all the facts and circumstances as put before him and accepted by him, should the defendants have been restrained from selling or disposing of all or any of the mortgaged or pledged property until a hearing on the merits of the claim and the counter-claim. The defences were filed during the hearing. A battery of skilled and experienced counsel appeared for the parties.

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It is now clear that the proposition that in November 1976 the first defendant:

"proposed to continue in business in Jamaica"

is a debatable point. The plaintiffs apparently do not accept this contention. What is also clear is that whatever may have been the state of mind of the first defendant in November 1976, the position today is that it has ceased doing business in Jamaica and it has no assets in the country. It is beyond the reach of the jurisdiction of the Court. A judgment entered against Chase Jamaica in these days, would amount to what Plinius termed:

"bruta fulmina et vana"
(a thunderbolt which strikes blindly and harmlessly).

(4) On April 11, 1979, Rose Hall Ltd., and Rose Hall (H.I.) Ltd. filed an action in the District Court of Delaware, against Chase Overseas and Holiday Inns Inc. The second plaintiff had to be pulled into the battle by a special procedure allowed by the rules of Court. It is an involuntary plaintiff. A lengthy complaint comprising of 49 paragraphs has been filed. The plaintiffs are asking for damages in the amount of $72M together with punitive damages to be assessed. Interest and costs are prayed for.

The claim is based mainly on the facts which I have attempted to outline. Tortious interference with negotiations between Rose Hall Ltd. and the Government of Jamaica touching the sale of the Hotel Asset at Rose Hall resulting in a non-consummation of an offer and acceptance of sale; conspiracy between the defendants to damage the plaintiffs and causing substantial damage thereby and a breach of fiduciary duty owed to Rose Hall Ltd. when the mortgaged property was being sold, are some of the counts mentioned in the complaint.

Motions to dismiss filed

Under the procedure allowed in Delaware, the defendants put up a fight. Motions were instituted to dismiss the action on various grounds. One of the grounds was forum non conveniens. It was not argued nor was it suggested that the defendants were not answerable in Delaware to the plaintiffs for the acts complained of in Jamaica and which have an echo in the

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claim and counter-claim before me.

The motions to dismiss the action were dismissed. I have had an opportunity to read the opinion of Steel, Senior Judge in Delaware and dated March 31, 1980. The question as to whether Jamaica or Delaware was the proper forum to try the action was strenuously argued by Chase Overseas in the Delaware Court. Pages 26-30 of the opinion deal with this point. If I am permitted to say so, the judge's reasoning is impeccable and his judgment rests on a firm foundation. I shall quote excerpts from his opinion on the question of forum non conveniens:

(1) PP.26-27: "The interest of Rose Hall in bringing the action in Delaware is beyond question. The indirect but ultimate beneficiary of the action, if successful, is John Rollins, a resident of Delaware. He owns all of the stock of Rollins Ja. Ltd; a Delaware corporation, which in turn owns all of the stock of Rose Hall, a Cayman Islands corporation. Chase Overseas is an Edge Act corporation, organized under 12 U.S.C. // 611-632 (1976) and has designated Newark, Delaware as its home office. This court has jurisdiction over questions arising under the Act."

The learned judge then deals with a point which was argued before me. Mr. Murihead has contended on behalf of Chase Jamaica that the parties in Jamaica and the issues are not the same. But Chase Overseas did not support this contention.

(2) P. 27: "Chase Overseas argues that Jamaica is the proper forum in which to try this action since Rose Hall has previously begun an action there where the parties and issues are the same as in this action. This Jamaican suit is still pending."

It is difficult to follow the argument of Chase Overseas that the action against it in Delaware should be tried in Jamaica. Its subsidiary Chase Jamaica, never had assets in Jamaica to the value of U.S.$72M inasmuch as Chase Overseas is not amenable to the jurisdiction of the Jamaican Courts.

The learned judge then continues to deal with the issue:

(3) PP.28-29: "Basically there are two reasons why Delaware rather than Jamaica is the proper jurisdiction in which to try this action. Chase Overseas, the defendant in Delaware, is not a party to the Jamaica suit and is beyond the reach of process there. Furthermore, this action involves the interpretation of the Edge Act, a federal law upon which Rose Hall importantly rests its claim. This can more appropriately be decided by a Court in the United States, particularly as the question here has never been decided."

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Later on at page 29, the judge observes:

> "Whether, however, under the Edge Act, Chase Overseas can be held liable for the acts of wrong doing, if any, of its subsidiary Chase Jamaica, is solely an issue in this action. It comes with ill grace for Chase Overseas to argue that Rose Hall should be required to press its claim in Jamaica where it is at least doubtful whether a judgment, if obtained, can be satisfied."

Jamaican action fixed for trial

The action of the plaintiffs has been fixed for trial in the early part of the new term in 1981. The trial period should run for about 21 days with a date in January as the commencement.

On or about October 23, 1980, the plaintiffs filed a summons applying for a stay of proceedings while the Civil action in Delaware is pending. As I have already indicated, I treated the application as a motion and heard it in open court.

It is not in dispute that the court has inherent jurisdiction to stay proceedings where good and sufficient cause is shown. There is a statutory provision in section 48(e) of the Judicature (Supreme Court) Act. It states as follows:

> "No proceeding at any time when pending in the Supreme Court shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of such proceeding might have been obtained if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto; but nothing in this Act contained shall disable the Court from directing a stay of proceedings in any cause or matter pending before it if it thinks fit, and any person, whether a party or not to

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> any such cause or matter, who would have been entitled if this Act had not been passed to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Court, by motion in a summary way, for a stay of proceedings, either generally or so far as may be necessary for the purposes of justice, and the Court shall thereupon make such order as is just."

The section is wide. And it has a long and interesting history. Lord Wilberforce traced it in his speech in the Atlantic Star. See /1973/ 2 W.L.R. 795 at p.811 C-F. Before the Supreme Court of Judicature Act, 1873 was enacted, proceedings in the High Court could be restrained by injunction:

> "on principle of convenience, to prevent litigation, which it considered to be either unnecessary, and therefore vexatious, or.....ill-adapted to secure complete justice." (See Lord Cranworth L.C. in Carron Iron Co. v. McLaren /1855/. 5 H.L. Cas 416 at p.438.)

Section 24 (5) of the 1873 Act aforesaid, removed the power to restrain proceedings by injunction and recognized the inherent power of the court to order a stay.

The section in the 1873 Act was replaced by sec. 41 of the Supreme Court of Judicature (Consolidation) Act of 1925. The Jamaican

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Statute sec. 48 (e) of the Judicature Supreme Court Act, is in almost identical terms as in the English Statute.

Submissions made

I shall outline in a summary form the contentions of the applicants and respondents in this motion, I hope that I will do no damage to the arguments of counsel if I do not use their exact words. What I reproduce is what I understand them to be saying. Where a judge has to listen to highly technical and skilled arguments for days, he may find that the rhetoric to which he was subjected and the persistency of counsel may throw him off course for a while. His first impression which is generally formed with the use of common sense based on reality, may become temporarily cloudy. But soon, he will recover his balance and his first impression - if it is the correct one - will re-assert itself.

I understand Mr. Mahfood to argue thus:

(1) If the advantages to the plaintiffs in the action in Delaware will outweigh the disadvantages to the defendants in defending it, then that is a good ground to stay the proceedings.

(2) All the parties involved in both actions (Jamaica and United States) have an American connection. Most of the witnesses to be called by both parties live in the United States. And since the plaintiffs have demonstrated a legitimate reason to proceed in Delaware, it does not lie in the mouth of Chase Jamaica to argue that that course will prejudice them or their parent company.

(3) If the plaintiffs should obtain judgment in Delaware, no difficulty would be encountered in reaping the proceeds. On the other hand, if a judgment is obtained in Jamaica, there is no asset against which the judgment creditor could proceed.

(4) The procedural steps open to a plaintiff in Delaware before trial, that is to say, matters like pre-trial discovery and trial practices, are substantially more favourable than in Jamaica. And certain pre-trial practices have already been put in motion since the filing of the suit in April 1979.

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An affidavit which has been placed before me is that of Mr. James M. Tunnel, Jr. one of the attorneys for Rose Hall Ltd. in the Delaware action. The affidavit is dated November 24, 1980.

Paragraphs 3 and 4 state as follows:

> 3. "Holiday Inns Inc. has nominated and agreed to produce 8 or 9 witnesses to be deposed, and all of those, whether their depositions have been taken, or concluded if taken, are non-residents of Jamaica."
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> 4. "Chase Manhattan Overseas Banking Corporation has agreed to produce for deposition, Edward Christopher Brown, who was formerly - in 1975, 1976 and 1977 - the Managing Director of Chase Merchants Bankers (Ja.) Ltd., and Ulises Giberga. Both are non-residents of Jamaica."

Another affidavit is that of Peter Millingen, one of the Attorneys for the plaintiffs in the Jamaican action. It is dated November 11, 1980. Paragraph 12 states as follows:

> "Several of the witnesses for the plaintiff including John Rollins and Ted Weitzel, live in the United States of America and several of the witnesses for the defendant including Chris Brown and Douglas Judah live in the United States of America. Further, the procedure of taking evidence by depositions which is normal in the procedure of the United States Courts, will also facilitate the progress of the Delaware action."

Contention of the defendants

Mr. Muirhead argued for many hours during which time he displayed his usual candour, persistency and adroitness. His main submissions were as follows:

(1) Where a plaintiff seeks to sue or has sued in one or more jurisdictions, it is for him to discontinue one of the actions. The application before the Court should, therefore, be in the nature of seeking leave to discontinue and not one seeking a stay of proceedings.

(2) The first action brought by the plaintiffs was in the natural forum, that is, in Jamaica. The nature of the action and the identification of the parties were determined by them.

(3) In the circumstances of the case, only the defendant or the defendants could properly ask for a stay. There is no live counter-claim in Jamaica. The defendant was entitled to sell and this fact has been conceded. It is not open to a plaintiff who has brought an action in Jamaica and in the United

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States to ask for a stay in Jamaica since he is not permitted to argue that his own action is oppressive or vexatious. The application is, therefore, misconceived.

(4) The Jamaican action has not been duplicated in the Delaware suit. The issues and the parties are not the same. As a result the question of a stay in Jamaica does not arise.

(5) The court has a discretion to exercise in a matter of this kind. An allegation of conspiracy between Chase Jamaica and Holiday Inns Inc. has been made in the Delaware action. The good name of Jamaica is likely to be tarnished and this factor should influence the court in the exercise of its discretion.

It is not out of disrespect to say that as I listened to the arguments of Mr. Muirhead, I detected sheer ingenuity in presentation and signs of a penchant in developing a technical point with skill. For example, it is shown on the pleadings in the Jamaica action, that the first defendant (Chase Jamaica) has counter-claimed against the plaintiffs. The first defendant has by its own action constituted the plaintiffs as defendants. Section 167 of the Judicature (Civil Procedure Code) Cap. 177 states as follows:

> " Subject to the provisions of section 212, a defendant in an action may set-off, or set-up by way of counter-claim against the claims of the plaintiff, any right or claim whether such set-off or counter-claim sound in damages or not; and such set-off or counter-claim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim."

Even if it is to be assumed that there is some law or rule of practice which disables a plaintiff in a matter of the nature before me, in moving for a stay, that rule of law or practice cannot apply on the facts. The plaintiffs are not permitted to make themselves plaintiffs and defendants in their own action. Therefore, as defendants the procedure is open to them.

The argument that there is no "live counter-claim" in Jamaica is untenable. Life is still there in order to sustain the status of the plaintiffs in making the application even if it is conceded that the contention concerning locus standi is sound. A distinction must be drawn between trying the counter-claim on its merits and the fact that a counter-claim which has not been discontinued, is to be tried. As I understand it, what is in issue in

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the the counter-claim - and it has a sonorous reverberation in the Delaware action - is not whether the defendants had the right to sell the mortgaged and pledged property but whether in equity and in law, the right could have been exercised in the way it was done.

Lis alibi pendens?

A great part of the submissions of Mr. Muirhead concentrated on the principles which guide a Court which has before it an application for a stay of proceedings because litigation concerning the same matter is being waged in a foreign court. As a result, reference was made to the relevant pages dealing with the plea of "lis alibi pendens" in Cheshire's Private International Law (9th edition) and Dicey and Morris (Conflict of Laws 8th edition). Several authorities were cited. But this was not all. The White Book (Supreme Court Practice, 1970, Vol. 2) was called in aid. Paragraph 3344 which deals with a stay of proceedings pursuant to section 41 of the 1925 English Supreme Court Judicature (Consolidation) Act, was carefully combed. As I have mentioned earlier, this section is almost identical with section 48(e) of the Jamaican Statute (Judicature, Supreme Court Act). The notes in the book touching the said paragraph were subjected to a linguistic examination. And all this exercise stemmed from the suggestion - and Mr. Muirhead stressed it vigorously - that no case can be found where a plaintiff in one court and who is the same plaintiff in the same subject matter in a foreign court, is the applicant for a stay of proceedings.

It was Coke who advised the student to sharpen his wits on recent judgments before he attempted the more recondite learning of the Year Books. See Co. Litt. 249b. And it is said that it was the same famous Coke who was responsible in putting into operation a circular argument which went like this:

> "If it is law, it will be found in the books,
> But the proposition is not found in the books,
> Therefore, it is not law."

The argument of Mr. Muirhead on this point went too near a fallacy for comfort. The fact that no precedent can be found in any case or text book to cover or support a proposition, does not mean that the proposition is unsound. And where the justice of the case demands it, a judge should

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be bold enough to formulate a precedent if he cannot find one. I shall cite a short passage from the judgment of a famous judge to demonstrate the spirit of the age:

> "This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected." (See Denning L.J. (as he then was in Candler v. Crane, Christmas & Co. /1951/ 2 K.B. 164 at 178.

In his reply, Dr. Barnett dealt very carefully with the points raised by Mr. Muirhead. One of the submissions made by Dr. Barnett may be stated thus:

> "Any person with a sufficient interest in the subject matter and who can show that he would suffer a real disadvantage by the continuation of the proceedings in Jamaica, is entitled to apply under the provision of section 48(e) for a stay."

I entirely agree with the contention of Dr. Barnett. In my view, under the section the following persons are entitled to be an applicant for a stay:

(1) Any person whether a plaintiff or a third party to the suit or any other person who can show a sufficient interest;

(2) Any person who is entitled to enforce any judgment decree rule or order given or made in the case or which could have been given or made.

The numerous authorities cited during the arguments, show that each case must be examined on its merits. No judge should get himself tied to a principle which, although it is sound, has no application to the special facts before him. Stating a principle is one thing. Applying it to certain facts in order to meet the justice in the case, is something quite different.

Certain guidelines

I have extracted certain principles which ought to assist a judge in an application of this kind.

(1) Where there is a possibility that a plaintiff may reap an advantage by prosecuting a suit in two countries, the Court should not disturb him. And if a stay should be granted by the Court in order to avoid a duplicity of proceedings, or to save expense or trouble, the order will

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be made to assist the party applying who shows that it would be more beneficial to him and that no detriment will be suffered by the other party.

(2) In general, the plaintiff ought to pursue the defendant in the Court to which he is normally subject. The facts show that when the matter is reduced to simple terms, a picture appears where three American interests are involved. And they are two giant corporations neither of which is amenable to the Jamaican jurisdiction and another company which is not so powerful. But the latter was the first to prepare for a fight. On September 30, 1976, an action is launched in the United States against one of the giants and on October 4, about three days after, another action is launched in Jamaica against the offsprings of both giants. But the Jamaican action appears to have been brought out of sheer necessity and in self-defence. Real estate in Jamaica was threatened. The power of sale to be wielded was peaked - according to the minor American interest - to strike in a manner not permitted by law and in defiance of the dictates of fairplay and reasonableness.

(3) Where it is shown that the plaintiff has bona fide brought an action in a foreign Country against a defendant and that there is pending in Jamaica an action based on the same facts in which he is the plaintiff - but that an injustice will be suffered by him if he prosecutes the action here and that the defendant will not be prejudiced by defending the action abroad, a case is made out for a grant of stay at the instance of the plaintiff.

On the facts before me, the plaintiffs have shown that it would be idle to litigate here. And what is very significant is that if either Chase Overseas or Holiday Inns Inc. was really serious and straightforward in their move to have the Jamaican action tried, one would have expected that an offer would have been made to pay money into Court to abide the event of damages or costs being awarded against any of its agencies in Jamaica. But as

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it is, not even one dollar is available.

The evidence shows that Chase Jamaica is not even listed in the current telephone directory. The bird has flown to its parent and the parent is residing where the main interested party Mr. John Rollins is also resident. Mr. Rollins who is the main voice of the complaining company has the right to bring his action in Delaware. For substantial reasons he has done so. Why he should not be allowed to go on with his claim? And what is the fear of the defendants to face him there first in the encounter?

I entirely agree with Senior Judge Steel, that apart from other considerations, the case of the plaintiff (Rose Hall Ltd.) against Chase Overseas rests on the interpretation of a Federal Act of Parliament; and that as there is no precedent to follow in the interpretation of the Act it would be better if an American court should blaze the trail instead of a judge in Jamaica. I am putting in my own words what I understand the learned judge to be saying. His observation, with respect, makes pleasant reading. It is good law and sound sense.

I have deliberately omitted to mention in this judgment the numerous cases cited by counsel for the applicants and the respondents in their arguments. I have examined all of them but none of the authorities is of any real assistance. What has been forgotten is that each case must be considered with reference to its own facts and circumstances. In examining the circumstances, a broad common sense view must be used as a yardstick. Strained analogies and whimsical resemblances should be eschewed.

As a developing country, Jamaica welcomes entrepreneurs of all developed countries. Where these businessmen are from the same country and have a dispute among themselves here as a result of their dealings, there may be a desire to settle any claim or complaint in the courts of their own country. Damages may be measured on a scale higher than what obtains here. Procedural and other interlocutory steps with which they are familiar may be more effective than what Jamaica offers. And the reaping of any judgment debt may be more easy and useful than in Jamaica.

In such a situation, it is my view that no obstacle should be put in the way of any of the parties who in good faith has launched proceedings against his own countrymen in their own court. He is entitled to follow

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his offending brother, particularly where the offender has decided to leave the the beautiful climate which he once enjoyed here. In order, therefore, to induce more of these entrepreneurs to Jamaica, it should be shown that as far as the administration of justice goes, the Court will do what in the circumstances, is considered just and what may be necessary for the purposes of obtaining a reasonable or equitable result.

Summary of reasons

I shall outline in a summary form the main reasons why a stay has been granted in the terms already indicated.

(1) All the interested parties in both the Jamaican and American actions are Americans. The defendants reside in America and cannot be reached by the judicial process of the local court. Most of the material witnesses to be called reside in America.

(2) The subsidiary company (Chase Jamaica) no longer conducts business within the jurisdiction. There is no asset in Jamaica nor is there any money paid into Court to abide the event.

(3) As has been conceded by Chase Overseas in the court of Delaware, the issues and the parties both in Jamaica and in America are the same. But the Delaware action is more all embracing. It includes a charge of conspiracy against the defendants to the detriment of Mr. Rollins and his company.

(4) Under section 48(e) of the Judicature Supreme Court Act, any person (whether plaintiff, defendant or otherwise) who is able to show a substantial interest in a suit may apply to the Court for a stay of proceedings until a certain event is satisfied. Lis alibi pendens, is only one of the grounds which may be urged in support of the motion.

(5) If the veil of incorporation is lifted, it will be shown that the real complainant is Mr. John Rollins, an American and a resident of Delaware. He has satisfied me that the continuance of his action in Jamaica would bring him no benefit whatever if he is successful and that the defendants will suffer no harm or injustice if the trial of his Delaware action proceeds.

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(6) Every application for a stay of proceedings must be considered with reference to its own peculiar facts and circumstances. Citation of numerous cases decided abroad and having reference to different facts and circumstances tends to cloud the issues and unnecessarily to impinge on the area of substance. The law must serve the community. The social and economic conditions prevailing in the society at any given period must be observed when the law is required to operate. The stranger within and outside the gates should be made aware of this fact.

(7) The case of Mr. Rollins against Chase Overseas in Delaware has as its plinth, the proper interpretation of a 61 year old Federal Act (Edge Act). The Act still awaits an examination by the American Courts. Mr. Rollins should be allowed the opportunity to be the first litigant to ask for the Court's interpretation without any delay or unnecessary expense. If he can blazon his name while reaping a benefit, the Court should not prevent him from running the race he has set himself.

Question of costs

On the question of costs, I am compelled to re-state certain dates.

(1) The first American action launched by Rose Hall Ltd. in the state of Georgia is dated September 30, 1976.

(2) The Delaware action was launched on April 11, 1979.

(3) The application for a stay of proceedings was filed on the 23rd October, 1980. By this time it was decided that the trial of the Jamaican action would begin early in the Hilary Term of 1981.

Dr. Barnett submitted on the issue of costs, that if the application for a stay is granted, then the ordinary principle that where a motion is resisted, the successful party is entitled to costs, should prevail. However, he conceded that the costs of taking instructions on the question whether or not the application should be resisted, should be credited to the defendants.

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On the other hand, Mr. Leo Rhynie argued that even if the Court should rule in favour of the applicants, there would still be a question for the Court to consider, namely, did the defendants act properly in resisting the application. He argued that there has been a delay in moving the Court for the order sought and during this time, the defendants had to engage the services of counsel for the fixture in early 1981. As a result of these considerations, Mr. Leo Rhynie submitted boldly that the costs of the application should be awarded to the defendants whatever the result of the application. I agree that the application for a stay could have been made long before October 23. There was no need to wait so long.

The records show however, that with the exception of Mr. Leo Rhynie, all the counsel and the instructing attorneys in the matter have been the same, at least since November 1976 when the matter concerning the injunction was heard by Rowe, J. A senior Counsel (Norman Hill,Q.C.) who then appeared for the first defendant is no longer in active practice in Jamaica. It is believed that he has migrated. I have to assume, therefore, that the defendants did not have to explore new stables in order to secure fresh starters for the fixture made during the Hilary Term.

When the summons was filed on October 23, the defendants were entitled to seek counsel's opinion whether or not the application should be considered. A hearing was fixed for November 6. But on that date, it was adjourned to November 13, when it was further adjourned with costs to the defendants. Part of the order made on November 13 was that the matter was not to be set down for hearing within fourteen days from that date.

It is clear that by November 13, the defendants had obtained sufficient advice and were ready to resist the application.

On December 3, 1980, Mr. Muirhead informed the Court that his instructing attorney had received certain information from an American Attorney acting on behalf of Chase Overseas. The information was to the effect that in case, the three week action to begin in January 1981 did end in favour of the plaintiffs, Chase Jamaica would be supported to the extent of J$10M in satisfying the judgment. The Court then informed Mr. Muirhead that the instructing attorney should file an affidavit to the extent of what was disclosed in Court. Mr. Muirhead promised that this would be done.

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On the 4th December, the last day of the hearing, Mr. Leo Rhynie informed the Court that in the course of that day, the instructing attorney would file the affidavit exhibiting the telex communication which was received. On the 5th December, the assurance given by Counsel was complied with. Mr. Michael Nunes, the instructing attorney, filed an affidavit and exhibited thereto, the telex communication which he received. The content of the message is interesting. I shall quote in part, the relevant portion of it.

> ". . . . Chase Manhattan Overseas Banking Corporation has agreed to pay any final judgment that may be entered against Chase Merchant Bankers Jamaica Ltd., in the suit brought against it by Rose Hall Ltd., in the Supreme Court of Judicature of Jamaica up to the extent of Jamaican Dollars 10 million, provided however that the trial will not be delayed beyond its presently scheduled date of January 7, 1981."

But Mr. Nunes had a telephone conversation with Mr. Edward J. Reilly a member of the firm which represents Chase Manhattan Overseas Banking Corporation. The final portion of paragraph two of the affidavit of Mr. Nunes speaks for itself:

> "In telephone conversation with Mr. Reilly, he has made it clear that the agreement to pay herein is conditioned on the trial commencing as scheduled and continuing throughout on the dates. as set out for hearing."

There is a French Proverb which runs thus:

> "With the help of an 'if' you might put Paris into a bottle."

A promise is susceptible to debility by a delicate condition or a disturbing stipulation introduced by an "if".

I am yet to read what is put forward as an "undertaking" which is hedged and bristled with such a condition that it makes what is proffered as worthless. The so called undertaking is worded in such a manner that if Counsel for the defendants had become ill on January 6, 1981 and his illness caused a delay of the proceedings by one or two days, there would have been

no obligation to come to the rescue of Chase Merchant Bankers Jamaica, if it had found itself a loser at the end of the trial. I find that the "undertaking" given by Chase Overseas, is lame and it does not reflect anything resembling seriousness and reliability.

It is my view that by November 13, the defendants had sufficient time to instruct counsel concerning the posture to be exhibited towards the application for a stay. And after that date, I hold that any resistance offered to a very fair and just application was and is unreasonable and unwarranted. The move shows signs that it was more calculated to obstruct the course of justice than to achieve it. The trying of the Jamaican action would not bar the prosecution of the claim based on conspiracy and breach of fiduciary duty in Delaware.

The defendants are, therefore, entitled to all costs incident to the application up and including November 13. Thereafter, the applicants are entitled to their costs including the costs of the hearing.

The final order of the Court is this:

(1) There will be a stay of the proceedings in the terms announced on December 19.

(2) The defendants are entitled to the costs incident to the application up to and including November 13.

(3) The defendants must pay the applicants the costs incurred by them after November 13, including the costs of the five day hearing.