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Spiliada Maritime Corporation v Cansulex Ltd (1986)

EDWIN PEEL

THERE IS NO doubt that *Spiliada Maritime Corporation v Cansulex Ltd*[1] is a landmark case in the conflict of laws. It is perhaps most accurate to describe it as the last of a series of landmark cases which significantly changed English law in so far as it relates to the circumstances in which the English courts will decline to exercise their jurisdiction when there is another available forum. This essay examines the development of the principles still applied today, with particular focus on *Spiliada* itself, before a brief assessment of whether, in practice, it has turned out to be, as some have said, a 'treasure-house'.[2]

In assessing the state of the law prior to the decision of the House of Lords in *The Atlantic Star*, Lord Wilberforce opined that it could only be understood 'against an evolutionary background'.[3] A similar approach assists with our understanding of the law as laid down in *Spiliada* because, while it is Lord Goff's speech in *Spiliada* which has proved to be seminal, a lot of the heavy lifting was done by a number of earlier decisions of the House of Lords.[4] Lord Goff's speech is also notable for a gracious postscript, in the following terms:[5]

> 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] LMCLQ 227, and the article by Miss Rhona Schuz in (1986) 35 ICLQ 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.

[1] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 (HL).

[2] A Briggs, 'Foreign Judgments: More Surprises' (1992) 108 *Law Quarterly Review* 549, 553.

[3] *Owners of the Atlantic Star v Owners of the Bona Spes (The Atlantic Star)* [1974] AC 436 (HL) 464.

[4] See further A Arzandeh, *Forum (Non) Conveniens in England: Past, Present and Future* (Oxford, Hart Publishing, 2018) ch 3; D Robertson, 'Forum Non Conveniens in America and England: A Rather Fantastic Fiction' (1987) 103 *Law Quarterly Review* 398.

[5] *Spiliada* (n 1) 488.

> 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.

We start with the cases, before turning to the 'pilgrims'.

I. CASES

In tracing the evolution of the law in *The Atlantic Star*, Lord Wilberforce observed that it was 'not necessary to go back much more than 100 years'.[6] We need only concern ourselves with a much shorter period when it comes to the development of the law from the decision in *The Atlantic Star* in 1973 to the decision in *Spiliada* in 1986.[7] That in itself indicates that this was a period of rapid evolution.[8] It is best described as the erosion (rapid on this occasion, and not gradual[9]) of claimant bias in the selection of venue, and of judicial chauvinism. The leading cases are *The Atlantic Star* itself, *MacShannon v Rockware Glass Ltd*,[10] and *The Abidin Daver*.[11] It is submitted that the most significant of them is *The Atlantic Star*, if only because it set in motion a force which proved impossible to resist.[12]

A. *The Atlantic Star*

In *The Atlantic Star*,[13] a collision occurred in Belgian waters between the *Atlantic Star*, a Dutch container vessel, and two barges, one Dutch-owned and the other Belgian. As one would expect, the barges came off worst and were lost, along with two men who drowned. The owners of the Belgian barge began an action against the owners of the *Atlantic Star* in the Antwerp court, but the owners of the Dutch barge began an action in rem in the Admiralty Court in England,

[6] *The Atlantic Star* (n 3) 464.

[7] A decision which is not directly addressed as part of this evolutionary study is *Amin Rasheed Shipping Corporation v Kuwait Insurance* [1984] AC 50 (HL). This is on the basis that it does not add a great deal to the evolutionary stage covered by *The Abidin Daver*, and the particular context of *Amin Rasheed* (service out of the jurisdiction) is dealt with in *Spiliada* itself. It is however noted that one of the judges in the Court of Appeal in *Amin Rasheed* was Robert Goff LJ. See text at n 38.

[8] As reflected in the title of one of the articles by Adrian Briggs, referred to by Lord Goff: 'Forum Non Conveniens – Now We Are Ten?' (1983) 3 *Legal Studies* 74.

[9] *Cf MacShannon v Rockware Glass Ltd* [1978] AC 795 (HL) 811 (Lord Diplock: 'The progress of the common law is gradual').

[10] ibid.

[11] *Owners of the Las Mercedes v Owners of the Abidin Daver (The Abidin Daver)* [1984] AC 398 (HL).

[12] Given the title of this collection, it may be noted that *The Atlantic Star* was described as a 'landmark' case by Lord Diplock in *The Abidin Daver* (n 11) 407.

[13] *The Atlantic Star* (n 3).

when the *Atlantic Star* was due in Liverpool (arrest being avoided when the owners accepted service and arranged security). There is little doubt that one of the reasons for commencing an action in England was publication of the report of a court appointed surveyor in Antwerp which indicated that the collision was caused by sudden fog, rather than any fault on the part of the *Atlantic Star*. The owners of the *Atlantic Star* applied for a stay. The owners of the Dutch barge then initiated proceedings in Antwerp solely to avoid being out of time, if the English action was stayed, but gave an undertaking to discontinue the Belgian action if the English action was allowed to proceed. Brandon J refused the stay,[14] and his decision was affirmed by the Court of Appeal.[15] By a narrow majority, an appeal was allowed and a stay ordered by the House of Lords.[16]

In terms which have become familiar since the decision in *Spiliada* Brandon J held that the court in Antwerp was 'by far the more appropriate forum', based on the following reasons, as summarised by Lord Reid in the House of Lords: the place of collision; the case was governed by Belgian law and local regulations;[17] five other claims arising out of the collision were pending in Antwerp; the appellants had ensured that full security was available there.[18] For good measure, Brandon J observed that 'the case has absolutely no connection with England, except that, because the defendants' ship trades from time to time to an English port, she is liable to arrest here'. Nonetheless, a stay had been declined in the lower courts because the conduct of the Dutch barge owners in commencing an action in England could not be regarded as 'vexatious' and 'oppressive'.

The language of 'vexation' and 'oppression' is most closely associated with the test formulated in the following terms by Scott LJ in *St Pierre v South American Stores (Gath & Chaves) Ltd*:[19]

> 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 the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

This test was applied by the minority in the House of Lords in accordance with the more natural and ordinary meaning of the terms employed, in dismissing

[14] *Owners of the Atlantic Star v Owners of the Bona Spes (The Atlantic Star)* [1972] 1 Lloyd's Rep 534 (Ad).

[15] *Owners of the Atlantic Star v Owners of the Bona Spes (The Atlantic Star)* [1973] QB 364 (CA).

[16] It may be noted that successful counsel for the appellants was Robert Goff QC.

[17] Brandon J referred only to the fact that 'navigation' was governed by Belgian law and local regulations. At the time, the *lex causae* would have been determined by the double actionability rule applicable to torts committed abroad.

[18] *The Atlantic Star* (n 14) 539.

[19] *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382 (CA) 398.

the appeal on the basis that the owners of the Dutch barge had not acted 'in bad faith', or with an 'improper motive', so as to 'harass the defendant'.[20] For those who have only known the law as laid down in *Spiliada*, it is worth reminding that the best evidence of the claimant's 'good faith' appears to have been his assessment that an action in England offered better prospects of success than in Belgium,[21] ie the very epitome of forum shopping. The whole point of the '*St. Pierre* test' is that there was nothing wrong with forum shopping; particularly if one was shopping in the English courts.[22] One was only required not to abuse the privilege.

When one turns to the majority, it is tempting to say that it is with the benefit of hindsight that one can see that their speeches entailed a radical change in the law, or at least the first step on the way to such radical change. But one suspects that Lords Reid, Wilberforce and Kilbrandon were only too well aware, even at the time, that they had set the law on a very different path, even if the speeches of all three are a masterclass in the subterfuge that is sometimes practised to avoid the accusation of judicial activism.[23] Thus, the Scottish plea of *forum non conveniens* was not adopted. Rather, any change should be sought 'within the existing framework of English law';[24] and the language of 'vexation' and 'oppression' was still serviceable, but should be interpreted 'more liberally',[25] or in a 'morally neutral' way,[26] and applied as 'pointers rather than boundary marks'.[27] But the substance of the change was all too evident. In particular, it was not enough for the claimant to point to 'any' advantage of suing in England,[28] and certainly not an 'advantage' based on 'nothing more than a hope that in an English court he might stand a better chance of winning'.[29] Since that was all the owner of the Dutch barge could point to, it was not sufficient to outweigh the factors identified by Brandon J in favour of a stay. In his most expansive comment, Lord Wilberforce stated that, in deciding whether to grant a stay, 'the court must take into account (i) any advantage to the plaintiff; (ii) any disadvantage to the defendant: this is the critical equation, and in some cases it will be a difficult one to establish'. 'Critical' and 'difficult' proved to be prescient observations.

[20] *The Atlantic Star* (n 3) 459 (Lord Morris).
[21] ibid.
[22] 'The right of access to the King's court must not be lightly refused': *St. Pierre* (n 19) 398 (Scott LJ).
[23] The principal concern of the majority appears to have been to avoid too radical a departure from the settled view of the law (at least in one step), rather than to avoid accusations of 'judicial legislation'. Parliament has eschewed any opportunity it might have had to develop the law in this area: Briggs (n 8) 74 ('the legislature has declined to get involved in quite remarkable fashion').
[24] *The Atlantic Star* (n 3) 454 (Lord Reid).
[25] ibid, 454 (Lord Reid) 468 (Lord Wilberforce).
[26] ibid, 454 (Lord Kilbrandon)
[27] ibid, 468 (Lord Wilberforce).
[28] ibid.
[29] *The Atlantic Star* (n 3) 471 (Lord Wilberforce).

B. *MacShannon v Rockware Glass Ltd*

In *MacShannon v Rockware Glass Ltd*,[30] the House of Lords heard appeals in four cases,[31] in all of which the claimants were Scotsmen suing English registered companies for injuries sustained in industrial accidents in Scotland. Below the level of the House of Lords, the defendants' applications for a stay were refused. In the House of Lords, they were allowed. On this occasion, the decision was a unanimous one. The speeches of their Lordships are notable for a number of features. First, the language of 'vexation' and 'oppression' only served to confuse and should be abandoned.[32] Second, this allowed the 'gist' of the speeches of the majority in *The Atlantic Star* to be reflected in a restatement of Scott LJ's two stage approach, by Lord Diplock, in the following terms:

> 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.[33]

Third, any 'legitimate personal or juridical advantage' must be a 'real one', ie, not just the subjective belief of the claimant or his legal observers, but shown 'objectively and on the balance of probability to exist'.[34]

Since the only connection that any of the actions had with England was the registered office of the defendants, it was clear that Scotland was, and England was not, the 'natural forum'. The claimants could point to no personal advantage. As for juridical advantages, Robert Goff J, at first instance in two of the cases, had condensed them into the following, as alleged by the claimants: higher damages in England; a lengthier and more costly legal process in Scotland; and the reduced likelihood of the recovery of costs. What may be noticed about this condensed list is that questions of cost seem more obviously to be relevant to the first stage of Lord Diplock's restated test, suggesting that more work needed to be done to refine it, but, even if treated as juridical advantages, the claimants failed to prove that any advantage lay with England over Scotland.

A point to be noted for later reference is the extent to which their Lordships thought it relevant to take account of wider questions of 'public policy', or 'public interest'. It was said that the practice of bringing 'Scottish' industrial injury actions in the English courts was widespread. Lord Diplock did not think that this was

[30] *MacShannon v Rockware Glass Ltd* (n 9).

[31] In two of the cases the judge at first instance was Robert Goff J. He had refused to stay the actions.

[32] *MacShannon v Rockware Glass Ltd* (n 9) 811 (Lord Diplock) 819 (Lord Salmon); *cf* 827 (Lord Keith, 'endorsing' a broad and liberal interpretation).

[33] ibid, 812.

[34] ibid, 812 (Lord Diplock); *cf* 829 (Lord Keith).

irrelevant, if it meant that time and effort was wasted on litigation 'which would otherwise be spent on activities that are more directly productive of national wealth or well-being',[35] but he conceded that 'the sole consideration which should influence the judge in exercising his discretion in each individual case was to do justice as between that plaintiff and that defendant'.[36] Their other Lordships thought that matters of public policy should play no part in the decision.[37]

C. *The Abidin Daver*

The particular focus in *The Abidin Daver* was the effect of a *lis alibi pendens* between the parties, in circumstances where the defendant in foreign proceedings already underway (in Turkey in that case, following a collision in the Bosphorus) commences proceedings in England, in the same action, as the claimant. That focus is of no real concern in this study of the evolution of the law. The speeches of their Lordships are perhaps most notable for the acknowledgement by Lord Diplock, based on the decisions in *The Atlantic Star, MacShannon* and *Amin Rasheed Shipping Corporation v Kuwait Insurance*,[38] that English law was now 'indistinguishable from the Scottish legal doctrine of *forum non conveniens*'.[39] Although addressed in the context of *lis alibi pendens*, Lord Diplock also added an important gloss to the question of any personal or juridical advantage to the claimant of suing England: not only did it have to be established 'objectively by cogent evidence', it had to be 'of such importance that it would cause injustice to deprive him of it'.[40] An important terminological marker was also laid down by Lord Keith when he referred to the 'natural forum' as 'that with which the action had the most real and substantial connection'.[41]

As for the decision in *The Abidin Daver* itself, it is a good example of the last vestiges of the 'judicial chauvinism [which] has been replaced by judicial comity'.[42] The Court of Appeal had overturned Sheen J and refused a stay. In doing so, Donaldson LJ had indulged in the very comparison between the relative merits of the English and Turkish courts which he said should not play a part, leading to the memorable observation from Lord Brandon that his 'heart was not really in what he felt obliged to concede'.[43] Turkey was clearly the natural forum and the claimant could point to no personal or juridical advantage of which it would be unjust to deprive him and Sheen J's order was restored.

[35] ibid, 813–14.
[36] ibid, 813.
[37] ibid, 822 (Lord Salmon) 823 (Lord Russell) 833 (Lord Keith).
[38] See comment at n 7 above.
[39] *The Abidin Daver* (n 11) 412.
[40] ibid. This was not a new gloss: see Lord Salmon in *MacShannon* (n 9) 818: 'the real test of a stay depends on what the court in its discretion considers that justice demands'.
[41] *The Abidin Daver* (n 11) 415.
[42] ibid, 411 (Lord Diplock).
[43] ibid, 424.

II. PILGRIMS

Lord Goff did not elaborate on how he had been assisted by the articles by Adrian Briggs and Rhona Schuz. Having revisited them, one suspects that they helped to identify the issues that still needed to be resolved. This brief summary of the issues identified by the pilgrims and dealt with by Lord Goff does scant justice to the analysis in all three articles, but will have to suffice for present purposes. The first of Adrian Briggs' articles referred to by Lord Goff was written before *The Abidin Daver*.[44] The focus of this summary is therefore on his second article[45] and that of Rhona Schuz.[46]

The key issue raised by both was the weight to be given to any legitimate personal or juridical advantage and how to balance what may be advantage to the claimant, but disadvantage to the defendant. As Lord Wilberforce had observed in *The Atlantic Star* (above), this is the 'critical equation'. Both preferred a solution which turned on the 'balance of justice'. As Adrian Briggs put it: 'To attempt to "balance" in these circumstances is difficult … it is submitted that it is better to ask the question in the terms … stated by Lord Diplock [in *The Abidin Daver*[47]] …: is the advantage of such importance that it would be unjust to deprive the plaintiff of it?'[48] Other important, but less central, issues raised were as follows: since all three of the evolutionary cases were concerned with a stay, the need to clarify the position regarding service out of the jurisdiction, including the question of the burden of proof in both contexts;[49] which factors are relevant to the identification of the 'natural forum' and how to weigh, or balance them;[50] and whether, if English law was now 'indistinguishable' from the Scottish doctrine, the Scottish authorities were of assistance in an English application for a stay.[51]

Given the terms in which the law was subsequently stated in *Spiliada*, the proposed formulation by Rhona Schuz of the test to be applied is particularly worthy of note:[52]

> Any action brought in the English courts shall be stayed if the defendant shows that … the courts of another country have a closer and more real connection with the action and that the foreign court has jurisdiction to hear the dispute unless the plaintiff proves that in all the circumstances of the case it would be unjust for the action to be tried in that foreign court.

[44] Briggs (n 8).

[45] A Briggs, 'The Staying of Actions on the Ground of "Forum Non Conveniens" in England Today' [1984] *Lloyd's Maritime and Commercial Law Quarterly* 227.

[46] R Schuz, 'Controlling Forum-Shopping: The Impact of *MacShannon v Rockware Glass Ltd*' [1986] *International & Commercial Law Quarterly* 374.

[47] Text to n 40.

[48] Briggs (n 45) 240; *cf* Schuz (n 46) 395, invoking the dictum of Lord Salmon at (n 40) above.

[49] Briggs (n 45) 240–41; *cf* Schuz (n 46) 399 and 407.

[50] Briggs (n 45) 231.

[51] ibid, 249.

[52] Schuz (n 46). The full version of this included two provisos: 'Provided always that (i) no action shall be stayed if the judgment of the foreign court would not be entitled to be recognised in

III. SPILIADA

When mixed with water, sulphur can cause significant damage to steel. Loading wet sulphur on a ship is not, therefore, a good idea. In 1980 this was the fate of the *Spiliada* when it was chartered to carry a cargo of bulk sulphur from Vancouver to India. The owners of the vessel obtained leave to serve out of the jurisdiction on the shippers on the ground of an action to recover damages for breach of a contract governed by English law.[53] The shippers applied to set aside the order on the ground that the case had not been shown to be 'a proper one' for service out of the jurisdiction.[54] Staughton J dismissed the application, but was overturned by the Court of Appeal. An appeal by the shipowners to the House of Lords was allowed.[55] Having been at the forefront of the development of the law in this area, as counsel,[56] as High Court Judge[57] and as Lord Justice of Appeal,[58] it seems fitting that it should fall to Lord Goff to add the final imprimatur in *Spiliada*. It is helpful to begin with his statement of the law, before turning to its application in the case.

In terms of the issues identified by the 'pilgrims' above, two can be dealt with quite briefly. First, Lord Goff concluded that English law had adopted the Scottish doctrine of *forum non conveniens* and it was necessary 'now to have regard to the Scottish authorities';[59] in particular, the decision of the House of Lords in *Société du Gaz de Paris SA v SA Navigation 'Les Armateurs français'*[60] and the 'classic statement'[61] of Lord Kinnear in *Sim v Robinow*:[62] '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'. Second, subject to three provisos, the doctrine, in the form stated by Lord Kinnear, applied to both

England; and (ii) no action shall be stayed where to do so would be contrary to express statutory provision.' Proviso (ii) calls for no further comment. For an example of a decision based, in part, on the *relative* enforceability of English and foreign judgment, see *International Credit & Investment Co (Overseas) Ltd v Adham* [1999] ILPr 302 (CA).

[53] RSC Ord 11, r 1(1)(f)(iii) (see now CPR PD 6B para 3.1(6)(c)).

[54] RSC Ord 11, r 4(2) (see now CPR r 6.37(3)). For the view that the courts have not always paid too much attention to what statutory language there is which impinges on this area, as for example in the change from 'the *case* is a proper one for service out' to 'England … is the proper *place* for the *claim* to be brought' (CPR r 6.37(3)), see M Davies, '*Forum Non Conveniens*: Now We Are Much More Than Ten' in A Dickinson and E Peel (eds), *A Conflict of Laws Companion* (Oxford, OUP, 2021) 34–35.

[55] Thus, in the three cases which had developed the law, a *stay* was ordered, whereas in the case which put the final imprimatur on such development, an application to *set aside* jurisdiction was refused.

[56] See n 16.

[57] Text to n 31.

[58] Text to n 6.

[59] *Spiliada* (n 1) 475.

[60] *Société du Gaz de Paris SA v SA Navigation 'Les Armateurs français'* 1926 SC (HL) 13.

[61] *Spiliada* (n 1) 474.

[62] *Sim v Robinow* (1892) 19 R 665, 668.

applications for a stay and applications to set aside service out of the jurisdiction.[63] The main proviso was the burden of proof, which was on the defendant in an application for a stay and on the claimant in an application for leave to serve out of the jurisdiction. This is considered further below. It is debatable whether the two other provisos are regarded as that significant in the present day (if they were at the time),[64] namely that an application for leave to serve out of the jurisdiction invites the court to invoke a 'discretionary power' and permits the exercise of an 'exorbitant' jurisdiction.[65] More recently, it has been said that '[i]t should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like "exorbitant". The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.'[66] That said, there has been no departure from the principal practical effect of these two provisos, namely that the burden on the claimant in an application for leave to serve out is to prove that England is 'clearly' the more appropriate forum, this being the obverse of the burden on the defendant in an application for a stay to prove that there is another forum which 'is clearly or distinctly more appropriate than the English forum'.[67]

The remaining issues identified by the pilgrims are dealt with herein, as they were by Lord Goff in *Spiliada*, as part of his review of how the principle of *forum non conveniens*, now fully acknowledged, applied in cases of stay of proceedings. He formulated the now familiar two-stage test.[68] First, the burden is on the defendant to identify that there is another forum which is the 'natural forum', endorsing in this regard the expression of Lord Keith in *The Abidin Daver*, above, that this is the forum 'with which the action had the most real and substantial connection'. The 'connecting factors' to take account of at this stage are those of 'convenience' and 'expense', such as the availability of witnesses (to which may be added evidence more generally), but also include the governing law and the places where the parties respectively reside or carry on business. If there is no such alternative forum, no stay will be ordered, or it is at least difficult to imagine the circumstances in which a stay would be granted. Second, if the 'natural forum' lies elsewhere, a stay will ordinarily be granted 'unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted'. The burden of proof at this stage, shifts to the claimant.

[63] *Spiliada* (n 1) 480.

[64] Lord Goff himself counselled caution in the description of jurisdiction in such cases as 'exorbitant': 'an old-fashioned word which perhaps carries unfortunate overtones': ibid, 481.

[65] ibid, 480–81.

[66] *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043 [53] (Lord Sumption). For a vigorous debate as to the significance to be attached to this comment, see A Briggs, 'Service Out in a Shrinking World' [2013] *Lloyd's Maritime and Commercial Law Quarterly* 415 and the response of Lord Sumption in *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 [31]. See also L Merrett, 'Forum Conveniens', in W Day and S Worthington (eds), *Challenging Private Law: Lord Sumption on the Supreme Court* (Oxford, Hart Publishing, 2020).

[67] *Spiliada* (n 1) 477.

[68] The points made in the rest of this paragraph are all set out ibid, 477–78.

It is also at this stage that questions of personal or juridical advantage fall to be assessed, which brings us to the 'critical equation' identified above.

It is notable that Lord Goff first singled out one particular factor which might be relevant at the second stage, but chose to deal with the treatment of a 'legitimate personal or juridical advantage' as a quite separate issue later in his speech. The factor singled out is 'the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction'.[69] It seems clear that what Lord Goff is referring to here, as was Lord Diplock in *The Abidin Daver*[70] in a passage to which Lord Goff referred, is the fact that the claimant will not obtain 'even-handed justice' on grounds of corruption, bias or discrimination. The real difficulty with such a factor is setting the standard for 'cogent evidence', and meeting it,[71] but it cannot seriously be disputed that it is a factor which would tip the 'balance of justice' in favour of the claimant and prevent a stay. However, beyond that rather obvious example of an 'injustice factor', it becomes more difficult, as was acknowledged by Lord Goff in the treatment of personal and juridical advantages.

One thing made clear by Lord Goff was the need for a *balanced* approach: 'the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive'.[72] That might have sufficed at the second stage of Lord Diplock's two-stage test in *MacShannon*, but no more. Further, a test based on the balance of *justice* would, as a general rule, rule out reliance on certain types of 'advantage', even if objectively proven. The examples given by Lord Goff are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; and a more generous limitation period.[73] Beyond the obvious example of an unfair hearing referred to above, it is necessary for the claimant to prove that the circumstances are such that a stay would not only result in a loss of advantage, but prevent the court from doing 'substantial' or 'practical' justice. The point at which a loss of advantage elides into injustice was always going to be one of the more difficult aspects of the principles formulated by Lord Goff and he deals with an example which arose on the facts of *Spiliada*.

The claimant's claim was time barred in the alternative forum of British Columbia,[74] but not in England. The effect of this factor in deciding the case itself is dealt with below. So far as time bars in general are concerned, Lord Goff conceded that there was 'a strong theoretical argument' that, if there is another

[69] ibid, 478.
[70] *Abidin Daver* (n 11) 411.
[71] See n 103.
[72] *Spiliada* (n 1) 482.
[73] ibid.
[74] The fact that the courts of British Columbia may have had a discretionary power to waive the time bar was regarded by Lord Goff as irrelevant, as was the fact that a claim might still be brought in the Federal Court of another province on the basis that 'it cannot be 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': ibid, 487.

clearly more appropriate forum, a stay should generally be granted even though the claimant's action would be time barred there. However, since the ultimate aim was to do practical justice, a stay would be refused if the claimant had not acted unreasonably in failing to commence proceedings in the natural forum.

The facts in *Spiliada* occurred before the Foreign Limitation Periods Act 1984 came into force. The effect of the 1984 Act is to require the English courts to apply the limitation period of the *lex causae*,[75] whereas previously limitation was usually characterised as a question of procedure and governed by the *lex fori*. The 1984 Act will have reduced the circumstances in which a claim may be time barred in the natural forum but not in England, but has not eliminated them (eg, where limitation is characterised as procedural in the natural forum and governed by the *lex fori*, but the *lex causae* is a different law). To ask whether the claimant has behaved 'unreasonably' might be thought to set the bar a little too low if the overriding concern is to do practical justice. In this regard, it may be noted that, under the 1984 Act, the *lex causae* is not applied to the extent to which it would conflict with public policy and this will be the case if its application would cause 'undue hardship'.[76] Perhaps mindful that the bar was set a little low, Lord Goff did comment that, as the principles set out in *Spiliada* should become more clearly established and better known, it would be increasingly difficult for claimants to prove lack of negligence in this respect. A feature of the time bar factor is that, in some circumstances, it is one which can be neutralised by the defendant, eg, where it takes the form of a defence which the defendant has to assert, or can waive. As a consequence, it may not necessarily form the basis for refusing a stay, but rather a condition upon which the court will order the stay, eg, on the basis of an undertaking from the defendant that the time bar in the natural forum will be waived. A similar point can be made about the provision of security.

The time bar proved not to be decisive to the outcome in *Spiliada*. Lord Goff did not, as such, apply the principles he had formulated to the facts as a whole, in order to identify whether British Columbia was the 'natural forum' and, if it was, whether 'substantial' or 'practical' justice nonetheless pointed against setting aside service. Rather, he confined himself to the question of whether the Court of Appeal had been entitled to interfere with Staughton J's exercise of his discretion in refusing the application to set aside. He held that they had not and that it was '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'.[77] To the extent that his decision on the appeal turned on one factor above any

[75] See also Regulation (EC) No 593/3008 (Rome I) (as amended by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 reg 10), Art 12(d) and Regulation (EC) No 864/2007 (Rome II), (as amended by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 reg 11), Art 15(h).

[76] Foreign Limitation Periods Act 1984, s 2(1)–(2).

[77] *Spiliada* (n 1) 486.

other, it has proved to be almost unique to *Spiliada* and was referred to as the '*Cambridgeshire* factor'.[78] Staughton J heard the application to set aside while there was proceeding before him a very similar action involving the same defendants in relation to a ship called the *Cambridgeshire*.[79] In that action no fewer than 15 counsel had been engaged and the estimate for the length of the trial was six months. According to Staughton J:

> … if all other things were equal, I should be inclined to hold that even-handed justice *would* be served best if one action [the *Cambridgeshire* action] were tried here and the other [the *Spiliada* action] 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 [the defendants] 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 [the defendants] if they had to bring their witnesses and senior executives here a second time.

Not only did Lord Goff agree with Staughton J, he also embellished the point on the basis that, although the shipowners in the two cases were different, their solicitors were in both cases instructed by the same insurers, who were managed in England. He said that it was 'shutting one's eyes to reality to ignore the fact that it is the insurers who are financing the litigation and are dominus litis'.[80] To the extent that it turned on this factor, one might harbour doubts about the decision itself in *Spiliada*, notwithstanding Lord Goff's characterisation of it as a matter which went beyond 'financial advantage' to the shipowners[81] to a matter which should be taken into account 'in the objective interests of justice'.[82] Those doubts are not dispelled if one includes the effect of the time bar which Lord Goff dealt with only briefly because he did not consider it strictly necessary. The shipowners' solicitors were said to have 'stumbled across' the time bar when investigating the availability of suitable lawyers in Vancouver. Their failure to have commenced proceedings there, as a precaution, is excused by Lord Goff

[78] The Court of Appeal held that Staughton J had placed too much weight on this factor and the prospect of the charterers being joined to the proceedings against the shippers, and that he had erred in his findings as to the availability of expert witnesses. Lord Goff did not think that the judge had placed too much weight on the 'multiplicity of proceedings'. Any error in relation to the witnesses had been drawn to Staughton J's attention at the end of his judgment and was a factor which he was better placed to assess than the Court of Appeal.

[79] There had been an application to stay the proceedings in the *Cambridgeshire* action which Staughton J had refused and from which there was no appeal.

[80] *Spiliada* (n 1) 486; *cf Société du Gaz* (n 60) 20 (Lord Sumner).

[81] This was the characterisation of Oliver LJ in the Court of Appeal.

[82] *Spiliada* (n 1) 486. The question of when 'advantage' becomes a 'justice factor' is returned to below.

largely on the basis that, until the decision of the House of Lords in *The Amin Rasheed* case,[83] it was reasonable still to expect that an unexpired limitation period in England would be taken into account as a legitimate personal and juridical advantage. That looks generous against the backdrop of the evolution of the law which started with *The Atlantic Star* and in which, it may be recalled, the owners of the Dutch barge did issue a protective writ in the alternative forum. Perhaps Lord Goff himself shared some of these doubts when he pointed to one further factor which he said Staughton J could have taken into account. The putative governing law of the contract between the shipowners and the shippers was English law and this was 'by no means an insignificant factor' since there was not only a dispute as to the effect of the bill of lading contract, but also as to the nature of the obligations thereunder in respect of 'dangerous cargo'.

One final point to note is the short speech of Lord Templeman which was as equally prescient as that of Lord Wilberforce in *The Atlantic Star*. He offered this well-known, and salutary, warning:[84]

> I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff of Chieveley in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere.

IV. AFTER SPILIADA

While the speech of Lord Goff in *Spiliada* undoubtedly marked the end of the transition from a test of vexation and oppression to one of even-handed discretion aimed at balancing the interests of the parties and the ends of justice, it was perhaps inevitable that it would raise as many questions, or issues, as it resolved.[85] In this final part, three issues fall for brief consideration.

A. Theoretical Basis

In the first of the articles referred to by Lord Goff in *Spiliada*, Adrian Briggs noted that, in some of the 'evolutionary' cases, there was a 'failure to state clearly the theoretical basis upon which the rules for the granting of a stay now rest'.[86] Was that still the case after *Spiliada*? Is it still the case now? One possible

[83] *Amin Rasheed* (n 6).

[84] *Spiliada* (n 1) 465.

[85] For a hostile reception, see AG Slater, 'Forum Non Conveniens: A View From the Shop Floor' (1988) 104 *Law Quarterly Review* 554. For glowing endorsement, see A Briggs, 'Forum Non Conveniens – The Last Word?' [1987] *Lloyd's Maritime and Commercial Law Quarterly* 1.

[86] Briggs (n 8) 77.

candidate is judicial comity. The difficulty with any discussion of 'comity' is to decide exactly what is meant by the term. This is not the place for an extended definitional debate,[87] but it seems reasonably clear that when, in the evolutionary cases, and in *Spiliada*, the courts spoke in terms of 'comity', they meant what has been described as follows: '[a] greater tolerance and respect for other countries' legal systems and their claims … to be able to provide parties with substantial justice in their courts'.[88] That is most evident in the move away from an innate sense of the superiority of the English judicial process[89] and is taken to be what Lord Diplock was referring to in *The Abidin Daver*, when he spoke of the extent to which 'judicial chauvinism has been replaced by judicial comity'.[90] It may also be seen in the requirement that any loss of 'advantage' must be objectively proved.[91] But does it take us much further than that? It is noticeable that 'comity' is referred to only twice in Lord Goff's speech in *Spiliada*. First, in the form of a general acknowledgement that was 'of importance', when he observed that the English approach to the burden of proof was broadly in line with other common law jurisdictions;[92] and, second, only when he cited from the speech of Lord Diplock in the *Amin Rasheed* case.[93]

On one view, while *jurisdiction* can be explained by comity, in the sense at least in which it turns on the recognition of territorial sovereignty, a decision *not to exercise jurisdiction* on the grounds of *forum non conveniens* has been described as follows: 'it has the effect that a case which is, *ex hypothesi*, properly before the English court, should be transferred to some other judge, almost whether he likes it or not. The way in which that supports the principle of comity is … hard to grasp.'[94] It is perhaps not necessary to go that far (and it would, once again, open up debate about what one means by comity) in order to make the point that, while comity may explain some features of the law as stated in *Spiliada*, and the way it developed, it does not provide the theoretical basis for the principles of *forum non conveniens* laid down therein. That lies rather in the concept of doing 'substantial justice', in the sense that it is this which will prevail above and beyond any considerations of comity.[95]

[87] For a flavour of which, see A Briggs, 'The Principle of Comity in Private International Law' (2012) 354 *Recueil des Cours* 65.

[88] A Bell, 'The Natural Forum Revisited' in A Dickinson and E Peel (eds), *A Conflict of Laws Companion* (Oxford, OUP, 2021) 10. This is not offered as a definition of comity as such, but it fits the bill.

[89] In addition to the example provided by Donaldson LJ in *The Abidin Daver* (n 43), see also Lord Denning in *The Atlantic Star* (n 15) 382: 'You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.'

[90] Text to n 42.

[91] Text to n 40.

[92] *Spiliada* (n 1) 477.

[93] ibid, 478.

[94] Briggs (n 87) 121. See also the reference, at 119, to 'a form of dumping, possibly of toxic waste' (should that be 'forum dumping'?).

[95] This is not a new idea: A Briggs, 'Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments' (2004) 8 *Singapore Yearbook of International Law* 1, 1 ('judicial comity should not be allowed to become the enemy of justice'.)

This is one possible answer to recent criticism that the principles to emerge from *Spiliada* have, if anything, increased the circumstances in which the English courts are required to adjudicate in a way which is an affront to comity.[96] In a superb essay which revisits the law as it developed in England and Australia,[97] Andrew Bell argues that the 'hard cases' were always destined to be those at the 'second stage' of the *Spiliada* enquiry, ie, where the natural forum lies elsewhere, but 'there are circumstances by reason of which justice requires that a stay should nevertheless not be granted'.[98] How 'hard' such cases are, and the extent to which they might be regarded as an affront to comity, depends to some extent on what it is about proceedings in the natural forum which would be 'unjust', as opposed simply to reflecting the 'advantages' and 'disadvantages' of the two legal systems. This is addressed in the next part of this chapter. For now, one might start with a circumstance which, *if proven*, would undoubtedly be regarded as conducive to injustice. This is the 'one factor' singled out by Lord Goff in *Spiliada*, ie, where it is said that the claimant will not get a fair hearing in the natural forum. Leading examples since *Spiliada* are *Cherney v Deripaska*[99] and *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*.[100] In the former, Russia was the natural forum, but England was held to be the 'proper place' for permission to serve out of the jurisdiction on the basis that there was cogent evidence either that no trial would take place there, or any such trial would not be fair because of the risk for the claimant of assassination, or arrest on trumped up charges, or state interference in the judicial process. In the latter, Kyrgyzstan was the natural forum, but there was held to be 'substantial evidence of specific irregularities, breach of principles of natural justice, and irrational conclusions, sufficient to justify a conclusion that there was considerably more than a risk of injustice'.[101]

The requirement for 'cogent evidence' is derived from the speech of Lord Diplock in *The Abidin Daver* and is clearly intended to ensure that a finding as to the risk of injustice is not lightly reached. That is, of course, an accommodation of the principle of comity,[102] but as the decisions in *Cherney* and *Altimo* indicate, *if* it is met, the aim of doing substantial justice will prevail over any remaining concerns about comity. This is not the place to assess whether the threshold of cogent evidence has been set at the right level, or applied correctly in cases like *Cherney* and *Altimo*.[103] The more general question to be asked is

[96] In addition to the cases discussed in this part, see also the 'funding' cases of *Lubbe v Cape plc* [2000] UKHL 41, [2000] 1 WLR 1545 and *Connelly v RTZ Corporation* [1997] UKHL 30, [1998] AC 854 discussed below.

[97] Bell (n 88). For earlier thoughts, see A Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford, OUP, 2003).

[98] *Spiliada* (n 1) 478 (Lord Goff).

[99] *Cherney v Deripaska* [2009] EWCA Civ 849, [2009] 2 CLC 408.

[100] *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804.

[101] ibid, [143] (Lord Collins).

[102] ibid, [97] (Lord Collins: 'comity … is why cogent evidence is required').

[103] For expressions of doubt, see A Briggs, 'Decisions of the British Courts 2009' (2010) 80 *British Yearbook of International Law* 575, 577; *cf* A Briggs 'Forum Non Satis: *Spiliada* and an Inconvenient Truth' [2011] *Lloyd's Maritime and Commercial Law Quarterly* 330.

whether the occurrence of such 'hard' cases means that the post-*Spiliada* world is, or is not, an improvement on what went before. It is, surely, an improvement. A test of vexation and oppression based only on the subjective belief of the claimant as to the advantages of English proceedings no doubt had the beneficial side effect that all foreign courts were to a large extent treated alike,[104] but only at the expense of hearing cases that had little or no connection with England. In his essay, Andrew Bell makes the point about the English courts finding themselves faced with 'invidious inquiries as to the quality and integrity of foreign legal systems'[105] in support of the position adopted by the Australian courts, which is not to identify the 'natural forum', but to ask whether the Australian court is a 'clearly inappropriate forum'.[106] As he puts it:

> A refusal to grant a stay of proceedings because the local forum is not clearly inappropriate does not require the same focus to be fixed on the procedures and experience of foreign courts, still less the more problematic charge that the courts of particular countries are creatures of government or beset with endemic corruption or administered with gross incompetence.

He may be right, but two questions arise which will have to be pursued on another occasion. First, is it not better to confront a problem than to avoid it? Second, how effective is the avoidance in a case, say, where Australia is regarded as inappropriate,[107] but allegations of the type made in *Cherney* are presented to the court?

B. From Advantage to Injustice

Another example of 'hard cases' said to be the product of *Spiliada*[108] is provided by cases like *Connelly v RTZ Corporation*,[109] *Lubbe v Cape plc*,[110] and *Vedanta Resources Plc v Lungowe*.[111] They are 'hard' because they raise two key issues

[104] There are echoes here of the approach of the English courts to the recognition of a foreign judgment. The judgment debtor is always afforded the opportunity to deny recognition on the ground that the judgment was obtained by fraud and no fresh evidence is needed; nor does it matter whether a plea of fraud has already been heard in the foreign court. All foreign judgments are treated alike in this regard, though one suspects the 'quality' of adjudication in the foreign court is reflected in other ways, eg, when deciding if the defence of fraud amounts to an abuse of process. For general discussion, see A Briggs, *Civil Jurisdiction and Judgments,* 7th edn (London, Routledge, 2021) [38.30] and also ch 6.

[105] Bell (n 88) 29.

[106] See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (HCA); A Briggs, 'Forum Non Conveniens in Australia' (1989) 105 *Law Quarterly Review* 200; A Bell, 'Transnational Litigation and the Current State of Australian Law', in K Lindgren, *International Commercial Litigation and Dispute Resolution* (Sydney, Sydney University Press, 2010).

[107] It does happen. It happened in *Voth* (n 106).

[108] See Bell (n 88) 24.

[109] (n 96).

[110] (n 96).

[111] [2019] UKSC 20, [2020] AC 1045.

about the application of *Spiliada* in practice. The first, and the primary concern of this part, is how to determine when the loss of an advantage to the claimant from proceedings in England is of such importance that it would cause injustice to deprive him of it. We have seen that the requirement of 'injustice' is intended to avoid a comparative assessment of the 'merits' and 'demerits' of the competing legal systems in relation to the level of damages, the scope of discovery etc, but that still leaves the question of when the deprivation of what is otherwise a juridical advantage is unjust. The second issue is that, to the extent that the first issue is concerned with the interests of the parties, is there also room to take account of 'public interest'?

All three cases presented the same basic features[112] which may be summarised by reference to the *Lubbe* case in the first instance. Some 3,000 claimants commenced proceedings in England as of right against Cape plc, the parent company of certain subsidiary South African companies, for injury or disease caused by their exposure to the asbestos produced by mines operated in South Africa by the subsidiaries. Cape plc applied to stay the proceedings. South Africa was clearly the natural forum, but a stay was declined on the basis that a trial was only possible in England. This was the result of a combination of two factors: the complexity of the group litigation involved and the lack of means to fund it in South Africa, either via legal aid, or a conditional fee arrangement, both of which were available in England. At one level, the claimants were seeking to avoid a stay on the basis that they would lose a juridical advantage from suing in England, ie, the availability of legal aid, or conditional fee arrangements. As Lord Bingham acknowledged: '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'.[113] If the case had depended solely on the absence of established procedures in South Africa for handling group actions, it would have involved 'the kind of procedural comparison which the English court should be careful to eschew',[114] but in combination with the funding issue it became a question of 'substantial justice', ie, of whether the claimants would get their day in court.[115]

Put in such terms, it is hard to argue with the outcome in *Lubbe* but, as Andrew Bell has commented, the 'forum of necessity' recognised in cases like *Lubbe* and, for different reasons, in cases like *Cherney* is 'far removed from both

[112] All three involved claims by individuals for personal injury at the hands of a corporate defendant. For a suggestion that the nature of the formative cases before the English and Australian courts may have had some bearing on how the law developed (eg, *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 (HCA) (personal injury); *cf The Atlantic Star* (n 7), *The Abidin Daver* (n 11), *Spiliada* (n 1) (all commercial)), see A Briggs, 'The Death of *Harrods*: Forum Non Conveniens and the European Court' (2005) 121 *Law Quarterly Review* 535, 536.

[113] *Lubbe v Cape* (n 96) 1554.

[114] ibid, 1559.

[115] The human rights dimension was perhaps all too evident (ECHR, Art 6), but Lord Bingham did 'not think that article 6 supports any conclusion which is not already reached on application of *Spiliada* principles': *Lubbe v Cape* (n 96) 1559.

the natural forum championed in *The Atlantic Star* and *Spiliada* and the centrality of the concept of comity in those decisions'.[116] It has been suggested above that the answer to this is that substantial justice trumps comity, but that still brings one back to the difficulty that, in *Lubbe*, any injustice was the product of being able to commence proceedings against Cape plc because it was an English registered company, and the fact that the English legal system had advantages for the claimant which were not available in South Africa.

To this one might add the question of 'public interest'.[117] It did not arise at all in *Spiliada* and only indirectly in one of the evolutionary cases. It will be recalled that, in *MacShannon*, Lord Diplock stated that 'the sole consideration which should influence the judge in exercising his discretion in each individual case was to do justice as between [the] plaintiff and [the] defendant'.[118] That too was the approach of Lord Hope in *Lubbe* in response to any concern about the expense and inconvenience to the administration of justice of litigating the actions in England. As he put it: '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 of the parties or the ends of justice in the case which is before the court'.[119] It would seem therefore that when Lord Kinnear spoke about the forum which was most suitable 'for the interests of all the parties *and* for the ends of justice',[120] the 'and' is to be read conjunctively and not disjunctively, ie, justice *as between the parties*.[121]

In both respects, ie, in determining when a loss of advantage becomes a question of injustice and when there may be room to allow considerations of public interest which can be related to the private interests of the parties, the dissenting judgment of Lord Hoffmann in *Connelly* might be seen by some[122] as a missed opportunity. In that case, the claimant developed cancer as a result of working in a uranium mine in Namibia operated by the Namibian subsidiary of the defendant, an English registered company. He sued the defendant in England as of right. The defendant applied for a stay. This was ultimately refused by the House of Lords on essentially the same basis as in *Lubbe*. While Namibia was clearly the natural forum, the combination of the nature and complexity of the case and the claimant's lack of funding, other than via legal aid or a conditional fee arrangement in England, meant that this was not just a case where the natural forum was in some respects less advantageous to the claimant than England,

[116] Bell (n 88) 29.

[117] For an extended analysis of the case for taking account of 'public interest', particularly in light of the effect of modern technology on the trial process, see Davies (n 54).

[118] *MacShannon v Rockware Glass Ltd* (n 9) 813.

[119] *Lubbe v Cape* (n 110) 1566. See also Lord Bingham (at 1561): 'in applying [Lord Kinnear's principle] questions of judicial amour propre and political interest or responsibility have no part to play'.

[120] Text to n 62.

[121] And also that CPR 1.1(2)(e) is largely to be ignored when it states that the overriding objective of dealing with cases justly (CPR 1.1(1)) includes 'allotting to [the case] an appropriate share of the court's resources, while taking into account the need to allot resources to other cases'.

[122] But not all: A Briggs, *Civil Jurisdiction and Judgments*, 6th edn (London, Informa, 2015) 415, n 231.

but that substantial justice could not be done in Namibia. Lord Hoffmann noted that 'any multinational with its parent company in England will be liable to be sued here in respect of its activities anywhere in the world' and '… the more speculative and difficult the action, the more likely it is to be allowed to proceed in this country with the support of public funds'.[123] If the primary concern was the deployment of public funds, the subsequent withdrawal of legal aid for any personal injury actions has largely taken care of that. What also seems to have concerned Lord Hoffmann was the risk of the process of turning an advantage into a question of substantial justice becoming an exercise of pulling oneself up by one's own bootstraps, or rewarding the very forum shopping which the doctrine of *forum non conveniens* is supposed to control. This is evident from his endorsement of the following statement of principle by Sopinka J in *Amchem Products Inc v (British Columbia) Workers' Compensation Board*:[124]

> The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as 'forum shopping.' On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

The 'legitimate expectation' referred to by Sopinka J cannot be confined to the advantages available from the forum with the *most* real and substantial connection since that would collapse the *Spiliada* test into the first stage of identifying the natural forum. Lord Hoffmann's assessment that the claimant had no such expectation in *Connelly* has always looked a little harsh. Mr Connelly had returned to Scotland from Namibia in 1983 and did not discover that he had contracted the cancer which formed the basis of his claim until 1986. In *Lubbe*, Lord Hoffmann simply agreed with the speech of Lord Bingham even though it is hard to see how the claimants in that case could meet the test of 'legitimate expectation'. Presumably, he did not press the point because he had failed to take the rest of their Lordships with him in *Connelly* and the concept of 'legitimate expectation' is nowhere to be seen in the latest decision of the Supreme Court in this context, in *Vedanta*. The English courts may have declined to act as 'international policeman' when it comes to the scope of their power to award an anti-suit injunction,[125] but the submission that, in some contexts at least, *Spiliada* has turned them into a 'forum of necessity' is perhaps well founded. Should that be too surprising if the ultimate aim is to ensure 'substantial justice'?

[123] *Connelly v RTZ Corporation* (n 109) 876.

[124] *Amchem Products Inc v (British Columbia) Workers' Compensation Board* (1993) 102 DLR (4th) 96, 110–111.

[125] *Airbus Industrie GIE v Patel* [1998] UKHL 12, [1999] 1 AC 119; E Peel, 'Anti-suit injunctions – The House of Lords declines to act as International Policeman' (1998) 114 *Law Quarterly Review* 543.

C. Cost

It is self-evident that Lord Templeman's prescient warning in *Spiliada* has fallen on deaf ears. There are numerous instances of judges bemoaning the time and resources spent on contested applications for a stay, or to set aside service, but one of the most recent will suffice to give a flavour of the frustration felt in some quarters. In *Vedanta* Lord Briggs observed that 'unless condign costs consequences are made to fall upon litigants, and even their professional advisers, who ignore these requirements [ie, those set out by Lord Templeman], this court will find itself in the unenviable position of beating its head against a brick wall'.[126] One is bound to ask why the courts have not so acted. In his recent essay, Andrew Bell identifies seven reasons why, *if* one endorses the doctrine of *forum non conveniens* as articulated in *Spiliada*, the time and costs involved almost inevitably follow.[127] To them, one might also add that a jurisdictional battle is rarely just about jurisdiction, with the parties moving on, after the question of jurisdiction has been resolved, to the expenditure of yet more time and resource on the merits. Often the jurisdictional battle is *the* battle. When I studied for the BCL, Adrian Briggs made this point by inviting my tutorial colleagues and I to find the reports of the hearing of the merits in the cases on jurisdiction which we had studied. It is anecdotal, of course, and I am not sure how hard we looked, but it is nonetheless an effective methodology and one I still use on my own students today. It may be that one is left simply to ask whether the inevitable cost associated with *Spiliada* is a price worth paying.[128]

V. CONCLUSION

There is no doubt that Lord Goff chose his words carefully in the postscript to his speech in *Spiliada* when he referred to the road to 'unattainable perfection'. The principles he set out are not perfect,[129] but it was always likely that a search for the natural forum, tempered only by a concern to do substantial justice, was bound to have wide appeal and so it has proved, as other common law countries have broadly adopted them.[130] By that measure, as stated at the outset, there can be no doubt that it is a landmark case in the conflict of laws.

[126] *Vedanta* (n 111) [14].

[127] Bell (n 88) 15–17.

[128] There is perhaps a parallel to be drawn with the costs involved in the operation of claims for personal injury and death. For a robust defence that the price is worth paying, but that one should always be looking to reduce cost where possible (and the same point can be made in the present context), see A Burrows, *Understanding the Law of Obligations* (Oxford, Hart Publishing, 1998) ch 6; *cf* P Atiyah, *The Damages Lottery* (Oxford, Hart Publishing, 1997).

[129] See, eg, L Merrett, 'Uncertainties in the First Limb of the *Spiliada* Test' (2005) 54 *International & Comparative Law Quarterly* 211

[130] See, eg, *Club Mediterranee NZ v Wendell* [1989] 1 NZLR 216 (NZ); *Amchem Products Inc v (British Columbia) Workers' Compensation Board* (1993) 102 DLR (4th) 96 (Can); *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (Sing); *The Adhiguna Meranti* [1988] 1 Lloyd's Rep 384 (HK).