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COURT OF APPEALS

STATE OF NEW YORK

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DAVIS,

Appellant,

-against-

No. 111

SCOTTISH RE GROUP LIMITED,

Respondent.

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20 Eagle Street  
Albany, New York  
October 10, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: First matter on this  
2 afternoon's calendar is appeal number 111, Davis v.  
3 Scottish Re.

4 Counselor.

5 MR. BRENNER: Good afternoon, Chief Judge. May  
6 it please the court, my name is Eric Brenner on behalf of  
7 appellant Paul Davis. And if I could reserve two minutes  
8 for rebuttal, please, Your Honor?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. BRENNER: Thank you. This appeal turns on  
11 properly distinguishing two conceptually distinct  
12 categories of legal rules. First, there are the  
13 substantive screening principles that courts apply to  
14 determine whether a shareholder has standing to bring a  
15 derivative case against the company. Second and  
16 separately, there's the jurisdictional issue of who applies  
17 the standing test. There is no question that Cayman law  
18 includes a screening test that filters out derivative cases  
19 in the first category of rules. It's the prime facie case  
20 test. It comes from the English Common Law. It was  
21 adopted in the Cayman Islands in the Renova judgment that  
22 the parties have briefed, and it is undisputedly applicable  
23 in this case under the Internal Affairs Doctrine of the  
24 State of New York.

25 The question presented on appeal is whether Order



1 15 Rule 12(A) of the Procedural Rules of the Grand Court of  
2 the Cayman Islands creates a second additional substantive  
3 rule of law mandating that only a Cayman court can apply  
4 Cayman standing principles in a case involving a Cayman  
5 company even if the case is being litigated in New York.

6 JUDGE FEINMAN: So - - - so for you to prevail,  
7 we would have to find that it's procedural, correct?

8 MR. BRENNER: Our position is that Rule 12(A) is  
9 a procedural mechanism as respondent's Cayman law expert  
10 says. Yes.

11 JUDGE FEINMAN: Could you not read 12(A) as sort  
12 of the rule embodying the substantive rule of the Foss  
13 case?

14 MR. BRENNER: Respectfully, Your Honor, we do not  
15 believe that is a sustainable reading of Rule 12(A) for a  
16 few reasons. First of all, Rule 12(A) - - -

17 JUDGE FEINMAN: But if it were would that then  
18 mean that this is a substantive rule?

19 MR. BRENNER: If Rule 12(A) were akin to the  
20 rules of, you know, the Canadian Business Corporations Act,  
21 which we reference, or akin to the BVI rules which are  
22 substantive exclusive jurisdiction rules which say if you  
23 want to bring a case, a derivative case, against a BVI  
24 company, there is no question that under the rules of the  
25 BVI Companies Law you have to go to the BVI, you have to



1 get permission, and only if you get permission can you  
2 bring that case.

3 JUDGE STEIN: Doesn't Renova essentially say  
4 that's what this is even though it's not worded that way?

5 MR. BRENNER: Renova adopts the prime facie case  
6 test which is from the English Common Law and predates Rule  
7 12(A). It's in the - - - the prime facie case test comes  
8 from Prudential Insurance. It was a judgment of the  
9 English Court of Appeals in 1988. The Rule 12(A) was first  
10 adopted in England in 1994, and then it was adopted in the  
11 Cayman Islands in 1995. The Common Law - - - the prime  
12 facie case test, comes from the Common Law. It predates  
13 Rule 12(A). Renova says this explicitly. Their Cayman Law  
14 expert says it explicitly. The chronology makes it  
15 absolutely plain, and therefore the prime facie case test  
16 is the screening principle that courts in the Cayman  
17 Islands use to decide whether or not a shareholder can move  
18 forward with a derivative case.

19 JUDGE STEIN: Right. But Renova say that was the  
20 purpose of Rule 12(A) to implement that?

21 MR. BRENNER: Exac- - - - I think implement is  
22 exactly the right word, Your Honor. As their put it - - -  
23 as their Cayman Law expert put it, and this is in paragraph  
24 5 of Mr. Meeson's reply affidavit: "Order 15 Rule 12(A)  
25 was introduced simply as the mechanism to ensure that the



1 issue could be most conveniently addressed by the court.  
2 But the prime facie case requirement predated the  
3 introduction of the rule and is the test which is applied  
4 by the court."

5 JUDGE FAHEY: So - - - so it is your - - - is it  
6 your position, that's a question, really, that 12(A) can be  
7 analogized to 3211 in the CPLR?

8 MR. BRENNER: Yes, Your Honor. Exactly. So - -  
9 -

10 JUDGE FAHEY: All right. So - - - but you do  
11 recognize there are some differences? It - - - it seems to  
12 me that 3211 really talks about allegations and here you  
13 have at least a minimal burden of proof as opposed to a  
14 minimal burden of allegations, as you would under 3211. So  
15 that kind of moves it somewhere between, say, 3211 and  
16 3212.

17 MR. BRENNER: I'm sorry. I think I misunderstood  
18 your initial question.

19 JUDGE FAHEY: Yeah. Yeah.

20 MR. BRENNER: I agree - - - it is our position  
21 that Rule 12(A) is a procedural mechanism in the same way  
22 that CPLR 3211(a)(5) is the mechanism in the New York  
23 courts if you want to argue statute of frauds or if you  
24 want to argue collateral estoppel. There's a body of  
25 jurisprudence that says what the rule is about collateral



1 estoppel, but if you want to make an argument about  
2 collateral estoppel in the New York courts, you better  
3 bring the 3211(a)(5) motion. You got to make it in the  
4 time periods. And otherwise you're not going to get your  
5 rights vindicated.

6 JUDGE FAHEY: Right. Right.

7 MR. BRENNER: So our view is Rule 12(A) is akin  
8 to that. I agree with the second principle which is that  
9 3211 is not on all fours with the standards in Renova that  
10 may be applicable in applying the prime facie case test.

11 JUDGE FEINMAN: Well, so - - - so how is that  
12 practically going to play out? You know, under your  
13 position a New York court should be able to adjudicate  
14 whether this case should be able to go forward. How - - -  
15 how is the New York court, practically speaking, under our  
16 rules going to carry out this prima facie test?

17 MR. BRENNER: Sure. As a matter of history,  
18 courts have done it under 3211. We cite a number of cases  
19 where courts have applied 3211 or Rule 12 to decide these  
20 issues. So that's happened. That's happened post-Rule  
21 12(A), that's happened post Renova in the New York state  
22 and federal courts. If there is a factual issue of the  
23 type that we were just discussing, our position is that New  
24 York courts have all the discretion they need under both  
25 the Constitution and Judiciary Law to be free to apply



1           whatever procedures they want. I mean, for example, in  
2           Renova it says - - - well, in Renova - - -

3                   JUDGE FEINMAN: Well, be specific if you can.

4                   MR. BRENNER: Sure.

5                   JUDGE FEINMAN: Are they going to then vote, you  
6           know, there's a particular CPLR section that says you can  
7           conduct a factual hearing if you need to to resolve a  
8           motion? Is that what you're talking about? I mean  
9           specifically how are they going to ferret this out?

10                  MR. BRENNER: Sure. We - - - we cite a number of  
11           cases under Judiciary Law 2(b)(3), Your Honor, that say, as  
12           the People v. Redding case says, which is a Court of  
13           Appeals case from 2009, you know: "Courts may fashion the  
14           necessary procedures as they need." We cite I think three  
15           cases that have some form of that statement which is  
16           essentially New York courts have discretion to adopt what  
17           procedures they need to do justice. So if under Renova the  
18           rule is the parties need to - - - plaintiff need to submit  
19           an affidavit, defending can then submit an affidavit, and  
20           then it's up to the court to decide and apply now the prime  
21           facie case test, you know, whether or not plaintiff has  
22           serious as opposed to speculative grounds or bona fide  
23           unreasonable grounds for bringing their claim just as sure  
24           as we can make that determination based upon the affidavits  
25           just like the Renova court did.



1 JUDGE WILSON: Suppose we agree with you on  
2 procedural versus substantive. Why don't you lose on Foss  
3 v. Harbottle anyway?

4 MR. BRENNER: Well, I guess there are two  
5 questions here. One is whether it's ripe for  
6 determination. We've obviously briefed it and we'd be glad  
7 to have this court decide it, although we recognize there  
8 are prudential reasons the court might want to send it to  
9 the First Department or there's actually now a new  
10 complaint that has been filed as of right. So the factual  
11 determination - - - the factual allegations that go to Foss  
12 have changed to some degree.

13 But we're right, basically, because we allege  
14 this is a case where the wrongdoers are the investors,  
15 Cerberus and Mass Mutual who are the majority owners of the  
16 company and now the 100 percent owners of the company.  
17 They are implicated in the wrongdoing. Therefore, under  
18 the wrongdoer control test, we're going to satisfy that  
19 because there is no possible way that this company is ever  
20 going to bring the derivative claims that Mr. Davis  
21 alleges. If the board, who are the defendants in this  
22 case, decide not to bring those claims then certainly the  
23 investors who are the principle wrongdoers implicated in  
24 this are not going to permit this to go forward. And  
25 second, in terms of wrongful benefit, as both sides,





1 experts, I think agree, if there is a conspiracy and you  
2 allege that the beneficiaries are part of that conspiracy,  
3 as the investors certainly are here because our whole case  
4 is about self-dealing on the part of the investors, then  
5 you've satisfied wrongful benefit.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 Counsel.

8 MR. ATAMIAN: Good afternoon; Jean-Marie Atamian  
9 from Mayer Brown on behalf of the appellees. Let me start  
10 out with the language of Rule 12(A). It states, quote:  
11 "Once a defendant in a derivative action gives notice of  
12 intention to defend, the plaintiff must apply to the  
13 court," that's the court of the Cayman Islands, "for leave  
14 to continue the action."

15 JUDGE STEIN: Is there only one court of the  
16 Cayman Islands?

17 MR. ATAMIAN: Well, the Court of First Instance  
18 is the Grand Court of the Cayman Islands, and that's where  
19 the plaintiff here was required to go to try to get his  
20 derivative claim started.

21 JUDGE STEIN: So - - - so there's no question  
22 that that language is referring to the courts of the Cayman  
23 Islands. Is that - - - is what you're saying?

24 MR. ATAMIAN: Correct. It's a specific court in  
25 the Cayman Islands.



1 JUDGE STEIN: What about the fact that it refers  
2 to "actions begun by writ"?

3 MR. ATAMIAN: And I'm not sure - - -

4 JUDGE STEIN: Isn't that the - - - isn't that  
5 what the - - -

6 MR. ATAMIAN: Yes. You would have to - - - you -  
7 - -

8 JUDGE STEIN: So do we bring actions in New York  
9 by writ?

10 MR. ATAMIAN: No. But you have to bring - - - if  
11 you want to sue a Cayman Island company, you first have to  
12 go to the Cayman Island Court and you have to make a  
13 evidentiary showing to make sure that the claim is not  
14 vexatious or frivolous.

15 JUDGE RIVERA: And let's say the court finds in  
16 your - - -

17 JUDGE FEINMAN: This is true only for derivative  
18 actions or not direct?

19 MR. ATAMIAN: Certainly under Rule 12(A), which  
20 is what we're dealing here, on - - - on derivative actions.

21 JUDGE RIVERA: Okay. And let's say the court  
22 finds that, indeed, that you could proceed. What does that  
23 mean? You then withdraw the action and you run over to  
24 court in New York state?

25 MR. ATAMIAN: You have two options. Once the



1 court in the Cayman Islands has made a substantive - - -

2 JUDGE RIVERA: Yes.

3 MR. ATAMIAN: - - - determination after a hearing  
4 with evidence if it - - - and whatever evidence it wants,  
5 it can ask for more evidence than is initially proffered,  
6 then you can either proceed in that court in the Cayman  
7 Islands and have your derivative claims heard there - - -

8 JUDGE RIVERA: Well, no, but that's obvious.

9 MR. ATAMIAN: Or - - -

10 JUDGE RIVERA: My -- - that's not my question.

11 MR. ATAMIAN: Or you can go to New York. So - -  
12 -

13 JUDGE RIVERA: And then - - - and then what  
14 happens in New York? Does that foreclose the - - - the  
15 defendant from filing a motion to dismiss for failure to  
16 state a claim?

17 MR. ATAMIAN: No. He has his full rights in New  
18 York, but first he's got to go through this gating rule.

19 JUDGE RIVERA: So what - - - so what is the  
20 point? I don't - - - I'm not understanding, then, how it's  
21 a substantive versus a procedural rule in this analysis if  
22 otherwise once they get it to New York they're going to be  
23 able to act as if they had not taken any action in the  
24 Grand Cayman Islands.

25 MR. ATAMIAN: Well, that's right, but that's the



1 price you pay when you invest millions of dollars in a  
2 Cayman Island company. You subject yourself to the law of  
3 the Cayman Islands.

4 JUDGE RIVERA: And how does that further - - -  
5 how does that further the substantive laws and concerns in  
6 the policy of the Cayman Islands and the Grand Caymans if  
7 indeed they've gone through all that work and you never are  
8 desiring to proceed in the Grand Cayman courts?

9 MR. ATAMIAN: Well, a fundamental principle of  
10 Cayman law is to protect Cayman Island companies from being  
11 sued on corporate governance issued under the laws of  
12 different jurisdictions. And when you invest in a Cayman  
13 Island company, there is a corporate - - -

14 JUDGE RIVERA: I'm sorry. Isn't it the same law  
15 as to whether or not you can bring the derivative suit  
16 that's going to be applied, whether it's in the Grand  
17 Caymans or in New York?

18 MR. ATAMIAN: No. The - - - you have to go to  
19 the Cayman court. The Cayman court is the court that makes  
20 the substantive determination after a hearing as to whether  
21 or not these derivative claims have enough merit either to  
22 proceed in the Cayman Island - - - and maybe it would have  
23 been more efficient for the plaintiff to go to the Cayman  
24 Islands first as it was required to do - - -

25 JUDGE RIVERA: So you're saying that



1 determination cannot be revisited in the state court?

2 MR. ATAMIAN: That's correct. Is the - - -

3 JUDGE WILSON: Could they be given comity?

4 MR. ATAMIAN: That doesn't apply here because  
5 you've got a substantive gating rule, Rule 12(A), like the  
6 statutes in Canada - - -

7 JUDGE FEINMAN: Yeah. But in terms of - - -  
8 trying to follow up on Judge Rivera's question. Plaintiff  
9 starts an action in New York, goes to the Cayman Islands,  
10 maybe not first, but simultaneously or shortly thereafter,  
11 gets a ruling that says it's okay to proceed with this  
12 derivative action. Is the New York court then bound to  
13 accept that ruling on the rules of comity and allow the  
14 action to move forward?

15 MR. ATAMIAN: If it does so timely, if the  
16 plaintiff had brought its action in the Cayman Islands and  
17 a Cayman court had made a merits determination that the  
18 action was not frivolous then he could, yes, have pursued  
19 his claims in trial court. But now he's waited four years.  
20 He's known about this for four years. We briefed this - -  
21 -

22 JUDGE FEINMAN: And I'm not talking necessarily  
23 about this specific fact pattern.

24 MR. ATAMIAN: Okay.

25 JUDGE FEINMAN: I'm just talking generally to



1 understand how this scheme is going to play out.

2 MR. ATAMIAN: All right. Well - - - well, these  
3 rules are fairly common in leave of court rules and demand  
4 rules. There are plenty of countries whose laws require  
5 you to go to a court of that country - - -

6 JUDGE FEINMAN: Well, yeah. But - - - and  
7 specifically, you know, Can- - - - Canada says you can only  
8 sue in Canada and you can only do it this way, and the  
9 British Virgin Islands says you can only do it this way.  
10 But this statute doesn't say that, does it? This rule,  
11 rather, doesn't say that. It says any court.

12 MR. ATAMIAN: Well, this rule says that in order  
13 for someone who wants to bring derivative claims against a  
14 Cayman Island company, against a company incorporated in  
15 the Cayman Islands, must start in the Cayman Island court.  
16 It can stay in the Cayman Island court if the court finds  
17 that there is merit to the claim, or it can then go to the  
18 New York court or whatever court it wants in the United  
19 States and pursue those derivative claims.

20 JUDGE RIVERA: Does the - - - does Rule 12(A)  
21 anywhere set out what you've - - - what you've just  
22 articulated that this is just a decision short of writ  
23 large on whether or not the party can proceed and then they  
24 can choose what form and which to proceed? Does it - - -  
25 does it say that expressly?



1 MR. ATAMIAN: It doesn't - - - it doesn't  
2 explicitly say they can then proceed wherever they want.

3 JUDGE RIVERA: But can you be sanctioned for  
4 first filing in the Grand Caymans and then picking up your  
5 papers and walking over to - - - or taking the boat or the  
6 plane over to the New York state courts?

7 MR. ATAMIAN: No. No. And that's not the way  
8 the court reads - - - the rule reads, and that's not the  
9 way the courts that have interpreted 12(A) have interpreted  
10 it.

11 JUDGE RIVERA: And what - - - what's the  
12 experience in the court to people who file, as is required  
13 by 12(A), then - - - once it - - - for those, of course,  
14 who are found to have satisfied the standard - - -

15 MR. ATAMIAN: Yeah.

16 JUDGE RIVERA: - - - do they stay or do they go  
17 to other jurisdictions?

18 MR. ATAMIAN: Well, for those who are worthy,  
19 they typically continue in the Cayman Island but they also  
20 have the right, as New York courts have recognized, to then  
21 prosecute their derivative claims in New York. Other - - -  
22 another judge - - -

23 JUDGE RIVERA: So - - - so have there been cases  
24 in New York where someone hasn't proc- - - - not this case,  
25 obviously.



1 MR. ATAMIAN: Yes.

2 JUDGE RIVERA: Someone has not been able to  
3 either - - - either gone to the Grand Cayman court to  
4 satisfy Rule 12(A) or hasn't satisfied it on - - - based on  
5 the evidentiary hearing and a determination by the judge  
6 and then, nevertheless, been permitted to proceed in the  
7 state courts?

8 MR. ATAMIAN: Well, Justice Bransten dismissed a  
9 plaintiff in our capitol on exactly the same grounds for -  
10 - -

11 JUDGE RIVERA: Yeah. I'm aware of that one. But  
12 I'm saying are there - - -

13 MR. ATAMIAN: Well - - -

14 JUDGE RIVERA: - - - other cases that have  
15 proceeded, nevertheless?

16 MR. ATAMIAN: On 12(A), she - - - she gave them  
17 an opportunity to go - - -

18 JUDGE RIVERA: No. I - - - I understand. I'm  
19 sorry to interrupt you but I am aware of that case. I am  
20 not asking you about that case, right. I'm asking you  
21 about cases where they have proceeded in the New York  
22 courts.

23 MR. ATAMIAN: There are - - -

24 JUDGE RIVERA: Either because they haven't gone  
25 to the Grand Caymans first to satisfy Rule 12(A) or they -





1 - - or they did go and either did or didn't satisfy the  
2 requirements that you see here?

3 MR. ATAMIAN: Well, this - - - this hasn't come  
4 up much because usually plaintiffs who sue a Cayman Island  
5 company start the proceeding in Cayman Island. Now in the  
6 rare cases where they have tried to skirt that rule and  
7 ignore it by starting, for example, in New York, the  
8 actions have been dismissed. Now Justice Bransten gave the  
9 plaintiffs an opportunity in that case in our capitol to go  
10 file in the Cayman Islands assuming that they weren't time  
11 barred.

12 JUDGE STEIN: What, if any, ramifications would  
13 there be for other circumstances, for example, the, you  
14 know, derivative demand requirements and things like that  
15 if we were to hold that this is procedural and that the New  
16 York courts can apply this common law merits test in the  
17 courts here? Are there other areas of law that would be  
18 affected by that?

19 MR. ATAMIAN: Well, this is an issue of corporate  
20 governance and affirmance will be a very good thing for  
21 corporations because they will provide predictability.  
22 Corporations won't have to worry about having inconsistent  
23 judgment and inconsis- - - inconsistent rulings.

24 JUDGE STEIN: Well, but are - - - but we in  
25 various instances have successfully, I suppose, applied the



1 substantive law of other states or other countries in - - -  
2 in making determinations. We do that all the time. And  
3 that doesn't necessarily lead to inconsistent results.  
4 It's our application of some other jurisdiction's laws. So  
5 why is that more problematic in this circumstance than in  
6 those circumstances?

7 MR. ATAMIAN: Because then you are upending the  
8 corporate governance rules of the Cayman Islands. Justice  
9 Sherwood - - -

10 JUDGE STEIN: Why? Because we're applying their  
11 test.

12 MR. ATAMIAN: Well - - -

13 JUDGE STEIN: Why would that be upending - - -  
14 that's what I'm trying to understand.

15 MR. ATAMIAN: Because - - - because in their  
16 rules they get to make the determination in the first  
17 instance as - - -

18 JUDGE FEINMAN: Well, couldn't they have written  
19 the rule then that says you can only bring derivative  
20 action in the Cayman Islands?

21 MR. ATAMIAN: Sure they could. But this is a  
22 legislative - - -

23 JUDGE FEINMAN: But they didn't do that, right?

24 MR. ATAMIAN: But this is a legislative matter.  
25 This is the way the courts of the Cayman Island that have



1 interpreted 12(A) have held. They've all held it  
2 substantive. Every New York court that's dealt with this  
3 has held that it's substantive because it envelopes - - -

4 JUDGE RIVERA: Is 12(A) a legislative rule?

5 MR. ATAMIAN: Yes, by the Cayman legislature.  
6 It's part of their corporate practice.

7 JUDGE WILSON: You may have to correct a  
8 misunderstanding of mine but a couple times you've  
9 introduced 12(A) as if you want to sue a Cayman  
10 corporation. But my understanding, which may be wrong, is  
11 it applies to any lawsuit brought in the Cayman courts  
12 regardless of the nationality of the corporation. Is that  
13 wrong?

14 MR. ATAMIAN: Well, 12(A) - - - if you want to  
15 sue a Cayman island company - - -

16 JUDGE WILSON: What if you want to sue a company  
17 that is not a Cayman company in the Cayman Islands?

18 MR. ATAMIAN: Well, then you - - -

19 JUDGE WILSON: Do you have to go through 12(A)?

20 MR. ATAMIAN: Well, then you would apply the law  
21 of that state's court of incorporation.

22 JUDGE WILSON: So not 12(A)?

23 MR. ATAMIAN: Not 12(A). But this because this -  
24 - -

25 JUDGE STEIN: Which if it's procedural - - -



1 JUDGE WILSON: Are there Cayman decisions that  
2 say that?

3 JUDGE STEIN: Sorry.

4 MR. ATAMIAN: Yes. But they're - - - it's not  
5 procedural, and every court that has ruled on this issue,  
6 that has considered this issue substantively, has concluded  
7 that it is substantive. It is not procedural. It is a  
8 procedural mechanism to get before the Cayman Island court.  
9 But all of the cases that have dealt with this and all of  
10 the analogous statutes that require going to a court to get  
11 permission to sue a foreign company in another jurisdiction  
12 - - -

13 JUDGE RIVERA: So I'm sorry. Just to clarify, I  
14 - - - I know I've gone over my time. With the Chief  
15 Judge's permission, just to clarify in response to - - - to  
16 Judge Wilson's question. So - - - so a party is suing a  
17 non-Cayman Islands company. Where - - - where do they  
18 start that lawsuit? Because you say Rule 12(A) doesn't  
19 apply. They just go to whatever's the court - - - the  
20 initial court?

21 MR. ATAMIAN: Well, you apply the internal affair  
22 doctrine, it depends where that - - - that company is  
23 incorporated. Here I have the facts before me, and it's a  
24 Cayman Island company. So you start under the Internal  
25 Affairs Doctrine by - - - by employing and applying the law



1 of the state of incorporation.

2 JUDGE FAHEY: The problem - - - the problem with  
3 that is the litigation reality is is that you may be suing  
4 three or four different corporations at the same time, so  
5 you bring one lawsuit in one court. And since New York is  
6 one of the commercial capitals of the world, this has  
7 significant policy effects because you are proposing, by  
8 calling this rule substantive, that it be policy in New  
9 York that you sue - - - you're bringing - - - you're suing  
10 three different companies. First, you're suing New York.  
11 Then you have to go against your Cayman Island corporation  
12 and get permission to sue your Cayman Island corporation  
13 from the Cayman Islands. Then you can come back afterwards  
14 - - - if I understand your argument, afterwards and then  
15 continue your suit in New York applying Cayman Island law.  
16 Is that the - - - the procedure that you're outlining for  
17 us?

18 MR. ATAMIAN: Not really because the - - -

19 JUDGE FAHEY: Okay.

20 MR. ATAMIAN: - - - plaintiff could have sued on  
21 all of its claims in the Cayman Island in the first  
22 instance. It just completely - - -

23 JUDGE FAHEY: Okay. But as I said, the  
24 litigation reality is quite often there are a number of  
25 parties that are being sued simultaneously, as you would



1 recognize, and that's quite often why we end up in New  
2 York.

3 MR. ATAMIAN: Okay. But that could apply  
4 anywhere, and here if you want to do business with a Cayman  
5 Island company, you have to submit to the - - - the  
6 corporate law of the Cayman Islands just as if you do  
7 business with a New York corporation you think it's fair  
8 and it's reasonable that your dispute is going to be  
9 governed by New York law. That is nothing unusual just  
10 because it's Cayman Island. It could have been New York.  
11 It could have been another state.

12 CHIEF JUDGE DIFIORE: Thank you, sir.

13 JUDGE FAHEY: Thank you.

14 MR. ATAMIAN: Thank you.

15 CHIEF JUDGE DIFIORE: Mr. Brenner, if the  
16 Cayman's court makes a merits determination in plaintiff's  
17 favor, can that determination be exported to a New York  
18 court?

19 MR. BRENNER: I think the only merits - - - well,  
20 our position is that Rule 12(A) does not actually permit  
21 the Cayman court to determine whether or not Mr. Davis can  
22 proceed with a case in our state, and our - - - and our  
23 expert is very clear on that. A plaintiff to foreign  
24 litigation cannot bring a Rule 12 application - - - 12(A)  
25 application even if it wanted to do so. There's no



1 mechanism that permits it. The rules don't contain a  
2 process.

3 And to Judge Rivera's question, there are no  
4 reported cases ever under either Rule 12(A) in the Cayman  
5 Islands or under Rule - - - it's parallel Rule 12(A) in  
6 England, where this has ever happened where someone brings  
7 a case in a foreign jurisdiction, presses pause, goes down  
8 to the Cayman Islands or goes to England, gets a Rule 12(A)  
9 ruling somehow, and then if they get their ticket stamped  
10 then goes back to the original court. There's no case  
11 where there's ever happened, and it doesn't work as Mr.  
12 Halkerston says in paragraph 22, 24, 38. Their expert - -  
13 - I think we make this point in our papers - - - he had the  
14 opportunity to respond to that. Doesn't dispute it in the  
15 least so it's undisputed in the record. You can't do this,  
16 and it's a function of the very first sentence that was  
17 discussed, I think by Judge Stein, where the rule applies  
18 to every action begun by writ. Writ is like a complaint.  
19 If you start the case and file suit in the Cayman Islands,  
20 sure, then the Cayman court is going to be the one  
21 determining whether or not you can bring that case, whether  
22 you have standing as a - - -

23 JUDGE RIVERA: Does Rule 12(A) apply to non-  
24 Cayman corporations?

25 MR. BRENNER: It does. Absolutely it does. The



1 rule applies to: "every action begun by writ where the  
2 cause of action is vested in the company." Lowercase c,  
3 undefined term. Again, that's in contrast to the laws in  
4 Canada, contrast to the laws in the BVI where companies are  
5 a defined term, the statutes. I think counsel misspoke.  
6 The question was whether this is in the procedural rules or  
7 the corporate rules. It is in the procedural rules. I  
8 think that is undisputed. There's a dispute about how much  
9 significance that takes on under Tanges, and I think what  
10 Tanges says it's instructive but not dispositive.

11 JUDGE RIVERA: But it is a legislatively enacted  
12 rule?

13 MR. BRENNER: There's a rules committee that I  
14 think is established by legislative enactment - - -  
15 enactment. And interestingly, if you look at the - - - the  
16 rules establishing what the scope of the rules committee  
17 is, and Mr. Halkerston makes this point in his papers, they  
18 only have jurisdiction to establish rules of procedure for  
19 the Cayman Islands, not New York.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 (Court is adjourned)

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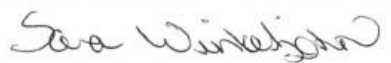




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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Davis v. Scottish Re Group Limited, No. 111 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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