Lubbe and Others and Cape Plc. and Related Appeals [2000] UKHL 41 (20th July, 2000)

HOUSE OF LORDS

Lord Bingham of Cornhill Lord Steyn Lord Hoffmann Lord Hope of Craighead Lord Hobhouse of Woodborough

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

SCHALK WILLEM BURGER LUBBE
(SUING AS ADMINISTRATOR OF THE ESTATE OF RACHEL JACOBA LUBBE)
AND 4 OTHERS
(APPELLANTS)

AND

CAPE PLC
(RESPONDENT)
AND RELATED APPEALS

ON 20 JULY 2000

LORD BINGHAM OF CORNHILL

My Lords,

1. The central issue between the plaintiffs and the defendant in these interlocutory appeals is whether proceedings brought by the plaintiffs against the defendant should be tried in this country or in South Africa.

2. There are at present over 3,000 plaintiffs. Each of them claims damages in one of the 11 writs issued against the defendant between February 1997 and July 1999. All the plaintiffs claim damages for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos and its related products in South Africa. In some cases the exposure is said to have occurred in the course of the plaintiff's employment, in others as a result of living in a

contaminated area. The exposure is said to have taken place in different places in South Africa and over varying, but sometimes lengthy, periods of time, ending for claim purposes in 1979. One of the plaintiffs (Mrs. Pauline Nel, suing as personal representative of her deceased husband) is a British citizen resident in England. All the others are South African citizens resident in South Africa. Most of the plaintiffs are black and of modest means. Instructions to sue have been given to English solicitors by more than 800 additional claimants.

3. The defendant is a public limited company. It was incorporated in England in 1893 under the name Cape Asbestos Company Limited, principally to mine and process asbestos and sell asbestos-related products. From shortly after 1893 until 1948 it operated a blue asbestos (or crocidolite) mine at Koegas and a mill at Prieska, both in the Northern Cape Province. In 1925 the defendant acquired the shares in two companies, both incorporated in 1916: these were Egnep Limited and Amosa Limited, which operated a brown asbestos mine and mill at Penge in Northern Transvaal. For practical purposes the head office of these companies was in Cape Town. In 1940 a factory was opened at Benoni, near Johannesburg, to manufacture asbestos products. It was owned by a wholly-owned subsidiary of the defendant.

4. In 1948 the corporate structure of the defendant's group was changed. The mine at Koegas and the mill at Prieska were transferred to a newly-formed South African company, Cape Blue Mines (Pty.) Limited. The shares in Cape Blue Mines, Egnep and Amosa were transferred to a newly-formed South African holding company, Cape Asbestos South Africa (Pty.) Limited (CASAP). The offices of all these companies were in Johannesburg. All the shares in CASAP were owned by the defendant. In 1979 CASAP sold its shares in Cape Blue Mines, Egnep and Amosa to an unrelated third party buyer, which shortly thereafter sold them on. The defendant continued to hold an interest in the South African companies which operated out of the factory at Benoni until 1989 (although the factory had been closed earlier). Since then the defendant has had no presence anywhere in South Africa, and when the first of the writs in the current proceedings was served the defendant had no assets in South Africa.

5. Although originating in South Africa, the defendant's asbestos-related business has not been confined to that country. From 1899 the defendant operated a number of factories in England engaged in processing asbestos and manufacturing asbestos products. A factory at Barking was run by the defendant from 1913 until 1962, and then by a wholly-owned subsidiary until the factory was closed in 1968. Another subsidiary, incorporated in Italy, operated a factory in Turin which made asbestos products from 1911 until 1968, with an intermission during the war years.

6. Some of the claims made in these actions date back to times when the defendant was itself operating in Northern Cape Province. But the central thrust of the claims made by each of the plaintiffs is not against the defendant as the employer of that plaintiff or as the occupier of the factory where that plaintiff worked, or as the immediate source of the contamination in the area where that plaintiff lived. Rather, the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss). Some 360 claims are made by personal representatives of deceased victims. As reformulated during the first Court of Appeal hearing the main issue raised by the plaintiffs' claim was put in this way:

> "Whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?"

7. The first of the writs in these proceedings was issued by Mrs. Lubbe and four other plaintiffs on 14 February 1997 (and when she died the action was continued by Mr. Lubbe as her personal

representative). The defendant promptly applied to stay the proceedings on the ground of forum non conveniens. This application came before Mr. Michel Kallipetis Q.C. sitting as a deputy judge of the Queen's Bench Division, who acceded to it. He sought to apply the principles authoritatively laid down by this House in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] AC 460, and for reasons given in a lengthy and careful judgment dated 12 January 1998 he concluded that everything pointed towards South Africa as the natural forum for the trial of the action and that there was no pressing circumstance which would justify him in deciding that the interests of justice required a trial in this country instead of the natural forum in South Africa.

8. The plaintiffs appealed and on 30 July 1998 the Court of Appeal (Evans, Millett and Auld L.JJ.) allowed the appeal: [1998] CLC 1559 Like the judge, the Court of Appeal also sought to apply the principles in *Spiliada.* But it reached a different conclusion, holding that the judge had failed to give weight to the fact that the negligence alleged was against the defendant company as opposed to those persons or companies responsible for running its South African businesses from time to time, and that the judge had failed to take account of the fact that the South African forum had been unavailable to the plaintiffs until the defendant offered undertakings during the hearing before the judge, the availability of the South African forum being conditional upon those undertakings being fulfilled (at page 1573). Taking those matters into account, the Court of Appeal ("the first Court of Appeal") held that the defendant did not show that South Africa was clearly and distinctly the more appropriate forum. In fairness to the judge it should be observed that the second of these points was not raised before him (it was indeed raised by the first Court of Appeal itself) and he could not therefore be reproached for failing to take it into account.

9. At that stage, therefore, the plaintiffs were at liberty to pursue their action in England. Before either of these decisions the sole plaintiff resident in England (Mrs. Nel) had also issued proceedings as personal representative of her husband, joining no other plaintiff. The defendant sought to challenge the decision of the first Court of Appeal but leave to do so was refused by that court and, following an oral hearing, by your Lordships' House on 14 December 1998.

10. After the refusal of leave by your Lordships in December 1998, writs were issued by all the remaining plaintiffs in these proceedings. It is unnecessary to summarise the detailed procedural steps which followed. It is enough to note that the defendant applied to stay all the actions, including the Lubbe action, on grounds of forum non conveniens and abuse of process, and directions were given to consolidate the various proceedings (without prejudice to the position of the Lubbe plaintiffs) into a group action.

11. The defendant's summons to stay came before Buckley J. who heard detailed submissions and considered copious documentary material. He gave a full judgment in writing on 30 July 1999: [2000] 1 Lloyd's Rep. 139 at 141. He concluded that South Africa was clearly and distinctly the more appropriate forum for trial of this group action and that there were no sufficient reasons for nevertheless refusing a stay (page 151). In reaching this last opinion he considered and discounted a number of objections raised by the plaintiffs, including the alleged unavailability of legal aid in South Africa. Of that submission he said (page 150):

> "In all the circumstances, I cannot find that legal aid would not be granted, if applied for in South Africa. I readily accept there may be difficulties and some delay but that, at least in part, must flow from the claimants' decision not to apply for legal aid in South Africa and to issue proceedings here, when, as [the plaintiffs' solicitor] well knew, the defendant would contest jurisdiction."

The judge accordingly ordered a stay of proceedings. He considered an argument advanced by the defendant that the proceedings were an abuse. The basis of this argument was that the solicitors representing the Lubbe plaintiffs had misled the first Court of Appeal and the House of Lords by failing to disclose their intention, if jurisdiction in England was established in the Lubbe case, to launch a multi-plaintiff group action, and also that the bringing of a group action was oppressive and an abuse. The judge expressed criticism of the solicitors representing the Lubbe plaintiffs but stopped short of finding abuse of the process (page 154). The judge also considered an argument, advanced by the defendant, suggesting that there were public interest grounds for concluding that

the proceedings should be tried in South Africa: the judge reached his decision independently of this argument (page 154), but considered that it reinforced his decision. He gave both sides leave to appeal.

12. Thus the matter came before the Court of Appeal (Pill, Aldous and Tuckey L.JJ., "the second Court of Appeal") again, and in judgments given on 29 November 1999 ([2000] 1 Lloyd's Rep. 139) the appeals were dismissed. Pill L.J. described the factors pointing towards South Africa as the more appropriate forum as "overwhelming" (page 160). The action had the most real and substantial connection with South Africa and considerations of expense and convenience pointed strongly in that direction (page 161). The public interest considerations supported that conclusion (pages 161-2). He was not persuaded by the argument that the South African High Court would be unable to handle these actions (page 162), and with reference to legal representation he said (at page 164):

> "I have already referred to the high repute in which the South African courts are held. There is also in South Africa a legal profession with high standards and a tradition of public service, though I do not suggest that lawyers in South Africa, any more than those anywhere else, can be expected to act on a large scale without prospects of remuneration. While I would not be prepared to apply the second stage of the *Spiliada* test, so as to permit English litigation, even in the absence of evidence that legal representation will be available, I am unable to conclude that in the circumstances it would not become available for claims in South African courts. Moreover, given the accessibility to the wealth of scientific, technical and medical evidence available in this context, I am confident that it could be made available in a South African court, to the extent required to achieve a proper consideration of the plaintiffs' cases. The action would by no means be novel or speculative."

13. Pill L.J. was not prepared to strike out the proceedings as an abuse of process (page 164-5). He recorded that the plaintiffs had not pursued their contention that Article 2 of the Brussels Convention deprived the English court of any discretion to stay an action brought against a defendant domiciled here, since they did not wish the proceedings to be delayed while a reference was made to the European Court of Justice (pages 164-5). He considered that the bringing of the multi-plaintiff group action entitled the Court of Appeal to reconsider the decision of the first Court of Appeal in the Lubbe action and to reach a different conclusion (page 165). He dismissed the appeal.

14. Aldous L.J. agreed, while recording earlier reservations about the availability of legal representation (page 166). He also expressed strong cricitism of the solicitors representing the Lubbe plaintiffs but agreed with Pill L.J. that what had happened did not mean that there was an abuse of process such that the group action and the Lubbe action should be stayed (page 167). Tuckey L.J. also agreed: he deprecated the acrimony caused by the Lubbe solicitors' failure to inform the Court of Appeal and the House of Lords of the plan to launch a group action (page 168) and attached less weight than the first Court of Appeal had done to the fact that the South African forum had only become available because of the defendant's undertaking to submit (page 168). The second Court of Appeal refused leave to appeal, but leave was given by your Lordships to the plaintiffs on 7 February 2000. On 30 March 2000 your Lordships also vacated the earlier order refusing leave to appeal in the Lubbe action and gave leave to the defendant to challenge the decision of the first Court of Appeal.

15. Reference should be made, finally, to an action which is not directly involved in these proceedings. On 3 October 1997 proceedings were issued by Vincenzina Gisondi and three other plaintiffs against the defendant making claims on grounds similar to those relied on by the plaintiffs in the proceedings before the House. The significant difference is that these plaintiffs complain of exposure to asbestos and asbestos products not in South Africa but in Italy. Thus the plaintiffs are resident in a state which is a party to the Brussels Convention and sue a defendant domiciled in England, another contracting state. It has not been suggested that the English court could under the Convention decline jurisdiction in favour of an Italian forum, and no application for a stay has been made by the defendant in that case. There appears to be no jurisdictional objection to the prosecution of that action here, and no application has been made to strike out the claim as disclosing no cause of action.

The applicable principles

16. Where a plaintiff sues a defendant as of right in the English court and the defendant applies to stay the proceedings on grounds of forum non conveniens, the principles to be applied by the English court in deciding that application in any case not governed by Article 2 of the Brussels Convention are not in doubt. They derive from the judgment of Lord Kinnear in *Sim v. Robinow* (1892) 19 R. 665 at 668 where he said:

> "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."

Thus it is the interest of all the parties, not those of the plaintiff only or the defendant only, and the ends of justice as judged by the court on all the facts of the case before it, which must control the decision of the court. In *Spiliada* it was stated (at page 476):

> "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."

17. In applying this principle the court's first task is to consider whether the defendant who seeks a stay is able to discharge the burden resting upon him 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 had to the fact that jurisdiction has been founded in England as of right (*Spiliada*, page 477). At this first stage of the inquiry the court will consider what factors there are which point in the direction of another forum (*Spiliada*, page 477; *Connelly v. R.T.Z. Corporation Plc.* [1998] AC 854 at 871). 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, that is likely to be the end of the matter. But if the court concludes at that stage that there is some other available forum which prima facie is more appropriate for the trial of the action it will ordinarily grant a stay unless the plaintiff can show that there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this second stage the court will concentrate its attention not only on factors connecting the proceedings with the foreign or the English forum (*Spiliada*, page 478; *Connelly*, page 872) but on whether the plaintiff will obtain justice in the foreign jurisdiction. The plaintiff will not ordinarily discharge the burden lying upon him by showing that he will enjoy procedural advantages, or a higher scale of damages or more generous rules of limitation if he sues in England; generally speaking, the plaintiff must take a foreign forum as he finds it, even if it is in some respects less advantageous to him than the English forum (*Spiliada*, page 482; *Connelly*, page 872). It is only if the plaintiff can establish that substantial justice will not be done in the appropriate forum that a stay will be refused (*Spiliada*, page 482; *Connelly*, page 873).

18. This is not an easy condition for a plaintiff to satisfy, and it is not necessarily enough to show that legal aid is available in this country but not in the more appropriate foreign forum. Lord Goff of Chieveley said in *Connelly* (at page 873):

> "I therefore start from the position that, at least as a general rule, the court will not refuse to grant a stay simply because the plaintiff has shown that no financial assistance, for example in the form of legal aid, will be available to him in the appropriate forum, whereas such financial assistance will be available to him in England. Many smaller jurisdictions cannot afford a system of legal aid. Suppose that the plaintiff has been injured in a motor accident in such a country, and succeeds in establishing English jurisdiction on the defendant by service on him in this country where the plaintiff is eligible for legal aid, I cannot think that the absence of legal aid in the appropriate jurisdiction would in itself justify the refusal of a stay on the ground of forum non conveniens. In this connection it should not be forgotten that financial assistance for litigation is not necessarily regarded as essential, even in sophisticated legal systems. It was not widely available in this country until 1949; and even

since that date it has been only available for persons with limited means. People above that limit may well lack the means to litigate, which provides one reason for the recent legalisation of conditional fee agreements.

Even so, the availability of financial assistance in this country, coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor in this context. The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available."

19. In *Connelly* a majority of the House held that the case before it was such an exceptional case. The nature and complexity of the case were such that it could not be tried at all without the benefit of legal representation and expert scientific assistance, available in this country but not in the more appropriate forum, Namibia. That being so, the majority of the House concluded that the Namibian forum was not one in which the case could be tried more suitably for the interests of all the parties and for the ends of justice.

The present cases

20. The issues in the present cases fall into two segments. The first segment concerns the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence.

21. The second segment of the cases involves the personal injury issues relevant to each individual: diagnosis, prognosis, causation (including the contribution made to a plaintiff's condition by any sources of contamination for which the defendant was not responsible) and special damage. Investigation of these issues would necessarily involve the evidence and medical examination of each plaintiff and an inquiry into the conditions in which that plaintiff worked or lived and the period for which he did so. Where the claim is made on behalf of a deceased person the inquiry would be essentially the same, although probably more difficult.

22. In his review of the *Lubbe* case, which was alone before him, Mr. Kallipetis considered that the convenience of trying the personal injury issues in South Africa outweighed any benefit there might be in trying the parent company responsibility issue here. That was in my opinion a tenable though not an inevitable conclusion on the case as then presented. The two reasons given by the first Court of Appeal for disturbing that exercise of judgment are not to my mind convincing. Mr. Kallipetis' judgment does not suggest that he overlooked the way in which the plaintiffs put their case, although he did not express it very clearly (perhaps because the pleading was not very clear). The first Court of Appeal thought it undermined the defendant's application for a stay that the South African forum only became available as a result of the defendant's undertaking to submit, but for reasons given by my noble and learned friend Lord Hope of Craighead (with which I fully agree) this was not a factor which should have weighed in the balance either way. I would not accept the argument advanced by the plaintiffs on this point. I question whether the first Court of Appeal was justified in disturbing Mr. Kallipetis' conclusion and substituting its own. But its own assessment of the balance between the parent company responsibility issue and the personal injury issues is not shown to be unreasonable or wrong. On the case as then presented there was room for the view that South Africa was not shown to be a clearly more appropriate forum. This is a field in which differing conclusions can be reached by different tribunals without either being susceptible to legal challenge. The jurisdiction to stay is liable to be perverted if parties litigate the issue at different levels of the judicial hierarchy in the hope of persuading a higher court to strike a different balance in the factors pointing for and against a foreign forum.

23. The emergence of over 3,000 new plaintiffs following the decision of the first Court of Appeal had an obvious and significant effect on the balance of the proceedings. While the parent company responsibility issue remained very much what it had always been, the personal injury issues assumed very much greater significance. To investigate, prepare and resolve these issues, in relation to each of the plaintiffs, would plainly involve a careful, detailed and cumbersome factual inquiry and, at least potentially, a very large body of expert evidence. In this changed situation Buckley J., applying the first stage of the *Spiliada* test, regarded South Africa as clearly the more appropriate forum for trial of the group action and the second Court of Appeal agreed. Both courts were in my view plainly correct. The enhanced significance of the personal injury issues tipped the balance very clearly in favour of South Africa at the first stage of the *Spiliada* exercise, and no effective criticism has been made of that conclusion. The brunt of the plaintiffs' argument on these appeals to the House has been directed not against the decisions of Buckley J. and the second Court of Appeal on the first stage of the *Spiliada* test but against their conclusion that the plaintiffs had not shown that substantial justice would not be done in the more appropriate South African forum.

Funding

24. The plaintiffs submitted that legal aid in South Africa had been withdrawn for personal injury claims, that there was no reasonable likelihood of any lawyer or group of lawyers being able or willing to fund proceedings of this weight and complexity under the contingency fee arrangements permitted in South Africa since April 1999 and that there was no other available source of funding open to the plaintiffs. These were, they argued, proceedings which could not be effectively prosecuted without legal representation and adequate funding. To stay proceedings in England, where legal representation and adequate funding are available, in favour of the South African forum where they are not would accordingly deny the plaintiffs any realistic prospect of pursuing their claims to trial.

25. The defendant roundly challenged these assertions. Reliance was placed on the facts that the plaintiffs had not applied for legal aid in South Africa before its withdrawal and had made no determined effort to obtain funding in South Africa. Even if legal aid was no longer available in South Africa, contingency fee agreements were now permissible and it was unrealistic to suppose that South African counsel and attorneys would be any less ready to act than English counsel and solicitors if the claims were judged to have a reasonable prospect of success. If contingency fee arrangements could not be made in South Africa because South African counsel and attorneys did not judge the claims to have a reasonable prospect of success, that did not involve a denial of justice to the plaintiffs. In any event there were other potential sources of assistance available to the plaintiffs in South Africa.

26. The material placed before the House (and the lower courts) relevant to these issues is very extensive and cannot conveniently be summarised. The following conclusions are in my opinion to be drawn from it:

1) The proceedings as now constituted can only be handled efficiently, cost-effectively and expeditiously on a group basis. It is impossible at this stage to predict with accuracy what procedural directions might on that basis be given in future (although the directions could only relate to the conduct of proceedings in England). Obvious possibilities include the trial of a preliminary issue on the parent company responsibility question and the trial of selected lead cases to test the outcome in different factual situations. It would be very highly desirable, if possible, to avoid determination of these claims on a plaintiff by plaintiff basis.

2) The plaintiffs' claims raise a serious legal issue concerning the duty of the defendant as a parent company, and it would be necessary to decide whether that duty was governed by English or South African law. If a duty were held to exist, there would be a serious factual issue whether the defendant was in breach of it. If the plaintiffs were successful on these questions, the personal injury issues would have, even in the context of a group action, to be investigated, prepared and quantified. This would be a heavy and difficult task. It could only be done by, or under the supervision of, professional lawyers. It would call for high quality expert advice and evidence,

certainly on medical and industrial issues, very possibly on other issues also. I see no reason to question the judgment of a South African attorney instructed by the defendant who swore:

> "The magnitude and complexity of both the factual and legal issues will require the application in South Africa of considerable financial resources and manpower, if there is to be any reasonable prospect of addressing the plaintiffs' allegations meaningfully."

It is significant that Professor Unterhalter, an independent expert approached by the defendant, observed:

> "Detailed expert evidence would be required on a number of aspects of the matter. Without agreement between the parties as to how the issues might be limited, I would venture no opinion as to the length and magnitude of this litigation, save to say that it is likely to be drawn out and complex, and would almost certainly come before the Supreme Court of Appeal in due course."

3) A possibility must exist that the proceedings may culminate in settlement. The plaintiffs confidently predict such an outcome if they succeed on the parent company responsibility issue. But the defendant has given no indication that the claims will not be fully contested. In the *Spiliada* case Staughton J. thought it right to decide the stay application on the assumption that there would be a trial, and it would seem to me wrong in principle to reject a submission that justice will not be done in a foreign forum on the basis of a speculative assumption that, if a stay is granted, proceedings in the foreign forum will culminate in a just settlement without the need for a trial.

4) In a letter dated 20 September 1999 to Leigh, Day and Company representing some of the plaintiffs, the Legal Aid Board of South Africa wrote:

> "It will however be of interest to you to note that on 13 September 1999 the Legal Aid Board resolved, because of the financial crisis faced by it, as per the attached letter to the Minister of Justice, to exclude from the operation of the legal aid scheme operated by the South African Legal Aid Board with effect from 1 November 1999 funding in respect of personal injury claims and all other claims sounding in the money."

27. Other material before the House makes plain that before this decision the Legal Aid Board had experienced a period of extreme financial stringency. Despite suggestions to the contrary there is no convincing evidence to suggest that legal aid might be made available in South Africa to fund this potentially protracted and expensive litigation. Written submissions on behalf of the Republic of South Africa contain no hint that public funds might, exceptionally, be made available to fund it.

5) The South African Contingency Fees Act (No. 66 of 1997) sanctioned a new regime similar (although not identical) to that governing conditional fees in this country. It enables counsel and attorneys to undertake work for plaintiffs on the basis that if the claim is successful they will receive a fee in excess of that ordinarily chargeable, and that they receive nothing if the claim fails. This regime does not apply to the fees of expert witnesses, who may not be engaged on the basis that they are paid only if the plaintiff by whom they are called is successful. The defendant referred to an affidavit sworn by very experienced South African counsel who deposed:

> "In my view, if a firm of attorneys with a reasonable infra-structure is of the view that the claims of the present Plaintiffs are good, this would mean that the firm would be able to earn very substantial sums of money by way of fees. At the same time, one should not lose sight of the fact that this case is likely to have a very high profile and that the Plaintiffs' attorney/s would be accorded a great deal of positive publicity in the media. This would be a further inducement to take on a case of this nature. There is every reason to believe that there would be no shortage of firms of attorneys who would be desirous of taking on such a case if they believed that it had good prospects of success.
>
> "Accordingly, if there are attorneys in South Africa who are as positive about the prospects of success as [the plaintiffs' solicitor] is (as conveyed in his affidavit), I feel sure that there

> will be no lack of attorneys in South Africa prepared to represent these plaintiffs under Contingency Fee arrangements."

28. This very general assertion of belief by a member of the Bar was flatly contradicted by a number of other equally distinguished counsel who provided sworn statements to the plaintiffs, and counsel for the defendant indicated that he placed no reliance on it. More significantly, it received no support from any practising attorney, and it would be attorneys who would be required, if these proceedings were undertaken for the plaintiffs on a contingency fee basis, to finance the investigation of the claims, the obtaining and calling of evidence and the conduct of the trial during a period which would inevitably last for months and, very much more probably, years. The clear, strong and unchallenged view of the attorneys who provided statements to the plaintiffs was that no firm of South African attorneys with expertise in this field had the means or would undertake the risk of conducting these proceedings on a contingency fee basis. The defendant suggested that financial support and professional assistance might be given to the plaintiffs by the Legal Resources Centre, but this suggestion was authoritatively contradicted. In a recent affidavit the possibility was raised that assistance might be forthcoming from the European Union Foundation for Human Rights in South Africa, but the evidence did not support the possibility of assistance on the scale necessary to fund this litigation.

    6) If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice. In the special and unusual circumstances of these proceedings, lack of the means, in South Africa, to prosecute these claims to a conclusion provides a compelling ground, at the second stage of the *Spiliada* test, for refusing to stay the proceedings here.

    7) The conclusions on the funding issue reached by the second Court of Appeal did not in my opinion take account of the evidence, which did not permit the finding which the court made.

29. The plaintiffs, as a ground for challenging the appropriateness of the South African forum, relied on the absence of established procedures in South Africa for handling group actions such as the present. They compared that situation with the procedural situation here, where the conduct of group actions is governed by a recently-developed but now tried and established framework of rules, practice directions and subordinate legislation. I do not regard this objection, standing alone, as compelling. It involves the kind of procedural comparison which the English court should be careful to eschew (*Spiliada*, page 482: *Connelly*, page 872), and the evidence is clear that South African courts have inherent jurisdiction to adopt procedures appropriate to the cases they are called upon to handle. There is force in the observations of Pill L.J. ([2000] 1 Lloyd's Rep. 139 at 162):

    > "I am entirely unpersuaded by arguments that the South African High Court would be unable to handle these actions efficiently either on the ground that there are territorial divisions within South Africa or because there is at present no procedure expressly providing for group actions. It is common ground that the law potentially to be applied is the same throughout South Africa.
    >
    > "In England, there has been a vast amount of litigation by victims of asbestos dust without resort to group actions. Whether by a form of group action or otherwise, I have no doubt that the High Court of South Africa will be able to devise and adopt suitable procedures for the efficient despatch of business such as this. None of the evidence or submissions on behalf of the plaintiffs suggests any significant obstacle to that efficient despatch by the Court of cases before it."

30. I do, however, think that the absence, as yet, of developed procedures for handling group actions in South Africa reinforces the submissions made by the plaintiffs on the funding issue. It is one thing to embark on and fund a heavy group action where the procedures governing the conduct of the proceedings are known to and understood by experienced judges and practitioners. It may be quite another where the exercise is novel and untried. There must then be an increased likelihood of

interlocutory decisions which are contentious, with the likelihood of appeals and delay. It cannot be assumed that all judges will respond to this new procedural challenge in the same innovative spirit. The exercise of jurisdiction by the South African High Court through separate territorial divisions, while not a potent obstacle in itself, could contribute to delay, uncertainty and cost. The procedural novelty of these proceedings, if pursued in South Africa, must in my view act as a further disincentive to any person or body considering whether or not to finance the proceedings.

Third Parties

31. Both before Buckley J. and the second Court of Appeal it was contended by the defendant and accepted as a factor pointing towards the appropriateness of the South African forum that the defendant, if sued there, could make and enforce claims against third parties who could be shown to have contributed to the plaintiffs' condition, whereas it might be difficult to join such parties and enforce judgments if the actions were pursued here. The plaintiffs have sought to meet this point by questioning whether, in truth, the defendant has disclosed any potential claim against an identified third party with assets or insurance sufficient to meet any significant claim; by relying on Court of Appeal authority (*Holtby v. Brigham & Cowan (Hull) Ltd.,* unreported, 6 April 2000) for the proposition that a defendant is only liable for such proportion of a plaintiff's damage as he is shown to have caused; and by formally undertaking, in asbestos (but not mesothelioma) cases, to limit their claim to compensation for loss and damage for asbestos-related disease to such sum as would reflect the proportion of a plaintiff's total asbestos exposure as was shown to be the defendant's responsibility. The courts below were in my judgment right to treat the third party consideration as one strengthening the appropriateness of the South African forum, but I am persuaded by the plaintiffs' response that the refusal of a stay will not expose the defendant to a significant risk of prejudice so long as any new claimants are admitted to the group only upon their binding themselves by the undertaking of the present plaintiffs.

Article 6 of the European Convention on Human Rights

32. The plaintiffs submitted that to stay these proceedings in favour of the South African forum would violate the plaintiffs' rights guaranteed by Article 6 of the European Convention since it would, because of the lack of funding and legal representation in South Africa, deny them a fair trial on terms of litigious equality with the defendant. For reasons already given, I have concluded that a stay would lead to a denial of justice to the plaintiffs. Since, as *Spiliada* makes clear, a stay will not be granted where it is established by cogent evidence that the plaintiff will not obtain justice in the foreign forum, I cannot conceive that the court would grant a stay in any case where adequate funding and legal representation of the plaintiff were judged to be necessary to the doing of justice and these were clearly shown to be unavailable in the foreign forum although available here. I do not think Article 6 supports any conclusion which is not already reached on application of *Spiliada* principles. I cannot, however, accept the view of the second Court of Appeal that it would be right to decline jurisdiction in favour of South Africa even if legal representation were not available there.

Public Interest

33. Both the plaintiffs and the defendant placed reliance on public interest considerations as strengthening their contentions that these proceedings should be tried in the forum for which they respectively contended. I agree with my noble and learned friend Lord Hope of Craighead, for the reasons which he gives, that public interest considerations not related to the private interests of the parties and the ends of justice have no bearing on the decision which the court has to make. Where a catastrophe has occurred in a particular place, the facts that numerous victims live in that place, that the relevant evidence is to be found there and that site inspections are most conveniently and inexpensively carried out there will provide factors connecting any ensuing litigation with the court exercising jurisdiction in that place. These are matters of which the *Spiliada* test takes full account. It is important that the focus should remain on the principle so clearly stated by Lord Kinnear: in applying this principle questions of judicial amour propre and political interest or responsibility have no part to play.

Article 2 of the Brussels Convention

34. The House received and heard erudite argument on the applicability of Article 2 of the Brussels Convention to a case such as the present. The plaintiffs submitted that the court was precluded by Article 2 from granting a stay. The defendant argued that the jurisdiction of the court to grant a stay in favour of a forum in a non-contracting state was unaffected by Article 2. The correctness of the Court of Appeal decision in *In re Harrods (Buenos Aires) Ltd.* [1992] Ch. 72 was in issue. Both parties argued that the answer for which they respectively contended was clearly correct. If it was not, the plaintiffs invited the House to seek a ruling from the European Court of Justice, a course which the defendant resisted.

35. For reasons already given, I am unwilling to stay the plaintiffs' proceedings in this country. It is accordingly unnecessary to decide whether the effect of Article 2 is to deprive the English court of jurisdiction to grant a stay in a case such as this. Had it been necessary to resolve that question, I would have thought it necessary to seek a ruling on the applicability on Article 2 from the European Court of Justice, since I do not consider the answer to that question to be clear.

Conclusion

36. I would dismiss the defendant's appeal against the decision of the first Court of Appeal. I would allow the plaintiffs' appeal against the decision of the second Court of Appeal and remove the stay which that court upheld. The defendant must bear the costs of both appeals, and also the costs of the proceedings before Buckley J. and the second Court of Appeal.

LORD STEYN

My Lords,

37. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead. For the reasons they give I would also make the order which Lord Bingham of Cornhill proposes.

LORD HOFFMANN

My Lords,

38. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead. For the reasons they give, I would also make the order which Lord Bingham of Cornhill proposes.

LORD HOPE OF CRAIGHEAD

My Lords,

39. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for the reasons which he has given I too would allow the claimants' appeals and dismiss the appeal by the defendant. I should however like to add some observations on two matters that were raised in the course of the argument about the doctrine of forum non conveniens.

Available forum

It is clear that the decision of the first Court of Appeal [1998] CLC 1559 to refuse a stay was much influenced by the view which they formed about the defendant's submission that the South African courts were available to the plaintiffs because it had offered during the hearing before the judge to submit to the jurisdiction of those courts.

40. It was not suggested to the judge that there were any reasons for doubting that this offer had removed the difficulty that the defendant was not otherwise subject to the jurisdiction of the South African courts as it was neither present nor had any assets in South Africa. But in the Court of Appeal it was contended that the offer was objectionable, for two reasons. The first was that the

courts in South Africa were not available at the time when the plaintiffs brought their proceedings in England, as the defendant did not indicate its willingness to be sued in South Africa until after the proceedings had been brought. The second was that the effect of treating the South African courts as available in these circumstances was to give the defendant a choice of jurisdiction, enabling it to elect for the court that was more favourable to it and thus indulge in forum shopping. Evans L.J. did not go so far in his judgment as to say that the South African courts were not to be regarded as available in these circumstances. But he made it clear that in his opinion the fact that the South African courts were not available until the defendant offered the undertakings, and that their availability remained conditional upon them, were factors which should be taken into account in the application to the case of the principles stated in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] AC 460. The implication was that these were factors to be weighed in the balance against the defendant in the decision whether or not the action should be stayed.

41. This is not a point that required to be considered in *Connelly v. R.T.Z. Corporation Plc.* [1998] AC 854, and I think that counsel for the defendant was in error when he submitted to the Court of Appeal in the present case that it could have been: [1998] CLC 1559, 1565F. In *Connelly's* case the two defendant companies, like the defendant in this case, were English companies which had their registered offices in England. But the basis upon which they were being sued in England was that they were responsible, either directly in fact or vicariously in law, for defects in the health and safety arrangements at the mine which was operated in Namibia by a subsidiary of the first defendant by whom the plaintiff was employed while he was working there: see the issues which were identified in the Court of Appeal by Waite L.J.: [1996] Q.B. 361, 364B-D. The subsidiary, against which the plaintiff had previously directed his claim at the suggestion of the first defendant, was present and available to be sued in Namibia. It was common ground that Namibia was a forum that was available to the plaintiff for his claim of damages. No doubt this was on the view that for all practical purposes no distinction was to be drawn between the first defendant, which as my noble and learned friend Lord Hoffmann observed at [1998] AC 854, 876G was a multinational company present almost everywhere, and its subsidiary in Namibia.

42. In the present case the asbestos mines and mills in South Africa which were operated by the defendant's subsidiaries are all closed, and its subsidiaries are no longer present or available to be sued in that country. The question whether the South African courts are available to the claimants is thus entirely dependent upon the proposition that the defendant itself is subject to the jurisdiction of those courts. As the defendant has no presence in that country, and as it has no assets there which could be attached to found jurisdiction, the only ground on which its courts could exercise jurisdiction against it is that of prorogation. The validity of the defendant's undertakings is therefore critical to its argument that the South African courts are available to the claimants as a forum in which their actions should be tried.

43. The approach that is to be taken to this question has been examined in a number of Scottish cases to which it may be helpful to refer, as the underlying principles which Lord Goff of Chieveley described in the *Spiliada* case were derived from the Scottish authorities.

44. In *Clements v. Macaulay* (1866) 4 M. 583 an objection was taken to the jurisdiction of the Scottish courts in an action to enforce a contract entered into between two Americans on the plea of forum non competens. This was on the grounds that Texas where the agreement was entered into was the only proper forum for the dispute and that the Scottish court was an inconvenient and improper forum. Lord Justice- Clerk Inglis, having concluded that the view that the courts of Texas would have jurisdiction was plainly untenable, said at p. 592:

> "But then I am bound to inquire, if this is an inconvenient and incompetent forum, where is the proper forum? Apart from the suggestion of Texas, no other suggestion is made, and I know no case of a plea of this kind being sustained, where the defender did not satisfy the court that there was another court where the cause could be tried with advantage to the parties and to the ends of justice. The defender does seem to have thought himself under obligation to suggest what was the proper forum, but he has unfortunately suggested one which has no jurisdiction."

At p. 594 Lord Cowan said:

> "Your Lordship has conclusively shewn that there is no jurisdiction in the courts of Texas, on the ground stated by the defender, to entertain this action. Where, then, is the forum on which the defence is founded? When the court has given effect to such a plea, it has always been because another forum, specially referred to by the defender as that in which he undertakes to plead, has been regarded as the more convenient and preferable for securing the ends of justice. Here the elements for disposing of this defence, pleaded on this, its essential ground, do not exist."

In *Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français"* 1925 S.C. 332, 347 Lord Justice-Clerk Alness said that the result of the cases was that it must be plain that "another forum is open to the parties". His analysis of the law was approved by Lord Dunedin in your Lordships' House: 1926 SC (HL) 13, 18. There is no indication here or in any of the other Scottish cases that this matter ought to be approached on any other basis than that this is a requirement that must be satisfied in a practical manner when the question of forum non conveniens is being considered by the court.

45. In *Clements v. Macaulay* the defender did not offer an undertaking to submit to the jurisdiction of the Texas courts. But in *Tulloch v. Williams* (1846) 8 D. 657 two actions had been raised against the defender when he was on a visit to Scotland relating to his conduct while acting as the pursuer's commissioner and attorney in Jamaica. He lodged with his defences in each action a minute stating that he was ready and willing to answer in the courts of Jamaica to any writ or action that the pursuer might bring against him with reference to that subject matter. The Lord Ordinary said that he was not aware of any authority for taking the course desired by the defender, which was to decline to proceed with the case in the meantime leaving it to the pursuer to institute proceedings against the defender in the courts of Jamaica. In the absence of such authority he repelled the plea. But he invited the pursuer to consider the defender's offer as providing the most satisfactory and least expensive way of having justice administered between them, saying that to go on with the litigation in Scotland could not fail to be productive of much delay and additional expense. In the Inner House the process was sisted for three months in the light of these observations to allow the pursuer an opportunity to bring an action in the proper court in Jamaica. Lord President Boyle explained at p. 659 that it was a question of convenience whether the case should go on in Jamaica or whether it should proceed in Scotland upon evidence of the law and custom of Jamaica.

46. It was not suggested in *Tulloch v. Williams* that the fact that the defender did not offer to submit to the jurisdiction of the courts of Jamaica until he lodged his defences presented any difficulty, either on the ground that the offer came too late or on the ground that he ought not to be allowed to choose the jurisdiction in which he was to be sued. His undertaking was seen as the obvious solution to the difficulty that, although the most expedient course in the interests of both parties was for the case to be dealt with not in Scotland but in Jamaica, the defender was not otherwise subject to the jurisdiction of the Jamaican courts.

47. In *Sim v. Robinow* (1892) 19 R. 665 the defender was sued in Scotland on the ground that he had been resident there for more than forty days. He maintained that he was only a temporary visitor to Scotland, that he was domiciled in South Africa, that he intended to return to his business in that country and that the courts of that country were the proper forum for determining the matter in dispute as they related to transactions between the parties when they were both in South Africa. His plea that the Scottish courts should decline jurisdiction on the ground of forum non conveniens was repelled. Lord Kinnear, who delivered the leading judgment, said that he was not satisfied that it had been shown that there was another court in which the action ought to be tried as being more convenient for all the parties and more suitable for the ends of justice. In regard to the question whether the courts of South Africa were available, he noted that the defender had not offered the same undertaking as was offered in *Tulloch v. Williams*. All that he had said was that he intended to go to South Africa, as to which Lord Kinnear observed at p. 669:

> "I do not think that the pursuer can be asked to wait till the defender carries out this intention, or that he ought to be sent to a court which may be unable to exercise any

jurisdiction over the defender in consequence of his continued absence from South Africa."

48. He described *Tulloch v. Williams* at p. 669 as a very exceptional case and indicated that it ought not to be followed. But this was not because he thought that it was wrong for the court to proceed on the defender's undertaking to submit to the jurisdiction of the other court which he offered after the action had been raised. His criticism of the decision in *Tulloch's* case was that the court ought not to have sisted the action for a short period to await events, but that it ought to have determined the matter either one way or the other there and then. This was on the ground that, as he put it at p. 669:

> ". . . if this court is not a convenient forum for the trial of the cause, then the action ought to be dismissed, but, if this court is a convenient forum, then I can see no reason why the action should not go on in the ordinary way."

49. Under Scots procedure a decree of dismissal is a decree which is used when it is intended to decide that the particular action should not be allowed to proceed against the defender, but which is intended to leave it open to the pursuer to bring another action: Maclaren, *Court of Session Practice* (1916), p. 1093 .

50. In the light of these authorities I would have regarded the undertakings which were offered by the defendant in this case as sufficient to satisfy the requirement that the alternative forum in South Africa was available because it had undertaken to submit to the jurisdiction of the courts of that country. Nothing turns on the time when the undertakings were given. It is sufficient that they were before the judge when he was considering the question of forum non conveniens. As for the suggestion that the defendant was choosing its jurisdiction and thus indulging in a kind of forum shopping, this overlooks the fact that the issue as to forum non conveniens is for the court itself to resolve. It is not a matter that is left to the choice of the defender. Furthermore the court resolves the issue by looking to the interests of all parties and the ends of justice. As Lord Justice-Clerk Alness said in *Société du Gaz de Paris v. Armateurs Français*, 1925 S.C. 332, 347, it does not do so from the point of view of the defender only. The only purpose of the undertaking is to satisfy the requirement that the other forum is available. The ground on which the jurisdiction of the courts in the other forum is available to be exercised is of no importance either one way or the other in the application to the case of the *Spiliada* principles.

Public Interest

In my opinion the principles on which the doctrine of forum non conveniens rest leave no room for considerations of public interest or public policy which cannot be related to the private interests of any the parties or the ends of justice in the case which is before the court.

51. In *Société du Gaz v. Armateurs Français*, 1925 S.C. 332, 361, where jurisdiction was established over the defender by an arrestment to found jurisdiction, Lord Anderson rejected the extreme argument that that case ought not to be litigated in Scotland at all as it was an action between two foreigners. He said:

> "Anyone who succeeds in founding jurisdiction in this way seems to me to be entitled, as of right, to invoke the exercise of the jurisdiction so founded, and the court can only refuse to exercise the jurisdiction invoked if a defence of forum non conveniens is established."

In the House of Lords, 1926 SC (HL) 13, 21 Lord Sumner was alluding to the same point when he said:

> "Obviously the court cannot allege its own convenience, or the amount of its own business, or its distaste for trying actions which involve taking evidence in French, as a ground for refusal…the court has to proceed until the defender objects, but, as against the pursuer's right, the defender has an equal right to plead forum non conveniens."

52. In *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, 822D Lord Salmon said that he did not think that matters of general policy should play any part in deciding issues of this kind, and Lord

Keith of Kinkel made an observation to the same effect at p. 833D.

53. The proper approach therefore is to start from the proposition that a claimant who is able to establish jurisdiction against the defendant as of right in this country is entitled to call upon the courts of this country to exercise that jurisdiction. So, if the plea of forum non conveniens cannot be sustained on the ground that the case may be tried more suitably in the other forum, in the words of Lord Kinnear in *Sim v. Robinow* (1892) 19 R. 665, 668, "for the interests of all the parties and for the ends of justice", the jurisdiction must be exercised - however desirable it may be on grounds of public interest or public policy that the litigation should be conducted elsewhere and not in the English courts. On the other hand, if the interests of all parties and the ends of justice require that the action in this country should be stayed, a stay ought to be granted however desirable it may be on grounds of public interest or public policy that the action should be tried here.

54. I would therefore decline to follow those judges in the United States who would decide issues as to where a case ought to be tried on broad grounds of public policy: see *Union Carbide Corporation Gas Plant Disaster at Bhopal* (1986) 634 F. Supp. 842 and *Piper Aircraft Company v. Reyno* (1981) 454 U.S. 235 . I respectfully agree with Deane J.'s observation in *Oceanic Sun Line Special Shipping Company Inc. v. Fay* [1988] 165 C.L.R. 197, 255 that the court is not equipped to conduct the kind of inquiry and assessment of the international as well as the domestic implications that would be needed if it were to follow that approach. However tempting it may be to give effect to concerns about the expense and inconvenience to the administration of justice of litigating actions such as these in this country on the one hand or in South Africa on the other, the argument must be resolved upon an examination of their effect upon the interests of the parties who are before the court and securing the ends of justice in their case. I would hold that considerations of policy which cannot be dealt with in this way should be left out of account in the application to the case of the *Spiliada* principles.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

55. For the reasons given by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead, I too agree with the order which Lord Bingham of Cornhill has proposed.
