Neutral Citation Number: [2005] EWHC 1048 (Ch)
Case No: HC0003960

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2 A 2LL

25/05/2005

MR JUSTICE LINDSAY

(1) PEER INTERNATIONAL CORPORATION
(a company incorporated pursuant to the laws of the State of New Jersey, United States of America)
(2) SOUTHERN MUSIC PUBLISHING CO INC
(a company incorporated pursuant to the laws of the State of New York, United States of America)
(3) PEERMUSIC (UK) LIMITED
Claimants

-and-

(1) TERMIDOR MUSIC PUBLISHERS LIMITED (2)
TERMIDOR MUSIKVERLAG GMBH & CO KG
(a company incorporated pursuant to the laws of Germany)
Defendants

-and-

EDITORA MUSICAL DE CUBA
Part 20 Defendant

Mr Pushpinder Saini (instructed by Sheridans) for the Claimants
Mr Peter Prescott Q.C. and Mr James Mellor (instructed by Teacher Stern Selby) for Editora Musical de Cuba (the Part 20 Defendant)

Hearing date: 18th May 2005

HTML VERSION OF JUDGMENT

Mr Justice Lindsay :

The issues set in context

Has a Judge sitting in the High Court in London any ability, in point of jurisdiction, to order that oral evidence intended to be deployed in the case before him can, in appropriate circumstances, be taken by way of examinations before him overseas, even where one party to that case opposes that on the ground of want of jurisdiction and opposes also the venue proposed? If I have that power, should I, as a matter of discretion, exercise it on the facts of this case and, if I should, how should it be exercised and subject to what, if any, terms or conditions?

1. I shall first briefly explain the context in which the questions arise. I am in the course of hearing the trial of an action in which the Claimants principally seek declarations that they are either the owners of the copyright in certain musical compositions or are the exclusive licensees thereof. As to some compositions they claim title by way of alleged direct dealing with the composer, as to others by way, alternatively or in addition, by way of alleged dealings with the composer's heirs. The compositions in issue are of chiefly what may be called "Cuba Son", music written in the 1930s and 1940s by Cubans, in a recognisable Cuban style, a style said to be enjoying a revival going well beyond the shores of Cuba itself. The revival is said to have been encouraged at least in part by the success of the film "The Buena Vista Social Club".

2. The Claimants in the action are Peer International Corporation, Southern Music Publishing Co Inc. and Peermusic (UK) Limited. The first two Claimants are incorporated in the United States (respectively New Jersey and New York), the third in England. The Claimants are together represented by Mr Saini. The Defendants are Termidor Music Publishers Limited, Termidor Musikverlag Gmbh & Co KG and the Part 20 Defendant is Editora Musical de Cuba ("EMC"). The first and second Defendants, respectively of English and German incorporation, are taking no present active part, being content to accept such result as emerges between the Claimants and EMC. EMC is taking an active part and is represented by Mr Prescott QC and Mr Mellor.

3. A detailed description of the form of incorporation of EMC has not yet emerged but

for present purposes it suffices to describe it as a not-for-profit company formed under Cuban law and wholly owned by the Cuban Government. There is no evidence that it is subsidized by the Cuban State. EMC alleges that where any alleged initial written contracts or subsequent written dealings purport to indicate some ostensible title to a composition being in a Claimant, the documents should not be enforced but should be set aside on the grounds, including misrepresentation, undue influence and repudiation, set out in their pleading. EMC both denies the Claimants' title to the compositions in issue and raises its own claims to title in the copyrights by reference to alleged dealings between the heirs of the composers and itself.

4. Inevitably, both sides intended to call witnesses living or previously living in Cuba to give oral or written evidence, which, in some cases, was contemplated as going back to the events of up to some 75 years ago. Moreover, as the 14 compositions still in issue were written by 5 separate composers, all of whom are deceased and many of whom, under Cuban law, left several heirs, there are many potential Cuban witnesses, especially on the EMC side. Neither side was willing to accept the truth of the witness statements lodged by the other; each side wished to test the other's evidence.

5. In the event, on the Claimants' side, two witnesses previously living in Cuba were called, both now living outside Cuba, one giving evidence here in person and one by video link. Although the Claimants' case is not yet concluded, some EMC witnesses have already been interposed. On EMC's side direct oral evidence has been already received from some Cubans who had come over to London for that purpose and arrangements were also made for a greater number to give evidence by video link.

6. Unfortunately it was found, after a while, that the available video links with Cuba were not only prone to very frequent breakdown but the quality of the picture was a deal poorer than had been hoped. Both sides, after persisting for a while, abandoned the video link as a practical mode of adducing evidence and each recognised that some alternative was required. Thus it was that on day 6 of the trial Mr Prescott Q.C. asked that I should hear the evidence from Cuban witnesses in Cuba. Mr Saini opposed that on grounds of jurisdiction but, if he lost as to that, he resisted a hearing in Cuba urging that I should instead hear the evidence from Cuban witnesses in the Bahamas, the British Virgin Islands or the Cayman Islands (all, he said, no great flying time away from Cuba and all being places, he said, to which the parties, their legal representatives and instructing individuals would be free to go). Mr Saini indicated that he wished to argue that, absent consent of all parties, the Court had no *jurisdiction* to order the taking of evidence by me in Cuba. Both sides asked that I should break off the trial to give each an opportunity to research the emergent question as to jurisdiction and, should there be a jurisdiction, to research also questions relative to the exercise of that jurisdiction. I did break off. Accordingly on day 7 I heard argument on the two issues which can conveniently be called respectively "jurisdiction" and "discretion". At the conclusion of the argument on day 7 I announced the result and said I would give my reasons later. I now give those reasons.

Jurisdiction

7. Mr Saini acknowledges that there are many examples spread over several years of an

English judge hearing evidence outside England and Wales. He, as I too, have had personal experience of that. Mr Prescott and Mr Mellor have personal experience of an English judge conducting a "view" abroad. But, said Mr Saini, all the examples were of cases where the relevant parties had all agreed to such a course; never had the question of jurisdiction so to do been ruled upon. I leave aside EMC's response that, as consent itself cannot confer a jurisdiction that otherwise does not exist, earlier examples abroad must indicate that there is a jurisdiction to do so. I leave that aside partly because other sittings abroad may have represented nothing more than the Court acceding to a system for collecting evidence that had been agreed by all parties but also because the corner-stone of Mr Saini's argument proved not to relate to consent or its absence but to be section 71 of the Supreme Court Act 1981[Acts]. Subsections (1) and (2) of that provide as follows:-

> "71.(1) Sittings of the High Court may be held, and any other business of the High Court may be conducted, at any place in England or Wales.
>
> (2) Subject to rules of court –
>
> (a) the places at which the High Court sits outside the Royal Courts of Justice; and
>
> (b) the days and times when the High Court sits at any place outside the Royal Courts of Justice,
>
> shall be determined in accordance with directions given by the Lord Chancellor."

Whilst acknowledging that section 71 does not in terms *prohibit* sittings of the High Court outside England and Wales, Mr Saini asks rhetorically what point would there be in section 71's reference to "any place in England and Wales" if the Court was all along free to order a sitting in any part of the world. He noted also that CPR 2.7 says:-

> "2.7 The court may deal with a case at any place that it considers appropriate……"

but he urged that such a provision could not have been intended to override the limitation to England and Wales which section 71, he said, requires. He notes, too, the editorial comment on CPR 2.7 in the current edition of the White Book, namely that:-

> "There is some doubt as to whether rule 2.7 lies within the rule-making power."

8. I have real doubt as to whether section 71 is intended to have any effect on the questions before me. It purports to deal with "Sittings of the High Court"; its language and legislative history suggest that it is looking to where, in general, the High Court should sit rather than where it might need, in particular cases, to receive evidence. However, I need look no further into that because, as I shall explain, I see Mr Saini's reliance upon section 71 to be founded on a false premise, namely that my taking evidence abroad would necessarily constitute a sitting of the High Court outside England and Wales. If that is not so then plainly section 71's regulation of

"Sittings of the High Court" would not apply.

9. The explanation is this. CPR 34.13, so far as material, provides as follows:-

> "34.13(1) This rule applies where a party wishes to take a deposition from a person who is –
>
> (a) out of the jurisdiction; and
>
> (b) not in a Regulation State within the meaning of Section III of this Part.
>
> (1A) The High Court may order the issue of a Letter of Request to the judicial authorities of the country in which the proposed deponent is.
>
> (2) A Letter of Request is a request to a judicial authority to take the evidence of that person, or arrange for it to be taken.
>
> (3) ……..
>
> (4) If the government of a country allows a person appointed by the High Court to examine a person in that country, the High Court may make an order appointing a special examiner for that purpose.
>
> (5) A person may be examined under this rule on oath or affirmation or in accordance with any procedure permitted in the country in which the examination is to take place."

Sub-rules (6) and (7) provide in more detail for the procedure where the Court in England makes an order for the issue of a Letter of Request.

10. It will be noted that there is no restriction upon the identity of the special examiner who may be appointed under 34.13 (4); more particularly, there is nothing that bars a High Court judge who is hearing the case in England appointing himself to be the special examiner. Equally, there is nothing that constitutes an examination by a special examiner as a sitting of the High Court, even if the examiner happens to be a High Court Judge. I note that in *St Edmundsbury & Ipswich Diocesan Board of Finance & Anor –v- Clark* [197] Ch 323 at the top of p. 327 Megarry J. carefully distinguished between an examination before an examiner and a sitting of the Court. Section 71 supra has, in my judgment, no application to the sittings of a special examiner.

11. Cuba is not "a Regulation State" within the meaning of CPR 34.13 (1) (b) supra. The relevant editorial comment in the current edition of the White Book, at side-note 34.13.5 reads as follows:-

> "34.13.5 Non-Convention countries – If it is desired to obtain the taking of evidence in a country with which no convention has been made, enquiry should be made of the Masters' Secretary's Department …. as to whether the local law permits it. It is available in respect of willing witnesses before a special examiner in the following non-convention countries: …….. Cuba ……."

12. I have made enquiry and am greatly indebted to the Senior Master, Master Turner, for the speed and content of his response, which included that a special examination in Cuba was a possibility.

13. As I read CPR 34.13, so long as the Government of Cuba indicates that it will allow me, as a special examiner appointed by the High Court, to examine witnesses in Cuba, I may make an order appointing myself to that end.

14. Mr Saini, seeing that as a possibility, nonetheless urges that the full requirements for the issue of a Letter of Request must be followed through. But a Letter of Request, as 34.13 (2) itself indicates, is a request "to a judicial authority to take the evidence of [the] person, or arrange for it to be taken". My sitting in Cuba as a special examiner need not, indeed, will not involve any Cuban judicial authority taking evidence nor will it or need it involve any arrangements to be made by a Cuban judicial authority for that evidence to be taken. EMC is content to undertake to make the necessary arrangements. So long as the Government of Cuba is content to allow my presence for the purpose indicated in 34.13 (4) without its insisting on the full formality of the Letter of Request procedure there would seem to be no purpose whatsoever in obtaining a Letter of Request. The Letter of Request procedure, as it seems to me, is to meet the position where it is quite unknown whether the government of the country would give its consent, where it is understood it might not indicate its consent to a special examiner examining a person in its country or where it may require time fully to consider the matter. That view is underlined by a comment of Sir Donald Nicholls V-C in *Panayiotou –v- Sony Music Entertainment (UK) Ltd* [1994] Ch 142 at 147 where he says:-

> "I must go back to the last Century. Before 1884, and leaving aside India and British Colonies, there were two methods of taking evidence overseas for use at a trial: under a commission pursuant to a Writ of Commission, and before an examiner pursuant to an order to that effect. The Governments objected to the examination of their subjects in their countries by examiners appointed by the English court: see *Daniell's Chancery Practice 8th Edition (1914), Vol.1, p. 549*. So the Letter of Request procedure was introduced to meet this difficulty. The English court addresses a request to the foreign court, seeking its assistance by conducting an examination of the witness who is within the jurisdiction of the foreign court."

That suggests that where the difficulty referred to does not exist the Letter of Request procedure is unnecessary. Adopting it in the case before me, given what I say in the next paragraph, would do nothing but add time and costs in a case where EMC is confident its proposed witnesses, often deposing to their own as well as EMC's advantage, would need no coercion to attend.

15. As to whether the Government of Cuba would be likely to consent to a person appointed by the High Court (namely myself) as special examiner to examine the Cuban citizens who are prospective witnesses intended by EMC to give evidence in this case, Mr Prescott Q.C., instructed, as I have mentioned, by a body wholly owned by the Government of Cuba, says that such consent will be readily forthcoming.

16. Whilst I do not doubt what Mr Prescott says both CPR 34.13 (4) and comity require

a more formal consent unequivocally to be given by the Cuban Government but I should first make it clear, lest there be any doubt, that my sitting as special examiner would represent no possible incursion by me or by the British Government into Cuba's dominion over its own people and territory. There would be no sitting of the English High Court in Cuba. Although different considerations might in some respects possibly apply if the fuller formalities of a Letter of Request were to be gone through, where the acting is under the less formal machinery here contemplated of nothing more being done than the obtaining of the foreign government's, Cuba's, prior consent, not only would I have no power to compel the attendance of witnesses but I would have no right even to ask for Cuba's assistance to procure the attendance. Should an EMC witness choose not to attend I could, as a special examiner so appointed, do nothing to remedy that. I would have no powers, either, to respond to what, in England, would or might be a contempt of Court and, should any witness lie, I would have no power to recommend proceedings for perjury. Indeed, I would not have at my disposal any of the coercive powers available to a judge sitting in his own jurisdiction.

17. If the governmental consent is given, the shape which the examination of witnesses would take is that at a private hearing with only the parties, their lawyers and I present and unrobed, the witness would first swear or confirm that he or she would tell the truth, the whole truth and nothing but the truth. Then I would hear, with the assistance of an interpreter, EMC's Counsel obtaining verification by the witness concerned of his or her witness statement. Then I would hear the witness's oral answers to any appropriate supplementary questions put by EMC's Counsel to that witness. I would next hear the Claimant's Counsel orally cross-examine the witness and, should EMC's Counsel so wish, his oral re-examination of that witness would follow. The witnesses, of course, would be questioned and would answer in their own tongue, Spanish. It would be my intention to direct Counsel to limit the questioning to issues arising in the action. A sound recording would be made of the hearing and transcripts would be made from that recording of the questions and answers as translated at the time into English.

18. On my return to London one or more of the parties would then invite me, as a matter of discretion, to receive the English transcripts into the evidence in the case. There is no reason as yet to expect either side to resist their reception. In my evaluation of the evidence I would, of course, if the transcripts are received into evidence, be able and expected to take account not merely of the words in the transcript but of the parties' respective submissions as to the demeanour of the witnesses whilst giving the evidence and my own impression of that. One outcome of this process would be that EMC's witnesses would not suffer that weakening of the force of their evidence that can quite properly attend on the evidence of witnesses who have not been seen or heard by the Court and whose evidence has therefore not been tested by cross-examination. Another outcome is that the Claimants will be able to argue, based on their cross-examination of the witnesses, that less weight should be given to the evidence of the witnesses than a mere consideration of their written witness statements would suggest to be appropriate. From the point of view of the Judge returning to London, the process offers a route to a more informed and just

evaluation of witness evidence than would have been available had the witnesses not been seen and heard and had not had their evidence tested.

19. If, upon the above indication of the relative powerlessness of a special examiner appointed under 34.13 (4) in the manner proposed and upon the above indication of the shape which the examination would take, the Government of Cuba gives the consent which CPR 34.13 (4) contemplates then I see no bar to the examination taking place on the ground of there being no available jurisdiction. Accordingly, on the assumption that such a jurisdiction does exist, I next turn to the questions of whether it should be exercised at all and, if so, upon what terms or conditions?

Discretion

20. As to whether the jurisdiction should be exercised at all, Mr Prescott says that EMC wishes to tender some 10 or 12 Cuban-resident witnesses for the giving of oral evidence. He does not wish their evidence to suffer the risk of impairment that evidence neither seen nor heard nor tested may suffer. The video link, as is common ground, has proved inadequate. The cost, he says, of bringing all 10 or 12 to London, accommodating them here and flying them back to Cuba would not only be hugely greater than taking much smaller forces to Cuba but would threaten, if not, by now, to stifle EMC's case, at least severely to impair it. Cuba's shortage of "hard" currency, including sterling, is such, he says, as to be notorious and EMC (already owing substantial costs in London and now on "unless order" terms as to their payment over a period in such a way as will, on the evidence adduced, exhaust its available hard currency resources) would be very likely to be quite unable to afford the further conduct of its case in the manner it had intended. Added to that, he says, is the circumstance that a number of the Cuban witnesses are of very full age indeed and one is blind. Moving them to and from London would be fraught with difficulty and risk and could easily unsettle them in ways that might affect their ability to give evidence. On such a footing, justice, he says, requires that evidence should be taken other than in England.

21. I do not understand Mr Saini to resist that if, contrary to his primary submission, there is a relevant jurisdiction. He does not insist on a movement of witnesses to England. It is he (should he fail as to jurisdiction) who proposes the taking of evidence in the Bahamas, the British Virgin Islands or the Cayman Islands (which I will call, together, "the British Territories"). On the basis that the jurisdiction in issue is thus required to be exercised the question becomes a contest between two venues; Cuba on the one hand or a British Territory on the other.

22. As a venue a British Territory has the advantage that no one representing the Claimants and who has, with the Claimants' English Counsel and Solicitors, the conduct of the case on the Claimants' behalf, has any misgiving about attendance there. Moreover, all the British Territories are, in terms of flying time, only a matter of an hour or two away from Cuba and direct flights are possible. The disadvantages of a British Territory as the venue are, though, considerable. Not only would flights and accommodation costs be incurred in respect of what I might call the whole legal team but also it would require flights for 10-12 witnesses to and from Cuba and the accommodation for them in the selected British Territory (all of which territories have reputations as not-inexpensive holiday resorts). That would have to be paid for,

at any rate in the first instance, by EMC and in hard currency. Whilst the risk of a stifling of the action would not arise, as it would be unlikely that EMC would now discontinue, it could find itself unable to present its full intended case for want of sufficient access to sterling or dollars. Again, also, there would arise the difficulties inherent in having not just elderly but downright old people required to leave their homes and for them to be put in what would be very likely to be felt to be very different and strange surroundings. The witnesses are not likely to be relative sophisticates to whom flying, being abroad and hotel accommodation are familiar. By comparison the advantages of Cuba are that only the legal team has to be moved, EMC can bear local accommodation costs in its own currency and the hearing would be a walk or a bus or train ride only from witnesses' homes and in surroundings familiar to them.

23. Had I reason to think that the Cuban prospective witnesses, being uncompellable, would be unlikely to attend for examination in Cuba or would be likely to attend in smaller numbers than in a British Territory, I would need to take that into account both as to whether to exercise the jurisdiction at all and in the contest as to the venue but I have no reason to think that any witnesses, often, as I have mentioned, deposing to their own advantage as well as EMC's, would fail to attend in Cuba.

24. So far, the balance thus strongly favours Cuba but Mr Saini draws particular attention to the position of Mr Jaegerman, a citizen of the United States.

25. Mr Jaegerman is Senior Vice President of Legal and Business Affairs of the United States Peermusic Group of Companies in the United States. He has had that rôle since 1997. He is admitted to practice before the Courts of Washington D.C. and the States of Maryland and New York. He is also admitted to practice before the Federal United States Courts of New York and in various other locations on a "pro hac vice" basis in connection with individual actions. He has experience, going back to the mid-1980s, of legal and business aspects of the music industry. Before his present rôle with Peermusic he was its "in-house" Counsel from 1991. He has sat behind the Claimants' Solicitors and Counsel throughout the hearing so far save when he has himself been giving evidence. It is his evidence that was broken off in order to interpose evidence from Cuban or former Cuban citizens. The poor relationship between Cuba and the United States is, of course, well known and Mr Jaegerman has a fear which I cannot describe as unreasonable that if he were to attend any hearings in Cuba, as he would have done in England, in order to give any necessary instructions to the Claimants' Solicitors and Counsel, he could find that either EMC, the Cuban Government or local citizens might wish to take steps against him either in respect of any alleged personal activity of his or that of any Peer company. He says, with some justice, that an undertaking on behalf of EMC that it would not itself take any steps against him personally or procure anyone else to do so would be no adequate protection against the possible activity of others. Given that EMC's case is at several points that Peer acted over many years in a rapacious and unjust manner in the way it acquired and exploited Cuban music it is impossible, whatever undertaking EMC might offer, to be assured that no steps would be taken by Cuban composers or their heirs against him were he to be present in Cuba. I have accordingly been told that his attendance in Cuba to give instructions to the

Claimants' Solicitors and Counsel would put him and, through him, the US Peer companies in a jeopardy that otherwise would not exist and that he would thus, in turn, be powerfully deterred from going there. This is a demerit in having Cuba as the venue but it is, in my judgment, overstated.

26. The oral examinations which are contemplated will, as far as one can foresee, be largely as to events of which Mr Jaegerman has no personal knowledge and quite often of events taking place in periods during which he had no connection at all with Peer. I do not see the examinations as being such that instructions would frequently be required to be taken from him as they proceed and it is not without significance that such oral examination of EMC's Cuban witnesses as has already taken place in England and which covered (but with respect to different composers or different works) much the same ground as the ground that it is intended to be covered by the 10 or 12 witnesses yet to come, took place without Mr Saini or his Solicitors taking instructions from Mr Jaegerman and without Mr Saini asking me that I should release Mr Jaegerman from his position as a person already in course of giving evidence in order that he might give instructions to Mr Saini or to the Claimants' Solicitors. Even if instructions were required to be taken during the course of the oral examinations in Cuba I fail to see why instructions should not be taken from Mr Jaegerman by telephone. Although neither side has filed evidence on the point it would seem that the better view is that telephone communication from Cuba to the United States is possible in a number of ways including by way of mobile telephone. Whilst documents could not be sent from the United States to Cuba by the US Postal Service, it has already appeared that they could be sent by DHL, even if e-mail had proved impractical, as to which there is no evidence. If I were to be liberal in granting Mr Saini or his Solicitors full opportunity to break off the hearings in order to take or be given instructions should the need to do so truly arise, I would not see the Claimants as being materially disadvantaged were it to be the case that Mr Jaegerman was deterred, for the reasons that I have given, from going to Cuba. Indeed, as there was considerable cross-fire on the question of whether EMC should in any event be required to pay the reasonable costs that would be incurred in Mr Jaegerman's obtaining a visa to go to Cuba, I am far from sure that he is irrevocably determined not to go there.

27. Whilst none of the proposed venues is wholly convenient, on the basis that the disadvantage to the Claimants in not having Mr Jaegerman present in Cuba, if that proves to be the case, is overstated, I see that disadvantage as to a hearing in Cuba being substantially outweighed by the advantages of the hearing being there. It is, in my judgment, expedient in the course of justice firstly that there should be examinations by a special examiner in Cuba and, secondly, as the full benefit of someone seeing and hearing the witnesses give evidence can be obtained only if the special examiner is also the judge hearing the action, that I should be that special examiner. I thus propose, subject as appears below, to order that I shall be the special examiner appointed by the High Court under the provisions of CPR 34.13 (4) and that I shall hear witnesses in Cuba. The parties are agreed on the appropriate dates, which begin on Monday the 26th September 2005. Other practical arrangements and requirements (including as to the expenses involved) have been largely already dealt

with in argument or by undertakings or agreed between the parties and are to be the subject of a Minute of Order which the parties are preparing. If difficulties remain such issues can be restored to me.

Machinery

28. The above proposal, though, is dependent upon an adequate indication from the Government of Cuba that it would allow me, as a person appointed by the High Court, to examine the proposed witnesses in Cuba in the capacity of special examiner.

29. To that end I suggest, by way of machinery, that EMC draws up a list to include the names and addresses of all persons resident in Cuba whom it wishes or may wish to be examined or to be offered for cross-examination. They should then send a copy of the list to the Claimants' Solicitors. If that list fails to include any person who has made a witness statement in the action but whom the Claimants will wish to cross-examine then the name and, if known, the address of that person or those persons should be added to the list. The full list should then be sent, together with a copy of this judgment, to the Department of Constitutional Affairs with a request that the Department should then as soon as possible ask the Cuban Embassy to indicate to it in writing whether the Cuban Government consents to me, as a person prospectively to be appointed by the High Court as a special examiner for such a purpose, examining in Cuba all or some of those witnesses on that full list. If the Cuban Government so consents then when the fact of its consent is signified to me by the Department of Constitutional Affairs I shall then appoint myself the special examiner for the purpose described.

30. There will, of course, be numerous other steps required in respect not only of myself and my Clerk but of the Solicitors and Counsel on both sides as to flights, visas, accommodation and so on. It would be prudent were EMC to forewarn the Cuban Embassy of the steps likely to be required of it and to put in train arrangements in Cuba. For my part I shall have a copy of this judgment sent to the relevant department at the Department of Constitutional Affairs so that it, too, shall be forewarned. Although the renewed hearing is scheduled, if examination in Cuba does proceed, to begin on the 26th September and, thereafter, in England at or shortly after the beginning of the Michaelmas Term in early October 2005, it would be prudent for all necessary steps to be put in train as soon as practicable. I shall invite Counsel to draw my attention to any further points with which I am able to deal at this stage.

Conclusion

31. To revert to the questions that I raised in the first paragraph of this judgment, for the reasons I have given I hold myself to have the jurisdiction, exercisable in the manner I have indicated, to order examinations of witnesses to be conducted overseas, even where one party has opposed that on the ground of want of jurisdiction and has opposed also the venue that is proposed. However, I hold also that the prior consent of the foreign government, in this case the Government of Cuba, is a pre-requisite to its exercise but where, as here, there is already good reason to believe that the relevant consent will be readily forthcoming, I see it as possible to act without the

greater formality of the Letter of Request procedure.

32. In my discretion and for the reasons that I have given, I exercise the jurisdiction I have described by ordering that I should, upon receipt of an adequate indication of the consent of the Government of Cuba, appoint myself a special examiner. That would be done with an underlying intent that transcripts such as I have described would be receivable into the evidence in the action on my return to London for its further hearing. Should it prove, contrary to EMC's expectation, that the consent of the Government of Cuba is withheld or delayed, then the more formal process of seeking a Letter of Request will need to be followed.