BETWEEN: PARKER CROCKETT, CHARLES J. FRASER, GEORGE KEY, HORACE MacFARLANE, HUBERT McNEILL and PETER POPE, PLAINTIFFS AND: THE CORPORATION OF LLOYD'S AND THE SOCIETY AND COUNCIL OF LLOYD'S, DEFENDANTS AND BETWEEN: NORMAN MacLEOD and JOHN HOWATT, PLAINTIFFS AND: THE SOCIETY OF LLOYD'S, DEFENDANT
Crockett v. Corp. of Lloyd's

File No. GSC-17145; GSC-17147 Charlottetown
Prince Edward Island Supreme Court Trial Div
2000 A.C.W.S.J. LEXIS 53518; 2000 A.C.W.S.J. 512251; 100 A.C.W.S. (3d) 569

April 7, 2000, Decided

KEYWORDS: [*1]

CONFLICT OF LAWS -- Jurisdiction -- Contracts --Stay of action -- Plaintiffs underwrote insurance through worldwide insurer based in England, pursuant to contracts providing for governance by English law and exclusive jurisdiction of English courts -- Plaintiffs alleged fraud and breach of Securities Act, R.S.P.E.I. 1988, Cap. S-3, thus rendering contracts void -- Prince Edward Island action was stayed

COURTS -- Stay of proceedings --Plaintiffs underwrote insurance through worldwide insurer based in England, pursuant to contracts providing for governance by English law and exclusive jurisdiction of English courts -- Plaintiffs alleged fraud and breach of Securities Act, R.S.P.E.I. 1988, Cap. S-3, thus rendering contracts void -- Prince Edward Island action was stayed

INSURANCE -- Illegality --Stay of action -- Plaintiffs underwrote insurance through worldwide insurer based in England, pursuant to contracts providing for governance by English law and exclusive jurisdiction of English courts -- Plaintiffs alleged fraud and breach of Securities Act, R.S.P.E.I. 1988, Cap. S-3, thus rendering contracts void -- Prince Edward Island action was stayed

SUMMARY: The plaintiffs [*2] underwrote insurance through syndicates of Lloyd's of London, England, which operated worldwide. The plaintiffs were called upon to honour substantial claims, and commenced action in Prince Edward Island in 1999, alleging fraud and misrepresentation rendering their contracts void, and breaches of the provincial Securities Act (P.E.I.). The insurer was involved in litigation in England since the 1990s, but the plaintiffs declined to join a pending test case involving the issues of fraud and misrepresentation. The contracts included provisions for governance by English law, and for the English courts to have exclusive jurisdiction to determine all disputes. The defendant insurer sought a stay of proceedings. The plaintiffs asserted a real and substantial connection with the province, and claimed that they would suffer a serious loss of juridical advantage if unable to rely on the provincial securities legislation.

HELD: The discretion to refuse a stay should not be exercised, where the plaintiffs failed to meet the test of showing a strong case for not applying the choice of law and forum provisions of the contract into which the plaintiffs voluntarily entered. Although the plaintiffs [*3] showed a loss of juridical advantage, it was not so substantial that it would be unjust to deprive the plaintiffs of the advantage. England was the more appropriate forum, and the plaintiffs failed to meet the onus to show why they should not be held to their agreements. A stay should be granted on terms, including that the defendants would be precluded from seeking security for costs of an action commenced by the plaintiffs in England, would waive any precondition as to satisfying any judgment obtained against the plaintiffs, or any contractual precondition to action.

COUNSEL: M. Lynn Murray and Glenn A. Smith - Solicitors for the Plaintiffs (Crockett, et al.)
Alan K. Scales, Q.C., D. Spencer Campbell and Glenn A. Smith Solicitors for the Plaintiffs (MacLeod and Howatt)
Mark Ledwell, Peter F.C. Howard and Eliot N. Kolers Solicitors for the Defendant (Lloyd's)

JUDGES: Jenkins J. in Chambers

Jenkins J. :

[**1] The plaintiffs are Lloyd's underwriters. In these actions they allege fraud and breaches of Prince Edward Island securities legislation. The defendant brings this motion to stay the actions on the grounds that the parties agreed that all disputes would be adjudicated by the courts in England [*4] in accordance with English law. The defendant also pleads forum non conveniens and issue estoppel. The plaintiffs submit that the Court should refuse the defendant's motion because denial of the their choice of forum would result in a serious loss of juridical advantage and because they have a real and substantial connection with this jurisdiction.

The parties and actions:

[**2] All the plaintiffs are residents of Prince Edward Island, and Names in Lloyd's. The defendant Lloyd's, variously described in these proceedings, is based in London, England, from where it regulates an insurance market through which syndicates provide insurance throughout the world on behalf of Names. During the late 1980's and early 1990's each plaintiff underwrote insurance through syndicates at Lloyd's, regarding which an exceptional level of claims resulted in them being called to cover unexpectedly high losses.

[**3] In these actions, the plaintiffs allege that Lloyd's, directly and through agents, subjected them to fraudulent misrepresentations and fraudulent, deceitful, and reckless practices, but for which they neither would have become members of Lloyd's nor have undertaken particular underwriting [*5] obligations.

[**4] The plaintiffs seek a declaration that their agreements with Lloyd's are void ab initio , and they ask the Court to rescind all agreements, order indemnification for claims made against them and the return of all money paid, and to declare they are no longer members and have no obligations to Lloyd's. The plaintiffs allege Lloyd's carried out a fraudulent scheme in Prince Edward Island, and regarding their introduction, solicitation, and involvement, that Lloyd's was an unlicensed security issuer. They seek a declaration that by virtue of Lloyd's failure to comply with the licensing, prospectus, and other disclosure and filing requirements of the Securities Act , R.S.P.E.I. 1988, Cap. S-3, that their contractual obligations to Lloyd's are unenforceable. The plaintiffs seek general, aggravated, and punitive damages, which in Cause No. GSC-17145 they state are $ 100 million.

[**5] Over years of litigation involving the defendant and various Names throughout the 1990's, sometimes including the plaintiffs, the plaintiffs have avoided participation in any proceedings in England. The plaintiffs commenced these actions in Prince Edward Island in January, 1999. [*6]

This motion:

[**6] Before filing a defence, the defendant asks the Court on this motion to order the actions permanently stayed, on three grounds: (i) jurisdiction selection-the plaintiffs having expressly agreed that all disputes would be litigated only in England; (H) forum non conveniens -substantially all the factors, including choice of law and jurisdiction, proper law, contacts, location of most witnesses and documents, and opportunity to participate in related litigation, pointing to England and away from Prince Edward Island as the appropriate forum; and (iii) issue estoppel--the subject matter of the actions being res judicata .

[**7] The parties' choice of forum is stated in various agreements made in London, England at the inception of each plaintiff becoming a member of Lloyd's. The General Undertaking states:

2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

2.2 - Each party hereto irrevocably agrees that the courts of England [*7] shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought to any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

[**8] The plaintiffs' primary submission is that denial of their choice of forum will remove from them the opportunity to pursue one of their two substantive claims, namely that their obligations to Lloyd's are

unenforceable because of substantive non-compliance with the Securities Act . The English courts have already determined that [*8] the Canadian securities legislation will not be applied in English proceedings, so they could not rely on what they submit is a very strong and straightforward cause of action in an action for fraud in England. The plaintiffs classify this juridical disadvantage as fundamental and massive. The plaintiffs express further concerns over the personal disadvantages they would experience over costs, logistics, and opportunity should they be forced to pursue their fraud claims in England.

[**9] The defendant's primary submission is that the parties agreed from the outset that all disputes will be adjudicated in England according to English law, and upon consideration of all the circumstances which should be taken into account the reasonable expectations of the parties should be maintained. The defendant associates with this submission the additional argument that the issues raised by the plaintiffs in this motion, especially application of Canadian securities law in proceedings in England based on English law, have already been litigated in previous Lloyd's litigation to which the plaintiffs were privy or declined opportunity to participate, so that the plaintiffs should now be estopped [*9] from pursuing those issues. The defendant encourages this Court to avoid a provincial approach of presuming the law and courts of this jurisdiction are preferable to the parties' agreed choice of forum, and asks the Court to observe that remedies would be available in England for inaccurate disclosure, and to resile from the parties' choice of forum only if no remedy is available in England.

[**10] The crux of the matter is whether the plaintiffs must bring their allegations of fraud before a court in England where Lloyd's is located, the contract was made and the underwriting activities occurred, as they agreed to do, or whether they can maintain their action here where they reside, were solicited, and their resources being called upon to honour claims are situate. At issue is the applicable test on exercise of the Court's discretion for a stay of proceedings in the presence of an agreed choice of forum and a prospective loss of juridical advantage, and application of the applicable test to all the circumstances which should be taken into account.

The test for granting a stay of proceeding:

[**11] The parties devoted primary and substantial attention to the applicable test [*10] where there is an agreed choice of forum and a loss of juridical advantage in issue.

[**12] In Knolloffice Inc. v. Oulton Agencies Inc. (1988), 30 C.P.C. (2nd) 12 (P.E.I.S.C.A.D.), the Appeal Division of this Court stated the applicable test in this jurisdiction for granting a stay of proceedings where the parties have stated their agreement:

Authorities appear to clearly state that the Courts will uphold a properly framed contractual choice of forum unless the balance of convenience [Emphasis start] massively[Emphasis end] favours an opposite conclusion. The onus of showing that the contractual choice of forum should not be followed rests with the plaintiff. [emphasis added]

[**13] Carruthers C.J. distinguished this from the forum non conveniens situation where there is no jurisdiction clause:

The onus, however, when dealing with the doctrine of forum conveniens , where no contractual choice of forum is involved. rests with the defendant to satisfy the Court that the plaintiff's choice of forum should not be respected.

[**14] Carruthers C.J. considered the weight to be given to the agreement and the factors to be taken into account in the presence of an agreement. [*11] He confirmed the test in "Eleftheria" (The) (Cargo Owner) v. "Eleftheria" (The) , [1969] 2 All E.R. 641 (Eng. P.D.A.) is the applicable test in this jurisdiction, and he adopted with approval the interpretation of that test in Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd. , [1986] 1 W.W.R. 380 (Alta. C.A.). Carruthers C.J. stated:

... It is well settled law that as a general rule Courts will uphold contractual provisions as to choice of forum. Lord Denning states in Re The Fehmarn , ...

... English courts are in charge of their own proceedings: and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. [Emphasis start] Such a stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them[Emphasis end].

... Brandon J. in Re The Eleftheria ... :

The principles established by the authorities can, I think, be summarised [*12] as follows: (I) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (II) [Emphasis start] The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.[Emphasis end] (III) The burden of proving such strong cause is on the plaintiffs. (IV) [Emphasis start] In exercising its discretion, the court should take into account all the circumstances of the particular case.[Emphasis end] (V) In particular, but without prejudice to (IV), the following matters, where they arise may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts: (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely [*13] desire trial in the foreign country, or are only seeking procedural advantages, (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would - (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

The approach taken by Brandon J. was adopted by the Alberta Court of Appeal in Volkswagen Can. Inc. v. Auto Haus Frohlich Ltd. : ...

In our view, [Emphasis start] the court should honour terms of that sort and give effect to them unless the balance of convenience massively favours an opposite conclusion[Emphasis end]. We essentially agree with the approach taken by the English court ... The Eleftheria ..

We have therefore heard argument on the question of balance of convenience, remembering always that the onus of showing that the balance of convenience does not favour Ontario rests with the plaintiff, and that it is a [Emphasis start] heavy onus[Emphasis end].

I am satisfied that para. 18 of the [Knolloffice agreement] was a properly framed contractual choice [*14] of forum and on the basis of these authorities it should be upheld [Emphasis start] unless the respondent can establish that the balance of convenience massively favours an opposite conclusion[Emphasis end]. The onus is not on the [defendant] ...

... As Brandon J., states in The Eleftheria, supra , the Court should take into account all the circumstances of the particular case when deciding where the case is to be heard. The following circumstances satisfy me that the [plaintiff] has not met the burden it has in order to overcome the contractual choice of forum. ...[circumstances cited] ...

[Emphasis start] I am, therefore, of the view that the parties should honour their agreement[Emphasis end].
[emphasis added]

[**15] Canadian courts have placed varied interpretations on the The Eleftheria statement that judicial discretion should be exercised by granting a stay “unless strong cause” for not doing so is shown. While these decisions all associate themselves with The Eleftheria , those which introduce the variations on the theme appear to raise or lower the plaintiffs hurdle, and correspondingly to fetter or expand the scope of judicial discretion.

[**16] Following [*15] Volkswagen Canada Inc. and Knolloffice , in Alberta and in this Province a plaintiff must show the balance of convenience “massively favours” his choice of forum, and the onus on the plaintiff of showing the balance of convenience does not favour the contractual choice of forum is “heavy”.

[**17] The parties refer to two versions of the test from Ontario. The plaintiffs cite Fairfield v. Low (1990), 71 O.R. (2d) 599 (Ont. H.C.J.), a trial level decision which lowers the hurdle. Under this test, a court should give effect to the term of an agreed choice of forum unless the party seeking to have the case heard in another jurisdiction can show “ that the interests of the parties and the interests of justice favour trial in that other jurisdiction ”. According to Doherty J., this formulation recognizes the importance of the forum selection agreement, but gives it somewhat less weight than did some previous Ontario cases.

[**18] The defendant cites Ash v. Lloyd's Corp. (1991), 6 O.R. (3d) 235 (Ont. Ct. (Gen. Div.)), a trial level decision regarding some Ontario Names and Lloyd's involving the same jurisdiction clause and [*16] substantially the same circumstances as are present in these actions. All parties in Ash agreed that the existence of an exclusive jurisdiction clause " places a heavy burden " on the party seeking to avoid the clause. McKeown J. canvassed the competing language in Fairfield v. Low and Volkswagen Canada Inc. , and referred to the principles from The Eleftheria . He concluded:

In light of the foregoing, I am not bound to grant a stay but I must exercise my discretion based on the factors set out above. The onus rests on the plaintiffs [Emphasis start] to demonstrate strong cause[Emphasis end] why Ontario is a more appropriate forum than England. The plaintiffs have relied on the allegations of fraud against Lloyd's set out in their statement of claim to overcome the exclusive jurisdiction clauses contained in the various agreements they entered with Lloyd's. [emphasis added]

[**19] This decision was affirmed by the Ontario Court of Appeal in Ash v. Lloyd's Corp. (1992), 9 O.R. (2nd) 755 (Ont. C.A.); leave to appeal to the Supreme Court of Canada refused October 8, 1992.

[**20] In New Brunswick, on a motion substantially the same as this motion, [*17] P.S. Creaghan J. in Morrison v. Society of Lloyd's (1999), 208 N.B.R. (2d) 337 (N.B.Q.B.) applied the standing test in New Brunswick that " the court will stay proceedings brought in violation of the exclusive jurisdiction clause unless the balance of convenience heavily favours disregarding it ". The New Brunswick Court of Appeal affirmed this test in Morrison v. Society of Lloyd's , [2000] N.B.J. No. 41 (leave to appeal to the Supreme Court of Canada currently being sought). In assessing the effect to be given to the jurisdiction clause and the extent of the burden on a plaintiff to overcome it, the Court saw the adverbs " heavily " and " massively " and the requirement for " strong cause " as similar characterization.

[**21] The plaintiffs urge that the " massively " standard stated in Knolloffice places the hurdle too high, especially where the circumstances include a serious loss of juridical advantage. In support of a lower standard the plaintiffs rely on the jurisprudence in Avenue Properties v. First City Development Corp. (1986), 7 B.C.L.R. (2d) 45 (B.C.C.A.) regarding the effect of loss of juridical advantage, which was left intact following 472900 B.C. Ltd. [*18] v. Thrifty Canada Ltd. (1998), B.C.L.R. (3d) 143 (B.C.C.A.); the Fairfield v. Low formulation of the test; and what they submit is a Supreme Court of Canada restatement of principles on forum non conveniens in Amchem Products Inc. v. British Columbia (Workers' Compensation Board) , [1993] 1 S.C.R. 897. The plaintiffs submit that Amchem Products fixed a new regime from a previous state of disrepair, which is sufficiently broad to cover cases involving an exclusive jurisdiction clause, and that by taking juridical advantage and forum selection as factors to be weighed in the balance, the plaintiff has a lower hurdle and the court has more discretion to favour a plaintiff s choice of forum than it does under The Eleftheria standard as adopted into this jurisdiction by Knolloffice .

[**22] Avenue Properties involved an agreed choice of forum of Ontario and circumstances which put the parties in close contact with British Columbia. This decision does not mention The Eleftheria or its statement that an exclusive jurisdiction clause raises a prima facie case for a stay regarding which the court must be careful not just to pay lip service and [*19] then fail to give effect to it because of a mere balance of convenience. In Avenue Properties , the Court approached a stay by enunciating general principles for dealing with an application for a stay. The appeal in Avenue Properties was argued on the basis that the appropriate test was the MacShannon test (MacShannon v. Rockware Glass Ltd. , [1978] 1 All E.R. 625 (H.L.)). Its approach imposed an initial onus on the defendant to show another jurisdiction where justice could be done at substantially less inconvenience and expense, and upon that onus being satisfied shifted the onus to the plaintiff to demonstrate a loss of personal or juridical advantage. The essential direction from Avenue Properties was that discretion should be exercised so that a plaintiff s choice of forum should not be lightly denied. As well, it held that the existence of two actions in different jurisdictions is not itself sufficient to invoke the court's jurisdiction to grant a stay, and that litigation should not be stayed if there is apprehension of prejudice to one of the parties because of differences in rights, remedies of procedures.

[**23] Thrifty Canada , decided [*20] in 1998, involved a dispute between an Ontario defendant and a British Columbia plaintiff over a licensing agreement for the Vancouver airport area. The parties had agreed to attorn to the non-exclusive jurisdiction of the Ontario courts and that Ontario law applied. Following Avenue Properties , the motions judge had dismissed the defendant's application for a stay. The British Columbia Court of Appeal reversed this decision because no weight was given to what it classified as the "important" circumstance that the parties had agreed to attorn to the nonexclusive jurisdiction of the courts of Ontario. Comity was a conclusive

factor. The reasoning in Avenue Properties was considered inconsistent with the present state of the law. No mention was made of The Eleftheria .

[**24] Thrifty Canada rejected the dominant principle upon which Avenue Properties was premised. Essen J.A. stated that the principle that the plaintiff's choice of forum should not be lightly denied, which had been one of the major cornerstones of the old English law, was laid to rest by The Abidin Daver , [1984] A.C. 398 (H.L.), which placed greater emphasis on the importance of comity and the major considerations [*21] in the modern rule on forum non conveniens . According to Esson J.A., Avenue Properties reflected the old considerations contained in the insular St. Pierre rule (from St. Pierre v. South American Stores (Garth & Chaves) Ltd. , [1936] 1 K.B. 382), and failed to take into account the radical change in the law effected by the Abidin Daver . Regarding juridical advantage, Thrifty Canada placed a heavier burden on the plaintiff than did Avenue Properties and the authority upon which it was based.

[**25] Essen J.A. adopted this statement of Lord Diplock in The Abidin Daver regarding the exercise of discretion when considering commercial agreements with international contacts:

My Lords, the essential change in the attitude of the English courts to pending or prospective litigation in foreign jurisdictions that has been achieved step-by step during the last 10 years as a result of the successive decisions of this House in The Atlantic Star [1974] A.C. 436; MacShannon [1978] A.C. 795 and Amin Rasheed [1984] A.C. 50, is that judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge frankly [*22] is. in the field of law with which this appeal is concerned, indistinguishable from the Scottish legal doctrine of forum non conveniens

[**26] In Thrifty Canada the court was concerned with both the existence of a pending action in a foreign jurisdiction and the plaintiffs concern over a loss of juridical advantage. The competition between loss of juridical advantage and comity was brought into focus by referring further to Lord Diplock:

24. In the next paragraph, Lord Diplock stated the rule which henceforth was to apply to cases such as this in which there is already an action on foot in the other jurisdiction dealing with the same subject matter:

Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently [*23] in two different countries where the same facts will be in issue and the testimony of the same witnesses required [Emphasis start] can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or judicial advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it[Emphasis end].

25. In the next paragraph, Lord Diplock expressed the view that the danger of conflicting decisions if two actions were to proceed concurrently in two jurisdictions is a significant one and that:

[Emphasis start] Comity demands that such a situation should not he permitted to occur as between courts of two civilised and friendly states. It is a recipe for confusion and injustice[Emphasis end].

[Emphasis start] 26. The most significant development was the adoption of comity as the governing principle in place of the old rule that access to the English court is not to be lightly refused[Emphasis end].

[emphasis added]
[**27] Thrifty Canada saved the Avenue Properties obiter dicta on the issue of juridical advantage:

The appeal was allowed [*24] for the reasons of McLachlin J.A. (as she then was) who treated the main issue as being whether the defendants established the requirements for a stay of proceedings. It was held to be unnecessary to decide the issue relating to juridical advantage but McLachlin J.A. considered it and held at p. 58 that, had it been necessary to decide the question, she would have concluded that the purchaser had

... established that there is a fair possibility that it will gain a legitimate juridical advantage by prosecuting its action in British Columbia rather than in Ontario.

On that basis, the decision may well have been correct in the result. But...

[emphasis added]

[**28] That there is no mention in Thrifty Canada to The Eleftheria stream of cases does not signal judicial division or a materially different approach. The approach in Thrifty Canada was in response to the issue before the Court, the primary concern being competing proceedings in different jurisdictions. That was the situation in most of the English jurisprudence upon which Thrifty Canada was based. The Eleftheria cases addressed the straightforward situation of a proceeding being commenced contrary to an [*25] agreement to litigate elsewhere. The British Columbia case law is developed on forum non conveniens like principles, with particular direction regarding the effect of loss of juridical advantage and the importance of comity. The Eleftheria cases provide for an exception from forum non conveniens general principles to the extent necessary to fully recognize the agreement of the parties on jurisdiction. In The Eleftheria a jurisdiction clause was viewed as raising a prima facie case for a stay, regarding which factors along forum conveniens lines both rebutting and in reinforcing a stay were considered. In the presence of a jurisdiction clause, the starting premise for Brandon J. was that the court " should give full weight to the desirability of holding the plaintiffs to their agreement ".

[**29] Both authorities recognize discretion. Both take into account the parties' choice of jurisdiction, loss of juridical advantage, comity, and all the applicable circumstances, including the nature of the commercial agreement and the contacts with each jurisdiction. The differences in approach are in regard to the onus and to the weight to be attributed to competing factors. It [*26] may be that in some cases this would still produce different results, but it seems to me that this opportunity for different results is substantially dissipated by The Abidin Daver/Thrifty Canada stream of authority having overtaken the St. Pierre rule followed in Avenue Properties .

[**30] Amchem Products does not reveal to me any intention by the Supreme Court of Canada to change the test for granting a stay in the presence of a contractual choice of forum. Amchem Products was a forum non conveniens case. It did not address a jurisdiction clause. The reasons of Sopinka J. do not suggest a policy statement from which an intention to change the law subsilentio should be inferred. Had the Supreme Court intended to affect something as significant in private international law as the matters of onus and weight regarding a forum selection clause in a commercial agreement and to abandon The Eleftheria approach, it would have said so.

[**31] Amchem Products is instructive though, as it did address the approach to be taken to loss of juridical advantage in a forum non conveniens assessment. Sopinka J. (at p. 920) stated these policy considerations:

The weight to [*27] be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

[**32] Agreement between parties on choice of forum involves an important distinction from forum non conveniens . It suggests that the reasonable expectation of both parties when they made their agreement was that in the event of litigation they would honour their agreement, and that prima facie the question whether the juridical advantage would be available would be for determination by the courts in the agreed forum.

[**33] Two conclusions emanate from this assessment of the applicable test.

[**34] First, [*28] regarding the general rule, in my opinion the case law has not reduced the forum selection clause to " a consideration to be taken into account ". The principles from The Eleftheria remain intact. Avenue Properties did not address The Eleftheria ; Ash (Ont. C.A.) preferred the test adopted in Ash (Ont. Ct. (Gen. Div.)) over the formulation offered in Fairfield v. Low , and Amchem Products does not suggest a change to the law where there is exception from general forum non conveniens principles taken to account for a jurisdiction selection clause. Indeed, the overall theme of both Thrifty Canada and Amchem Products is akin to The Eleftheria reasoning.

[**35] Second, the applicable test on this motion will be the test from The Eleftheria , without qualification or reformulation. Recognizing and respecting that the interpretation in Knolloffice is binding by stare decisis , and without questioning directions from that decision, as a precaution, to most favourably entertain the plaintiffs' choice of forum, and incidentally to ensure coverage by The Eleftheria rule, the plaintiffs will receive the benefit of whatever lowering of the hurdle occurs between [*29] " massive " and " heavy ". Further, the plaintiffs' burden on this motion will be no greater than to show " strong cause " for not granting a stay in accordance with statement of principles from the authorities as set out in The Eleftheria . In exercising my discretion, all the circumstances of the case are to be taken into account, and special recognition will be made to the plaintiffs' concern over loss of the juridical advantage of the Securities Act defence.

Application of the test:

[**36] The language of the clause in the General Undertaking is plain and obvious. The plaintiffs are taken to have been aware of it, understood it, and voluntarily executed the agreement. The parties made a properly framed contractual choice of forum. The plaintiffs do not allege that the jurisdiction clause was itself obtained by fraud, or any irregularity except that it was not explained at the Rota meeting in London.

[**37] The plaintiffs commenced these proceedings in Prince Edward Island contrary to the terms of their agreement to refer disputes to England. On that basis the defendants have applied for a stay. The plaintiffs' claims are within the jurisdiction of this Court, so I am [*30] not bound to grant a stay, but have a discretion whether to do so or not. My discretion should be exercised by granting a stay unless strong cause is shown for not doing so. The plaintiffs bear this onus. In exercising my discretion, account is to be taken of all the circumstances of the case, including in particular the loss of juridical advantage and the circumstances cited in The Eleftheria .

Conclusion

[**38] Upon applying the applicable test to all the circumstances of the parties and the actions, I conclude that strong cause is not shown for a stay not to be granted. The jurisdiction clause is entitled to full weight as raising a prima facie case for a stay. I have gone on from there to weigh the factors tending to rebut and factors tending to favour the prima facie case, paying special attention to the plaintiffs' concern over loss of juridical advantage. Regarding juridical advantage, it appears to me that the loss of juridical advantage urged by the plaintiffs, while established, is not as substantial as portrayed, and not of such importance in all the circumstances that it would be unjust to deprive the plaintiffs of that advantage. Regarding the other factors [*31] enumerated in The Eleftheria as they apply to this case, England is quite clearly the more convenient and appropriate forum for the pursuit of the action and for securing the ends of justice. On taking into account all the circumstances of the case, the plaintiffs have not discharged their onus of showing why they should not be held to their agreement. Regardless of onus, consideration of all the other circumstances, including loss of juridical advantage, does not rebut the prima facie case raised by the jurisdiction clause, and indeed indicates England and not Prince Edward Island as the proper forum. I will address the factors individually.

Jurisdiction selection clause

[**39] The parties agreed to litigate their disputes in England according to English law for good reason. The composition of Lloyd's and the relationships and transactions involved are intricate in nature, international in scope, and governed by special English legislation. The subject matter of the plaintiffs' actions occurred mainly in England. Lloyd's had at its lowest count over 5,000 Names in many countries around the world. The 1986 Lloyd's Applicants' Guide to Underwriting Membership stated: " Underwriters [*32] at Lloyd's form a unique market of more than 28,500 individuals at January, 1986. each of whom writes insurance for their own account and not for one another. " All Names are required to sign an exclusive jurisdiction clause. According to Lloyd's, this for consistency of treatment for the benefit of the Lloyd's market as a whole.

[**40] The law favours enforcement of jurisdiction selection clauses. There are good and substantial reasons to allow persons to agree in advance on the jurisdiction for the resolution of disputes between them. Courts give effect to such agreements and thereby enforce the reasonable expectations of the parties.

[**41] The plaintiffs' allegations of fraud do not render the jurisdiction clause void, or alter its force or effect. A contract induced by fraud is voidable, but it is not void ab initio . As such, its terms remain operative until a final determination by a court. The rationale for this was stated by Carthy J.A. in Ash (Ont. C.A.) (at p. 758):

... an allegation that a contract is void ab initio does not make it so until a final judgment of the court. If the plaintiffs can commence an action with an allegation of fraud which would void [*33] the contract and thus vitiate a choice of jurisdiction clause from the outset. then they may succeed on the merits while enjoying their own jurisdiction or fail on the merits while depriving the defendant of the contracted choice. These clauses are too important in international commerce to permit that anomalous result to flow .....

[**42] The basis and authority for giving full weight to the agreement of the parties is discussed throughout these reasons.

Differences between English and Prince Edward Island law

[**43] English law differs from Prince Edward Island law in one important respect. The decision of Tuckey J. in The Society of Lloyd's v. Daly , Donnell Russell (Eng. H.C.J.) (Q.B.) 1996 Folio No. 2447, January 27, 1998, informs us that English courts would probably not recognize and involve the Securities Act . The importance of this difference is discussed further below under " loss of juridical advantage ".

[**44] Beyond that, the case law directs that an in-depth conflicts of law analysis should not occur on a motion for a stay. It is sufficient to observe here that it has not been shown on this motion that English law is in some way inferior to Prince [*34] Edward Island law or that the plaintiffs would be denied under English law opportunity to maintain their causes of action in England.

Loss of juridical advantage: Prince Edward Island Securities Act defence

[**45] The plaintiffs submit that to make unavailable to them the remedies and protection afforded by the Securities Act would neuter the public policies which are at the heart of Canadian securities legislation, and deprive them as Prince Edward Island residents the remedies and protection available under that legislation. The plaintiffs submit the protection sought is based on core public policy which is intended to provide full and true disclosure of all material facts from parties seeking capital from Prince Edward Island investors. They urge that a stay would absolve the defendant from the consequences of violating Prince Edward Island securities legislation when its fraud, deceit and fraudulent misrepresentations may have been the very cause of the violation.

[**46] The plaintiffs submit that the public policy of extending Prince Edward Island legislative remedies to them as investors should outweigh the consideration that all Names should be treated consistently [*35] by being forced to litigate in England. According to the plaintiffs, Lloyd's came here seeking capital from them to fund losses of billions of pounds, made fraudulent misrepresentations of the financial soundness of the investment, and did not provide the plaintiffs with a prospectus or any form of full and true disclosure of material facts; and the English Court has demonstrated it will not recognize this violation.

C Fair possibility of juridical advantage

[**47] The plaintiffs have established the threshold requirement of showing there is a fair possibility that they would be entitled to rely on the Securities Act if allowed to pursue their action here. It remains to assess this juridical advantage in the context of the other factors. The importance of the loss of advantage is not assessed in isolation. In Amchem Products , Sopinka J. in addressing this question under a general forum non conveniens analysis stated (at p. 933):

When will it be unjust to deprive the plaintiff in the foreign proceeding of some personal or juridical advantage that is available in that forum? I have already stated that the importance of the loss of advantage cannot be assessed in isolation. [*36] The loss of juridical or other advantage must be considered in the context of the other factors. The appropriate' inquiry is whether it is unjust to deprive the party seeking to litigate in the foreign jurisdiction of a judicial or other advantage, having regard to the extent that the party and the facts are connected to that forum based on the factors which I have already discussed. A party can have no reasonable expectation of advantages available in a jurisdiction with which the party and the subject matter of the litigation has little or no connection. Any loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in the domestic forum. I pointed out in my discussion of the test for determining the forum non conveniens that loss of juridical advantage is one of the factors and it will have been considered in step one. ..

[**48] The Securities Act may provide the plaintiffs with some relief from Lloyd's claims for enforcement. However, the measure of the advantage and its importance to the plaintiffs' claims appears as substantially reduced when [*37] considered in the context of each of a number of factors.

C Limitations

[**49] To the extent the Securities Act is procedural, it does not require that local law will apply notwithstanding that the proper law of the contract indicates otherwise. It is not a choice of law rule. It does not contain anti-waiver provisions. It does not indicate a legislative intention to stipulate application to investments by residents of Prince Edward Island in foreign jurisdictions where those residents have expressly agreed that the other jurisdiction will be the forum and applicable law for resolution of dispute.

[**50] On the substantive side, it is worthy of observation that the Securities Act may not provide the plaintiffs with the relief, or the extent of relief, they assert. The opinion of Professor MacIntosh on the enforceability of the Securities Act regarding the contractual arrangements made between the plaintiffs and Lloyd's does not state unequivocally that the legislation would constitute the arrangements as a " security ". His opinion is that "... it is my view that a court could find that a particular interest constitutes an investment contract, and therefore a security, [*38] despite ...".

[**51] Should it be held that the contracts are an investment covered by the legislation, it is notable as well that the plaintiffs did receive a significant amount of information from Lloyd's in the nature of disclosure about the financial aspects of membership and their exposure to liability, and that they consciously travelled to London to complete their contracts.

[**52] However, I will not discount or diminish the plaintiffs' position on loss of juridical advantage on account of those reservations. I am satisfied that the plaintiffs have satisfied the test of reasonable or fair possibility that if the actions proceed in Prince Edward Island a court may apply the Securities Act , which would operate to afford them relief from enforcement of Lloyd's claims against them.

C Public policy considerations

[**53] I am not satisfied it would be contrary to public policy to grant a stay. The parties agreed their disputes would be decided in a foreign forum based on foreign law. Their contract has extensive international involvement and is substantially performed elsewhere in England. The actions do not involve serious issues of morality, or illegality, as understood [*39] within the case law, and the jurisdiction selection was included for proper business purposes. Public policy does not stand as a reason to deny the parties' choice of forum in this case.

[**54] The view is shared in the reasons in the Canadian decisions in Ash and Morrison and numerous American appellate courts which have heard motions similar to this one involving claims against Lloyd's in American states. Two exceptions, one American and the other Australian, cited and relied upon by the plaintiffs, are distinguishable.

[**55] The Securities Act does express important public policy in Prince Edward Island. The issue is whether this public policy should be applied at the international level, in this case to transactions which occurred mainly in or emanated from England.

[**56] It is noteworthy that while the English courts have decided that public policy does not prevent enforcement of the contracts under English law, they do not presume to decide whether English judgments would be enforceable against the plaintiffs in Prince Edward Island.

[**57] There is a public policy argument in favour of holding the parties to their agreement. The American cases refer [*40] to the " Bremen's presumption ". They relate that public policy weighs strongly in favour of enforcement of forum selection agreements because uncertainty as to the forum for disputes and applicable law will almost inevitably exist with respect to any contract touching two or more countries, and the elimination of such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. See Haynsworth v. Lloyd's of London (1997), 121 F.3d 956 (U.S.C.A. 5th Cir).

[**58] In Allen v. Lloyd's (1996), 94 F.3d 923 (U.S.C.A. 4th Cir.), the court stated they did not believe Congress intended that the disclosure requirements of the United States securities law be exported and imposed as governing principles on markets conducted entirely in other countries simply because membership in such markets is solicited in the United States.

[**59] Richards v. Lloyd's of London (1998), 135 F.3d 1289 (U.S.C.A. 9th Cir.) dealt with a motion similar to this one, but involved securities legislation containing an anti-waiver provision. [*41] Richards held that the legislation and the public policy embodied therein did not render void the choice of forum and choice of law provisions as English law provided the Names with adequate recourse (at p. 1295):

Moreover, the Supreme Court has explained that, in the context of an international agreement, there is "no basis for a judgment that only United states laws and United States courts should determine this controversy in the face of a solemn agreement between the parties that such controversies be resolved elsewhere." ..To require that "'American standards of fairness' must...govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries."

These passages from Scherk , we think, resolve the question whether public policy reasons allow the Names to escape their "solemn agreement" to adjudicate their claims in England under English law. Scherk involved a securities transaction ... The Court rejected Wilko's holding that the anti-waiver provision of the '34 Act prohibited choice clauses ... It also recognized that enforcing the forum selection clause would, in some [*42] cases, have the same effect as choosing foreign law to apply ... Yet the Court did not hesitate to enforce the forum selection clauses. It believed that to rule otherwise would "reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts .... As the Supreme Court has explained. "' [w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."' Id (quoting Bremen ...

[**60] In a case similar to Richards , West et al. v. Lloyd's et al. (1997), (U.S.) (Calif. C.A.), B095440, reached the opposite conclusion. The decision of a motions judge enforcing a forum selection clause was reversed because California securities law would not be applied in England, and the plaintiffs would be deprived all their rights under that law, and because the forum selection clause would result in the application of English law it was found to be therefore void as well. West is distinguishable from the present case. First, it was based on California law providing an express anti-waiver provision which stipulated that any contractual provision which requires an investor [*43] to waive compliance with any provision of California securities law is void. On the basis of the anti-waiver provision, the burden was held to be on the defendant to show that litigation in the contract forum would not diminish any of the plaintiffs' rights under California law. Prince Edward Island law does not contain such a provision. Second, on the facts of West the initial undertaking signed by investors did not contain a choice of law or forum provision. In any event, West followed the reasoning of an earlier decision involving Richards which was subsequently overturned by Richards .

[**61] Commonwealth Bank of Australia v. White and The Society of Lloyd's , [1999] V.S.C. 262 is the other case in which a stay was denied based on public policy considerations. It proceeded on the basis that Lloyd's breached Australian companies legislation which prevents misleading and deceptive conduct. The Court refused to allow an exclusive jurisdiction agreement " to circumvent a legislative scheme established by Parliament to protect investors ...". The Court stated:

It is a hard thing to turn away a litigant who has properly invoked the jurisdiction of this Court, particularly [*44] where the consequence of this must he that the litigant is precluded from enforcing rights which he enjoys as a person engaging in commerce in [Australia] by virtue of legislation in force in this jurisdiction. ...

[**62] White is distinguishable. On the facts, there was substantially more contact in Australia in White than there is in Prince Edward Island in this case. On the issues, the Court allowed White's pleading that Lloyd's impropriety in introducing the exclusive jurisdiction agreement was a persuasive factor in forming the contractual relationship; in the present case, the impropriety in the exclusive jurisdiction clause itself is not in issue. On the law, it is determined for the present case that the jurisdiction clause is not in any event void ab initio , but only voidable upon determination of the plaintiffs' actions..

[**63] I will address the plaintiffs' argument based on White . The plaintiffs submit that the strong policy considerations in White are consistent with the choice exercised in Daly . Tuckey J. considered whether comity required him to apply Canadian securities laws. While conceding the importance of comity, he concluded there were countervailing [*45] English public policy considerations which precluded the exercise of comity.

Specifically, he upheld the policy that consistent treatment of all Names in England required that no exceptions be carved out for foreign Names based on standards imposed by foreign statutes in force in the foreign capital markets where Lloyd's solicited investments. From an English public policy perspective, for English courts to give effect to Canadian securities laws was necessarily unreasonable. Allowing Canadian Names to rely on their home securities laws in English proceedings would conflict with the English policy interest in maintaining the consistent treatment of English and foreign names. In short, the English court weighed the policy between comity and domestic policy and held that domestic policy outweighed comity.

[**64] In Amchem (at 913), Sopinka J. defined comity as:

... the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other person who are under the protection of its laws ..

[**65] The plaintiffs [*46] ask the Court to take the view that comity is a balancing factor, not the predominant policy. Also in the scales are the interests of the forum court in safeguarding its own jurisdiction, protecting the interests of those who have the right of access to its courts, and safeguarding the domestic public policy objectives underpinning its own laws. Where domestic policy conflicts with the domestic policy underlying the laws of another state, there is no reason for the Prince Edward Island court-any more than there was for the English court in Daly -to defer in favour of the foreign policy. The desire of Lloyd's and the English courts for uniformity in the law applicable to the players in the Lloyd's insurance market, while of obvious first importance in the eyes of an English court, does not compel this court to allow Lloyd's to be minimized from civil sanction for noncompliance with local securities law when it chooses to enter the Prince Edward Island capital market.

[**66] The plaintiffs submit that their civil claim arises out of a violation of Prince Edward Island securities legislation connected here in all significant respects, except the place where the investment arrangements [*47] are ultimately underwritten. The competing foreign law being that of another country rather than another province, which reflects a clear difference in underlying values and basic public policy, this court must give precedence to Prince Edward Island public policy.

[**67] In my view, this plaintiffs' submission does not prevail in the circumstances of this case. First, the foundation of their submission is White . The ruling in White is essentially based on the rule in St. Pierre , which was rejected by the Abidin Daver and then by the Canadian courts. Second, the nexus or substantial connection of the subject matter of the fraud actions in this case is with England and not with this jurisdiction. Third, Daly was a motion to determine if foreign law would apply to a proceeding where the parties had agreed that English law would apply. The Court's decision was based on very strong policy reasons which went to the heart of the Lloyd's structure involving thousands of investors and other participants in a world-wide financial and insurance web. Fourth, our Securities Act does not contain anti-waiver or anti-forum selection provisions from which it should be held that our [*48] Legislature intended to extend its reach to international transactions in which the parties have agreed the applicable foreign law and forum for determination of disputes between them. Overall, the reasoning of the English courts in Daly seems consistent with the direction in Amchem as to weight to be given to comity.

C Remedies

[**68] The loss of juridical advantage does not leave the plaintiffs without a remedy. The substance of their claims, based on non-disclosure, misrepresentation and fraud, can be pursued in England in accordance with their agreement. Neither the evidence on this motion, nor cited English law, demonstrates that the plaintiffs would be denied justice in England.

[**69] The suggestion that the plaintiffs could establish fraud in Prince Edward Island but not in England seems parochial, being contrary to comity and respect between the courts of this jurisdiction and England. Absent experience, it seems unfounded. Should the plaintiffs establish fraud, it can be anticipated they would become entitled to an appropriate remedy before an English court. However, if the plaintiffs proceed here and fail to establish fraud then the defendant would have been [*49] deprived of its expressly agreed choice of forum.

[**70] The English cases of Daly and Fraser do not reveal the basis for the concern expressed by the plaintiffs. The English courts considered the applicability of the Canadian securities legislation, and they

determined judicially this law should not be applied. As for a remedy, the pending test case in Jaffray will address fraud and misrepresentation directly. The plaintiffs have not demonstrated that an English court would not find fraud and follow up with an appropriate remedy.

[**71] The adequacy of remedies available in foreign courts is a matter for consideration. Some of the American appellate cases have observed that while broader remedies would be available at home than in England, the differences were not sufficient to override the jurisdiction clauses. See Richards , at p. 1296, which considered whether the remedies in the chosen forum are so inadequate that enforcement would be fundamentally unfair. In Lipcon v. Underwriters at Lloyd's , London (1998), 148 F.3d 1285 (U.S.C.A. 11th Cir.), the Court stated:

Like the seven other courts of appeals that have addressed this issue, [*50] we hold that English law provides remedies adequate to address the complaints of the aggrieved Names.... We therefore conclude that the contractually chosen law is not fundamentally unfair and thus does not provide a basis upon which to deny enforcement of the choice clauses.

[**72] Riley v. Lloyd's (1992), 969 F.2nd 953 (U.S.C.A. 10th Cir.), at p. 57 in holding similarly, observed that pleadings and remedies can differ:

... Riley will not be deprived of his day in court. He may, though, have to structure his case differently than if proceeding in federal district court. The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny...enforcement, provided that the law of the chosen forum is not inherently unfair. ..

[**73] Bonny v. Lloyd's (1992), 3 F.3d (U.S.C.A. 7th Cir.), at p. 49 employed fairly strong language:

We conclude that the available remedies and potential damage recoveries suffice to deter deception of American investors and to induce the disclosure of material information to investors. It is true [*51] that enforcement of the Lloyd's clauses will deprive plaintiffs of their specific rights under ... the Securities and Exchange Act of 1933 . However, the fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not alone a valid basis to deny enforcement of forum selection. arbitration and choice of law clauses. .

It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of his country's tort law or his country's statutory law or his country's property law in order to render nugatory any forum selection clause that implicitly or ... explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading. In the absence of other considerations, the agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a [*52] different forum.

C Developments since Ash

[**74] The English test case in Daly informs us that an English court would not apply the Prince Edward Island Securities Act in an action brought by the plaintiffs in England. Ash preceded Daly , and on that basis the plaintiffs distinguish the present case. In my view, the judicial developments since Ash do not provide for either the distinction or the concern over loss of juridical advantage which the plaintiffs portray.

[**75] The plaintiffs' submission is based on the premise that in Ash McKeown J. assumed simply that the English courts would apply Ontario law. In fact, his assumption is stated to have been based on the premise that it would be applied if properly pleaded, proven " and determined to be applicable ". McKeown J. then identified a number of problems the Ash plaintiffs would face with respect to the breach of Ontario securities law.

[**76] Second, the English court did consider the applicability of Canadian securities law in Daly and Fraser . The English court first put the case for the Canadian Names in its best light, and then after extensive analysis set out in reported reasons determined that [*53] Canadian securities law is not applicable. Neither the process nor the decisions of the English courts have been shown to be unreasonable. Both appear defensible within our system of law.

[**77] The English Commercial Court considered the securities law defence in Daly . The issue was the same as pleaded by the plaintiffs in the present case, and previously pleaded in the Ash and Morrison cases. Justice Tuckey's reasons for deciding that the securities defence did not provide a defence for the Canadian Names state:

The effect of saying that the General Undertaking is unenforceable against a particular name undermines the whole basis upon which that name has underwritten at Lloyds. Under the United Kingdom and EEC regulatory regimes for conducting insurance business, only members of Lloyds may underwrite. If the General Undertaking is unenforceable against a particular name. does this mean that his underwriting was unlawful and he is not liable for the losses upon that underwriting?. Mr. Lenczner says it does not. Mr. Daly. he said, accepted that he was a member of Lloyds and was liable for his underwriting. So what is being said is that the General Undertaking is enforceable [*54] so far as it made Mr. Daly a member of Lloyds, but should be treated as a matter of English public policy as unenforceable insofar as membership made him subject to a regime which entitled Lloyds to make him liable to pay premium under the Contract. I do not think English public policy should give effect to such an anomaly either on the grounds of comity or common sense.

[**78] The Court of Appeal (in Fraser) held a full hearing and then refused leave to appeal Daly with affirming reasons. The Court of Appeal stated:

[T]he acceptance of this argument would mean that the insurance contracts entered into by Mr. Daly would likewise be void and unenforceable, a consequence which for obvious reasons Mr Daly disclaimed. because their validity under English law depended upon the validity of Mr Daly's underwriting membership of Lloyd's. If he was not an underwriting member of Lloyd's he could not lawfully enter into any insurance contract, as an insurer, in England. No principle of comity or public policy would suffice to justify that result and, as we have said, it was one which Mr. Daly has implicitly recognised to be unacceptable.

[**79] The English Court of Appeal considered [*55] the issue of misrepresentations being made in a Canadian jurisdiction and leading to a contract made in England. It posed the question of whether an act which is illegal under the law of Ontario preceding and leading to a contract in England governed by English law, which contract would be unenforceable in Ontario against an Ontario resident had the consequence in English law that the contract is unenforceable in the English court. The Court answered this question this way:

On established principles of English private international law any question of the material or essential validity of a contract is governed by its proper law (Dicey Rule 184) here English law. Similarly no question of formal validity under a foreign law can arise where the contract is both made in this country and governed by English law (Dicey Rule 183). Any invalidity or lack of enforceability under a foreign law is irrelevant.

[**80] The contract between Lloyd's and Daly was held to not require or involve the performance of any act in Ontario contrary to the law of Ontario, nor to have as its purpose the commission of any breach of the law of Canada or any province. On this basis, enforcement of the contract [*56] did not offend against a principle of universally recognized positive law, and it would be contrary to the comity of notions that English courts should enforce it.

[**81] In my view, the English courts did not ignore Canadian securities law or consider it irrelevant. They considered it, and decided it was not applicable given the governing law was by agreement of the parties English law. They gave full consideration to the expert opinion that the Canadian securities legislation applied to the Names membership and underwriting. The English courts considered it significant that Canadian securities legislation does not prohibit the sale of securities, but only regulates the conditions, does not render the contract of sale illegal or void, and that the buyer may continue to enforce the contract. The English courts determined Canadian securities law did not provide a defence to Lloyd's claim in the circumstances.

Location of evidence

[**82] Lloyd's does not have an office or a representative in Prince Edward Island. However, all the plaintiffs reside in Prince Edward Island, and all were recruited by a Member's Agent in Prince Edward Island. Recruitment included meetings, dissemination [*57] of information about Lloyd's, completion of application forms, and the like. The plaintiffs signed some documents in Prince Edward Island. The plaintiffs then travelled to London as required to attend a Rota interview and finally make the contract and become members of Lloyd's. Upon becoming Names, the Plaintiffs' participation, involving selection of syndicates, payment of fees,

maintenance of letters of credit and the like, were performed by them from Prince Edward island through their Members' Agents in London.

[**83] The alleged fraud which is the subject matter of claims was conceived and carried out mainly in England. The actions allege a sophisticated scheme of fraud perpetrated through agents over a period of many years. The role of the Members' Agents and Managing Agents is important, and these proceedings may have to involve them. These proceedings will involve a great number of fact witnesses, including Lloyd's employees and members of Council, Members' Agents, Managing Agents and their employees, other Names, and expert witnesses regarding the operation of Lloyd's market. Substantially all of those witnesses are in England. Lloyd's solicitor Demery deposed that persons [*58] who may have to be involved as parties or people who might be affected could run into the hundreds if not thousands.

[**84] The proceedings will involve voluminous business records of Lloyd's as well as other documents relevant to the matters in issue. All this documentation is located in England. All agents have their offices and business records in London. Lloyd's solicitor Demery deposed that while it is difficult at this stage to estimate the extent of the documents with any accuracy, the Jaffray proceeding indicates the number of documents to be in excess of 40,000.

Connections

[**85] The parties themselves are closely connected to the irrespective country of residence. The plaintiffs physically live in Prince Edward Island, from where they carried out most of their involvement as Names, and their assets which are being called upon to satisfy calls are situate here. The defendant operates complex and extensive activities worldwide from its offices in London, England. This activity includes the regulation of syndicates through agents who carry out the underwriting activities, including their dealings with Names, from London. These extensive activities, and the international [*59] and interrelated aspects involving other Names, shows a genuine interest and a public interest in having the myriad Lloyd's litigation, including these actions, occur exclusively in England.

Genuine desire or procedural advantage?

[**86] The plaintiffs' wish to proceed in Prince Edward Island is driven by what appears to be a genuine desire to maintain a perceived juridical advantage of the securities legislation, and personal advantages of cost and convenience. On the other hand, their expressed agreement on jurisdiction, and the connections with the subject matter of the litigation being overwhelmingly with England, promotes the view that forum shopping as well is their primary motivation.

Prejudice

[**87] There is no question of prejudice by having to sue in a foreign court on account of any of the categories mentioned in last factor in The Eleftheria list of circumstances for consideration.

Loss of personal advantage, expense and convenience

[**88] The plaintiffs submit that since the Ash decision in 1992 significant developments have occurred which have overtaken the facts and assumptions considered in Ash . They say these developments demonstrate the serious [*60] loss of advantage suffered by Canadians Names who litigate in England. The plaintiffs cite: (i) the outcome of the Mason fraud claim, which was stayed and then Mason became bankrupt; (ii) the Reconstruction and Renewal ("R & R") scheme, by which Lloyd's unilaterally changed its agreements with Names by reinsuring through Equitas and imposing premiums even on unwilling Names who refused to accept R & R; (iii) determination in Daly and Fraser that there is a material difference in legal remedies available in England compared with Canada, particularly that English courts will not apply Canadian law even if it is accepted that Lloyd's contravened Canadian securities legislation; (iv) the insurmountable costs for Canadian Names of English litigation; and (v) the English court's case management requirement for the plaintiffs to either join the fraud test case in Jaffray now underway or forego any opportunity to bring a fraud claim.

[**89] Development # (iii), which refers to juridical advantage of local securities legislation, has already been addressed under " loss of juridical advantage ". The other four developments assert a loss of personal advantages. I have considered [*61] the material before me regarding each one. Each is a factor and taken into account. On consideration of all the facts and circumstances of this case, in my view these developments do not

weigh in the balance nearly as substantially as the plaintiffs assert. As well, accommodation of some of the associated personal disadvantages is provided by the stipulations offered by the defendant which can be attached as conditions to a stay of proceedings.

[**90] The fraud claim in Mason was stayed by agreement of the parties pending the determination of other defences on test cases. Subsequently Mason declared bankruptcy. Plaintiffs continue to bring claims against Lloyd's. Jaffray is such a test case on fraud, regarding the asbestos claims, which is currently underway.

[**91] The fact and outcome R&R litigation, and the judgments for the Equitas premiums, do not preclude the plaintiffs from pleading fraud in England.

[**92] Regarding cost, the plaintiffs' evidence on this motion is anecdotal and sketchy, and does not substantiate the scenario that very expensive and complex litigation would be undertaken in this jurisdiction at materially less cost than in England. There is [*62] no credible indication that these proceedings, which would involve similar subject matter and the same stakes, would be carried out only by local or other Canadian counsel without primary involvement of counsel of substantially the same experience and cost as would be experienced in an English proceeding. Second, while by proceeding in England the plaintiffs would incur some additional personal expense and inconvenience, it is clearly apparent that conduct of the proceedings here would involve inconvenience and expense for a vastly greater number of people, and cause correspondingly greater associated costs to be borne on the litigation. Third, without being unduly deferential, because the Lloyd's litigation is occurring in England, there is substantial experience in these matters by the English court, where English law is the applicable law. Fourth, there is opportunity for the plaintiffs to participate with other Names advancing similar claims in England on a shared-cost basis. Taken together, this suggests that any personal disadvantage of cost and convenience to the plaintiffs underestimates the cost of pursuing a fraud case in this jurisdiction as compared to England, and in [*63] any event that any personal advantage is more than offset by cost and inconvenience that would be experienced by the defendant and other persons who would become involved in these proceedings, and by the opportunity for expedition by proceeding in England.

[**93] Jaffray will deal with the asbestos-related claims of fraud. The recent case management statement in Jaffray is not all encompassing regarding fraud claims, and it appears in any event to contemplate the accommodation of effective participation even though the case is now approaching trial. In the present motion, the defendant has assured this Court that the plaintiffs would not be barred from reasonable opportunity to plead fraud in England. A condition of reasonable accommodation can be attached to a stay so that should the plaintiffs become shut out from the English court they could be heard again regarding this loss of advantage.

Forum non conveniens

[**94] For two reasons, it is unnecessary to decide the alternative ground of forum non conveniens . First, the outcome on contractual forum selection is determinative. Second, in Knolloffice , after deciding that a stay should be granted on the ground that [*64] the parties should honour their agreement, our Appeal Division directed, per Carruthers C.J.:

I am of the opinion that the doctrine of forum conveniens , as applied in the absence of any agreement between the parties as to choice of forum, has no application to this case.

[**95] With those acknowledgments, I mention only these comments to summarily address this ground.

[**96] The Ontario decisions in Ash considered forum non conveniens . Carthy J.A. stated for the Ontario Court of Appeal:

With a starting point of treating Lloyd's as the engine of the defence and treating the claims against it as the prominent concern in selecting a forum, I endorse the entirety of McKeown J.'s reasons for staying the action against Lloyd's. [Emphasis start] Even without the exclusive jurisdiction clauses[Emphasis end] the contracts are to be performed in England. the alleged wrongful conduct was on the part of a large number of English residents who carry out the day-to-day functions under Lloyd's jurisdiction, and [Emphasis start] the overall picture is of an overwhelming affinity to England[Emphasis end].

[emphasis added]

[**97] In New Brunswick in Morrison , Creaghan J. [*65] referred with approval to this statement in Ash and then stated his own analysis. On the facts before him he was not inclined to be so generous as was the

Ontario Court of Appeal. Creaghan J. too saw England as the more convenient forum. He mentioned numerous actions the Lloyd's problem has spawned, acknowledged his understanding that the plaintiffs personally would have less inconvenience and expense if they proceeded in New Brunswick, and expressed that justice could probably be done best in the English courts given all considerations of inconvenience and expense. The New Brunswick Court of Appeal stated only this was a finding of fact regarding which they would not interfere. (I am informed that the New Brunswick plaintiffs have sought leave to appeal Morrison to the Supreme Court of Canada.)

[**98] These decisions are not binding, but they are informative. The facts and circumstances are substantially the same in the present case as they were in those cases, except for the subsequent legal developments regarding the applicability of Canadian securities law since Ash . Upon application of forum non conveniens considerations, all tolled it appears clear that England and [*66] not Prince Edward Island is the natural and more appropriate forum for these proceedings.

Issue estoppel:

[**99] Counsel for the plaintiffs acknowledged that should the loss of judicial advantage submission fail, there would be no need for the Court to consider the res judicata ground.

Disposition and terms:

[**100] In all the circumstances, the parties should honour their agreement. The plaintiffs have not established that the balance of convenience favours the opposite conclusion. A stay with conditions will be granted regarding the plaintiffs' actions. The effect of conditions is that the stay may be removed if proper grounds are shown, so that the actions are not hereby dismissed or discontinued, but are still pending. (See Holmested & Gale, Ontario Judicature and Rules of Practice , (1995-Rel.3) at 18-48).

[**101] The parties informed the Court regarding Jaffray that they agree: the plaintiffs knew of litigation since July, 1998; learned in summer 1999 they could possibly join; and presently have no estimate of the fees for trial. Lloyd's has stipulated that it does not, and will not, seek security for costs from Canadian Names, including the plaintiffs, [*67] proceeding in England; and their ability to join the Jaffray action is not conditional upon the plaintiffs satisfying Lloyd's English judgments, but this does not obligate Lloyd's to stay enforcement proceedings in other jurisdictions.

[**102] In Morrison , Creaghan J. expressed concern that the plaintiffs should not lose certain personal or juridical advantages which would be available to them if their actions were continued in New Brunswick by attaching conditions to the stay to address those concerns. In this case, the defendant has stipulated its agreement that the plaintiffs will have the benefit of those same conditions. Therefore, the same three conditions will be attached to this stay, on consent.

[**103] I also wish to address the plaintiffs' concern that they will be shut out from access to the English courts forever regarding claims for fraud, misrepresentation, and non-disclosure. On November 5, 1999, Justice Cresswell issued a case management statement in Jaffray . This advised that the Commercial Court has ordered that the trial of the threshold issue of whether claimants were fraudulently induced to become or remain members of Lloyd's by reason of Lloyd's [*68] failure to disclose the nature and extent of the market's liability for asbestos-related claims would commence in January, 2000. It informed all Names who have not settled with Lloyd's that so far as the English court is concerned, the Jaffray trial is intended to finally resolve allegations of fraud respecting treatment of asbestos-related losses at Lloyd's between 1978 and 1988. It directed that Names who wish to reserve the right to advance such allegations must provide notice (in case of Canadian Names) by December 10, 1999 confirming they wish to become parties to the Jaffray litigation, and that failure of timely notice would thereafter preclude such Names from advancing such allegations without permission of the English Commercial Court. The statement contemplates that Names who become parties would give instructions to the " United Names Organisation " in London.

[**104] The plaintiffs have not attempted to join Jaffray . Indeed, to date the plaintiffs have avoided participation in English proceedings, despite opportunities. They waited for some time after being aware of their cause of action, until January, 1999, to commence these actions in Prince Edward Island. [*69] Upon receiving this ruling, they now know their claims against Lloyd's for fraud are to be pursued in England, and not here.

[**105] While it would be entirely for the English courts to decide within their own process any fact, extent and consequence of any plaintiff dalliance, I say with full deference that I do not imagine an English court would easily shut out a plaintiff's access to the court and to remedies available under English law. Carefully avoiding any suggestion toward management within a foreign court, I contemplate only that the English courts in their custom would seek opportunity to secure just determination regarding serious substantive claims brought before them.

[**106] This passage from an earlier ruling by Colman J. in Jaffray rendered January 22, 1999 on an application to stay demonstrates that the English court views the situation in the Lloyd's fraud litigation as grave and the claims of utmost importance. Coleman J. addressed the inter-relationship which exists between the Names' cause of action for fraud and their difficulty in pursuing a remedy, and the magnitude and grave consequences of the dispute and litigation for the Names this way:

I would [*70] only add that had I concluded that the principle under which a stay is granted was wide enough to cover the facts in this case. I should have been unlikely to follow it unless I had taken the view that the names had proceeded in blatant and unreasonable disregard for the court's procedures. Any order for a stay is a discretionary order. In most cases the policy of the courts will be to discourage needless procedural duplication. However, there may be exceptional cases in which countervailing considerations may involve a discretionary balancing exercise The present case involves allegations by the names of the utmost seriousness, involving a pattern of deception by Lloyd's directed to maximising its capacity in order to accommodate more business. These allegations are not confined to a short period of time many years ago. They allege a continuing culture of misrepresentation over many years.

These allegations are exceptionally damaging to Lloyd's reputation and to the reputation of the London insurance market in general. Further, if they are made good at the trial, it may also be proved that this conduct has caused the names to suffer immense financial losses, so great in many cases [*71] that individuals have been driven to bankruptcy. physical illness and death as a result. In many cases the difficulties in discharging the costs orders may be shown to have been caused by the very fraud alleged. In view of these exceptional circumstances I would have given very considerable weight in any discretionary balance to the public interest in the ventilation and determination in these proceedings of the outstanding fraud issues, regardless of the failure to satisfy the prior costs orders. In the event, the result of the exercise of that discretion might well have been no different from that which I have already indicated in this judgment.

[**107] This level of gravity and magnitude of consequences applies to the plaintiffs in the present actions.

[**108] The conditions on the stay are:

[**109] (i) should the plaintiffs bring an action against the defendant in England, the defendant will not request security for costs;

[**110] (ii) should the plaintiffs bring an action against the defendant in England, the defendant will waive any precondition that any judgment it obtains against the plaintiffs, or either of them, be satisfied before the plaintiffs can proceed; [*72]

[**111] (iii) should the plaintiffs bring an action against the defendant in England, the defendant will waive any contractual provision that requires the plaintiffs to pay any contractual obligations arising between the plaintiffs and the defendant, before any action may lie against the defendant by the plaintiffs; and

[**112] (iv) should the plaintiffs proceed expeditiously to bring an action for fraud against the defendant in England, and be denied access to English courts for hearing the action, the plaintiffs can apply to this Court to end this stay of proceedings.

Costs:

[**113] Pursuant to the joint submission of counsel, costs on the motion follow the result, and are assessed at $ 10,000 all inclusive.