United Kingdom House of Lords Decisions

Judgment: 19.11.86

HOUSE OF LORDS

SPILIADA MARITIME CORPORATION (APPELLANTS)

v.

CANSULEX LIMITED (RESPONDENTS)

Lord Keith of Klnkel
Lord Templeman
Lord Griffiths
Lord Mackay of Clashfern
Lord Goff of Chieveley

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 comprehensibly 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 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 thr present case, a vessel managed partly in Greece and partly in England, ilying 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 snoutd 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.

LORD MACKAY OP CLASHFERN

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Temple man 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 (Oliver and Neill, L.J J.) 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. setters 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 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 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. This concerned a ship called the Roseline. The matter came before a Canadian Federal Court in March 1984, the 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. Mrs. Justice Reed 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. (as he then was) 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 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 13 January 1985, the parties to that action settled their differences. Furthermore his thought that "it may be that they [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.

It is true that the Cambridgeshire plantiffs 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 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. But it seems to me that the additional 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, Neill L.J. (who delivered the first judgment) referred to the speech of Lord Dip lock 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 Lloyds' 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 Consulex) 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 submission that the Cambridgeshire litigation was wholly irrelevant, he considered that the judge attached far too much importance to it. He said:

> "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 Iiyssia 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 as follows:

> "But what, Mr. Goldsmith asked 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 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, 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 Paver [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 M. 1049, 1053, per Lord President McNeill, and Clements v. Macaulay 1866 4 M. 583, 592, per Lord Justice-Clerk Inglis; and for a later statement, also in similar terms, see Societe du Gaz de Paris v. Societe Anonyme de Navigation "Les Armateurs Francais," 1926 SC (HL) 13 at p. 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 1892 19 R. 65 at p. 668, and by Lord Dunedin, Lord Shaw of Dumferline and Lord Sumner in Societe du Gaz case 1926 SC (HL) 13 at pp. 18, 19, and 22 respectively. Lord Dunedin said (at p. 18), with reference to the expressions forum non competens and forum non conveniens:

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

> "... 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. [1978J 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] 1 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] 1 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 Societe du Gaz case 1926 SC (HL) 13. Third, it is necessary to strike a note of caution regarding the prominence given 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.

(1) 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.

(2) 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).

(3) 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 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.

(4) 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 SC (HL) 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 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.

(5) 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 [1981] 2 Lloyd's Rep. 651. It is difficult to imagine circumstances when, in such a case, a stay may be granted.

(6) 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 enquiry, 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] 1 A.C. 398, 411, per Lord Diplock, a passage which now makes plain that, on this enquiry, 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.l(l)(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.l(l) 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 the English conflict rules."

Again, at p. 68, he said:

> "... 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 l(l)(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 l(l)(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 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.l(l)(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 that case as a whole Lord Diplock was emphasising that where exclusive reliance is placed upon r.l(l)(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 the situations which were capable of tipping the balance in favour of the granting of leave. Thus construed, 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 of the report. The practical effect was, however, as is reflected in the judgment of Oliver L.J. 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 Amrla) [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. 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 1892 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 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 Societe Generale de Paris v. Dreyfus Brothers (1885) 29 ChD 239, 292-243, 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 5.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 II 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 BP 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 Mr. Hunt 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 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 Societe du Gaz case 1926 SC (HL) 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. 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 [1892] 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 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 the Bhopal case, in the District Court for the Southern District of New York, May 12 1986, where a stay of proceedings in New York, commenced on behalf of Indian plaintiffs against Union Carbide 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. Here a special problem arises from the fact that, in English law, limitation is classified as a procedural rather than as a substantive matter. 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 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 that "even on his 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 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 releviant; 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 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 focussed, 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 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 do minus litis; and this is, in my view, a relevant factor to be taken into account (see the Societe du Gaz case 1926 SC (HL) 13 at p. 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 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 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 Brittannia 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 British Columbia, on the condition that Cansulex should waive its 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.
