HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)

2. Instructions in relation to the Mini-Trial

3. Trial bundle for Interim Application and Mini-Trial

In the accompanying email you have been advised which party you are representing.

Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court or to the jury must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court or jury have a very good understanding of the background facts and accordingly, while arguments must of course be put into factual context, there is no need for long, time-consuming recitations of the background facts.

- Remember, in addressing the jury it is not the role of a solicitor-advocate to instruct them on the law, that is the function of the judge.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Interim Application

As will appear from the evidential material, Golden Earth Trading (Pvt) Limited, a company incorporated in Hong Kong, has instituted action by way of writ in the Court of First Instance, Hong Kong, on 4 April 2016. In that action, Golden Earth Trading, the plaintiff, has sought a declaration as to the true terms of a contract and has sought payment of the balance due under that contract. The defendant in the action is a company registered in the state of Western Australia, Australia, called Brown Snake Acquisitions (Pty) Limited.

As will further appear from the evidential material, two days after the institution of the Hong Kong action, Brown Snake Acquisitions, as plaintiff, instituted action itself in the Supreme Court of Western Australia dealing essentially with the same conflict.

Brown Snake Acquisitions has made an application for the stay of the Hong Kong proceedings pending the resolution of proceedings in Western Australia. The application has been made on the basis that Western Australia is clearly or distinctly the more appropriate forum for the resolution of the dispute. In short, Brown Snake Acquisitions, the defendant in the Hong Kong proceedings, has made a *forum non conveniens* application to the Hong Kong Court of First Instance.

The evidential material to be used consists of the following witness statements:

1. the witness statement of Terry Rui for the plaintiff;

2. the witness statement of Edgar Wu for the plaintiff;

3. the witness statement of Dan Brown for the defendant;

4. the witness statement of Harry Fry for the defendant.

In addition certain evidence has been agreed or is not contested. The evidence is as follows –

1. A statement by Prof. John Smith of the University of Western Australia, an expert in private international law, that there is no significant difference in the laws of Hong Kong and Western Australia relevant to the dispute that is the subject of the two actions.

2. A statement by the Registrar of the Supreme Court of Western Australia saying that, because of the mining boom, a backlog of cases has arisen in the civil division of the Supreme Court. On average, on completion of pleadings, a civil case commenced by writ must wait 380 days for trial.

3. A statement by the Registrar of the Court of First Instance of Hong Kong saying that, on average, on completion of pleadings, a civil case commenced by writ must wait 120 days for trial.

4. A statement by Dr. Joan White, a medical doctor, saying that she is the attending physician to Harry Fry who was involved in a motor vehicle accident near Doona Creek. As a result of that accident, he has suffered severe injuries and is paralysed from the waist down. The prognosis as to recovery from the paralysis is very poor.

5. A statement by Prof. Anne Johnson, Dean of the School of Anthropology at the University of Sydney, that she has studied the cultural beliefs of the Juni people of of Western Australia and is aware of the fact that, when injured or ill, they have a profound belief that they must remain in their ancestral lands or, at worst, in lands adjacent, if they are to have any hope of eventual recovery.

For the purpose of the application, you may refer to the following, all of which will be available to the Judge and your opponent at the hearing:

i. Evidence in the witness statements in the trial bundle,

ii. The following case authorities, copies of which are attached:

   a. *LS v AD, FCMC 34/2012;*

   b. Spiliada Maritime Corp v Cansulex Ltd, The Spiliada [1987] AC 460.

iii. Hong Kong Civil Procedure (the Hong Kong White Book).

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You will have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12 font, single spaced).

You may refer to the attached case authority as you think appropriate. You do not need to attach it to the skeleton; the Judge will have a copy of it at the hearing. You may also refer to the White Book as you think appropriate.

Please note that your arguments must be limited to the case authorities and the White Book.

It is very important that you email your skeleton argument in MS Word format to the Secretariat of the Higher Rights Assessment Board at info@hrab.org.hk by no later than 3pm of the Wednesday prior to the day of the assessment. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. You will therefore understand that, if you submit your skeleton late, it may not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the Interim Application

i. You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.

ii. No reply to submissions will be conducted.

iii. You should be prepared to deal with Judge interventions and questions in relation to your submissions.

iv. You should be prepared to address the court on the issue of costs as a matter of principle.

由此

FCMC 34/2012

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

SUIT NO. 34 OF 2012

BETWEEN

LS Petitioner

and

AD Respondent

Before : HH Judge Bruno Chan in Chambers
Date of Hearing : 18 September 2012
Date of Judgment : 5 October 2012

J U D G M E N T

(Stay of Proceeding : f*orum non conveniens*)

1. The Petitioner (Wife), a 38 years old housewife now residing with her 2 children in Beijing, issued a petition for divorce on 3rd January 2012 under these proceedings against the Respondent (Husband) on the ground of his unreasonable behaviour, and also prayed for custody care and control of their said children as well as general ancillary relief for herself and the children.

2. In her petition the Wife invoked jurisdiction of this court to deal with her divorce proceedings on the basis that the Husband, now aged 52 and the chairman of a company listed in the Hong Kong Stock Exchange, was habitually resident in Hong Kong throughout the period of 3 years immediately preceding the date of her petition, or that he had a substantial connection with Hong Kong at the date of the petition under section 3(b) or (c) of Matrimonial Causes Ordinance, Cap. 179.

3. Allegedly unaware of the Wife"s petition, the Husband commenced his own divorce proceedings in Beijing about a week later on 10th January 2012 under Case Number 04342 of 2012, and similarly sought custody of their 2 children and general ancillary relief.

4. On 12th February 2012 the Husband issued a summons in these proceedings for an order that the Wife"s petition be stayed on the ground of forum non conveniens in favour of his divorce application in Beijing.

5. At the initial hearing of that summons on 22nd February 2012, the parties agreed to undertake to the court not to proceed with either of their divorce proceedings (without prejudice to any application in relation to the

children) pending the determination of the said summons by this court, and upon the Husband undertaking to pay RMB120,000 per month for the interim maintenance of the children, and to directly pay for their school fees and other expenses, the hearing was then adjourned eventually to 18th September 2012 for argument, which is the matter now before me.

6. Both parties have since filed several affirmations and submitted various legal opinions from their own experts on the relevant PRC laws, and were represented by senior counsel at the hearing, with Mr Johnny Mok SC and Mr Jeremy Chan appearing for the Husband, and Mr Horace Wang SC with Clark Wang for the Wife, but before embarking on the consideration of the parties‟ respective case and evidence, it is important to first set out the relevant background.

Background

7. Both parties were born and raised in Beijing, where they also worked after leaving school, but the Husband subsequently emigrated to Canada in 1990 where he started a trading business importing various products from China for sale in Canada, and for which he had frequently travelled between the 2 countries over the years. His business had become highly successful and profitable, and after obtaining his Canadian citizenship in 1997, he returned to Beijing with about RMB500 million to explore further business opportunities.

8. There he invested heavily in a petro-chemical business in which he eventually became a major shareholder and chairman, and later successfully listed it in the Hong Kong Stock Exchange. As a result he has been running the company in Hong Kong since about 2001, but it was in

Beijing when he first met the Wife who was then working in the Foreign Affairs Department. They subsequently married on 19th March 2001 in Beijing, and it would be helpful to refer to the chronology of events during the marriage exhibited to the Husband's 1st affirmation of 17th February 2012 as "AD1-4" (P – 1 : 65-66), of which I understand there is no serious dispute from the Wife, as follows :

Date	Events
19/3/2001	Parties married in Beijing.
7/2001	Husband came to Hong Kong for work, using his Canadian passport. He applied for working visa.
Soon after married and until 2002	Wife went to England for her Master Degree.
2002	Wife went back to PRC.
2003	Wife lived in Hong Kong with the Husband.
19/9/2004	Elder Child (a boy), born in Hong Kong, now aged 7.
11/2004	Wife moved back to Beijing with the elder child and stayed and lived there, except for a year between 05/2006 and 06/2007, when the elder child was staying in Hong Kong with the Husband.

15/10/2008	Younger child (a girl), born in Hong Kong, now aged 3.
12/2008	Wife took the younger child back to Beijing and have been staying and living there since then.
3/2009	Husband acquired Hong Kong permanent ID card.
26/3/2009	Husband cancelled his Chinese citizenship
3/1/2012	Wife issued Petition in Hong Kong.
10/1/2012	Husband issued divorce application in Beijing
17/1/2012	Wife"s Summons for interim custody, care and control, leave for children to continue to stay in PRC.
19/1/2012	Service of the Hong Kong Petition on the Husband.
31/1/2012	Service of the Beijing divorce paper to the Wife by the Beijing Court.
2/2/2012	Husband"s application in Beijing, with the first list of family assets, for assets division.
4/2/2012	Husband filed Form 4 indicating his intention to dispute the forum.
14/2/2012	Wife"s application in Beijing to challenge the jurisdiction of Beijing Court on the divorce case.

20/2/2012	First hearing in Beijing.
26/3/2012	First Appointment Hearing in Hong Kong.

9. The relevant chronology of course does not end in March 2012, as the Husband"s Beijing proceedings were initially rejected by the Beijing Court on 1st March 2012, and on 8th March 2012 he lodged an appeal against that decision. On 30th August 2012 his appeal was allowed by the Beijing Appellate Court which directed that his divorce application may proceed in Beijing, although it appears that the Wife intends to apply for a review or appeal against that order.

The Application

10. The basis of the Husband"s application is mainly set out in his first 2 affirmations (P1 : 45, 285) which is essentially that the parties and children are closely connected to Beijing, that it is and has always been their home, that he does not own any property in Hong Kong where he only stays in a serviced apartment, that his only connection to Hong Kong is his business and that he has never regarded it as his permanent home, and that the laws and judicial process in Beijing make it a more appropriate forum for their case whether for the divorce, custody or financial matters. Before going into details of his case, it would however be relevant to first set out the applicable legal principles.

The Applicable Principles

11. The principles governing stay of a proceeding by reason of *forum non conveniens* have been well established by the House of Lords in the cases of ***The Abidin Daver*** [1984] AC 398, ***Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)*** [1987] AC 460, and ***de Dampierre v de Dampierre*** [1988] AC 92, which have been applied by our Court of Appeal in ***The Adhiguna Meranti*** [1987] HKLR 904] and ***Louvet v Louvet and Another*** [1990] 1 HKLR 670, and more recently in ***DGC v SLCneeC***, CACV 37/2005 [2005] when Cheung JA summarised them as follows :

> **"1. The single question to be decided is whether there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of an action i.e. in which the action may be tried more suitably for the interests of all parties and the ends of justice?**
>
> **2. In order to answer this question, the applicant for the stay has to establish that first, Hong Kong is not the natural or appropriate forum („appropriate" in this context means the forum has the most real and substantial connection with the action) and second, there is another available forum which is clearly or distinctly more appropriate than Hong Kong. Failure by the applicant to establish these two matters at this stage is fatal.**
>
> **3. If the applicant is able to establish both of these two matters, then the plaintiff in the Hong Kong proceeding has to show that he will be deprived of a legitimate personal or juridical advantage if the action is tried in a forum other than Hong Kong.**
>
> **4. If the plaintiff is able to establish this, the court will have to balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer. Deprivation of one or more personal advantages will not**

necessarily be fatal to the applicant for the stay if he is able to establish to the court's satisfaction that substantial justice will be done in the available appropriate forum."

12. In a more recent case where the above principles were applied in the matrimonial context, ***SA v SPH*** [2011] 6 HKC 413, in which the husband applied for a stay of the wife's divorce proceedings in Hong Kong in favour of Germany, and where the case on juridical disadvantage to her hinged on 2 nuptial agreements relied on by the husband, Poon J elaborated further in the 3-stage inquiry which the court should make in order to answer that single question referred to above at para 31 on p423 A – E when he stated :

"31. … In answering the question, the court embarks on a three-stage inquiry :

(1) Is it shown that Hong Kong is not only not the natural or appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong? Appropriate and natural forum means the forum with which the action has the most real and substantial connection. Connecting factors include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transactions, and the place where the parties respectively reside or carry on business. The evidential burden here is on the applicant. Failure by the applicant at this stage is normally fatal.

(2) If the answer to (1) is yes, will a trial at this other forum deprive the plaintiff of any legistimate personal or juridical

advantage? The evidential burden here lies upon the plaintiff.

(3) If the answer to (2) is yes, the court has to balance the advantages of (1) against the disadvantages of (2). Deprivation of one or more personal or juridical advantages will not necessarily be fatal to the applicant provided that the court is satisfied that substantial justice will be done in the available forum. The applicant bears this ultimate burden of persuasion. He needs to establish that on balance the other forum is more suitable for the interests of all the parties and the ends of justice."

13. Poon J then alluded to three additional points :

"33. First, the connecting factors relevant to stage 1 as to the appropriateness of the rival forum may equally have significance as juridical advantages at stage 2 as well : *de Dampierre*, supra, per lord Goff at p 109A-D and *Louvet*, supra, per Hunter JA at pp 678H-679E.

34. Second, typical examples relied on by a plaintiff as juridical advantages include damages awarded on a higher scale, a more complete procedure of discovery, a power to award interest or a more generous limitation period. As a general rule, the court should not be deterred from granting a stay simply because the plaintiff will be deprived of such an advantage provided that the court is satisfied that substantial justice will be done in the available appropriate forum : *Spiliada*, per Lord Goff at p 482E-F. That said, the underlying principle requires that regard must be had to the interests of all parties and the ends of justice. These considerations may well lead to different conclusions in different cases : *Spiliada,* per Lord Goff at p 483C. So ultimately, much depends on the actual circumstances of the case.

35. Third, stage 3 is the most delicate and difficult aspect of the inquiry because it involves balancing the interests of justice in the broadest sense of that word. The task is most difficult because a juridical advantage to a party almost inevitably results in a disadvantage to the other. When looking at the advantage to the plaintiff, the court does not measure it by the standards of the plaintiff"s forum, for example, Hong Kong. The court applies the more international concept of justice to both parties. See *Louvet*, supra, per Hunter JA at pp 676H-J. Hunter JA went on to explain at pp 677A-G :

„In the matrimonial context I do not think it is difficult to see why. It is, I believe, notorious that most contested matrimonial suits come down to arguments on custody or maintenance or both. It is inevitable that the advantage say to the wife petitioner produces an identical corresponding disadvantage to the husband respondent. If measured solely by the local standards of different tribunals, justice to one must equal injustice to the other. *de Dampierre*, and indeed this case has, I think, shown that the French law of maintenance is by the standards of the UK and of Hong Kong 20 or 30 years out of date. Fault still plays a potentially significant role, and a finding of sole fault against a wife, produces what used to be called in earlier days a compassionate allowance. Years ago this was recognised as unjust or unfair to the wives in the UK and in Hong Kong, and was rejected. It is therefore pertinent to ask upon what basis did the House of Lords compel a wife to submit to a regime which by UK domestic standards alone was apparently unjust.

The answer, I believe, is that the Lords faced the problem which had been most succinctly put by Oliver LJ in *Spiliada* in the Court of Appeal [1985] 2 Lloyds Rep 116 at p.135 :

„The difficulty that I felt about this initially was that what is one man"s advantage must be another"s disadvantage. If one is to look at it as a matter of abstract justice why should a defendant who has a juridical advantage in the jurisdiction in which he ought, *prima facie*, to be sued, be brought into a jurisdiction where he ought not, *prema facie*, to be sued, simply because that

jurisdiction deprives him of that advantage and confers a corresponding advantage on his opponent?"

It is, I think, significant that Oliver LJ was saying that the problem only arose when the defendant was taken out of what was prima facie the appropriate jurisdiction. If he was, it is quite plain that you cannot judge by the standards of the individual jurisdictions because you reach a headlong conflict. There is no half-way house. You have to recognize that there is going to be one loser and one winner in the result. The court has accordingly to resort to wider considerations, to perhaps a supra-national standpoint, and try to determine in each case which is the fairer jurisdiction to the parties collectively or, perhaps putting it more brutally, which overall produces the least unjust result. That I believe is basically the *de Dampierre* test."

14. With the above principles in mind, I shall now start the first stage of the enquiry : whether the Husband has discharged his burden to demonstrate that Hong Kong is not the natural or appropriate forum, and that there is another forum in Beijing which is clearly or distinctly more appropriate, the failure of which is, as stated above, normally fatal to his application.

The More Appropriate Forum

15. There is no question in my mind that there are factors that connect the case to Beijing, after all, it has been the home of the Wife and the 2 children since late 2004, except for a year between 2005/2006 and for a short period in 2008 for the birth of the younger child in Hong Kong. Naturally both children have since been attending school in Beijing, and it seems that the Wife intends to continue to live there in the near future, where she owns several major properties (some jointly with the Husband)

including her present residence and other substantial assets, as well as close family ties and place of origin in the city.

16. Similarly, it is also where the Husband has still maintained close ties and connection in terms of both family and business notwithstanding his move to Hong Kong, that he still regularly spends about 2/3 of his time each year in Beijing, and that given the latest decision of the Beijing Appellate Court, his choice of forum for dissolving his marriage with the Wife has now been allowed to proceed there.

17. There is therefore no question in my mind that Beijing would be an available or appropriate forum, but the same can also be said about Hong Kong by reasons of those connecting factors set out in paragraphs 22-45 of Mr Wang"s skeleton submission, mainly that the Husband leads his life and business in Hong Kong, that the major assets of the family, of which the Wife believes to be in excess of HK$5 billion, are located here, that the children were born in Hong Kong and all 4 members of the family are Hong Kong permanent residents, that the Wife has issued her proceedings in Hong Kong as of right, and that it would be more convenient of Hong Kong court to deal with cases of international dimension such as the present one.

18. The question henceforth to be answered by the Husband must then be this : What makes Beijing, according to him and in the context of those competing factors, clearly or distinctly a more appropriate forum for the parties" divorce proceedings than Hong Kong?

19. His answer lies in the skeleton submission of his senior counsel Mr Mok that Hong Kong is in fact not an appropriate forum for the parties"

divorce suit to proceed due to the fundamental jurisprudential difference between divorce under Hong Kong law and Mainland PRC law, and therefore by implication and/or comparison Beijing is clearly or distinctly the more appropriate if not the only available forum, as the Wife"s current petition for divorce is "fault-based", i.e. upon findings of fault on the part of the Husband but he is unable to accept that any breakdown of relationship was caused by unreasonable behaviour on his part, hence if the Wife"s petition is allowed to proceed, he will definitely oppose it, and a trial will ensue.

20. A trial of that petition in Hong Kong, Mr Mok submits, is likely to be expensive and prolonged, and is extremely inconvenient, having regard to the numerous allegations made in the petition, and the large number of witnesses, of which the Husband has identified 38 on his side, that need to be called by both parties, but since many of these witnesses are based in Beijing, there may well be all sorts of travel or visa problems to arrange for them to come to Hong Kong for the trial to further inconvenient the Hong Kong proceedings.

21. On the other hand, Mr Mok argues, a divorce in Mainland PRC will be achieved without resorting to any attribution of fault, and that it will be granted simply upon the breakdown of the marriage, hence there will not be any trial or any witness to be called if his petition is to proceed in Beijing, and all the Wife will need to do before the Beijing Court is to concede that the marriage has indeed broken down, which is exactly what she has pleaded in her Hong Kong petition.

22. Mr Mok further submits that he sees no reason why the Wife would not agree to a no-fault divorce in Beijing, and that she has no right to insist on a divorce based on fault in Hong Kong, relying on what Le Pichon JA had said in the appeal of ***Premisingh*** v ***Kishinani*** CACV 845/2000 at para 27 :

> **"It must unquestionably be in the parties' best interests to achieve a divorce through the no fault provision rather than bitterly contested proceedings. Where the common goal of the parties (i.e. the dissolution of the marriage) can be attained swiftly and without the unavoidable expense, aggravation and emotional toll that come with a contested divorce, there is every reason for the court to encourage the parties to pursue that alternative."**

23. That view in fact echoes what Ormrod LJ said in the English Court of Appeal in an earlier case of ***Grenfell v Grenfell*** [1978] CA, Fam 128, 1 ALL ER 561 :

> **"There is no point, as I see it, in a case like this in conducting an enquiry into behaviour merely to satisfy feelings, however genuinely and sincerely held by one or other of the parties. To do so would be a waste of time of the court and, in any event, would be running, as I think, counter to the general policy or philosophy of the divorce legislation as it stands today. The purpose of Parliament was to ensure that where a marriage has irretrievably broken down, it shall be dissolved as quickly and as painlessly as possible under the Act, and attempts to recriminate in the manner in which the wife in this case appears to wish to do so should be, in my judgment, firmly discouraged."**

24. It is further submitted on behalf of the Husband that even if there is to be a divorce in Hong Kong, the parties will still remain married as a matter of Mainland PRC law, under which the marriage was entered into in the first place, unless such time when it is dissolved by a PRC court, which

means that the parties will eventually have to do the same thing again in Beijing, but until then there will remain the hiatus of "suspended" or "unknown" status in between the two court orders, leading to a wholly undesirable *lis alibi pendens* situation – multiplicity of litigation and proceedings in multiple different jurisdiction that may result in a "limping marriage", something which the statutory provisions and the case-law strive to avoid where possible.

25. With that in mind, Mr Mok argues that the highly relevant factor of risk of inconsistent judgments also comes into play, and with parallel proceedings in the matrimonial context, the risk of inconsistent judgment becomes multi-fold as after divorce there will follow the questions of custody, care and control and access rights, as well as ancillary relief and maintenance not just between the spouses but also for their 2 children, which may lead to the impossible situation of the Hong Kong court and the Beijing court coming to different conclusions, something which he says has also been alluded to by the Wife in one of her affirmations.

26. Parallel proceedings however may not be a relevant factor to be considered, as pointed out by Mr Wang for the Wife that the plaintiff is entitled to choose the forum he has found as of right in which he prefers to litigate the matter, or be sufficient to stay the appropriate forum, according to ***Abidin Daver*** supra, and followed by ***Pei Zheng Middle School v China Pui Ching Education Foundation Ltd*** (unreported) CACV 262/2005 where Cheung JA stated at para 25 :

> **" … But even if these are to be treated as parallel proceedings, this factor will not be sufficient to stay the Hong Kong proceedings if Hong Kong is in fact the appropriate forum …"**

27. They may of course be relevant under some circumstances, as stated by the House of Lords in ***de Dampierre*** supra, at p108 :

" … However, the existence of such proceedings may, depending on the circumstances, be relevant to the inquiry. Sometimes they may be of no relevance at all, for example, if one party has commenced the proceedings for the purpose of demonstrating the existence of a competing jurisdiction, or the proceedings have not passed beyond the stage of the initiating process. But if, for example, genuine proceedings have been started and have not merely been started but have developed to the stage where they have had some impact is likely to have a continuing effect upon the dispute between the parties, especially if such impact is likely to have a continuing effect, then this may be a relevant factor to be taken into account when considering whether the foreign jurisdiction provides the appropriate forum for the resolution of the dispute between the parties."

28. This is however not the case with the proceedings before the Beijing Court which is, as pointed out by Mr Wang for the Wife, only in its initial stage and certainly not one where there is any material impact yet on the disputes between the parties.

29. Even if a set of parallel proceedings abroad is relevant by the standard of ***de Dampierre***, Mr Wang submits that it is rarely a material factor, as observed by Liu JA in ***Nan Tung Bank Ltd, Zhu Hai v Wangfoong Transportation Ltd*** [1999] 2 HKC 606 at 610 :

"It is agreed on all hands that after *The Abidin Daver* [1984] 1 AC 398, a multiplicity of proceedings is not of itself a material factor in an application made on the ground of forum non conveniens but „there might be exceptional cases where the bringing of the second action … while the foreign action was proceeding, might cause an unusual hardship to a particular defendant". At 409B, Lord Diplock observed :

As a general rule, the fact that to permit the (home) action to be pursued would result in concurrent actions on the same subject matter proceeding in two different jurisdictions could not be sufficient to justify depriving the plaintiff of the advantage to which he was entitled … *to choose* it as a forum in which he preferred to litigate the matter.(emphasis supplied)"

30. I agree with Mr Wang that the mere existence of the Beijing proceedings would not be sufficient to stay the Wife"s divorce in Hong Kong. It is certainly within the rights of the Husband not to accept that divorce based on alleged faults on his part, set out in 14 paragraphs within her petition, and he is certainly entitled to strenuously defend it in Hong Kong, of which he has already made very clear at the very beginning, and has since remained firmly of such intention, but this „unacceptable" ground of divorce with all those consequential problems and inconvenience associated with a trial alluded to above can and will be absolutely and entirely obviated if the Wife is to change her petition from "fault-based" to "no-fault" based on the parties" separation, which she has proposed in her solicitor"s affirmation of 12th September 2012, and confirmed by her senior counsel at the hearing that she will do so by the end of this year when the parties will have lived apart for 1 year.

31. In other words, she is going to do exactly what the Husband has suggested in accordance with the propositions referred to above in ***Primisingh*** and in ***Grenfell***, i.e. to achieve what is clearly the common goal of the parties : A no-fault divorce to be obtained within a relatively short time „swiftly and without unavoidable expenses, aggravation and emotional toll", and which Mr Wang for the Wife says may even be quicker than in Beijing.

32. It is because, as submitted by him, that not only is the Beijing proceedings still in its infancy, but according to the PRC laws may have to be adjourned for 6 months for mediation in the absence of agreement on all matters between the parties, whereas in Hong Kong the Wife would be able to obtain a no-fault divorce based on separation by the latest in early 2013, with the questions of custody and ancillary relief to follow immediately thereafter, which brings me to the next point raised by Mr Mok in favour of Beijing as a forum when it comes to consider the future arrangements of the children .

33. He submits that if the Hong Kong proceedings are stayed, the Beijing proceedings will continue, and once a divorce is effective under PRC laws, it is entitled to immediate automatic recognition under Hong Kong law as well under Part IX of the Matrimonial Causes Ordinance, Cap 179 where Section 56(1) provides that :

"The validity of an overseas divorce or legal separation shall be recognized if, at the date of the institution of the proceedings in the place in which it was obtained

(a) either spouse was habitually resident in that place; or

(b) either spouse was a national of that place.

34. Hence with the Beijing proceedings being proceeded and with the Hong Kong proceedings stayed, Mr Mok submits, it follows that all other matters concerning the children and ancillary relief will also be provided for in Beijing, which is only sensible given that the Wife and the children are all domiciled in and reside there, and intend to continue to do so, and where any order concerning them are enforceable.

35. This is particularly so where the children are concerned, he submits, as they grow up in Beijing and live a Beijing life and hence matters such as their living arrangements, schooling as well as maintenance must be assessed or measured against their Beijing background and standard of living, while any Hong Kong Social Investigation Report will hardly be as relevant or informative. In support he cited the English case of ***D v F (forum conveniens)*** [1998] 3 FCR 403, which concerned a Dutch husband and an Italian wife who lived most of her life in Italy and was then living in Italy with 2 children, the following facts of importance was noted by the trial judge :

> **"The Wife is Italian. She and the children live and will live in Italy …The Wife has no connection whatsoever with England. The Husband's connection with this jurisdiction arose out of his contract with his employer which has now ended. It is unlikely that they will return to live or work here … it is obvious that the issues relating to these Italian children should be dealt with in Italy …"**

36. Also cited was the case of ***C v L*** [2004] 2 HKLRD 1 which came before me earlier on the wife's application to stay the husband's divorce proceedings in which I made the following observation :

> **" … I believe it would be more practical and convenient for the Court in Singapore to deal with the parties' divorce there than in Hong Kong. It is clear from the evidence that the Wife and the children have already settled in Singapore. As the children are still relatively small with the youngest only at the age of 4, it would obviously be much more difficult or even impossible for the Wife to leave them behind in Singapore to attend to various hearings in Hong Kong in particular where custody and ancillary relief matters would be in serious dispute. It should also make sense for the issue of custody and/or access to be investigated by the authorities such as Social Welfare Department in Singapore where the**

children live and attend school than in Hong Kong. By comparison, it would be much less inconvenient for the Husband to travel by himself to Singapore for the proceedings there, or to instruct a lawyer to represent him in those proceedings."

37. There is no question in my mind that the children, and for that matter the Wife as well, are much more connected to Beijing than Hong Kong, and that if their custody indeed becomes an issue, it would appear more convenient for that matter to be dealt with in Beijing, although as pointed out by Mr Wang for the Wife, Hong Kong courts routinely obtain International Social Welfare Investigation Reports for assistance, and hence the children in this case will not have to travel to Hong Kong for that purpose, nor will their life in Beijing be unnecessarily disturbed or interrupted.

38. I however have serious doubt that in reality custody will indeed become a real or major issue between the parties. While both did ask for sole custody care and control of the children in their respective divorce petition, realistically I am unable to see how the Husband would be able to make out a convincing case other than perhaps for joint custody and/or generous or defined access instead of turning it into full-blown battle for care and control in view of the undisputable facts that the Wife has always been the primary carer of the children, now only 4 and 8 living in Beijing while he is a chairman of a listed company in Hong Kong no doubt committed to running its business here, and has in fact admitted to be unable to take care of the children full time (P1 : 307 2nd Aff § 71). I indeed find this „children factor" grossly overstated in the Husband"s case for the Beijing forum.

39. The real and major issue between the parties, I am convinced, lies in their ancillary relief disputes in particularly over the extent and identification of and eventual distribution of marital assets that brings into consideration the different system and approach between the 2 jurisdictions that would ultimately answer the question of which is the more appropriate forum.

40. There is no question that the parties‟ assets are very substantial but there are clearly serious issues over their extents, location and valuation. In his Beijing application the Husband listed 4 properties in Beijing all held under the Wife‟s name without stating their value, 1 vehicle held by each party with total value at $3.7 million, certain jewelleries held by the Wife with total value at $21.59 million, cash held by the Wife at $7 million, and 21.8 million shares in the said listed company held by him estimated at about $29 million, making a grand total of just over $90 million without taking into account of those 4 properties referred to above (P1 : 74).

41. This is however only the 1st list of assets according to the Husband, as he also stated in his Beijing application that there are many more assets amassed by the parties during their 10 years of marriage to be disclosed later after a second and third inventory have been undertaken by the parties (P1 : 73).

42. That was the Husband‟s estimation then. The Wife has of course put it much higher, and it would be helpful to refer to the skeleton submission of Mr Wang at paragraph 27 to get a taste of what sort of figures she is suggesting for the Husband‟s assets :

"There are presently sufficient undisputed evidence to show the Husband has very substantial assets both identified and unidentified in Hong Kong :

(1) The Husband acquired what later became (the listed company) using a substantial part of RMB 500 million (Husband 2nd Aff §§ 9, 10 [P1/287,288]);

(2) According to the estimation of the Wife and public information, the Husband holds around 74.12% shares of (the listed company), which are worth about HKD400 million (Wife 4th Aff §34 [P3/724]; LS-15 [P1/252,253]);

(3) The Husband holds a bank account with UBS in Hong Kong which had a balance of USD94,593,275.85 as of 2 June 2008 (LS-19 [P3/764-785]);

(4) The Husband holds a bank account with Standard Chartered Bank (Hong Kong) Ltd. In Hong Kong through a company named Ever Tip Company Ltd. And this account had a balance of at least HKD 130 million in January 2008 (Wife 4th Aff §35 [P3/724]; LS-18 [P3/761-763]);

(5) The Husband should have other Hong Kong or overseas bank accounts the details of which are unknown to the Wife (Wife 4th Aff §38 [P3/725]);

(6) The Husband personally told the Wife over the phone that he had total assets in the region of HKD 5 billion (Wife 2nd

Aff § 12 [P1/110]; Husband 2nd Aff § 73 [P1/308]; Wife 4th Aff § 38 [P3/725]);

(7) A Bently car (Husband 2nd Aff §79 [P1/310]);

(8) It was the intention of the Husband to transfer the majority of his assets away from PRC after 2008 (Wife 4th Aff §§ 35, 42 [P3/724, 726]);

(9) The assets of the Husband in Hong Kong are potentially liable to execution for a judgment debt of over $500 million under HCA 996/2010 (see Pony Hong Kong World Ltd v Vand Petro Chemicals (BVI) Co Ltd and Anor, HCA 996/2010, unreported, 30 November 2011).

43. Even ignoring the allegation that the Husband had admitted to have assets worth $5 billion under (6) above, of which he has denied (P1 : 308 § 73), it is clear that the remaining assets together with those properties in Beijing are still very substantial by any standard, and may still make him a billionaire.

44. More importantly, Mr Wang submits, while the assets in Beijing are relatively simple and can easily be identified, those in Hong Kong involve mainly shares in both BVI and Hong Kong companies, securities and other financial devices and investments, as well as potential debts which are much more fluid and hence easily disposed or transferred out of the jurisdiction, all of which may require complicated investigation, auditing, valuation, fluctuation and litigation.

45. Given what the Wife believes to be so far very limited disclosure by the Husband of assets which she says dwarfed by the size of those assets in Hong Kong, Mr Wang submits that there are good reasons to believe such complicated discovery process and tracing exercise will indeed be necessary, as he cited the following examples in para 31 of his submission of the Husband"s behaviour as evidence of attempts to conceal or mislead his true assets situation :

(1) His failure to produce any details of his bank accounts in Hong Kong notwithstanding evidence from the Wife of very substantial transactions in 2 of them referred to above;

(2) He deliberately declared in his 1st list of assets only a small fraction of his shareholding in his company held in his personal name only, omitting the majority held by 2 BVI companies controlled by him (P1 : 252 LS – 15);

(3) His deliberate denial of having any significant financial transactions in Hong Kong evidenced in the IPC Judgment at pp 4-5;

(4) His attempt to renege on what he had told the Wife about his assets being worth $5 billion in his 2nd Affirmation with such an incredible explanation : "I do not have assets over HK$5,000,000,000 as alleged by the Petitioner. I believe this figure came from one of the conversations that I had with the Petitioner in or about December 2011 when I asked her over the phone – I was out for a drink with my colleagues and friends at that time and I was a bit drunk – if I had HK$5,000,000,000 whether she would still want a divorce …" (P1 : 308 §73).

46. Whether or not the Husband is guilty as alleged, and he has categorically denied each and every one of them, given the amount of the assets involved and the unyielding stance taken by both sides, there is no doubt in my mind, as I have already noted above, that the ancillary relief dispute between the parties is where the battle line is going to be drawn, and it is where the significant differences between the 2 systems for such a dispute that should in my judgment ultimately determine the issue before me : Which is the more appropriate forum to deal with the parties" ancillary relief application.

47. According to the legal opinions obtained by the Wife from her PRC experts (P3 : 805 – 810, 955), whilst the Beijing Court has jurisdiction covering all assets wherever located including those in Hong Kong, and that PRC laws normally provide for such marital assets to be shared equally between divorcing couples, there is however no proper system or regulations for discovery or collection of evidence, hence the Beijing Court will have great difficulties, Mr Wang submits, tracing and unearthing the assets of the Husband in particularly those in Hong Kong which constitutes the majority but which he argues will require extensive investigation and discovery exercises to ascertain their extent and value.

48. Whereas there cannot be any argument that Hong Kong, as submitted by Mr Wang, has a comprehensive system of discovery including general discovery, specific discovery, interrogatories, subpoenas, anton pillar orders, etc to ensure that relevant evidence and information may be revealed.

49. This difference between discovery procedures in Mainland and Hong Kong was first noted by Deputy Judge Au, as he then was, in

Botanic Limited v China National United Oil Corporation, HCA 1852/2005 (unreported), where he summarised at para 80 as follows :

> **"From the PRC law expert evidence adduced by both parties, it is common ground that the major difference between the discovery procedure in Hong Kong and the civil procedure gathering procedure in the Mainland can be described as follows :**
>
> **(1) Under the Hong Kong discovery, the parties are obliged to even discover documents which are detrimental or unfavourable to them.**
>
> **(2) On the other hand, under PRC procedure, a party is initially only required to discover documents which it wants to rely on to support its case."**

50. He went on to conclude at para 113 that :

> **"In the circumstances, I accept that the deprivation of the compulsory and comprehensive discovery and the procedure for the administration of interrogatories would constitute a prejudice to the Plaintiff in obtaining relevant evidence to advance their claim. I therefore further accept that the lack of these procedures under the PRC legal system would result in real risk that the Plaintiffs may not be able to obtain substantial justice if the matter is to be tried in the Shenzhen Court instead of here."**

51. Similar observation was made by Deputy Judge To, as he then was, in another case where the discovery process of the 2 jurisdictions was again called into consideration, in ***Shenzhen Futaihong Precision Industry Co Ltd & Anor v BYD Co Ltd & Ors***, HCA 2114/2007 (unreported), and where he found that in Beijing inferior :

> **"Inferior discovery procedure**

95. The discovery process in the PRC is very much different from that in Hong Kong. In the PRC, there is no concept of voluntary discovery of documents which are relevant to the controversy in dispute. It is evident from the Defendant"s PRC lawyers that the attitude of PRC lawyers towards discovery is to disclose only documents favourable to their own client"s case. Not unless a party has knowledge of the existence of a document in the possession of the other party can he seek discovery. This is very much different from Hong Kong, where under the Peruvian test, discovery would include documents not immediately relevant to the issues but would reasonably lead to a chain of enquiry to documents which are relevant to an issue. In Hong Kong, discovery is not limited to documents in the possession of the party as in the PRC, but also include documents within the power and control of the party. Further, although the Beijing courts have a procedure for investigation and collection of evidence or documents by the court, that is very different in nature from specific discovery in Hong Kong. Under the PRC discovery procedures, the process for such investigation and collection of evidence is largely in the hands of the judge and beyond the control of the parties. Very importantly, such process of investigation and collection of evidence will only be allowed by the Beijing court if the documents requested for will, as perceived by the judge, significantly affect the outcome of the litigation. That is a more stringent test than that under the test of relevance in specific discovery in Hong Kong.

96. Discovery is of particular importance for assessing damages and testing the defence of diplomatic intervention in this case. The Plaintiff has no knowledge if the Defendant has disposed of any of the Orimulsion oil and on what terms and had to rely on the good faith of the Defendant in disclosing its records. Faced with the attitude and practice of PRC lawyers in general and the inferior discovery procedure in the PRC, there is a real risk that the Plaintiff will suffer a jurisdical disadvantage if the trial is to take place in the Beijing forum."

52. Mr Wang therefore points out that for the Beijing Court to deal with the assets in its order in this case, it must be shown that they actually exist, but given the lack of or insufficient voluntary disclosure by the Husband,

and the likelihood of the majority of them being located outside the Mainland, the Beijing Court is practically unable to exercise any power to request for the necessary evidence and information, which makes it all the more important that the Wife not be deprived of her right to the discovery process available in Hong Kong, without doubt a huge juridical advantage to her.

53. The Husband does not, and cannot in my view, dispute the different discovery process between the 2 jurisdictions, but Mr Mok submits on his behalf that now that PRC laws can provide for delaying or re-opening of ancillary relief at a later date if more assets are discovered later on, and that any "loophole" as such in the Beijing proceedings may be plugged by the Wife relying on Part IIA of the Matrimonial Proceedings and Property Ordinance, Cap 192 to make a further application for financial relief if necessary in Hong Kong after the divorce in Beijing, hence he argues that in the unlikely event that Hong Kong Court's assistance is required for whatever reason, such recourse is available to the Wife, and he sees no reasons at all for illegitimately "maintaining" divorce proceedings in Hong Kong which he says are wholly unnecessary to empower the Hong Kong Court with jurisdiction to deal with such matters.

54. While Part IIA was certainly enacted to cure situations such as those in ***YL v ML*** [2010] 13 HKCFAR 794, following the decision of the Court of Final Appeal that Hong Kong courts had no jurisdiction to deal with ancillary relief application after a party had obtained the divorce elsewhere, and in that case in Shenzhen, such an application under Part IIA cannot be made as of right as in the case of the divorce being obtained in Hong Kong where a mere compliance of certain simple procedural steps including setting out the relevant financial claims in the petition/joint

application and filing certain relevant forms would suffice, but would instead be subject to the following specific provisions and conditions :

29AC. Leave of court required for application for financial relief

(1) No application for an order for financial relief may be made unless the leave of the court has been obtained in accordance with rules of court.

(2) The court must not grant leave unless it considers that there is substantial ground for the making of an application for an order for financial relief.

(3) The court may grant leave under this section despite the fact that an order has been made by a competent authority outside Hong Kong requiring the other party to the marriage to make any payment or transfer any property to, or for the benefit of, the applicant or a child of the family.

(4) Leave under this section may be granted subject to any conditions the court thinks fit.

55. Furthermore, section 29AF imposes a duty on the court to decide whether Hong Kong is an appropriate venue for such application by having regard to matters which would otherwise not be necessary or relevant in an application for ancillary relief under section 7 of the same Ordinance after a divorce in Hong Kong as follows :

(1) Before making an order for financial relief, the court must consider whether in all the circumstances of the case it would be

appropriate for the order to be made by a court in Hong Kong, and if the court is not satisfied that it would be appropriate, the court must dismiss the application.

(2) The court must in particular have regard to the following matters –

(a) the connection that the parties to the marriage have with Hong Kong;

(b) the connection that those parties have with the place where the marriage was dissolved or annulled or where they were legally separated;

(c) the connection that those parties have with any other place outside Hong Kong;

(d) any financial benefit that the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a place outside Hong Kong;

(e) if an order has been made by a competent authority outside Hong Kong requiring the other party to the marriage to make any payment or transfer any property to, or for the benefit of, the applicant or a child of the family –

(i) the financial relief given by the orders; and

(ii) the extent to which the order has been complied with or is likely to be complied with;

(f) any right that the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any place outside Hong Kong and, if the applicant has not exercised that right, the reason for that;

(g) the availability of any property in Hong Kong in respect of which an order for financial relief in favour of the applicant may be made;

(h) the extent to which any order for financial relief is likely to be enforceable;

(i) the length of time that has elapsed since the date of the divorce, annulment or legal separation.

56. Accordingly the Wife would have to overcome not just one but two legal hurdles in her Part IIA application, first to seek leave of the court under s 29AC, and if leave is granted, to satisfy the court of those matters required under s 29AF, the burden of which no doubt is on her, quite possibly a heavy one, with no reason to expect any less strenuous resistance from the Husband then, notwithstanding his present proposition. Clearly in my view a serious juridical disadvantage to the Wife.

57. Mr Wang has gone further to argue that the Wife would in fact suffer severe unfairness as a result due to the risk of the Husband hiding his assets and her inability to seek discovery prior to obtaining leave for the Part IIA application, unlike in normal ancillary relief applications when

discovery almost always follows right after exchange of Financial Statement (Form E) by the parties.

58. Mr Wang submits that without the discovery process in Hong Kong to enable an investigation to take off, i.e. an initial paper trail referred to in ***Shenzhen Futaihong*** supra that one can follow through and identify the further information and documents for further discovery and investigation, it would be impossible for the Wife to set up a case of injustice or hardship by demonstrating that assets had been hived off from the Beijing Court such as to make its financial order unjust, hence there will be no basis at all for her to apply for, and obtain, leave under Part IIA.

59. Accordingly, Mr Wang submits that Part IIA cannot address the unfairness that is likely to result from the hiding of assets by the Husband and the inability of the Beijing Court to prevent that from happening, hence his reliance on ***SA v SPH*** is misplaced.

60. While there is no evidence at this stage of any attempts by the Husband to hide or dispose of his assets from the Wife"s financial claims, I can see why she has such concerns in view of his relatively limited disclosure of his assets so far in either proceedings, while his indication in his divorce application in Beijing that further disclosure would be forthcoming (P1 : 73) is mere cold comfort to the Wife, in particular when it has remained outstanding.

61. I also agree with Mr Wang that ***SA v SPH*** can be distinguished in that the Pre-nuptial Agreement and Separation Agreement executed by the parties in Germany in that case was found to be such a major connecting factor that at the end the court was satisfied that Germany was clearly and

distinctly the more appropriate forum. In the present case I am unable to find that kind of factor of such importance or significance to connect Beijing as the preferred forum.

62. Nor am I able to find any significant personal or juridical advantage that the Husband may have in the Beijing forum which he will be deprived in the Hong Kong forum other than savings on costs and expenses which is, as pointed out by Mr Wang, insignificant given his wealth and financial resources, now that a no-fault divorce can and will be obtained fairly quickly in Hong Kong, and for that matter by either party. In any event, as I have already alluded to above, whatever personal or juridical advantage the Husband may have in the Beijing forum is far outweighed by the fact that substantial justice would not be done by reason of the juridical disadvantages that the Wife will suffer in that forum.

Conclusion

63. For all the reasons discussed above, I am not satisfied that Beijing is clearly or distinctly the more appropriate forum for the parties" divorce and the subsequent custody and ancillary relief matters. Even if I were, I am convinced that the Wife would as a result be deprived of such important juridical advantage in the discovery process otherwise available to her in Hong Kong, and that she would suffer such juridical disadvantages in her Part IIA application that substantial justice would not be done in the Beijing forum.

64. In the circumstances the Husband"s application for stay must fail, which is hereby dismissed, with a costs order nisi to be made absolute at the expiration of 14 days in favour of the Wife to be taxed if not agreed,

with certificate for 2 counsel, to whom from both sides I am most grateful for their valuable assistance rendered to the court throughout the hearing.

Bruno Chan
(District Judge)

Mr Horace Wang SC and Mr Clark Wang instructed by M/S W.K. To & Co. for the Petitioner.

Mr Johnny Mok SC and Mr Jeremy Chan instructed by M/S Withers for the Respondent.

*460 Spiliada Maritime Corporation Appellants v Cansulex Ltd Respondents

House of Lords

19 November 1986

[1986] 3 W.L.R. 972

[1987] A.C. 460

Lord Keith of Kinkel , Lord Templeman , Lord Griffiths , Lord Mackay of Clashfern , and Lord Goff of Chieveley

1986 July 7, 8, 9; Nov. 19

Practice—Writ—Application to set aside—Shipowners bringing action in England alleging damage to vessel caused by shipping wet sulphur cargo—Shippers carrying on business in British Columbia—Whether case suitable for service out of jurisdiction—Relevance of claim being time barred in British Columbia— R.S.C., Ord. 11, r. 4(2)

Ships' Names—Spiliada

In 1980 a Liberian owned vessel was chartered to carry a cargo of bulk sulphur from Vancouver, British Columbia, to Indian ports. The shipowners alleged that the cargo was wet when loaded and as a result caused severe corrosion to the vessel. They obtained leave ex parte to serve proceedings on the shippers in Vancouver or elsewhere in Canada on the ground that it was an action to recover damages for breach of a contract governed by English law. The shippers issued a summons under R.S.C., Ord. 12, r. 8 , asking that the ex parte order be discharged on the ground, inter alia, that the case had not been shown to be "a proper one for service out of the jurisdiction" under R.S.C., Ord. 11, r. 4(2) [1] . At the hearing of the application Staughton J., who had already started to hear the trial of a similar action for damages involving the same shippers in respect of another ship, the *Cambridgeshire* considered, inter alia, the availability of witnesses, potential multiplicity of proceedings and the fact that the accumulated experience of counsel and solicitors derived from their participation in the *Cambridgeshire* action would lead to savings of time and money. He dismissed the application.

On the shippers' appeal, the Court of Appeal held that it was impossible to conclude that the factors considered by the judge, when taken together, showed that the English court was distinctly more suitable for the ends of justice, and that a further factor, not considered by Staughton J., that if the present proceedings were set aside the shipowners would be faced with a defence of limitation in British Columbia, was a neutral factor. The Court of Appeal allowed the appeal and set aside the writ.

On appeal by the shipowners:-

, allowing the appeal, that in order to determine whether a case was a proper one for service out of the jurisdiction under R.S.C., Ord. 11, r. 4(2) the court had, as in applications for a stay of proceedings founded on the ground of forum non *461 conveniens where the action was as of right by service on a defendant within the jurisdiction, to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice; that, accordingly, the judge having identified the correct test and considered the relevant factors, including the advantages of efficiency, expedition and economy in bringing the action in England following the *Cambridgeshire* action, the Court of Appeal had had no grounds for

interfering with the exercise of his discretion (post, pp. 464F, G, 465G - 466A, 480F-G, 484E-F, 485F - 486B).

Dictum of Lord Kinnear in Sim v. Robinow (1892) 19 R. 665 applied.

Ilyssia Compania Naviera S.A. v. Bamaodah [1985] 1 Lloyd's Rep. 107 , C.A. approved.

MacShannon v. Rockware Glass Ltd. [1978] A.C. 795 , H.L.(E.) considered.

Dicta of Lord Diplock and Lord Wilberforce in Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50 , 65, 72, H.L.(E.) and of Stephenson L.J. in Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119 , 129, C.A. explained.

Per curiam. Had the point arisen, the shipowners had not acted unreasonably in failing to commence proceedings in British Columbia before the expiry of the limitation period there. Had the judge erred in the exercise of his discretion, the proceedings would only have been set aside on condition that the shippers waived their right to rely on the time bar in British Columbia (post, pp. 464F, 465G - 466A, 487G - 488A).

Per Lord Templeman. The solution of disputes about the relative merits of trial in England and trial abroad is preeminently a matter for the trial judge, before whom submissions should be measured in hours not days. An appeal should be rare and the appellate court should be slow to interfere (post, p. 465E-G).

Decision of the Court of Appeal [1985] 2 Lloyd's Rep. 116 reversed.

The following cases are referred to in the opinion of Lord Goff of Chieveley:

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Abidin Daver, The [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470; [1984] 1 Lloyd's Rep. 339, H.L.(E.) .
Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50; [1983] 3 W.L.R. 241; [1983] 2 All E.R. 884, H.L.(E.) .
Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119, C.A. .
Atlantic Star, The [1973] Q.B. 364; [1972] 3 W.L.R. 746; [1972] 3 All E.R. 705 , C.A.; [1974] A.C. 436; [1973] 2 W.L.R. 795; [1973] 2 All E.R. 175, H.L.(E.) .
Blue Wave, The [1982] 1 Lloyd's Rep. 151
Britannia Steamship Insurance Association Ltd. v. Ausonia Assicurazioni S.p.A. [1984] 2 Lloyd's Rep. 98, C.A. .
B.P. Exploration Co. (Libya) Ltd. v. Hunt [1976] 1 W.L.R. 788; [1976] 3 All E.R. 879
Clements v. Macaulay (1866) 4 Macph. 583
Credit Chimique v. James Scott Engineering Group Ltd. 1982 S.L.T. 131
European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356, C.A. . ***462**
Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] 1 All E.R. 1042, H.L.(E.) .
Hagen, The [1908] P. 189, C.A. .
Ilyssia Compania Naviera S.A. v. Bamaodah [1985] 1 Lloyd's Rep. 107, C.A. .
Longworth v. Hope (1865) 3 Macph. 1049
MacShannon v. Rockware Glass Ltd. [1978] A.C. 795; [1978] 2 W.L.R. 362; [1978] 1 All E.R. 625, H.L.(E.) .
Sim v. Robinow (1892) 19 R. 665
Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français," 1926 S.C. 13, H.L.(Sc.) .
Société Générale de Paris v. Dreyfus Brothers (1885) 29 Ch.D 239
Trendtex Trading Corporation v. Credit Suisse [1982] A.C. 679; [1981] 3 W.L.R. 766; [1981] 3 All E.R. 520, H.L.(E.) .
Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo) [1949] A.C. 326; [1949] 1 All E.R. 294, H.L.(E.) .
Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo)
Union Industrielle et Maritime v. Petrosul International Ltd. (The Roseline) (unreported), 23 March 1984

The following additional cases were cited in argument:

Adolf Warski, The [1976] 1 Lloyd's Rep. 107 ; [1976] 2 Lloyd's Rep. 241, C.A. .
Bruce (W.) Ltd. v. J. Strong [1951] 2 K.B. 447; [1951] 1 All E.R. 1021; [1951] 2 Lloyd's Rep. 5, C.A. .
Cantieri Navali Riuniti S.p.A. v. N.V. Omne Justitia [1985] 2 Lloyd's Rep. 428, C.A. .
Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557; [1980] 3 W.L.R. 991; [1981] 1 All E.R. 143, H.L.(E.) .
Indian Fortune, The [1985] 1 Lloyd's Rep. 344
Maharani Woollen Mills Co. v. Anchor Line (1927) 29 Ll.L.Rep. 169, C.A. .
Media, The (1931) 41 Ll.L.Rep. 80 .
Shiloh Spinners Ltd. v. Harding [1973] A.C. 691; [1973] 2 W.L.R. 28; [1973] 1 All E.R. 90, H.L.(E.) .
Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803; [1978] 1 Lloyd's Rep. 1, H.L.(E.) .
Ward v. James [1966] 1 Q.B. 273; [1965] 2 W.L.R. 455; [1965] 1 All E.R. 563; [1965] 1 Lloyd's Rep. 145, C.A. .

Appeal from the Court of Appeal.

This was an appeal by the plaintiffs, Spiliada Maritime Corporation, by leave of the House of Lords from an order of the Court of Appeal [1985] 2 Lloyd's Rep. 116 (Neill and Oliver L.JJ.) allowing an appeal from the order of Staughton J. of 16 November 1984 whereby he had dismissed the application of the defendants, Cansulex Ltd., under R.S.C., Ord. 12, r. 8 to set aside service of proceedings upon them in British Columbia, and alternatively for a stay of the proceedings, and whereby he accordingly refused to discharge the ex parte order of Neill J. on 10 October 1983 giving leave to the plaintiffs to serve proceedings upon the defendants pursuant to R.S.C., Ord. 11, r. 1(1)(f)(iii) .

The facts are set out in the opinion of Lord Goff of Chieveley.

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Kenneth Rokison Q.C. and *Nicholas Legh-Jones* for the plaintiffs. The trial judge applied the correct test as to whether the case was a proper one for service out of the jurisdiction. He exercised his discretion in accordance with that test and therefore the Court of Appeal ought not to have intervened and substituted its own discretion: see Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50 , 65-68, *per* Lord Diplock. The way in which Lord Diplock's speech has been interpreted in Britannia Steamship Insurance Association Ltd. v. Ausonia Assicurazioni S.p.A. [1984] 2 Lloyd's Rep. 98 and Ilyssia Compania Naviera S.A. v. Bamaodah [1985] 1 Lloyd's Rep. 107 is correct - that the list of relevant factors is not exhaustive and the court has to carry out a balancing act of all the factors. [Reference was also made to Cantieri Navali Riuniti S.p.A. v. N.V. Omne Justitia [1985] 2 Lloyd's Rep. 428] . The Court of Appeal was only entitled to intervene and interfere with the judge's discretion in the circumstances set out by Lord Brandon of Oakbrook in The Abidin Daver [1984] A.C. 398 , 420, namely where (1) the judge had misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) the judge, in exercising his discretion, had taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) his decision was plainly wrong. Further, in Shiloh Spinners Ltd. v. Harding [1973] A.C. 691 , 728, Lord Simon of Glaisdale commented that the fact that the appellate court would give different weight to the various considerations assessed by the first instance court was not a reason to interfere. The judge had not only applied the correct test, but he had taken into account all relevant matters and cannot be said to have been "plainly wrong." Indeed, the judge was in the best position to weigh the relevant factors and in the particular the relevance and importance of the fact that the *Cambridgeshire* action had been fully prepared and fought in London (although it subsequently settled in the course of the trial). In the event that such circumstances were satisfied in the present case so that the Court of Appeal was entitled to consider the matter afresh and substitute its own discretion, then the fact that the defendants could rely on a time bar in British Columbia was not, as the Court of Appeal suggested, a neutral factor, but a powerful one which ought to have been weighed in the balance in the plaintiffs' favour. See Castanho v.

Brown & Root (U.K.) Ltd. [1981] A.C. 557 ; The Adolf Warski [1976] 1 Lloyd's Rep. 107 , 110; [1976] 2 Lloyd's Rep. 241 ; The Blue Wave [1982] 1 Lloyd's Rep. 151 and Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119 .

Robert Alexander Q.C. and *Peter Goldsmith* for the defendants. The correct test to be applied is that of Lord Diplock in Amin Rasheed [1984] A.C. 50 , 68: "The exorbitance of the jurisdiction sought to be invoked ... is an important factor to be placed in the balance against granting leave. It is a factor that is capable of being outweighed if the would-be plaintiff can satisfy the English court that justice either could not be obtained by him in the alternative forum; or could only be obtained at excessive cost, delay or inconvenience." That passage provides an exhaustive list of the circumstances in which a plaintiff can ***464*** satisfy the burden upon him of showing that the case is a proper one for service out of the jurisdiction. The plaintiffs in the present case could not satisfy that burden. [Reference was made to MacShannon v. Rockware Glass Ltd. [1978] A.C. 795 as to the weight to be applied to a preference for representation by lawyers in one jurisdiction rather than another; and to Ward v. James [1966] 1 Q.B. 273 , 293, as illustrating the correct approach to whether an appellate court may interfere with the exercise of discretion by a trial judge.] In the present case the Court of Appeal was right to review the exercise of the judge's discretion: [Detailed reference was made to the judgments and factual material]. The Court of Appeal was also right to hold that the time-bar point was a neutral factor: see: Maharani Woollen Mills Co. v. Anchor Line (1927) 29 Ll.L.Rep. 169 ; W. Bruce Ltd. v. J. Strong [1951] 2 K.B. 447 ; The Media (1931) 41 Ll.L.Rep. 80 and The Indian Fortune [1985] 1 Lloyd's Rep. 344 . The existence of a time-bar was only given significance in The Blue Wave [1982] 1 Lloyd's Rep. 151 - a case which turned very much on its facts.

Rokison Q.C. in reply. In determining whether a case is a proper one for service out of the jurisdiction, one starts with the balancing exercise, and only at a later stage does one move on to the considerations set out by Lord Diplock in the passage relied upon by the defendants at [1984] A.C. 50 , 68, There, Lord Diplock was merely illustrating by reference to examples the way a plaintiff seeking to invoke the English jurisdiction could satisfy the burden placed upon him. There is no difference between that speech and that of Lord Wilberforce at p. 72. It is one and the same test - correctly applied in the Britannia case [1984] 2 Lloyd's Rep. 98 and the Ilyssia case [1985] 1 Lloyd's Rep. 107 . The present is not a case where one can say that there is a natural forum. On the time-bar point, all the cases relied upon by the defendants were cases with an "exclusive jurisdiction" clause and where the same time-bar applied abroad as in England. They are not, therefore, of assistance.

Their Lordships took time for consideration. 19 November. LORD KEITH OF KINKEL.

MY Lords, I have had the benefit of reading in draft the speech to be delivered by my noble and learned friend Lord Goff of Chieveley. I agree with it and for the reasons he gives would allow the appeal and restore the order of Staughton J.

LORD TEMPLEMAN.

MY Lords, in these proceedings parties to a dispute have chosen to litigate in order to determine where they shall litigate. The principles which the courts of this country should apply are comprehensively reviewed and closely analysed in the speech of my noble and learned friend Lord Goff of Chieveley. Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of forum non conveniens will only stay the action if the defendant satisfies the court that some other forum is more appropriate. Where the plaintiff can only commence his action with leave, the court, applying the doctrine of forum conveniens will only grant leave if the ***465*** plaintiff satisfies the court that England is the most appropriate forum to try the action. But whatever reasons may be advanced in favour of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere.

In the present case, a vessel managed partly in Greece and partly in England, flying the flag of Liberia and owned by a Liberian corporation is said to have been damaged by a cargo loaded by a British Columbia shipper and carried from Vancouver to India. Both sets of insurers are English. Similar litigation took place in Canada

concerning the vessel *Roseline* . Similar litigation took place in England over another vessel, the *Cambridgeshire* , after Staughton J. had refused to stay the action. If Staughton J. had good reason to try the *Cambridgeshire* , it is difficult to see that he had bad reason for trying the *Spiliada* .

The factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion. The authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case. Any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the judge or considerations which are not relevant for his purpose. In the present case, for example, it is reasonably clear that Cansulex prefer the outcome of the *Roseline* proceedings in Canada to the outcome of the *Cambridgeshire* proceedings in England and prefer the limitation period in British Columbia to the limitation period in England. The shipowners and their insurers hold other views. There may be other matters which naturally and inevitably help to produce in a good many cases conflicting evidence and optimistic and gloomy assessments of expense, delay and inconvenience. Domicile and residence and place of incident are not always decisive.

In the result, it seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere. I agree with my noble and learned friend Lord Goff of Chieveley that there were no grounds for interference in the present case and that the appeal should be allowed.

LORD GRIFFITHS.

My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Templeman and Lord Goff of Chieveley. For the reasons they give I would allow the appeal.

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LORD MACKAY OF CLASHFERN.

My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Templeman and Lord Goff of Chieveley. I agree with them and for the reasons which they give I would allow the appeal.

LORD GOFF OF CHIEVELEY.

My Lords, there is before your Lordships an appeal, brought by leave of your Lordships' House, against a decision of the Court of Appeal [1985] 2 Lloyd's Rep. 116 (Oliver and Neill L.JJ.) whereby they reversed a decision of Staughton J. in which he refused an application by the respondents, Cansulex Ltd., to set aside leave granted ex parte to the appellants, Spiliada Maritime Corporation, to serve proceedings on the respondents outside the jurisdiction. The effect of the decision of the Court of Appeal was, therefore, to set aside the leave so granted and the proceedings served on the respondents pursuant to that leave.

(1) The facts of the case

As this appeal is concerned with an interlocutory application, I must, like the courts below, take the facts from the affidavit evidence filed on behalf of the parties. The appellants (whom I shall refer to as "the shipowners") claim to be (and can, for the purposes of this appeal, be accepted as being) the owners of a bulk carrier, of about 20,000 tonnes deadweight, called *Spiliada* . The shipowners are a Liberian Corporation, and their vessel flies the Liberian

flag; but their managers are in Greece, though some part of the management takes place in England. The respondents (whom I shall refer to as "Cansulex") carry on business in British Columbia as exporters of sulphur. The shipowners chartered their vessel to an Indian company called Minerals & Metals Trading Corporation of India Ltd. (whom I shall refer to as "M.M.T.C.") under a voyage charter dated 6 November 1980, for the carriage of a cargo of sulphur from Vancouver to Indian ports. The charterparty contained a London arbitration clause. Pursuant to that charterparty, the vessel proceeded to Vancouver and there loaded a cargo of sulphur between 18 and 25 November 1980. The sulphur was loaded on board the vessel by order of Cansulex, who were f.o.b. sellers of the sulphur to M.M.T.C. Bills of lading were then issued to, and accepted by, Cansulex. The bills were shipped bills, Cansulex being named as shippers in the bills. Clause 21 on the reverse of the bills of lading provided that, subject to certain clauses which are for present purposes immaterial, the bills of lading "no matter where issued, shall be construed and governed by English law, and as if the vessel sailed under the British flag." The bills were signed by agents for and by authority of the master. The cargo was discharged at ports in India between 29 December 1980 and 6 February 1981.

It has been alleged by the shipowners that the cargo of sulphur so loaded on the vessel was wet when loaded and as a result caused severe corrosion and pitting to the holds and tank tops of the vessel. The shipowners have claimed damages from Cansulex in respect of the damage so caused. The shipowners rely upon the age of the ship at the ***467** time of the voyage (she was then three years old) and the condition of the holds before and after the voyage. The shipowners have advanced their claim against Cansulex as shippers under the contract of carriage contained in or evidenced by the bills of lading to which I have already referred, basing their claim on article 4, rule 6, of the Hague Rules (contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels, 25 August 1924) incorporated into the bills, and on a warranty implied by English law that dangerous cargo will not be shipped without warning. Arbitration proceedings have also been commenced by the shipowners against M.M.T.C. in London under the arbitration clause in the voyage charter. It is open to M.M.T.C. to bring arbitration proceedings in London against Cansulex under the sale contract between them, by virtue of the London arbitration clause in that contract. Leave was obtained by the shipowners to issue and serve a writ upon Cansulex outside the jurisdiction on a ground contained in the then R.S.C., Ord. 11, r. 1(1)(f)(iii) , viz. that the action was brought to recover damages in respect of breach of a contract which was by its terms governed by English law.

Cansulex then applied for an order to set aside such leave and all subsequent proceedings. The application came before Staughton J. on 26 October 1984. The hearing of the application took place while there was proceeding before Staughton J. a very similar action, in which Cansulex were also defendants. That action concerned a ship called the *Cambridgeshire* , owned by an English company, Bibby Bulk Carriers Ltd. In it, the owners claimed damages for damage alleged to have been caused to their vessel by a cargo of sulphur loaded on her at Vancouver in November and December 1980, for carriage to South Africa and Mozambique. The defendants in the action were the charterers of the ship, Cobelfret NV, and three shippers - Cansulex, Petrosul International Ltd., and Canadian Superior Oil Ltd. In that action, Cansulex (supported by Petrosul International Ltd., another Canadian company) who had been served with proceedings outside the jurisdiction on the same ground as in the present case, applied in September 1982 for the leave to serve proceedings upon them outside the jurisdiction, and all subsequent proceedings, to be set aside. Staughton J. heard that application and dismissed it, holding that there was a good arguable case that the Canadian companies were parties to a contract governed by English law, and that the case was a proper one for service out of the jurisdiction. There was no appeal from that decision. The trial of the *Cambridgeshire* action started on 15 October 1984, again before Staughton J. He recorded in his judgment in the present case that there were no less than 15 counsel engaged in the *Cambridgeshire* action; that each was equipped with 75 files; and that the then estimate for the length of the trial was six months.

There has been another set of proceedings concerning damage to a vessel alleged to have been caused by a wet sulphur cargo shipped at Vancouver, Union Industrielle et Maritime v. Petrosul International Ltd. (unreported), 23 March 1984. This concerned a ship called the Roseline. The matter came before a Canadian Federal Court in March 1984, the ***468** defendant being Petrosul International Ltd. The owners of the *Roseline* claimed a declaration that a contract existed between them and Petrosul under which disputes were to be referred to

arbitration in Paris. The contract was said to have been contained in or evidenced by a bill of lading, in which Petrosul were named as shippers. Reed J. upheld a contention by Petrosul that they were not a party to any contract with the owners, or at least not a party to any contract containing an arbitration clause; her conclusion was reached on the basis that the bill of lading, in the hands of Petrosul, "partook of the nature of a receipt or a document of title," and that use for this purpose did not make the document a contractual one so far as Petrosul were concerned. There is doubt whether a similar conclusion would be reached in English law; Staughton J. was told that there was an unreported decision of Mustill J. to the contrary effect. However, Staughton J. held, and it is now accepted by Cansulex, that in the present case there is a good arguable case that Cansulex were parties to the bill of lading contract, and so parties to a contract governed by English law.

It is right that I should record that the judge was told that there were other disputes concerning similar damage to ships alleged to have been caused by sulphur loaded at Vancouver; but he knew no more about them.

(2) The decision of Staughton J.

The judge approached the application of Cansulex in the present case as follows. Having concluded that there was a good arguable case that the shipowners and Cansulex were parties to a contract governed by English law, he then proceeded to consider whether the case had been shown to be, as a matter of discretion, a proper case for service out of the jurisdiction. He referred first to the decision of this House in Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] A.C. 50 , and in particular to certain passages (which I will quote later) from the speeches in that case of Lord Diplock, at p. 65, and Lord Wilberforce, at p. 72, and to a suggested conflict between those two passages; but, following a decision of the Court of Appeal in Ilyssia Compania Naviera S.A. v. Bamaodah [1985] 1 Lloyd's Rep. 107 , he concluded that the suggested conflict was more apparent than real, and that the appropriate test for him to apply was that, if the English court is shown to be distinctly more suitable for the ends of justice, then the case is a proper one for service out of the jurisdiction. He then said:

> "In considering the exercise of discretion I must, of course, assume that the *Spiliada* action will come to trial eventually, either in England or in Canada. In fact, that seems to me improbable. After the *Cambridgeshire* proceedings have reached a final conclusion, with vast expenditure of money, time and effort, I think it very likely that the parties to the *Spiliada* dispute will have little appetite for litigation, and will reach a compromise. Cansulex feature as defendants in both actions, and are presently represented by the same solicitors and counsel in both. The plaintiff shipowners are, of course, different in the two actions, but they too are represented by ****469*** the same solicitors and counsel, and it may be that they are supported by the same insurers. So I suspect that what I am in fact deciding is not where the *Spiliada* action will ultimately be tried, but whether a settlement will be reached against the background of litigation pending in England or of litigation pending in Canada. Nevertheless, it is the prospect of a trial which provides the sanction to induce a settlement, and in my judgment I must decide this application on the assumption that a trial there will be."

This was, so far as the *Cambridgeshire* action was concerned, a prescient observation. For, on 18 January 1985, the parties to that action settled their differences. Furthermore his thought that "it may be that [the shipowners] are supported by the same insurers" was one which would certainly have occurred to other experienced commercial practitioners, and the judge's tentative inference that both the *Cambridgeshire* and the *Spiliada* were entered in the same P. and I. club was confirmed before your Lordships; indeed the solicitors acting for the owners in both cases have commenced proceedings against a number of Canadian sulphur exporters, including Cansulex, on behalf of various shipowners all entered in the same P. & I. club.

The judge then turned to consider the various factors which were said to influence the choice between an English and Canadian court. I need not list them all. The most important were (1) availability of witnesses, (2) multiplicity

of proceedings, and (3) a matter which was regarded as crucial by the judge, which I will call the *Cambridgeshire* factor and which relates to preparation for very substantial proceedings.

On availability of witnesses, the judge had this to say:

> "Apart from those matters, I now have, after listening to the opening speech in the *Cambridgeshire* trial for 15 days, a somewhat clearer picture of what the relative importance of the issues is likely to be. The principal or most important events in the case occurred in Vancouver, but many events of significance occurred in many other places. The most important witnesses of fact will be from Cansulex and various other concerns in Vancouver, and the ship's officers. But there are likely to be a great many witnesses from other places. In the *Cambridgeshire* applications I concluded that, in terms of witness/hours, events in Vancouver were likely to loom largest at the trial. I am no longer convinced that that was right, even leaving out of account the expert evidence. Certainly, there will be a very substantial body of evidence dealing with events which did not take place in Vancouver. As to the expert witnesses, I am told that all but one of them in the *Cambridgeshire* are English. But, as I then said, experts can travel, or be replaced by other experts.
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> "It is true that the *Cambridgeshire* plaintiffs are an English company and the ship is British, whereas the *Spiliada* plaintiffs are Liberian; so is their ship; and their managers are in Greece, although some part of the management takes place in England. That means that the *Spiliada* action has much less connection with England, but it does not give it any greater connection with ****470*** Vancouver. It is also true that two witnesses in the *Cambridgeshire* action decline to come to England to give evidence, so that their evidence will have to be taken on commission in North America. Nevertheless, I reach the clear conclusion that Vancouver is not overall a more suitable place for trial than England in terms of the convenience of witnesses. Indeed, if one assumes that the parties will wish to have the same experts as in the *Cambridgeshire* , I would say that England is shown to be more suitable."

I should interpolate that the judge was not right in thinking that all but one of the experts in the *Cambridgeshire* action were English; in fact, two of the defendants' experts came from England and four from elsewhere (one from Canada, one from the United States, and two from Europe - from Scandinavia and Greece). This was drawn to the judge's attention at the end of his judgment. The judge then stated that he did not however regard this difference as significant - no doubt he had it in mind that all the owners' experts were from England.

Next, turning to the question of multiplicity of proceedings, he referred to the facts that Cansulex wished to join their insurers and possibly others as third parties, which they could only do in Canada, and that the shipowners wished to join M.M.T.C. as co-defendants with Cansulex, which would obviously be a sensible course if it could be achieved. As to the former, he gave the same weight to it as he did in the *Cambridgeshire* application; as to the latter, he gave less, because, whereas the relevant charterers were joined as co-defendants in the *Cambridgeshire* action, in the present case (following, it appears, lobbying by both sides) he felt that he should regard the shipowners' objective of joining M.M.T.C. as problematical.

Turning to the *Cambridgeshire* factor, which he regarded as crucial, the judge had this to say:

> "But at the end of the day what seems to me important is this. Mr. Evans submits that Cansulex, having been put to the trouble and expense of bringing their witnesses and senior executives here once, should not have to bear the same burden again. Mr. Rokison replies that litigation is not like a football or cricket season, with one fixture at home and the other away. The trouble with such an attractive analogy or metaphor is that it tends to take one's eye off the ball, so to speak. Indeed, if all other things were equal, I should be inclined to hold that even-handed justice *would* be served best if one action were tried here and the other in Canada. But all other things are far from equal. The plaintiff's solicitors have made all the dispositions and incurred all the expense for the trial of

> one action in England; they have engaged English counsel and educated them in the various topics upon which expert evidence will be called; they have engaged English expert witnesses; and they have assembled vast numbers of documents. They have also, no doubt, educated themselves upon the issues in the action. All that has been done on behalf of Cansulex as well, save that one of their expert witnesses is Canadian. If they now wish to start the process again in Canada, that is their choice Rut it seems to me that the additional ***471*** inconvenience and expense which would be thrust upon the plaintiffs if this action were tried in Canada far outweighs the burden which would fall upon Cansulex if they had to bring their witnesses and senior executives here a second time.
>
> "There might have been an appeal from my decision on the *Cambridgeshire* applications, but there was not. I appreciate that there are a number of significant points of distinction between the two cases, including the principal ones that I have mentioned. It may then in a sense be hard on Cansulex if the decision reached on the *Cambridgeshire* applications should have the effect of determining their application in this case. But in my judgment it does, in the circumstances and for the reasons that I have mentioned. Overall it would be wasteful in the extreme of talent, effort and money if the parties to this case were to have to start again in Canada. The case is a proper one for service out of the jurisdiction."

On that basis, the judge decided not to accede to Cansulex's application. After he had prepared his judgment, evidence was placed before him on behalf of the shipowners with regard to the relevant limitation period applicable in British Columbia. It transpired that that period was two years, and had expired by November 1982, long before the hearing of Cansulex's application before the judge. The shipowners sought to rely on this point, apparently on the basis that to send the case back to British Columbia would deprive them of a legitimate juridical advantage in this country. However the judge, having already concluded that the action should be tried here, irrespective of the time bar point, did not think it necessary to consider that matter.

(3) The decision of the Court of Appeal

In the Court of Appeal [1985] 2 Lloyd's Rep. 116 , Neill L.J. (who delivered the first judgment) referred to the speech of Lord Diplock in Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191 , 220 and both he and Oliver L.J. referred to the speech of my noble and learned friend Lord Brandon of Oakbrook in The Abidin Daver [1984] A.C. 398 , 420, which state the limited grounds upon which an appellate court may interfere with the exercise of a trial judge's discretion. They also, like the judge, regarded themselves bound by the decision of the Court of Appeal in the Ilyssia case [1985] 1 Lloyd's Rep. 107 to regard the difference between the speeches of Lord Diplock and Lord Wilberforce in the Amin Rasheed case [1984] A.C. 50 as more apparent than real. Neill L.J. reviewed the judge's assessment of the various factors as follows. With regard to the availability of witnesses, he felt that, even on the judge's own analysis of the facts, the convenience of the parties and the witnesses probably tilted the scales towards British Columbia as the forum, but certainly did not show that an English court was "distinctly more suitable for the ends of justice." On multiplicity of proceedings, he saw force in the criticism of Mr. Goldsmith (counsel for Cansulex) that this was at most a neutral factor, and certainly did not bring the scales down heavily on the side of England. On the relevance of the *Cambridgeshire* factor, while rejecting Mr. Goldsmith's primary ***472*** submission that the *Cambridgeshire* litigation was wholly irrelevant, he considered that the judge attached far too much importance to it. He said [1985] 2 Lloyd's Rep. 116 , 124:

> "The fact that the London solicitors who are presently acting are firms of great eminence and the further fact that members of these firms have acquired detailed knowledge about the shipment of sulphur cargoes from Vancouver are pointers to trial in England but should not be regarded as of decisive importance if other factors tilt the balance the other way."

He held that it was impossible to conclude that the relevant factors, when taken together, showed that the English court was distinctly more suitable for the ends of justice. On this view of the case, it became necessary for him to consider the impact of the time bar in British Columbia. On that he adopted the view of Oliver L.J. that the existence of a time bar was a neutral factor. He therefore decided to allow the appeal.

Oliver L.J., like Neill L.J., accepted that they were bound to follow the decision of the Court of Appeal in the Ilyssia case, on the basis of which he thought it right to follow the view of Lord Wilberforce in the Amin Rasheed case; and he did not therefore accept the submission of Mr. Goldsmith for Cansulex that the judge had propounded the wrong test. He then considered the exercise of the judge's discretion. He reviewed the judge's assessment of the availability of witnesses in considerable detail; and pointed out that the judge had proceeded on an erroneous assumption that all the experts in the *Cambridgeshire* action were English. He went on to express the opinion that the supposed advantages of England as a forum were, in this respect, far less clear cut than the judge had appeared to have imagined. In his opinion, the highest that it could be put on the shipowners' side was that the factor of convenience of witnesses was neutral. He then considered the point of multiplicity of proceedings, and rejected criticism of the judge's approach because the point seemed to him to have played a neutral role in the judge's decision. Turning to the *Cambridgeshire* factor, he was very critical of the judge's approach. He summarised Mr. Goldsmith's principal criticism at [1985] 2 Lloyd's Rep. 116 , 133:

> "But what, Mr. Goldsmith asks forensically, does all that amount to beyond this, that the plantiffs say, in effect, 'we wish, for the purposes of our own and because it is convenient to do so, to retain the services of particular legal advisers and experts who happen to be resident and practising in England. Therefore, our desire to retain English legal advisers makes England a more appropriate forum for the hearing of the dispute?"'

Oliver L.J. accepted that criticism as well-founded. He concluded that, in giving to the *Cambridgeshire* action the decisive and conclusive weight that he did, the judge erred in principle.

Finally, Oliver L.J. considered the impact of the time bar in British Columbia. He came to the conclusion that the time bar was not of itself a factor which ought to carry the day. The difficulty in the way of the ***473*** shipowners' argument that, by sending the case to be tried in British Columbia, they would be deprived of a legitimate juridical advantage in that the action was not time-barred in England, was that what was one side's advantage must be another's disadvantage. This pointed, of course, to a time bar being regarded as a neutral factor. Even if, following the decision of Sheen J. in The Blue Wave [1982] 1 Lloyd's Rep. 151 , it was to be treated as a factor on which the shipowners as plaintiffs could rely unless they had acted unreasonably in allowing the time bar to elapse in the relevant foreign jurisdiction, that could be of no benefit to the shipowners in the present case, because there was no evidence tendered on their behalf providing any satisfactory explanation why no steps were taken to ascertain what the law of British Columbia was. Furthermore, the factor of the time bar in British Columbia could not in any event be conclusive; because the evidence showed that it was open to the shipowners to sue Cansulex in the Federal Court in any province in Canada. Accordingly, in agreement with Neill L.J., he decided that the appeal of Cansulex should be allowed.

(4) Submissions of counsel

Before your Lordships, the shipowners submitted that the Court of Appeal, having accepted that the judge applied the correct test, went beyond their limited power of review of the exercise of the judge's discretion. The real reason for their intervention was that they disagreed with the weight attached by the judge to the *Cambridgeshire* factor and were then, it was submitted, over-astute to discover an error which would enable them to substitute

their own discretion for his. For Cansulex, on the other hand, it was submitted that the Court of Appeal were fully entitled to interfere with the judge's exercise of his discretion, substantially for the reasons given by them; but it was further submitted that, in any event, both the judge and the Court of Appeal should have applied the more stringent test set out in the passage from Lord Diplock's speech in the Amin Rasheed case [1984] A.C. 50 , 68, which, if correctly applied, should certainly have led to the same order as that made by the Court of Appeal.

In considering the submissions of counsel, for whose assistance I am most grateful, it is necessary to review the applicable principles. I say this for two particular reasons. First, since the courts below have been troubled by apparent differences between observations of Lord Diplock and Lord Wilberforce in the Amin Rasheed case, it is, I think, desirable that this House should now resolve those differences. Second, since the question of the relevance of a time bar has now arisen in a number of cases, including the present, it is desirable that this House should give further consideration to the relevance of what has been called a "legitimate personal or juridical advantage," with special reference to time bars. But, in any event, the law on this subject is still in a state of development; and it is perhaps opportune to review the position at this stage, and in particular to give further consideration to the relationship between cases where jurisdiction has been founded as of right by service of proceedings on the defendant within the jurisdiction, but the defendant seeks a stay of the proceedings on the ground of forum non conveniens, ****474*** and cases where the court is invited to exercise its discretion, under R.S.C., Ord. 11, to give leave for service on the defendant out of the jurisdiction.

(5) The fundamental principle

In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called forum non conveniens. That principle has for long been recognised in Scots law; but it has only been recognised comparatively recently in this country. In The Abidin Daver [1984] A.C. 398 , 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in Sim v. Robinow (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:

> "the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

For earlier statements of the principle, in similar terms, see Longworth v. Hope (1865) 3 Macph. 1049, 1053, *per* Lord President McNeill, and Clements v. Macaulay (1866) 4 Macph. 583, 592, *per* Lord Justice-Clerk Inglis; and for a later statement, also in similar terms, see Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français," 1926 S.C.(H.L.) 13 , 22, *per* Lord Sumner.

I feel bound to say that I doubt whether the Latin tag forum non conveniens is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However the Latin tag (sometimes expressed as forum non conveniens and sometimes as forum conveniens) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of "mere practical convenience." Such a suggestion was emphatically rejected by Lord Kinnear in Sim v. Robinow, 19 R. 665 , 668, and by Lord Dunedin, Lord Shaw of Dunfermline and Lord Sumner in the Société du Gaz case, 1926 S.C.(H.L.) 13 , 18, 19, and 22 respectively. Lord Dunedin, with reference to the expressions forum non competens and forum non conveniens, said, at p. 18:

> "In my view, 'competent' is just as bad a translation for 'competens' as 'convenient' is for

> 'conveniens.' The proper translation for these Latin words, so far as this plea is concerned, is 'appropriate.'"

Lord Sumner referred to a phrase used by Lord Cowan in Clements v. Macaulay (1866) 4 Macph. 583, 594, viz. "more convenient and preferable for securing the ends of justice," and said, at p. 22: ***475**

> "one cannot think of convenience apart from the convenience of the pursuer or the defender or the court, and the convenience of all these three, as the cases show, is of little, if any, importance. If you read it as 'more convenient, that is to say, preferable, for securing the ends of justice,' I think the true meaning of the doctrine is arrived at. The object, under the words 'forum non conveniens' is to find that *forum* which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that *forum* is more likely to secure those ends."

In the light of these authoritative statements of the Scottish doctrine, I cannot help thinking that it is wiser to avoid use of the word "convenience" and to refer rather, as Lord Dunedin did, to the *appropriate* forum.

(6) How the principle is applied in cases of stay of proceedings

When the principle was first recognised in England, as it was (after a breakthrough in The Atlantic Star [1974] A.C. 436) in MacShannon v. Rockware Glass Ltd. [1978] A.C. 795 , it cannot be said that the members of the Judicial Committee of this House spoke with one voice. This is not surprising; because the law on this topic was then in an early stage of a still continuing development. The leading speech was delivered by Lord Diplock. He put the matter as follows, at p. 812:

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative; (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

This passage has been quoted on a number of occasions in later cases in your Lordships' House. Even so, I do not think that Lord Diplock himself would have regarded this passage as constituting an immutable statement of the law, but rather as a tentative statement at an early stage of a period of development. I say this for three reasons. First, Lord Diplock himself subsequently recognised that the mere existence of "a legitimate personal or juridical advantage" of the plaintiff in the English jurisdiction would not be decisive: see The Abidin Daver [1984] A.C. 398 , 410, where he recognised that a balance must be struck. Second, Lord Diplock also subsequently recognised that no distinction is now to be drawn between Scottish and English law on this topic, and that it can now be said that English law has adopted the Scottish principle of forum non conveniens: see The Abidin Daver [1984] A.C. 398 , 411. It is necessary therefore now to have regard to the Scottish authorities; and in this connection I refer in particular, not only to statements of the fundamental principle, but also to the decision of your Lordships' House in the Société du Gaz case, 1926 S.C.(H.L.) 13 . Third, it is necessary to strike a note of caution regarding the prominence given ***476** to "a legitimate personal or juridical advantage" of the plaintiff, having regard to the decision of your Lordships' House in Trendtex Trading Corporation v. Credit Suisse [1982] A.C. 679 , in which your Lordships unanimously approved the decision of the trial judge to exercise his discretion to stay an action brought in this country where there existed another appropriate forum, i.e., Switzerland, for the trial of the action, even though by so doing he deprived the plaintiffs of an important advantage, viz. the more generous English

procedure of discovery, in an action involving allegations of fraud against the defendants.

In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.

(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the Société du Gaz case, 1926 S.C.(H.L.) 13 , 21, *per* Lord Sumner; and Anton, Private International Law (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where "the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favor of the defendant,": see Scoles and Hay, Conflict of Laws (1982), p. 366, and cases there cited; and also in Canada, where it has been stated (see *Castel, Conflict of Laws* (1974), p. 282) that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." This is strong language. However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff upon which jurisdiction has been conferred ***477*** by the constitution of the country which includes both alternative jurisdictions.

A more neutral position was adopted by Lord Sumner in the Société du Gaz case, 1926 S.C.(H.L.) 13 , 21, where he said:

> "All that has been arrived at so far is that the burden of proof is upon the defender to maintain that plea. I cannot see that there is any presumption in favour of the pursuer."

However, I think it right to comment that that observation was made in the context of a case where jurisdiction had been founded by the pursuer by invoking the Scottish principle that, in actions in personam, exceptionally jurisdiction may be founded by arrest of the defender's goods within the Scottish jurisdiction. Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions (see, e.g., European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356), or in Admiralty, in the case of collisions on the high seas. I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum - in The Atlantic Star [1974] A.C. 436 (Belgium); in MacShannon's case [1978] A.C. 795 (Scotland); in Trendtex [1982] A.C. 679 (Switzerland); and in the The Abidin Daver [1984] A.C. 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to

establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see MacShannon's case [1978] A.C. 795 , *per* Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795 , 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the Société du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin ***478** Daver [1984] A.C. 398 , 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Crédit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay; see, e.g., the decision of the Court of Appeal in European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356 . It is difficult to imagine circumstances where, in such a case, a stay may be granted.

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the The Abidin Daver [1984] A.C. 398 , 411, *per* Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage.

(7) How the principle is applied in cases where the court exercises its discretionary power under R.S.C., Ord. 11

As I have already indicated, an apparent difference of view is to be found in the speeches of Lord Diplock and Lord Wilberforce in the Amin Rasheed case [1984] A.C. 50 . In that case, Lord Diplock said, at pp. 65-66:

> "the jurisdiction exercised by an English court over a foreign corporation which has no place of business in this country, as a result of granting leave under R.S.C., Ord. 11, r.1(1)(f) for service out of the jurisdiction of a writ on that corporation, is an exorbitant jurisdiction, i.e., it is one which, under general English conflict rules, an English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition. Comity thus dictates that the judicial discretion to grant leave under this paragraph of R.S.C., Ord. 11, r.1(1) should be exercised with circumspection in cases where there exists an alternative forum, viz. the courts of the foreign country where the proposed defendant does carry on business, and whose jurisdiction

would be recognised under English conflict rules."

Again, said, at p. 68: ***479**

> "the onus under R.S.C., Ord. 11, r.4(2) of making it 'sufficient to appear to the court that the case is a proper one for service out of the jurisdiction under this Order' lies upon the would-be plaintiff. Refusal to grant leave in a case falling within rule 1(1)(f) does not deprive him of the opportunity of obtaining justice, because ex hypothesi there exists an alternative forum, the courts of the country where the proposed defendant has its place of business where the contract was made, which would be recognised by the English courts as having jurisdiction over the matter in dispute and whose judgment would be enforceable in England.
>
> "The exorbitance of the jurisdiction sought to be invoked where reliance is based exclusively upon rule 1(1)(f)(iii) is an important factor to be placed in the balance against granting leave. It is a factor that is capable of being outweighed if the would-be plaintiff can satisfy the English court that justice either could not be obtained by him in the alternative forum; or could only be obtained at excessive cost, delay or inconvenience."

In contrast, Lord Wilberforce said, at p. 72:

> " R.S.C., Ord. 11, r. 1 merely states that, given one of the stated conditions, such service is permissible, and it is still necesssary for the plaintiff (in this case the appellant) to make it 'sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order' (r.4(2)). The rule does not state the considerations by which the court is to decide whether the case is a proper one, and I do not think that we can get much assistance from cases where it is sought to stay an action started in this country, or to enjoin the bringing of proceedings abroad. The situations are different: compare the observations of Stephenson L.J. in Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119 , 129. The intention must be to impose upon the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted upon a foreign defendant. In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense."

In the Ilyssia case [1985] 1 Lloyd's Rep. 107 , the Court of Appeal had to consider the apparent difference between the two approaches expressed by Lord Diplock and Lord Wilberforce. Ackner L.J. resolved the difference as follows, at p. 113:

> "Mr. Gross submits that Lord Diplock's statement was intended to be an exhaustive one. When reliance is based exclusively upon r.1(1)(f)(iii), it is *only* capable of being outweighed if the would-be plaintiff can satisfy the English court that either justice cannot be obtained by him in the alternative forum or could only be obtained at excessive cost, delay or inconvenience. Like Staughton J., I do not accept that submission. As I read the speech in the context of ***480** that case as a whole Lord Diplock was emphasising that where exclusive reliance is placed upon r.1(1)(f)(iii) then the burden of showing good reasons justifying service out of the jurisdiction is a particularly heavy one, and he illustrated this by the examples which he gave of situations which were capable of tipping the balance in favour of the granting of leave. Thus constructed, as the judge points out, there is no conflict between Lord Diplock's statement and that of Lord Wilberforce ... Lord

> Wilberforce there states that in order to decide whether the case is a proper one the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense."

May L.J. spoke in similar terms, at p. 118. The practical effect was, however, as is reflected in the judgment of Oliver L.J. [1985] 2 Lloyd's Rep. 116 , 127, in the present case, that the statement of principle of Lord Wilberforce was accepted as being the applicable principle.

With that conclusion, I respectfully agree; but I wish to add some observations of my own. The first is this. Lord Wilberforce said that he did not think that we can get much assistance from cases where it is sought to stay an action started in this country, or to enjoin the bringing of proceedings abroad; in this connection he referred to certain observations of Stephenson L.J. in Aratra Potato Co. Ltd. v. Egyptian Navigation Co. (The El Amria) [1981] 2 Lloyd's Rep. 119 , 129. It is right to point out that, in the relevant passage in his judgment in that case, Stephenson L.J. was only expressing caution with regard to assimilating cases of a stay to enforce a foreign jurisdiction clause with cases of a stay on the principle of forum non conveniens under MacShannon's case [1985] A.C. 795 . He was not addressing himself to the question of the applicable principles under R.S.C., Ord. 11, and, while sharing Lord Wilberforce's concern about help to be derived, in Order 11 cases, from cases where an injunction is sought to restrain proceedings abroad, I respectfully doubt whether similar concern should be expressed about help to be derived from cases of forum non conveniens. I cannot help remarking upon the fact that when Lord Wilberforce came, at the end of the passage from his speech which I have quoted, to state the applicable principle, his statement of principle bears a marked resemblance to the principles applicable in forum non conveniens cases. It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in Sim v. Robinow, 19 R. 665 , 668, viz. to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. That being said, it is desirable to identify the distinctions between the two groups of cases. These, as I see it, are threefold. The first is that, as Lord Wilberforce indicated, in the Order 11 cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the Order 11 cases the plaintiff is seeking to persuade the court to exercise its discretionary power to ****481*** permit service on the defendant outside the jurisdiction. Statutory authority has specified the particular circumstances in which that power *may be* exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be granted "unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction:" see R.S.C., Ord. 11, r.4(2).

Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the Amin Rasheed case [1984] A.C. 50 , 65 that the jurisdiction exercised under Order 11 may be "exorbitant." This has long been the law. In Soci ét é G én érale de Paris v. Dreyfus Brothers (1885) 29 Ch.D. 239 , 242-243, Pearson J. said:

> "it becomes a very serious question ... whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction."

That statement was subsequently approved on many occasions, notably by Farwell L.J. in The Hagen [1908] P. 189 , 201, and by Lord Simonds in your Lordships' House in Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo) [1949] A.C. 326 , 350. The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right.

Even so, a word of caution is necessary. I myself feel that the word "exorbitant" is, as used in the present context, an old-fashioned word which perhaps carries unfortunate overtones: it means no more than that the exercise of the jurisdiction is extraordinary in the sense explained by Lord Diplock in the Amin Rasheed case [1984] A.C. 50 , 65. Furthermore, in Order 11 cases, the defendant's place of residence may be no more than a tax haven to which no great importance should be attached. It is also significant to observe that the circumstances specified in Order 11, r. 1(1), as those in which the court may exercise its discretion to grant leave to serve proceedings on the defendant outside the jurisdiction, are of great variety, ranging from cases where, one would have thought, the discretion would normally be exercised in favour of granting leave (e.g., where the relief sought is an injunction ordering the defendant to do or refrain from doing something within the jurisdiction) to cases where the grant of leave is far more problematical. In addition, the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance (as in B.P. Exploration Co. (Libya) Ltd. v. Hunt [1976] 1 W.L.R. 788 , where, in my opinion, Kerr J. rightly granted leave to serve proceedings on the defendant out of the jurisdiction); or it may be of little importance as seen in the context of the whole case. In these circumstances, it is, in ***482** my judgment, necessary to include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the weight which, in all the circumstances of the case, it considers to be appropriate.

(8) Treatment of "a legitimate personal or juridical advantage"

Clearly, the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive. As Lord Sumner said of the parties in the *Société du Gaz* case, 1926 S.C.(H.L.) 13 , 22:

> "I do not see how one can guide oneself profitably by endeavouring to conciliate and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the interests of both that the case should be tried in the best way and in the best tribunal, and that the best man should win."

Indeed, as Oliver L.J. [1985] 2 Lloyd's Rep. 116 , 135, pointed out in his judgment in the present case, an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach inherent in Lord Kinnear's statement of principle in Sim v. Robinow, 19 R. 665 , 668.

The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried "suitably for the interests of all the parties and for the ends of justice." Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum. Take, for example, discovery. We know that there is a spectrum of systems of discovery applicable in various jurisdictions, ranging from the limited discovery available in civil law countries on the continent of Europe to the very generous pre-trial oral discovery procedure applicable in the United States of America. Our procedure lies somewhere in the middle of this spectrum. No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas. In this, I recognise that we appear to be

differing from the approach presently prevailing in the United States: see, e.g., the recent opinion of Judge Keenan in Re Union Carbide Corp. (1986) 634 F.Supp. 842 in the District Court for the Southern District of New York, where a stay of proceedings in New York, commenced on behalf of Indian plaintiffs against Union Carbide ***483*** arising out of the tragic disaster in Bhopal, was stayed subject to, inter alia, the condition that Union Carbide was subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by the plaintiff. But in the Trendtex case [1982] A.C. 679 , this House thought it right that a stay of proceedings in this country should be granted where the appropriate forum was Switzerland, even though the plaintiffs were thereby deprived of the advantage of the more extensive English procedure of discovery of documents in a case of fraud. Then take the scale on which damages are awarded. Suppose that two parties have been involved in a road accident in a foreign country, where both were resident, and where damages are awarded on a scale substantially lower than those awarded in this country. I do not think that an English court would, in ordinary circumstances, hesitate to stay proceedings brought by one of them against the other in this country merely because he would be deprived of a higher award of damages here.

But the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to a different conclusion in other cases. For example, it would not, I think, normally be wrong to allow a plaintiff to keep the benefit of security obtained by commencing proceedings here, while at the same time granting a stay of proceedings in this country to enable the action to proceed in the appropriate forum. Such a conclusion is, I understand, consistent with the manner in which the process of saisie conservatoire is applied in civil law countries; and cf. section 26 of the Civil Jurisdiction and Judgments Act 1982 , now happily in force. Again, take the example of cases concerned with time bars. Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But, in my opinion, this is a case where practical justice should be done. and practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is ***484*** elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country. This approach is consistent with that of Sheen J. in The Blue Wave [1982] 1 Lloyd's Rep. 151 . It is not to be forgotten that, by making its jurisdiction available to the plaintiff - even the discretionary jurisdiction under R.S.C., Ord. 11 - the courts of this country have provided the plaintiff with an opportunity to start proceedings here; accordingly, if justice demands, the court should not deprive the plaintiff of the benefit of having complied with the time bar in this country. Furthermore, as the applicable principles become more clearly established and better known, it will, I suspect, become increasingly difficult for plaintiffs to prove lack of negligence in this respect. The fact that the court has been asked to exercise its discretion under R.S.C., Ord. 11, rather than that the plaintiff has served proceedings upon the defendant in this country as of right, is, I consider, only relevant to consideration of the plaintiff's conduct in failing to save the time bar in the other relevant alternative jurisdiction. The appropriate order, where the application of the time bar in the foreign jurisdiction is dependent upon its invocation by the defendant, may well be to make it a condition of the grant of a stay, or the exercise of discretion against giving leave to serve out of the jurisdiction, that the defendant should waive the time bar in the foreign jurisdiction; this is

apparently the practice in the United States of America.

(9) Application of the principles to the facts of the present case

The judge proceeded on the basis that the relevant test was that "if the English court is shown to be distinctly more suitable for the ends of justice, then the case is a proper one for service out of the jurisdiction." The applicable principles are, I believe, as I have stated them to be; and the judge's approach was in accordance with those principles. I am therefore unable to accept the submission made on behalf of Cansulex that there was any material error of principle on the part of the judge.

I turn then to the question whether the Court of Appeal was entitled to interfere with the judge's exercise of his discretion. First, I take the criticism of the judge's assessment of the factor of availability of witnesses. It was said that he erred in thinking that all Cansulex's expert witnesses in the *Cambridgeshire* action were from England, whereas in fact two were from England, and four were from elsewhere. However, as I have recorded, this was drawn to his attention at the end of his judgment: he then took into account the true position, and said that this difference was not of significance. No doubt, in making that observation, he had it in mind that all the owners' expert witnesses in the *Cambridgeshire* action were from England. Next, Neill L.J. commented [1985] 2 Lloyd's Rep. 116 , 123 that

> "even on his own analysis of the facts the convenience of the parties and the witnesses probably tilted the scales towards British Columbia ****485*** as the forum, but certainly did not show that an English court would be 'distinctly more suitable for the ends of justice.'"

Similar observations were made by Oliver L.J. For my part, I consider, with all respect, that these comments were not justified. At this stage, the judge did not have to apply the overall test, but merely to assess the merits of the particular factor under consideration; and I cannot help but think that the judge, with all his experience derived from hearing a substantial part of the *Cambridgeshire* action, was better placed to make an assessment of this factor than the Court of Appeal.

Turning to the factor of multiplicity of proceedings, the judge referred to the possibility of M.M.T.C. being joined as co-defendants in the English proceedings as problematical. Before the Court of Appeal, Mr. Goldsmith submitted on behalf of Cansulex that the other proceedings were at most a neutral factor and certainly did not bring the scales down on the side of England. Neill L.J. saw force in this criticism. But, once again, the judge did not have to decide, and did not decide, that this particular factor was decisive of the case. Moreover, if (as I think) the judge gave weight to this factor, he was, in my judgment, entitled to do so. There is much to be said, in the interests of justice, in favour of the shipowners' claims against both Cansulex and M.M.T.C. being tried in the same proceedings; and, having regard to the advice given to M.M.T.C. by their solicitors, there was a prospect that, if it was decided that the case should be heard in England, M.M.T.C. would, acting in their own interests, accept their own solicitors' advice. Indeed, if this were to happen, it might also be agreed that a claim over by M.M.T.C. against Cansulex should be included in the same proceedings, rather than be arbitrated in London under an arbitration clause in the sale contract.

But the crucial point, in the judge's view, was the *Cambridgeshire* factor. This was regarded, certainly by Neill L.J., as relevant; and in this I find myself to be in agreement. The criticism of the judge's view of this factor goes, therefore, to its weight, as Neill L.J. indicated [1985] 2 Lloyd's Rep. 116 , 124 when he said that it seemed to him that the judge attached far too much importance to this factor. With all respect, however, when I read the judgments of both the Lords Justices, I consider that they underrated it. I believe that anyone who has been involved, as counsel, in very heavy litigation of this kind, with a number of experts on both sides and difficult scientific questions involved, knows only too well what the learning curve is like; how much information and

knowledge has to be, and is, absorbed, not only by the lawyers but really by the whole team, including both lawyers and experts, as they learn about the interrelation of law, fact and scientific knowledge, having regard to the contentions advanced by both sides in the case, and identify in their minds the crucial matters on which attention has to be focused, why these are the crucial matters, and how they are to be assessed. The judge in the present case has considerable experience of litigation of this kind, and is well aware of what is involved. He was, in my judgment, entitled to take the view (as he did) that this matter was not merely of advantage to the shipowners, but also constituted an ****486*** advantage which was not balanced by a countervailing equal disadvantage to Cansulex; and (more pertinently) further to take the view that having experienced teams of lawyers and experts available on both sides of the litigation, who had prepared for and fought a substantial part of the *Cambridgeshire* action for Cansulex (among others) on one side and the relevant owners on the other, would contribute to efficiency, expedition and economy - and he could have added, in my opinion, both to assisting the court to reach a just resolution, and to promoting a possibility of settlement, in the present case. This is not simply a matter, as Oliver L.J. suggested, of financial advantage to the shipowners; it is a matter which can, and should, properly be taken into account, in a case of this kind, in the objective interests of justice.

For these reasons alone, I am of the opinion that this is a classic example of a case where the appellate court has simply formed a different view of the weight to be given to the various factors, and that this was not, therefore, an appropriate case for interfering with the exercise of the judge's discretion. But, in addition, there are two other factors which the judge could, but did not, take into account, in support of the conclusion which he in fact reached. First, he was, in my judgment, entitled to take into account, in assessing the *Cambridgeshire* factor, the fact that, although the owners in the two cases were different, the solicitors for the owners were in both cases instructed by the same insurers; and he was also entitled to take into account that the insurers of the shipowners in the present case are managed in England. Usually this is a matter of no concern in English litigation; because, in subrogation claims, the action is in this country (unlike other countries) brought in the name of the assured, and the rights being enforced are the rights of the assured. But in the case of an application such as that in the present case, it is shutting one's eyes to reality to ignore the fact that it is the insurers who are financing the litigation and are dominus litis; and this is, in my view, a relevant factor to be taken into account: see the Soci é é du Gaz case, 1926 S.C.(H.L.) 13 , 20, *per* Lord Sumner. Second, it was a relevant factor that this litigation was being fought under a contract of which the putative governing law was English law, and that this was by no means an insignificant factor in the present case, since there was not only a dispute as to the effect of the bill of lading contract (as to which, as I have already recorded, there appears to be some difference of opinion between English and Canadian judges), but also, it appears, as to the nature of the obligations under the contract in respect of what is usually called dangerous cargo. However, had the judge taken these matters into account, they would only have reinforced the conclusion which he in fact reached.

(10) The effect of the time bar in British Columbia

On the view of the case which I have formed, it is not strictly necessary to consider the effect of the time bar in British Columbia; but since the point has been fully argued before us, I propose briefly to express my views upon it.

First, I cannot think that the fact (if it be the case) that the shipowners' claim was not time barred if brought in the Federal Courts ****487*** of Canada in provinces other than British Columbia - one suggestion was the Federal Court sitting in the neighbouring Province of Alberta - was of any relevance. On this, I accept the submission of the shipowners that it cannot be in the interests of the parties or in the interests of justice that the action should effectively be remitted to a forum which cannot be described as appropriate for the trial of the action.

Second, I do not think that the discretionary power which is, I understand, vested in the courts of British Columbia to waive the time bar, is relevant in this case. The point is simply that the shipowners' claim is not time barred in England but may be treated as time barred in British Columbia. In these circumstances, the question inevitably

arises whether the English court, if it were minded to set aside the leave to serve proceedings on Cansulex out of the jurisdiction, should do so on the condition that Cansulex should waive any right to rely on the time bar applicable in British Columbia.

So it is necessary to consider whether justice required the imposition of such a term. The evidence before the Court of Appeal showed that neither the shipowners nor their legal advisers were aware of the two-year limitation period applicable in British Columbia. Cansulex did not draw the matter to their attention in their affidavit evidence; the shipowners' solicitors simply stumbled upon it when investigating the availability of suitable lawyers in Vancouver. Next, although Cansulex had applied to the English court to set aside the proceedings in the *Cambridgeshire* action, they had not appealed from the judge's adverse decision on the point and the *Cambridgeshire* action had proceeded to trial. Furthermore, had the shipowners' solicitors considered the matter, experience would have indicated that, having regard to the law as generally understood to prevail before the decision of this House in the Amin Rasheed case [1984] A.C. 50 , in which the speeches were delivered in July 1983, and to the prominence hitherto given to legitimate personal and juridical advantages in the English jurisdiction (see, in particular, the decisions of the Court of Appeal in Britannia Steamship Insurance Association Ltd. v. Ausonia Assicurazioni S.p.A. [1984] 2 Lloyd's Rep. 98 and the Ilyssia case [1985] 1 Lloyd's Rep. 107), it was improbable that any different conclusion would be reached on an application to set aside the leave granted in the present case. In this connection, it is to be observed that the shipowners' cause of action against Cansulex in the present case must have accrued in November 1980 (when the loading of the cargo on board the Spiliada in Vancouver was completed) and so was prima facie time barred in British Columbia by November 1982, nine months before the decision of this House in the Amin Rasheed case. In my judgment, had the point arisen, I would have been minded to hold that, in all the circumstances of the case, the shipowners had acted reasonably in commencing proceedings in this country, and that they had not acted unreasonably in failing to commence proceedings in British Columbia before the expiry of the limitation period there. In these circumstances, had I agreed with the Court of Appeal that the judge erred in the exercise of his discretion, I would nevertheless only have set aside the proceedings, to enable proceedings to be brought in ***488** British Columbia, on the condition that Cansulex should waive their right to rely on the time bar in British Columbia.

However, for the reasons I have given I would allow the appeal with costs here and below, and restore the order of Staughton J.

(11) Postscript

I feel that I cannot conclude without paying tribute to the writings of Jurists which have assisted me in the preparation of this opinion. Although it may be invidious to do so, I wish to single out for special mention articles by Mr. Adrian Briggs in (1983) 3 Legal Studies 74 and in [1984] L.M.C.L.Q. 227 , and the article by Miss Rhona Schuz in (1986) 35 I.C.L.Q. 374. They will observe that I have not agreed with them on all points; but even when I have disagreed with them, I have found their work to be of assistance. For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding.

Representation

Solicitors: Holman Fenwick & Willan ; Linklaters & Paines .

Appeal allowed with costs. (C.T.B.)

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1. R.S.C., Ord. 11, r. 4(2): "No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order."

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that, for the mini trial conducted at the assessment, only 1 witness for each party will actually be physically present for examination purposes.

For the purposes of the mini trial only, it is to be assumed that the application for a stay of the Hong Kong proceedings made by the defendant, Brown Snake Acquisitions (Pty) Limited, a company incorporated in Western Australia, was unsuccessful. In the result, the defendant has agreed not to proceed with its action in Western Australia pending a resolution of the action in Hong Kong.

In the result, the trial is in the Hong Kong action in which the plaintiff, Golden Earth Trading (Pvt.) Limited, seeks a declaration as to the true construction of the contract entered into with Brown Snake Acquisitions and payment of the balance of $25 million due to the plaintiff in terms of that contract. The defendant, Brown Snake Acquisitions (Pty) Limited, also seeks a declaration as to the true construction of the contract and also tenders payment of the balance of $25 million.

For the purposes of the exercise, it is to be taken that the core issue in dispute is therefore the true construction of the contract: is it to be read, as the plaintiff claims, as not including the transfer of the harvesting rights or, as the defendant claims, as including those rights?

Witnesses

The witnesses for the two parties are described below.

You will be informed which two witnesses (one witness for the plaintiff and one witness for the defendant) will appear at the mini trial on the day of assessment itself when you arrive and register.

Plaintiff's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Plaintiff:

1. Terry Rui

2. Edgar Wu

You can assume:

i. the witnesses will give evidence at trial in the order listed above

ii. the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Defendant's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Defendant:

1. Dan Brown

2. Harry Fry

You can assume:

i. the witnesses will appear at trial in the order listed above

ii. the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Further, you can assume that the Judge/Assessor's finding on the interim application does not affect the evidence available for the purpose of the trial.

DURING the Mini-Trial

You will be required to:

- make an opening speech (max 5 minutes)

- examine in chief (max 10 minutes) the witness who will give 'live' oral evidence at trial on behalf of your client. You should conduct a full examination in chief of the witness on the basis that their statement does not stand as evidence in chief

- cross-examine (max 15 minutes) the opponent's witness who is attending at trial to give 'live' oral evidence. Please note that the opponent's witness may be un-cooperative at times. The witness' statement does not stand as evidence in chief

- deal with any interventions made by the advocate representing the opposing party

- make any interventions, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party

- deal with any Judicial interventions/questions as and when they arise