The Spiliada: From Convenience to Propriety

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In this article two interrelated aspects of the English court's jurisdiction over an action containing foreign elements will be examined. The first is the exercise of the court's discretion to grant a stay of English proceedings where jurisdiction has been founded as of right. Jurisdiction is so founded where, for example, a writ is served on the defendant who is present within the jurisdiction at the time of the service of the writ. The second is the exercise of the court's discretion to grant leave to serve a writ out of the jurisdiction under RSC Order II r.1(1). Such leave will be required if the defendant is not within the jurisdiction at the time of service. The analysis of these issues will be made in the light of the important decision in *Spiliada Maritime Corpn.* v. *Cansulex Ltd (The Spiliada)*[1] in which the court, for the first time, elaborated a coherent principle that can be applied to both Order II and stay situations.

Order II and stay: the pre-Spiliada rules

Prior to *The Spiliada* it was unclear to what extent the principles governing the exercise of the court's discretion to grant a stay and those in relation to the exercise of its discretion under Order II were co-extensive.

In relation to stay, the grant of a refusal to stay of English proceedings had, since 1978, turned on the two-stage test propounded by Lord Diplock in *MacShannon* v. *Rockware Glass Ltd.*:[2]

> "In order to grant a stay two conditions must be satisfied, one positive, one 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 and 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."

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1. [1986] 3 All E.R. 843.
2. [1978] A.C. 795, at p.812.

Prior to this test, discretion to grant or refuse stay was based on the question of whether the English proceedings could be said to be "oppressive or vexatious".[3] The oppressive or vexatious test proved unduly burdensome on the party seeking stay since, self-evidently, to prove that something is "oppressive" is no easy task. However, Lord Diplock's approach in *MacShannon* has produced its own special problems. For example, it has been disputed whether Lord Diplock introduced the defendent"[7] and then somehow reach a balance between the two. This could be Laws.[4] According to this concept the court had to consider whether there is another competent tribunal which is more suitable for the trial of the case in the interests of the parties and of justice.[5] If so, then a stay should be granted. The consequence of this uncertainty is that it has been unclear whether the courts should refer exclusively to Scottish criteria when deciding whether a stay should be granted or not. Further the balance between the (a) and the (b) branches of Lord Diplock's *MacShannon* test was never clear. However, if both were satisfied then the court had no choice but to determine the "critical equation" as explained by Lord Wilberforce in *The Atlantic Star.*[6] According to this, the court must "take into account (i) any advantage to the plaintiff, (ii) any disadvantage to the defendant"[7] and then somehow reach a balance between the two. This could be difficult since any advantage to the plaintiff was likely to be neutralised by a disadvantage to the defendant. Also, as Lord Wilberforce himself stated, the resolution of the "critical equation" was likely to be by way of an "instinctive process".[8] Yet, surely, reason demands that the exercise of such a discretion should have more legal content than mere "instinct". In relation to Order II, leave could be refused where England was not the *forum conveniens*[9] because, for example, of the locality of the parties or the witnesses.[10] There has never been any recondite guiding principle governing the exercise of this discretion of the *MacShannon* kind. The court has simply identified such matters as expense and inconvenience as possible grounds for refusing leave.

The question now is what effect *The Spiliada* has had upon these principles.

The Spiliada

In *The Spiliada* the court was concerned with the exercise of its discretion to grant leave to serve out of the jurisdiction under Order II r. 1 (1)(f)(iii). This

3. *St. Pierre* v. *South American Stores (Gath and Chaves) Ltd.* [1936] 1 K.B. 382.
4. In *MacShannon* itself, whereas Lord Diplock expressed the view that his reinstatement of the principles must be indistinguisable from the principle of *forum non conveniens*, Lord Salmon expressly rejected any adoption of that latter principle: [1978] A.C. 795, at pp.812, 822 and 817. See also, Adrian Briggs, [1984] *Legal Studies* 74.
5. *Sim* v. *Robinow* (1892) 19 R. (Ct. of Sess.) 665.
6. *The Atlantic Star* [1974] A.C. 436, at p.468.
7. *Ibid.*.
8. *Ibid.*.
9. *Maroux* v. *Sociedade Commercial Abel Pereira da Fonseca S.A.R.L.* [1972] 1 W.L.R. 962 and *G.A.F. Corporation* v. *Anchem Products Inc.* [1975] 1 Lloyd's L.R. 601.
10. See, *e.g.*, *Société Générale de Paris* v. *Dreyfus Brothers* (1885) 29 Ch.D. 239, at p.242.

sub-rule of Order II r.1 deals with the situation where a contract is "by its terms or by implication governed by English law", which all courts in *The Spiliada* saga agreed was, on the facts, the proper law.[11] The plaintiffs, the Liberian owners of The Spiliada, wanted to commence proceedings in England against Cansulex Ltd. in respect of corrosion caused to the ship when wet sulphur was loaded aboard it. The leave, which had been granted at first instance and then discharged by the Court of Appeal, was reinstated by the House of Lords.

Though the case was particularly concerned with Order II, Lord Goff (giving the leading judgment) took the opportunity to review both the principles relating to that Order and those relating to the grant of a stay of English proceedings which have been founded as of right.[12] In doing so he identified what, in his view, was the fundamental principle applicable to both. The court, he said, should exercise its discretion in favour of that forum in which the case could be tried more suitably for the interests of the parties and the needs of justice, *i.e.* the "appropriate forum".[13] The "appropriate forum" was that with which the case has its closest and most real connection.[14] The fact that the plaintiff might be deprived of a legitimate advantage if leave is refused or a stay granted is obviously relevant to this issue but by no means conclusive.[15]

By using the test of closest, most real connection, the English court was found to be the appropriate forum and so leave was reinstated. This decision was reached by consideration of, *inter alia*, the "Cambridgeshire factor" which in the event proved decisive.[16] The Cambridgeshire, an English owned ship, had also been damaged by the wet sulphur. Its owners had already commenced proceedings in England against Cansulex Ltd., when Spiliada Maritime Corporation sought leave under Order II. Both ships were supported by the same insurers and both of the ship's owners had briefed the same solicitors. The combination of the preparatory work done by the Cambridgeshire team together with the fact that English law governed the contract between Spiliada Maritime Corporation and Cansulex Ltd., led to the conclusion that England was the appropriate jurisdiction for the trial of the action.[17]

11. *The Spiliada* [1985] 2 Lloyd's L.R. 116 (C.A.).
12. [1986] 3 All E.R. 843, at p.853.
13. *Ibid.*, at pp.853-54. According to Lord Goff, the burden of proving the appropriate forum under Order II falls on the party seeking leave. In relation to stay it falls on the party seeking a stay.
14. *Ibid.*, at p.856. The ancillary significance of all this is a new departure for the 'closest and most real connection' test which began its life in contract and then spilled over by analogy into torts, and more recently has been recommended by the Law Commission in *Report No.* 168 for application in assessing the domicile of children. Is there room, then, for a prediction that all conflicts' issues will ultimately be resolved by applying this test?
15. *Ibid.*, at p.859.
16. *Ibid.*, at pp.861-62.
17. *Ibid.*.

The relationship between Order II and stay

Whether the court is being asked to grant a stay of English proceedings or leave is being sought under Order II, the same issue is at stake: should the matter be tried in England or in some other jurisdiction? Lord Goff's authoritative statement that there is a general underlying principle in relation to both Order II and stay is, therefore, to be welcomed. It provides a composite framework according to which the English court can properly take jurisdiction and allow English proceedings to continue or, conversely, refuse to assume jurisdiction altogether. Nevertheless, if this statement is examined in more depth, an important distinction between Order II and stay situations arises which casts doubt on the *general* applicability of the composite principle to both situations.

According to Lord Goff, when considering Order II, the English court should find that it clearly provides "*the* appropriate forum".[18] Where a stay is requested it should be granted if there is "another clearly *more* appropriate forum", failing which a stay should ordinarily be refused.[19] Though the matter is not explored further, it is submitted that this distinction is not merely verbal. The implication is that in the latter situation there are legitimate competing *fori* in accordance with coherent principles but something further makes a particular foreign forum the more appropriate one in all the circumstances of the case. However, in the former situation there is no room for competing *fori* in accordance with such principles; the English court must be the *only* appropriate forum. Moreover this distinction is desirable for, as Barma and Elvin have suggested, English judges should avoid the appearance of undue judicial chauvinism.[20] For example, they should not arrogate to themselves an unwarrantably wide jurisdiction. In order to achieve this, it is necessary for there to be a difference of approach towards Order II and stay.

To take stay first. As has been seen, the *MacShannon* test happily relaxed the former, burdensome requirement that a party must show that the English proceedings were "oppressive or vexatious".[21] *The Spiliada* conception of the appropriate forum (*forum non conveniens*) provides another "new departure" and is particularly valuable given that it should enable the English court to grant a stay more readily and flexibly in cases where jurisdiction founded as of right is in appropriate.[22] In this way it should ensure that the English court will not assume an unwarrantably wide jurisdiction. However, these advantages do not apply with equal force to the exercise of the court's discretion under Order II, since that Order already gives the court the power to assume an extended jurisdiction. Thus, so that the court will not assume an unwarrantably wide jurisdiction it should be more rigorous in its application of the "appropriate forum" test in relation to

18. *Ibid.*, at p.858 (emphasis added).
19. *Ibid.*, at pp.854-56 (emphasis added).
20. Barma and Elvin, [1985] *L.Q.R.* 48, at p.55.
21. *Supra*, at p.68.
22. *E.g.*, where the writ is served on a defendant whilst he is only temporarily present within the jurisdiction and there are other substantial factors connecting the case with an alternative forum.

Order II than in stay proceedings. In practice, this goal will be achieved by the distinction between proving the English court to be *the* appropriate forum and proving that there is another *more* appropriate forum for a stay to be granted, for it is more difficult to prove the former than the latter.

The doctrine of the appropriate forum

In adopting the principle of the appopriate forum the House of Lords in *The Spiliada* has cast doubt on the future use of the phrase *forum non conveniens*. Indeed, Lord Goff doubted "whether the Latin tag '*forum non conveniens*' is apt to describe this principle." In particular, by drawing on the classical statement of the doctrine by Lord Kinnear in *Sim* v. *Robinow*[23] he emphasised that the issue is *not* merely one of practical convenience.[24] Rather, a variety of factors have to be taken into account when establishing the appropriateness of the forum. These factors include not just those of expense and convenience but also, for example, the law governing any relevant transaction.[25] This shift of emphasis now requires establishing what may alternatively be referred to as an objectively determined proper forum for the trial of the dispute, that forum with which the action has its closest and most real connection.[26] The objectivity of this process is not to be undermined by giving undue weight to any legitimate advantage of which the plaintiff may be deprived should leave be refused or a stay granted, for, as Lord Goff noted, "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*.' [27] This is reflected in the decision on the facts in *The Spiliada*. The plaintiff had claimed as a legitimate advantage, for bringing the proceedings in England, the expiry of the British Columbia limitation period leaving them with no alternative but to proceed in England. In the view of the House of Lords the decisive factor indicating the English court as the appropriate forum was the Cambridgeshire factor *not* the limitation.[28]

The adoption of the principle of the appropriate forum is timely. It shifts the emphasis away from Lord Diplock's two stage test in *MacShannon* (as supplemented by Lord Wilberforce's "critical equation" conception in *The Atlantic Star*) and the problems that that test involved,[29] to a single composite test, the latter test being readily explicable, theoretically simple to operate and already "notorious" in other branches of the law.[30] Of course, the "appropriate forum" test is not without its own rather obvious difficulties. The court has to consider an apparently seamless web of connecting factors. The consideration of these factors

23. (1892) 19 R. (Ct. of Sess.) 665, at p.668.
24. [1986] 3 All E.R. 843, at p.853.
25. *Ibid.*, at p.856.
26. *Supra*, at p.69.
27. [1986] 3 All E.R. 843, at p.859.
28. *Supra*, at p.69. The legitimate advantage point was treated *obiter*: [1986] 3 All E.R. 843, at p.862.
29. *Supra*, at p.68.
30. See comment, *supra* n.14.

should not disintegrate into an "instinctive" process, however we define that, for otherwise the law would be put back into the position it was under *MacShannon*.[31] Yet just *how* the court is to assess all the connecting factors remains to be seen. This difficulty may be demonstrated by reference to the Court of Appeal's first attempts to apply *The Spiliada* in *Du Pont* v. *Agnew*[32] and *Charm Maritime* v. *Kyriakou*.[33] Both cases were concerned with stay and in both the Court of Appeal can be criticised for giving undue weight to one connecting factor indicating England as the more appropriate jurisdiction when other factors pointed to a legitimate alternative.

In *Du Pont* v. *Agnew* the court was faced with multi-party insurance claims arising out of a tort which had occurred in Illinois. None of the insurance policies contained a choice of law clause and so the Court of Appeal, treating a Lloyd's policy as the "lead" or principal policy, determined that English law was the proper law thereof (and therefore of all the other related policies). The particular issue concerned an indemnity which, according to English law as the proper law, could only be denied as a matter of English public policy.[34] Thus, the Court of Appeal found the English court to be the more appropriate forum for the determination of that issue because it was the more appropriate tribunal to assess the extent of English public policy.[35] Therefore, despite substantial connecting factors pointing to Illinois as the more appropriate jurisdiction (*inter alia*, the tort was committed there, the award giving rise to this particular litigation was made there and the Illinois courts were in a better position to analyse what had happened in respect of corporate responsibility for the injury),[36] a stay of English proceedings was refused.

Similarly, in the *Charm Maritime* case a stay was refused where the particular issue concerned a trust deed, the governing law of which was arguably English.[10] Since Greek law (being the law of the other possible appropriate forum) did not recognise the concept of a trust, England was found to be the more appropriate jurisdiction despite substantial connections between the case and Greece given, for example, that the parties to the dispute were Greek and the dispute itself had arisen there.[38]

It may be that these cases can be explained on the basis that, as Lord Goff emphasised in *The Spiliada*, "appropriateness" is not a synonym for "mere convenience".[40] The forum should arguably be *legally* appropriate rather than

31. *Supra*, at p.67.
32. [1987] 2 Lloyd's L.R. 585.
33. [1987] 1 Lloyd's L.R. 433.
34. [1987] 2 Lloyd's L.R. 585, at p.594.
35. *Ibid.*.
36. *Ibid.*, at p.593.
37. [1987] 1 Lloyd's L.R. 443, at pp.439, 451.
38. *Ibid.*, at p.451.
39. [1987] 2 Lloyd's L.R. 585, at p.595 and [1987] 1 Lloyd's L.R. 433. at p.448.
40. [1986] 3 All E.R. 843, at p.853.

merely factually convenient. What made England the more legally appropriate jurisdiction in *Du Pont* was the existence of an overriding English rule of public policy that could determine when the right to an indemnity could be denied. In *Charm Maritime* the absence of a law of trusts in Greece inexorably made England the more legally appropriate jurisdiction. Yet clearly the English courts should be wary of treating the fact that English law is the law governing the issue as determinative of the more appropriate forum if they are not to appear chauvinistic. On the whole, in these cases, the Court of Appeal seemed to give undue weight to English law as the law governing the issue.

Moreover, in *Du Pont* and *Charm Maritime* the Court of Appeal arguably fundamentally misapplied *The Spiliada* by finding England to be the more appropriate jurisdiction. According to Lord Goff in *The Spiliada*, if no other more appropriate forum than the English court can be established then ordinarily a stay should be refused anyway.[41] It is not necessary for the court to find that it is the more appropriate forum. Thus, where "appropriateness" can be said to be balanced between factual convenience and legal convenience, this giving rise to no other clearly more appropriate forum, a stay should be refused. In *Du Pont* and *Charm Maritime* it was open to the court to take this route and so refuse a stay on this basis alone.

The logical force of the general underlying principle of the "appropriate forum" as expressed in *The Spiliada* was considered by Steyn J in *Att.-Gen.* v. *Arthur Andersen & Co.*.[42] In that case the court was faced with a request for a stay of English proceedings *not* by the defendant but by the plaintiff who had actually brought those proceedings. The plaintiff had commenced proceedings against Andersen's in New York but, anticipating arguments disputing the jurisdiction of the New York court, had also served a protective writ in England. The plaintiff then sought a stay of these English proceedings pending the outcome of the dispute as to the New York court's jurisdiction. He was successful. Though the judgment is not remarkable for its clarity, it seems that Steyn J treated the case as a novel one in which the relevant principles applicable might "be regarded as a gloss"[43] on those contained in *The Spiliada*. The gloss was as follows: "Has it been shown that it is unjust, because it was *vexatious or oppressive*, to allow the English proceedings to be pursued pending the decision of the New York court?"[44] Though not stated it must presumably have been "vexatious or oppressive" to the plaintiff.

The extent to which Steyn J's test *is* a gloss on *The Spiliada* requires analysis. In *Andersen's* case a stay was granted on the basis that it was "vexatious or oppressive" to compel the plaintiff to continue with the English proceedings in the light of

41. [1986] 3 All E.R. 843, at p.856.
42. *The Times*, 13 October 1987, Lexis Transcript for 8 October 1987.
43. *Ibid.*.
44. *Ibid.* (emphasis added).

undertakings which the plaintiff had invited the defendant to accept.[45] It was *not* granted on the basis that New York was the appropriate jurisdiction by reason of being that with which the action was most closely connected. Thus, the "vexatious or oppressive" test was not being used euphemistically to refer to the appropriate forum. Rather, it seems that the court was weighing the respective advantages and disadvantages to the parties of a grant of stay. It was only when the judge turned to consider the professional involvement in the case that he concluded that "New York rather than London is at present the *centre of gravity*."[46] Self-evidently this is consistent with *The Spiliada* since the concept of a "centre of gravity" mirrors, at least in a rough and ready way, the notion of the "appropriate forum" as one with which the proceedings are most closely connected; even more so given the House of Lords' reliance in *The Spiliada* on the feature of professional involvement, *i.e.* the Cambridgeshire factor.[47] If this is correct, then the use of the words "vexatious or oppressive" is misleading, doubly so since the "oppressive or vexatious" test was expressly discarded by the House of Lords in relation to stay in 1978.[48] It would have been preferable for Steyn J either to have more clearly defined "vexatious or oppressive" as a test in its own right, or to have adopted *The Spiliada* as a general approach and used the "vexatious or oppressive" concept as a feature which might point to New York as the appropriate jurisdiction. As it is, the approach he took represents an unhappy mixture of the two and will clearly require future scrutiny.

Conclusion

The House of Lords in *The Spiliada* has wrought changes in the principles governing the exercise of the court's discretion in the two areas of Order II and stay proceedings. Two clear points have emerged. First, the same principle underlies the exercise of discretion in relation to both Order II and stay.[49] Secondly, that principle is that of the appropriate forum.[50] In this regard it has been argued that the House of Lords has done more than merely accept the doctrine of *forum non conveniens*. It has transposed that doctrine into that of the "appropriate forum". Given Lord Goff's adoption of what is "appropriate" rather than "convenient",[51] it may be misleading for future courts to talk in terms of *forum non conveniens*.

However, as has been seen, *The Spiliada* merely provides a basic framework for the guidance both of those who professionally advise clients on the question of the exercise of the court's discretion in relation to Order II and stay and the judges

45. *Ibid.*.
46. *Ibid.* (emphasis added).
47. *Supra*, at p.4.
48. *MacShannon* v. *Rockware Glass Ltd* [1978] A.C. 795.
49. *Supra*, at p.69.
50. *Supra*, at p.69.
51. [1986] 3 All E.R. 843, at p.854.

who actually exercise that discretion. This raises serious doubts as to whether Lord Templeman's *cri de coeur* in *The Spiliada* that submissions on Order II and stay "will be measured in hours not days" will be answered.[52] It is not without significance that the two cases on stay[53] subsequent to *The Spiliada* found their way to the Court of Appeal.

52. [1986] 3 All E.R. 843, at p.847.
53. *Du Pont* and *Charm Maritime, supra*, nn.32, 33.