House of Lords : Lords Goff of Chieveley; Lloyd of Berwick; Hoffmann; Hope of Craighead; Lord Clyde 24th July, 1997

**LORD GOFF OF CHIEVELEY** : My Lords,

1. There are before your Lordships two appeals, both arising out of the same proceedings. The plaintiff in the action is Edward Connelly, who is domiciled in Scotland. In 1971, when he was 21 years old, he went to South Africa. For a period of about five and a half years, between 1977 and 1982, he was employed by Rossing Uranium Ltd. ("R.U.L."), which carried on the business of mining uranium at Rossing in Namibia. He returned to Scotland in about 1983. In 1986 it was discovered that he was suffering from cancer of the larynx. He subsequently underwent a laryngectomy, and has since breathed through a tube in his throat. He claims that his cancer was the result of inhaling silica uranium and its radioactive decay products at the mine.

2. R.U.L. is a subsidiary of the first defendant, the R.T.Z. Corporation Plc ("R.T.Z."), which is an English company with its registered office in London. In March 1988 Scottish solicitors acting for the plaintiff wrote to R.T.Z. raising the question of compensation. R.T.Z. replied that the claim should be addressed to R.U.L., and forwarded the letter to R.U.L. in Namibia. R.U.L.'s insurers denied liability. In February 1990 the Legal Assistance Centre of Windhoek in Namibia lodged a claim for compensation on behalf of the plaintiff under the Workmen's Compensation Act 1941 of South Africa and Namibia. However the Workmen's Compensation Commissioner rejected the claim.

3. On 15 December 1993 the plaintiff obtained a legal aid certificate to bring proceedings against R.T.Z. in England, and the writ and statement of claim in the present action were served on R.T.Z. on 19 September 1994. It was alleged that R.T.Z. had devised R.U.L.'s policy on health, safety and the environment, or alternatively had advised R.U.L. as to the contents of the policy. It was further alleged that an employee or employees of R.T.Z., referred to as R.T.Z. supervisors, implemented the policy and supervised health, safety and/or environmental protection at the mine. Following receipt of information from R.T.Z.'s solicitors that certain of these "R.T.Z. supervisors" had been transferred to another subsidiary of R.T.Z., R.T.Z. Overseas Services Ltd. ("R.T.Z. Overseas") which was also an English company registered in London, the plaintiff obtained leave to amend his writ and statement of claim to join R.T.Z. Overseas as second defendants. This was duly done.

***The course of the proceedings***

4. On 28 October 1994 R.T.Z. applied to the High Court in London for a stay of the proceedings on the ground that Namibia was the appropriate forum for the trial of the action. It was later conceded by the plaintiff that Namibia was prima facie the jurisdiction with which the claim had the most real and substantial connection. The application for a stay came before Sir John Wood, sitting as a High Court judge. He gave his judgment on 28 February 1995. He referred in particular to section 31(1) of the Legal Aid Act 1988, which provides that: *"Except as expressly provided by this Act or regulations under it . . . b) the rights conferred by this Act on a person receiving advice, assistance or representation under it shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised*."

5. He held that, in deciding whether to exercise his discretion to grant a stay, he was bound by that subsection to disregard the fact that the plaintiff was in receipt of legal aid in this country; and, having regard to the close connection of the claim with Namibia, he decided to stay the action, notwithstanding that there was no financial assistance, in the form of legal aid or otherwise, available to the plaintiff in Namibia to enable him to pursue his claim there. The plaintiff was refused leave to appeal. On 18 August 1995 the Court of Appeal (Neill, Waite and Swinton Thomas L.JJ.) gave the plaintiff leave to appeal, but dismissed his appeal. The principal judgment was delivered by Waite L.J. He concluded that Sir John Wood was right to treat the non-availability of legal aid in Namibia as irrelevant to his decision, the exclusion of consideration of legal aid being consistent with section 31(1)(*b*) of the Legal Aid Act 1988. Neill and Swinton Thomas L.JJ. considered that the subsection placed an insuperable obstacle in the way of the plaintiff.

6. On 2 October 1995 the plaintiff's solicitors informed the defendants that the plaintiff would not proceed with a petition for leave to appeal to this House; but that the solicitors had entered into a conditional fee agreement with the plaintiff, and that therefore a summons would be issued seeking the lifting of the stay. Conditional fee agreements between legal advisers and clients had been authorised by section 58 of the Courts and Legal Services Act 1990, and by the Conditional Fee Agreements Order 1995 (S.1. 1995 No. 1674) which came into force on 5 July 1995. The plaintiff's legal aid certificate was discharged; but his solicitors later made it plain that they could not rule out the possibility that at some point in the future the plaintiff might again apply for legal aid. The defendants expressed the opinion that it was only a matter of time before the plaintiff was back on legal aid again, in view of the size, scope and cost of the proposed trial. Indeed it became apparent that at that time the conditional fee agreement was limited to the application to discharge the stay and any appeal from it, and certainly did not extend so far as to include the trial of the action.

7. The plaintiff's application to lift the stay came before Mr. David Steel Q.C., sitting as a Deputy High Court Judge, on 27 October 1995. Before him, the plaintiff's solicitors stated that they would enter into further conditional fee agreements if that was *"the only way of ensuring that the plaintiff gets justice."* Mr. Steel accepted that this statement was made in good faith, but he concluded that it was, to put it at its lowest, astonishingly ambitious. He took a realistic view of the situation, and considered that it was almost inevitable that an application for legal aid would in due course be made. It followed that in reality the situation had not changed. He therefore dismissed the plaintiff's application, and refused leave to appeal.

8. The plaintiff applied ex parte to the Court of Appeal for leave to appeal from Mr. Steel's order. On 29 January 1996, the plaintiff having offered undertakings that he would not apply for legal aid and that his solicitors would continue the conditional fee agreement on appropriate terms until the conclusion of the trial or earlier order, the Court of Appeal (Millett and Ward L.JJ.) granted him leave.

9. On 2 May 1996 the Court of Appeal (Sir Thomas Bingham M.R., Evans and Ward L.JJ.) allowed the plaintiff's appeal. The leading judgment was delivered by the Master of the Rolls. He rejected the realistic approach adopted by Mr. Steel, especially as the limited conditional fee agreement was supported by the undertakings given by the plaintiff's solicitors on the application for leave to appeal. The plaintiff was able to proceed without recourse to legal aid, and so section 31(1)(*b*) of the Act of 1988 no longer stood in his way. Accordingly the Court considered the matter on the basis of the principles stated by your Lordships' House in ***Spiliada Maritime Corporation v. Cansulex Ltd.*** [1987] A.C. 460. On 2 May 1996 they decided to allow the appeal. The decisive consideration is to be found in the following passage from the judgment of Sir Thomas Bingham M.R. *"But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights".*

10. The defendants petitioned this House for leave to appeal from this decision, and the plaintiff then petitioned for leave to appeal out of time from the decision of the Court of Appeal of 18 August 1995. Your Lordships' House gave leave in both cases.

11. There followed a minor complication. The plaintiff lodged a notice of appeal, but did not post the required security. Accordingly on 3 March 1996 his appeal stood dismissed pursuant to Practice Direction 11.1. The plaintiff then petitioned for his appeal to be restored, and his petition was granted.

**Section 31(1)(*b*) of the Legal Aid Act 1988**

12. I propose to turn at once to consider the relevance of this subsection. It was regarded as decisive, both by Sir John Wood and by the Court of Appeal, in relation to what I will call the first appeal. There is no comparable statutory provision in respect of conditional fee agreements, and so no argument of this kind is available to R.T.Z. in respect of the second appeal. This of itself presents a remarkable contrast between the two appeals.

13. I have already set out the terms of the subsection. The suggestion is that the subsection has the effect that, in the case of an application for a stay of proceedings on the principle of forum non conveniens, the fact that the plaintiff is in receipt of legal aid in this country cannot be taken into account because the subsection provides that the receipt of legal aid *"shall not affect . . . the principles on which the discretion of any court or tribunal is normally exercised."* I feel bound to say that I find it surprising that the subsection should have this effect. I can fully understand that, in matters arising in the course of legal proceedings in this country, the fact that one party is in receipt of legal aid should not be allowed to distort the legal process, whether as regards the rights or liabilities of other parties, or as regards the principles on which judicial discretions are exercised. The limited purpose of legal aid is, after all, to enable a person, who would otherwise lack the means to do so, to litigate; and it is understandable that his receipt of legal aid should not be allowed to have any such effect. But when it comes to an application by the other party to stay proceedings brought in this country by a legally aided plaintiff on the ground of forum non conveniens, it is difficult to see why the *fact* that the plaintiff is legally aided, which would in the circumstances be a relevant fact to be taken into account on the application, should be excluded. In such circumstances it is the exclusion of that fact, rather than its inclusion, which would have the fact of distorting the legal process.

14. In approaching the question whether the subsection has the effect of excluding the receipt of legal aid from the relevant considerations in cases of forum non conveniens, it is of some interest to consider the analogous situation where a stay of proceedings is sought to enable the matter in dispute to go to arbitration pursuant to an arbitration agreement between the parties. Under section 4(1) of the Arbitration Act 1950 (formerly section 4 of the Arbitration Act 1889) the court had a discretion to grant a stay of proceedings brought in breach of an arbitration clause; and, provided the statutory conditions for the grant of a stay were satisfied, the court would grant a stay unless the person resisting the application could persuade the court that good reason existed why a stay should not be granted. (For the present law, see section 9 of the Arbitration Act 1996.)

15. For present purposes the relevant authorities on this subject begin with ***Smith v. Pearl Assurance Co. Ltd.*** [1939] 1 All E.R. 95, decided before legal aid was made available by the Legal Aid and Assistance Act 1949, in which the provisions of subsection 31(1)(*b*) of the Act of 1986 first appeared in identical terms in section 1(*7*)(*b*) of Act of 1949. In the case of *Smith* the plaintiff claimed that, by reason of his poverty, he could obtain assistance from the Poor Persons Committee in court proceedings, but that such assistance was not available to him in arbitration. The Court of Appeal nevertheless stayed his action to enable the matter to go to arbitration under an arbitration clause binding on him, holding that poverty did not of itself justify the court to refuse to give effect to the agreement to arbitrate. A similar conclusion was reached in ***Ford v. Clarksons Holidays Ltd.*** [1971] 1 W.L.R. 1412, in which no question of legal aid arose. The party resisting a stay in that case simply claimed that the cost of arbitration was much greater than the cost of a County Court action. The Court of Appeal, following the earlier decision in *Smith*, held that this was not a good reason for refusing a stay.

16. In ***In Re Saxton Decd*** [1962] 1 W.L.R. 968, the Court of Appeal duly gave effect to section 1(*7*)(*b*) of the Act of 1949, not in connection with an arbitration clause, but with an order made in the course of proceedings in court.

An application was made by the plaintiff to the trial judge for an order that the defendants should produce certain documents for examination by a handwriting expert instructed by the plaintiffs. The judge granted the application but, having regard to the fact that the plaintiffs were legally aided, imposed a condition that the plaintiffs should disclose to the defendants any report by the expert. The Court of Appeal deleted the condition, holding that section 1(7)(*b*) of the Act of 1949 required the court to disregard the fact that the defendants were legally aided. However, in ***Fakes v. Taylor Woodrow Construction Ltd.*** [1973] Q.B. 436 the application of section 1(7)(*b*) arose in an acute form with reference to an arbitration clause. The plaintiff acted as plumbing subcontractor to the defendants, and claimed a large sum, amounting to over £80,000, from them. The defendants invoked an arbitration clause in the subcontract. The plaintiff however contended that, by reason of the defendants' default, he himself had been made insolvent and his business ruined. Legal aid was available to him in the High Court, but not in arbitration proceedings; and he claimed that, as a result of the defendants' default, he lacked the means to fight the arbitration proceedings, or even to take up an arbitration award in his favour. The Court of Appeal decided by a majority to refuse a stay. Lord Denning M.R. considered that if, as the plaintiff claimed, his insolvency arose as the result of the defendants' breach of contract, it would be a denial of justice to require him to go to arbitration, which he could not afford, instead of proceeding in the High Court, where he could get legal aid. Sir Gordon Willmer agreed, holding that there was sufficient material to justify the conclusion that there was a reasonable probability that the defendants' breaches of contract induced the plaintiff's poverty. They both concluded that section 1(7)(*b*) of the Act of 1949 did not compel them to reach a different conclusion. Megaw L.J., who dissented, held that that subsection did indeed compel the court to grant a stay. The decision in *Fakes* was later followed in ***Goodman v. Winchester & Alton Railway Plc*** [1985] 1 W.L.R. 141, and considered in ***Trustee of the Property of Andrews v. Brock Builders (Kessingland) Ltd.*** [1997] 3 W.L.R. 124, though without reference to the point arising under the Legal Aid legislation. I need not dwell upon the reasons given by Lord Denning M.R. in *Fakes* for holding that section 1(7)(*b*) did not stand in the way of his conclusion, though I am compelled to say that, as Parker L.J. was subsequently to hold (see ***Edwin Jones v. Thyssen (Great Britain) Ltd.*** (1991) 57 B.L.R. 116, 123-125), that reasoning was not persuasive. Yet the justice of the decision of the majority of the Court of Appeal was very strong; and it is startling that section 1(7)(*b*) should have the effect of compelling the court to refuse to do justice in a case of this kind. This prompts the question whether the decision of the majority of the Court of Appeal in *Fakes* can be justified on the basis that the subsection has no application in the case of an application for a stay under the Arbitration Act, where the discretion falls to be exercised not in the course of the proceedings themselves (as in the case of ***In re Caxton Decd*** [1962] 1 W.L.R. 968), but in deciding whether or not the action should be permitted to proceed at all in Court.

17. For the present purposes it is not necessary for your Lordships to consider that question, which does not directly arise for decision in the present appeal. It is enough that I should record that I entertain serious doubts whether the subsection was intended to apply in that situation. I am, however, satisfied that the subsection was never intended to apply in the case of applications for a stay of proceedings on the ground of forum non conveniens. In such a case, the question at issue is whether *"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"*: see ***Sim v. Robinow*** (1892) 19 R. 665, 668, *per* Lord Kinnear, cited with approval in ***Spiliada Maritime Corporation v. Cansulex Ltd.*** [1987] A.C. 460, 474. It would, in my opinion, be strange indeed if the application of so broad a principle of justice should be artificially curtailed by section 31(1)(*b*) of the Legal Aid Act 1988, so that the receipt by the plaintiff of legal aid is automatically excluded from the range of relevant considerations. Certainly the policy underlying the subsection, as I have identified it, provides no explanation, still less justification, for so curtailing it. For the reasons I have given I am satisfied that on its true construction, the subsection does not have any such effect.

18. My noble and learned friend, Lord Hope of Craighead, has drawn my attention to the comparable provisions of the Scottish Legal Aid legislation. The original Scottish Act, the Legal Aid and Solicitors (Scotland) Act 1949, received the Royal Assent on the same day as the English Act, the Legal Aid and Assistance Act 1949. The long titles of the two Acts are virtually identical, as are many provisions of the two Acts. Section 1 of each of the two Acts contains only one material distinction, which is that there is no provision in the Scottish Act equivalent to section 1(7)(*b*) of the English Act. This difference has persisted, so that there is still no provision in the present Legal Aid (Scotland) Act 1986 equivalent to section 31(1)(*b*) of the English Act of 1988.

19. I do not know why this distinction exists between the English and Scottish legal aid legislation. Whatever the reason, it must transcend any consideration relating to a stay of proceedings under the Arbitration Act or on the ground of forum non conveniens. Nevertheless, the result is that in Scotland, the native home of the principle of forum non conveniens now adopted in English law, there is nothing in the legislation to prevent the availability of legal aid being taken into account when that principle is invoked. This being so, it would be most remarkable if in England alone that principle was to be curtailed by excluding any consideration of the availability of legal aid. I add for good measure that, if section 31(1)(*b*) has that effect, this would also lead to the extraordinary result that conditional fee arrangements can be taken into account in this context, but not the availability of legal aid. These consequences fortify me in the view that section 31(1)(*b*) of the Act of 1988 (and its predecessor section 1(7)(*b*) of the Act of 1949) were, on their true construction, never intended to have any such effect.

20. It follows that, in my opinion, for the purposes of considering the question in the present case, section 31(1)(*b*) can be disregarded as irrelevant. Accordingly the question arising on the two appeals can be considered simply on

the basis of the principles applicable in cases of forum non conveniens, in relation to the availability either of legal aid or of a conditional fee agreement. To those principles I now turn.

***Forum non conveniens***

21. There are, as I have said, two appeals before your Lordships, one concerned with the impact of a conditional fee agreement, and the other with the impact of the availability of legal aid. In the former the defendants are the appellants, and in the latter the plaintiff is the appellant. In point of time, it was the former (which I have called the second appeal) which came first before your Lordships' House, with the leave of this House, although the relevant decision of the Court of Appeal was later than the decision of the Court of Appeal (in what I have called the first appeal) concerned with legal aid. The appeal from the latter decision was only added later when your Lordships' House granted leave to appeal to enable the two related matters to be considered together. As a result, the defendants' written case was primarily directed towards the second appeal, concerned with the conditional fee arrangement.

22. The cases advanced by the two parties before your Lordships presented diametrically opposed points of view. Those representing the plaintiff are plainly concerned with what they see as a potential denial of justice to their client. Their simple position, which was accepted as decisive by Sir Thomas Bingham M.R. on the conditional fee appeal, is that it is impossible for their client's case to be presented without financial assistance, indeed very substantial financial assistance; and as such assistance is not available to him in Namibia, but is available to him in this country, justice requires that there should be no stay of his action here, as it is only here that his case can be tried at all. The commitment of the plaintiff's advisers to his case is shown, not only by his solicitors' willingness to enter into a very substantial conditional fee agreement, but also by his barristers' readiness to act pro bono in the proceedings. Moreover, your Lordships were told that at least some of the expert witnesses who were expected to give evidence on his behalf in the proceedings were also prepared to act on a conditional fee basis; though the propriety of any such arrangement was questioned by the defendants.

23. From the defendants' point of view the matter appeared very differently. They see the plaintiff's claim as being highly speculative. The first defendant, your Lordships were told, is a holding company which has never traded, and has never employed anybody. The second defendant had transferred to it the contracts of employment of certain senior employees of R.U.L. from 1 January 1980, to provide them with a measure of security in the prevailing political situation and to protect their pension entitlements; its only business was to second these employees to R.U.L., which exercised full direction and control over them. The defendants also claim that the medical evidence supporting the allegation that the defendants caused the plaintiff's cancer is very thin, as is the evidence for the plaintiff's assertion that the first defendant devised the health and safety policy at Rossing. In addition, the plaintiff's claim is out of time, with the result that an English court will only hear it if it is prepared to exercise its discretion to do so under section 33 of the Limitation Act 1980, and to decline to apply the relevant Namibian time bar (as required by section 1 of the Foreign Limitation Periods Act 1984). Furthermore, having regard to the ambitious scope of the action envisaged by the plaintiff's solicitors, involving a very wide range of expert evidence, the defendants' solicitors' estimate that the costs of the trial could run into millions of pounds, whereas the plaintiff has contended that, even if he is completely successful, he will recover less than £400,000 including interest. So far as the conditional fee agreement is concerned, the defendants not only assert that the plaintiff's solicitors' expressed willingness to enter into such an agreement for the whole action is, as Mr. David Steel Q.C. held, astonishingly ambitious, but also that it is relevant to consider what arrangement the plaintiff's solicitors have made to cover the defendants' costs in the event of the plaintiff losing the action, bearing in mind that the only insurance available for this purpose from the Law Society is to cover causes of action arising in this country and is in any event limited to £100,000.

24. The unstated implication underlying these matters must be that the defendants see the purpose of the action as being to put them in the position where it would pay them to settle what they see to be the plaintiff's very weak claim for a substantial sum, rather than contest the action, however strong a defence they may have, and if successful in their defence find themselves faced with irrecoverable costs far exceeding the maximum amount of the claim.

25. Faced with these diametrically opposed points of view your Lordships should, I suggest, approach the appeals as follows. First, the question of a stay of proceedings must be considered on the basis of the applicable principles. These principles are concerned with the identification of the appropriate forum for the trial. They are not concerned with the strength of the plaintiff's claim, as to which your Lordships are not at present in any position to form a judgment. If it is decided that a stay should not be granted, then there are mechanisms available within the English trial process, such as an order for a preliminary issue, which can be invoked with a view to shortening the trial and saving costs. Second, if I am right in my view that section 31(1)(*b*) of the Legal Aid Act 1988 has no application in these appeals, it will follow that, given a favourable decision by the Legal Aid authorities, the plaintiff would in all probability pursue his claim with the support of legal aid rather than on the basis of a conditional fee agreement.

26. With this by way of introduction, I turn to consider the applicable principles.

***The applicable principles***

27. It is accepted on both sides that these are to be found in the decision of your Lordships' House in ***Spiliada Maritime Corporation v. Consulex Ltd.*** [1987] A.C. 460. I take the liberty of repeating that the underlying principle, drawn from the judgment of Lord Kinnear in ***Sim v. Robinow*** (1892) 14 R. 665, 668, was stated at p. 476 to be 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."*

28. It was further stated that the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. For that purpose, he has to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum in which jurisdiction has been founded by the plaintiff as of right. In considering that question, the court will look first to see what factors there are which point in the direction of another forum, i.e. connecting factors which indicate that it is with the other forum that the action has its most real and substantial connection. This is the first stage. However, even if the court concludes at that stage that the other forum is clearly more appropriate for the trial of the action, the court may nevertheless decline to grant a stay if persuaded by the plaintiff, on whom the burden of proof then lies, that justice requires that a stay should not be granted. This is the second stage.

29. Before your Lordships it was accepted by the plaintiff that the defendants had discharged the burden on them at the first stage of establishing that Namibia was the jurisdiction with which the action had the closest connection, with the effect that prima facie a stay should be granted. The crucial question arose, therefore, whether a stay should nevertheless be refused because justice so required, on the grounds that the plaintiff could not proceed with the trial without financial assistance and that, whereas no such assistance was available in Namibia, it was available in England, in the form either of legal aid or, failing that, a conditional fee agreement. The question therefore arises whether these circumstances are capable of justifying a refusal of a stay in favour of the appropriate forum and, if so, whether the Court of Appeal was justified in holding that for that reason a stay should be refused on the facts of the present case.

30. In the ***Spiliada*** [1987] A.C. 460, 478 it was stated that, at the second stage of the inquiry, the court will consider all the circumstances. Certainly the court is not restricted at this stage to considering factors which may connect the litigation with the English jurisdiction. In support of this proposition, reliance can properly be placed on ***Oppenheimer v. Louis Rosenthal & Co.*** [1937] 1 All E.R. 23, a case concerned with service out of the jurisdiction in which the Court of Appeal refused to set aside the service of the writ in Germany in circumstances in which the plaintiff, a German national of the Jewish faith, might not have been entitled to the services of an advocate in the German court and would have run a grave personal risk if he travelled to Germany to conduct his case in person. A similar point was considered, but rejected on the facts, by the House of Lords in ***The Abidin Daver*** [1984] A.C. 398, a case concerned with lis alibi pendens. Furthermore, some guidance was given in the ***Spiliada*** at pp. 482 et seq. as to the impact of specific advantages which the plaintiff might derive from the English jurisdiction, if a stay was not granted, viz., damages on a higher scale; a more complete system of discovery; a power to award interest; a more generous limitation period. From the discussion which followed, a general principle may be derived, which is that, if a clearly more appropriate forum overseas has been identified, generally speaking the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum. He may, for example, have to accept lower damages, or do without the more generous English system of discovery. The same must apply to the system of court procedure, including the rules of evidence, applicable in the foreign forum. This may display many features which distinguish it from ours, and which English lawyers might think render it less advantageous to the plaintiff. Such a result may in particular be true of those jurisdictions, of which there are many in the world, which are smaller than our own, and are in consequence lacking in financial resources compared with our own. But that is not of itself enough to refuse a stay. Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum, will the court refuse to grant a stay: see the ***Spiliada*** at p. 482.

31. I wish to interpolate at this stage that there is no question of the plaintiff in this case having founded jurisdiction against the defendants on what may be described as an extravagant basis. In a case where the plaintiff has done so, for example by serving proceedings on an individual defendant while on a brief visit to this country, the court may not be prepared to assist him by refusing a stay to enable him to keep the benefit of an advantage available to him in this country. Certainly in Scotland there has been a marked tendency to grant a stay, despite the availability of an advantage to the plaintiff in that country, where jurisdiction has been founded on the extravagant basis of arrestment of the defendant's assets within the jurisdiction: see, for example, ***Lane v. Foulds*** (1903) 11 S.L.T. 118, and ***Anderson Tulloch & Co. v. J. C. & J. Field Ltd.*** 1910 1 S.L.T. 401. Here, however, the plaintiff founded jurisdiction as of right by serving the two defendants in this country, both of them being English companies registered here. No doubt their domicile in this country, coupled with the availability of financial assistance here, has encouraged him to select them as defendants in place of R.U.L. But I cannot see that that of itself exposes the plaintiff to criticism. If he was going to sue these defendants, this was an appropriate jurisdiction in which to serve proceedings on them. It is then for the defendants to persuade the court, as they are seeking to do, that the action should be stayed on the ordinary principles of forum non conveniens.

32. 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 of 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.

33. 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.

34. This is in effect what was urged upon your Lordships in the present case. It is clear that the nature and complexity of the case is such that it cannot be tried at all without the benefit of financial assistance. There are two reasons for this. The first is that, as Sir Thomas Bingham M.R. recognised, there is no practical possibility of the issues which arise in the case being tried without the plaintiff having the benefit of professional legal assistance; and the second is that his case cannot be developed before a court without evidence from expert scientific witnesses. It is not in dispute that in these circumstances the case cannot be tried in Namibia; whereas, on the evidence before the Court of Appeal and before your Lordships, it appears that if the case is fought in this country the plaintiff will either obtain assistance in the form of legal aid or, failing that, receive the benefit of a conditional fee agreement with his solicitor. With regard to the latter I am, like the Court of Appeal, not prepared to doubt the sincerity of the statement made by the plaintiff's solicitor, Mr. Meeran, on oath, that he is prepared to enter into a conditional fee agreement to cover the conduct of the action, up to and including the trial. In these circumstances I am satisfied that this is a case in which, having regard to the nature of the litigation, substantial justice cannot be done in the appropriate forum, but can be done in this jurisdiction where the resources are available.

35. If the position had been, for example, that the plaintiff was seeking to take advantage of financial assistance available here to obtain a Rolls Royce presentation of his case, as opposed to a more rudimentary presentation in the appropriate forum, it might well have been necessary to take a different view. But this is not the present case. There is every reason to believe that this case calls for highly professional representation, by both lawyers and scientific experts, for the achievement of substantial justice, and that such representation cannot be achieved in Namibia. In these circumstances, to revert to the underlying principle, the Namibian forum is not one in which the case can be tried more suitably for the interests of all the parties and for the ends of justice.

***Conclusion***

36. For these reasons, I would allow the plaintiff's appeal in the first (legal aid) appeal, and dismiss the defendants' appeal in the second (conditional fee agreement) appeal. The defendants should, in my opinion, pay the plaintiff's costs of the first appeal here and below, and his costs of the second appeal before your Lordships' House.

***Postscript***

37. I wish to record that the argument that section 31(1)(*b*) of the Legal Aid Act 1988 should be held to be inapplicable in the case of an application for a stay of proceedings on the ground of forum non conveniens was not explored in depth before the Appellate Committee. In ordinary circumstances, therefore, the Committee might invite further submissions on the point before concluding that it should affect the outcome of the appeal. I have, however, come to the conclusion that in the present appeal it is, exceptionally, unnecessary and inappropriate for that course to be taken. First, the argument has no impact on what I have called the second appeal, which is concerned not with legal aid but with a conditional fee agreement. Moreover, the present position is that the plaintiff has the benefit of such an agreement, but is not in receipt of legal aid. It follows that the defendants' application for a stay must in any event fail, regardless of this argument. Second, this interlocutory battle has continued for nearly three years, and it is highly undesirable that it should be prolonged by yet another hearing. For these reasons, and bearing in mind that it is in the public interest that the point should be addressed and decided, I would not invite further submissions on the point.

**LORD LLOYD OF BERWICK** : My Lords,

38. I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley. I agree with it and for the reasons which he gives I would also allow the plaintiff's appeal in the first appeal and dismiss the defendants' appeal in the second appeal.

**LORD HOFFMANN** : My Lords,

39. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Goff of Chieveley. I agree with his opinion on the construction of section 31(1)(*b*) of the Legal Aid Act 1988. I am however in the somewhat individious position of not being in agreement with my noble and learned friend's application of the principles stated in his own classic judgment in ***Spiliada Maritime Corporation v. Cansulex Ltd*** [1987] A.C. 460. In my view, the existence of neither Legal Aid nor a conditional fee agreement is sufficient to displace the prima facie conclusion that Namibia is the appropriate forum for the trial of this case. Since none of your Lordships share this view, I shall state it with brevity.

40. In principle I understand your Lordships to accept that the availability in England of one form or another of financial assistance to carry on litigation is not a reason for refusing a stay when another country is so much more closely connected with the subject-matter of the litigation as to make it clearly the more appropriate forum. But, it

is said, there are circumstances which make this an exceptional case. These consist of a combination of three factors.

41. First, the plaintiff's lack of means and the complexity of the litigation make it in practice impossible for him to present his case effectively before the courts of Namibia. This was regarded as the determining factor by the Master of the Rolls: *"Faced with the stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly, in favour of that forum in which the plaintiff could assert his rights."*

42. My Lords, of course I sympathise with the plaintiff, who has contracted a serious disease while employed in another country and considers that he can demonstrate that it was caused by the conditions under which he worked and these are attributable to the culpable neglect of the defendants. But I do not think that the refusal a stay on this ground can be based upon any defensible principle. It means that the action of a rich plaintiff will be stayed while the action of a poor plaintiff in respect of precisely the same transaction will not. It means that 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. Such distinctions will do the law no credit. For my part, I prefer the eminently rational principle stated by Sopinka J. in ***Amchem Products Inc v. Workers Compensation Board*** (1993) 102 D.L.R. (4th) 96, 110: *"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."*

43. In my view, the plaintiff while employed in Namibia had no legitimate expectation that litigation arising out of the circumstances of his employment would take place in England. He had abandoned his Scottish domicile of origin and emigrated to South Africa. He had then moved to Namibia. His position was therefore no different from that of a native Namibian. Apart from the fact that his employer formed part of a multinational group of companies with its headquarters in England, the transaction had no connection with England.

44. The second factor relied upon is that the defendants are English companies properly served within the jurisdiction. The English court therefore has personal jurisdiction over them. But, my Lords, that is always the starting point for the exercise of the jurisdiction on the ground of forum non conveniens. It is the reason why the burden is on the defendant to satisfy the court, by reference to the subject-matter of the litigation, that there clearly another more appropriate forum. If, however, the defendant has satisfied the burden, I do not see how the existence of personal jurisdiction can without more be a factor to cast into the balance. I say, *"without more,"* because there may be other reasons why the defendant not only can be sued here but why his presence in the jurisdiction makes it more appropriate to sue him here. But there is no such factor in this case. The defendant is a multinational company, present almost everywhere and certainly present and ready to be sued in Namibia. I would therefore regard the presence of the defendants in the jurisdiction as a neutral factor. If the presence of the defendants, as parent company and local subsidiary of a multinational, can enable them to be sued here, any multinational with its parent company in England will be liable to be sued here in respect of its activities anywhere in the world.

45. Third and last, there is the fact that the plaintiff has, since leaving his employment, taken up residence and resumed his domicile of origin in Scotland. In my view, this change which has taken place since the events forming the subject-matter of the litigation cannot affect the question of whether the plaintiff had a legitimate expectation of being able to invoke the English jurisdiction.

46. For these reasons, I would have allowed the conditional fee appeal and dismissed the legal aid appeal.

**LORD HOPE OF CRAIGHEAD** : My Lords,

47. I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Goff of Chieveley. I entirely agree with it, and for the same reasons I also would allow the plaintiff's appeal in the first appeal and dismiss the defendants' appeal in the second appeal.

**LORD CLYDE** : My Lords,

48. I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend, Lord Goff of Chieveley. I agree with it, and for the reasons which he gives, would also allow the plaintiff's appeal in the first appeal and dismiss the defendants' appeal in the second appeal.