Case No: CH/2013/0159

Neutral Citation Number: [2013] EWHC 1493 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM THE PATENTS COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/06/2013

Before :

MR JUSTICE WARREN

- -

Between :

MACDERMID OFFSHORE SOLUTIONS LLC	**Appellant**
- and -	
NICHE PRODUCTS LIMITED	**Respondent**

- -
- -

Michelle Menashy (instructed by **Addleshaw Goddard LLP**) for the **Appellant**
Michael Hicks (instructed by **Gateley LLP**) for the **Respondent**

Hearing date: 13 May 2013

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Judgment

Mr Justice Warren :

1. This is an appeal by MacDermid Offshore Solutions LLC ("**MacDermid**") from a decision of HH Judge Birss QC (now Birss J) sitting in the Patents County Court ("**the PCC**") dismissing MacDermid's application to stay these proceedings in favour of a parallel action proceeding in the United States District Court for the Southern District of Texas, Houston Division before United States District Judge Melinda Harmon. Before me Michelle Menashy instructed by Addleshaw Goddard appears for MacDermid and Michael Hicks, instructed by Gateley, appears for the claimant ("**Niche**").

2. The Judge delivered his decision in a judgment handed down on 7 March 2013 ("**the Judgment**"). The facts are set out in [3] to [15] of the Judgment. They are not in dispute. Those paragraphs also identify the main issues between the parties. I set those paragraphs out verbatim.

> "3. MacDermid and Niche are rivals in the oil business. Niche is based in Lancashire, has about 17 employees and a turnover of £5 million. MacDermid is incorporated in the USA with a turnover of between £24 million to £30 million. Both companies sell hydraulic fluids for use in subsea production control systems. These fluids are used to control the functions of oil and gas wells via remote hydraulic systems at a considerable distance, perhaps as many as tens or even hundreds of kilometres. Once installed the systems have to remain functional for a long time, perhaps in excess of 25 years. These are obviously demanding requirements.
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> 4. Niche has a product called Pelagic 100 and MacDermid has a product called Oceanic HW 443. They are directly competitive products. As I understand it the main ingredients of these fluids are water and ethylene glycol but they also contain other ingredients such as lubricant and corrosion inhibitor additives.
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> 5. The issue at the heart of this dispute is a new formulation of MacDermid's Oceanic HW 443 fluid. Niche says that Oceanic HW 443 has been supplied for more than 20 years but in 2009/2010 MacDermid changed the formulation of its Oceanic HW 443 product in order to comply with European Regulation No 1907/2007 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals. This regulation is known as "REACh". I will refer to the new formulation as Oceanic HW 443 v2".
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> 6. Niche says that MacDermid was telling customers that it was appropriate to consider that Oceanic HW 443 v2 had the same characteristics as Oceanic HW 443 v1 because none of the chemical or performance properties of the product had been changed. Niche conducted comparative tests of Oceanic HW 443 v1 and v2 in April/May 2012 and produced a report setting out the results.

7. The Niche report contends that Oceanic HW 443 v2 is a different product from Oceanic HW 443 v1. It contends that the two products contain different lubricant and corrosion inhibitor additives, have different physical properties and perform differently in various tests. The Niche report contends that Niche considers the major cause of the changes observed was that the corrosion inhibitor has been changed. In Oceanic HW 443 v1 the corrosion inhibitor which Niche believes is present is a tertiary sulphonamide whereas in Oceanic HW 443 v2 Niche believes the corrosion inhibitor is a secondary sulphonamide. Whereas the relevant nitrogen in a tertiary sulphonamide has two alkyl groups and a sulphonyl group connected to it, the relevant nitrogen in a secondary sulphonamide has only one alkyl group in addition to the sulphonyl group bonded to it, and so has a hydrogen atom at its third bond, which, Niche contends, is a chemically active acidic hydrogen, with the potential to undergo further reaction. The original tertiary sulphonamide did not have the same potential. Niche argues that MacDermid has contended that the two corrosion inhibitors have the same chemical formula. Niche accepts that they have the same chemical composition but argues that they have different structures and therefore different chemical properties. The structures are given in the Niche report. The methyl group on the tertiary sulphonamide in the inhibitor believed to be in Oceanic HW 443 v1 is not present on the secondary sulphonamide believed to be in Oceanic HW 443 v2 but an extra methyl group is present elsewhere in the molecule. This would explain why the chemical compositions of the two inhibitors are the same but their chemical structures are distinct.

8. Of course even if Niche is right and there are differences in the additives in Oceanic HW 443 v2 as opposed to v1, it by no means follows that there is any material difference in the properties of these fluids. Niche contends the differences exist and they are material. MacDermid has not yet addressed whether it accepts the underlying differences exist at all but in any case, crucially, it does not accept that Oceanic HW 443 v2 has materially different properties from Oceanic HW 443 v1.

9. Since MacDermid did not agree with the Niche report, MacDermid issued a rebuttal letter on 18th June 2012. The rebuttal states that MacDermid has "*received notification regarding the distribution of misleading information from a specific competitor on Oceanic HW 443 Series v1 verses v2*". It states that the chemical specifications and performance of Oceanic HW 443 remain unchanged and that "*there has been no change in either the important chemical or the performance properties of Oceanic HW 443, the v2 merely relates to the UK environmental registrations. Further, MacDermid has been*

producing Oceanic HW 443 under the v2 designation for over two years in the UK and the fluid has been through the rigorous testing at leading subsea OEM's yielding the same performance results as v1, as would be expected".

10. Both the Niche report and the MacDermid rebuttal have been sent to customers.

11. The disagreement is clear and English solicitors acting for Niche and MacDermid exchanged correspondence between about June and August 2012.

12. One of the sub-issues arising is whether the correspondence has a bearing on the fact that MacDermid sued Niche in Texas (on 20th August 2012) four weeks before Niche sued MacDermid in the Patents County Court (PCC) in London. Niche says that when it looked like Niche was going to sue (in England) MacDermid said in correspondence that "time was not of the essence" so that Niche relaxed. Then, in the meantime, MacDermid suddenly started proceedings in Texas. So, says Niche, MacDermid tactically induced Niche to delay filing proceedings in England and its tactics are the only reason the action in Texas started a few weeks before the action here. MacDermid does not accept this characterisation of the correspondence. It says that the last message from Niche terminated the correspondence, using the phrase "see you in court" and so there was no tactically induced delay. This sub-issue is discussed at some length between the parties' US attorneys since it appears to have a bearing as far as US Federal law is concerned in dealing with jurisdiction between US states. In the USA MacDermid contends it could rely on a "first to file" rule as founding jurisdiction whereas Niche contends it could rely on an exception to the "first to file" rule when the first case was filed in anticipation of the second case.

13. In any event each has started proceedings against the other which are broadly equivalent, making allowances for the different laws of the USA and the UK. In the UK, Niche sued MacDermid for malicious falsehood, arguing that the MacDermid rebuttal letter is a malicious falsehood. Although MacDermid is a foreign company, no leave to serve the proceedings outside the jurisdiction was needed because MacDermid's trading name is registered as the name of a UK Establishment pursuant to the Overseas Companies Regulations 2009 with an address in Wigan and as conducting the business of the sales and marketing of offshore drilling chemicals. In Texas, MacDermid sued Niche under the Lanham Act (false and misleading advertising). MacDermid argues that the Niche report is false and misleading. In the Texas proceedings MacDermid sued both Niche itself and a US company called Niche LLC of which Niche is a part owner. I will return to

> Niche LLC below. Although there was a disagreement in Texas about whether Niche was duly served, that point is no longer live. The Texas proceedings are properly on foot.
>
> 14. At the heart of this dispute is a simple question - whether Oceanic HW 443 v2 is materially different from Oceanic HW 443 v1. If "yes" then Niche are right, if "no" then MacDermid are right. Both torts (malicious falsehood and, so far as I can see from the pleadings, infringement of the Lanham Act) have more to them than this question, such as the issue of malice in the UK, but in truth the centre of gravity of this dispute depends on that relatively simple factual question. To resolve the issue will require expert evidence, will involve a bit of chemistry and no doubt evidence about the performance of hydraulic fluids and their additives, but it is not an unduly complex technical issue. It is the kind of technical question decided in patent cases on a regular basis.
>
> 15. The UK proceedings also include two further claims by Niche, for copyright infringement and breach of confidence. These allegations relate to certain videos of the tests undertaken by Niche to produce the report. The videos were only available on a private part of Niche's website, accessible only to persons who had been given a username and password by Niche. Niche says that MacDermid (from an IP address in Wigan) downloaded the videos and therefore infringed copyright in them and misused Niche's confidential information. These claims are clearly secondary to the main dispute. It may be that the real motivation for their inclusion is for them to play a part in the parties' jockeying for positions in relation to jurisdiction as between the English court and the Texas court. In my judgment they have peripheral relevance to the questions I have to decide because the real dispute is the one I have described already. I also bear in mind that MacDermid has expressly agreed that Niche could bring those claims as counterclaims in Texas if it wishes to do so."

3. Ms Menashy who appeared for MacDermid before the Judge (and before me) put the case for a stay on two grounds. The first was on the basis of *forum non conveniens*; if she had succeeded on that, the proceedings would have been stayed permanently. The second was on the basis of case management; if she had succeeded on that, the proceedings would have been stayed pending the outcome of the Texas proceedings. The Judge rejected both grounds. In doing so, he addressed the law in relation to *forum non conveniens* after which he arrived at a decision on the facts. He then addressed the exercise of his case management powers.

4. In relation to the law, he referred to a number of cases: the three well-known decisions in *The Abidin Daver* [1984] 1 AC 398; *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("***Spiliada***"); and *De Dampierre v De Dampierre* ("***De Dampierre***")[1988] AC 92; and the perhaps less well known decisions in *Breams Trustees Ltd v Upstream Downstream Simulation Services Inc* [2004] EWHC 211

(Ch) ("***Breams Trustees***"); *MV Olympic Galaxy* [2006] EWCA Civ 528; and *Innovia v Frito Lay* [2012] EWHC 790 (Pat). I have been referred to all save the last of those. I have also been referred to the decisions in *Meadows Indemnity Co Ltd v Insurance Corporation of Ireland plc* [1989] 1 Lloyd's Rep 181 (Hirst J) and [1989] 2 Lloyd's Rep 298 (Court of Appeal) ("***Meadows***"). In the present case, the Judge decided (see [22] of the Judgment) that the effect of the cases was that he should decline to exercise the court's jurisdiction only if Texas was clearly a more appropriate forum for the trial of the action than England. He rejected Ms Menashy's legal submission, which he saw as coming down to an argument that, just because MacDermid succeeded in issuing its Texas claim four weeks before Niche started proceedings in England, (a) the English court was no longer concerned to identify which court is the more appropriate forum and (b) somehow an onus had shifted onto Niche to justify a refusal of a stay.

Ground 1 of the Appeal

5. MacDermid's first Ground of Appeal is that the Judge erred in adopting this legal approach and erred in not following the law as stated, on MacDermid's reading, in *MV Olympic Galaxy*. Ms Menashy submits that, when proceedings concerning the same subject matter have been initiated in another jurisdiction, the English court should exercise its discretion to stay proceedings as follows:

    i) First, the court should determine whether the foreign proceedings should be taken into account as relevant. In some cases, they would not be relevant, as where they have been initiated only in order to demonstrate the existence of a competing jurisdiction, or where they have not passed the early stage of initiation of proceedings.

    ii) Secondly, if consideration of the foreign proceedings is not ruled out, the court should determine whether the foreign court is, to use the phrase used by Lord Diplock in *The Abidin Daver* at p 411, "a natural and appropriate forum for the resolution of the dispute".

    iii) Thirdly, if the foreign court is such a forum, the question is whether the claimant in the English proceedings "can establish objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the English action that is of such importance that it would cause injustice to deprive him of it": see again Lord Diplock at p 412.

6. Mr Hicks, who appears for Niche, submits that this approach is wrong and that the Judge was correct in what he said in [22] of the Judgment.

7. Given this difference of position, it is necessary for me to review, as others before me have done, the cases which I have referred to, with a particular focus on the issue which divides the parties.

8. ***The Abidin Daver***. The facts appear sufficiently from the headnote. In March 1982 a collision occurred in the Bosphorus, an international waterway, between two ships owned by the Cuban plaintiffs and the Turkish defendants respectively. The Cuban vessel was arrested in Turkish territorial waters at the suit of the defendants, who in April 1982 began proceedings in a Turkish court claiming damages against the plaintiffs. In June 1982 the plaintiffs brought an action *in rem* in the Admiralty Court against the defendants for damage caused by the collision, the writ being served

within the High Court jurisdiction on the defendants' sister ship, which was released after security had been given. Sheen J ordered a stay, holding that the Turkish court was a forum in which justice could be done between the parties at substantially less inconvenience and expense than in England and that a stay would not deprive the plaintiffs of a legitimate personal or juridical advantage. The Court of Appeal allowed an appeal by the plaintiffs. The House of Lords restored the order of Sheen J.

9. The first point to note (since Mr Hicks places reliance on it) is that the facts were strongly in favour of the litigation being conducted in Turkey. As Lord Diplock summarised it at p 410A-B;

> "In my view as in that of Sheen J., not only was Turkey the country with which the matter litigated had the closest connections but also the natural and appropriate forum from the point of view of convenience and expense has, from the outset, been and still remains: the District Court of Sariyer in Turkey, where proceedings were promptly started by the Turkish shipowners against the Cuban shipowners as defendants and were proceeding with all due despatch when the writ in the English action was issued by the Cuban shipowners."

10. Lord Edmund-Davies took a similar view: see his brief speech starting at p414H. So, not only was Turkey, on the facts, a suitable forum but it was also the natural and appropriate forum.

11. Lord Diplock recognised that the law had changed over the previous 10 years. At p 411E-G, we find this:

> "So I turn to the crucial question of what influence upon the exercise of his discretion whether to grant a stay of the English proceedings or not the judge should have attributed to the fact that at the time the stay was applied for there was already proceeding in a natural and appropriate forum, the District Court of Sariyer, litigation between the same parties about the same subject matter in which the roles of plaintiff and defendant were reversed.
>
> My Lords, the essential change in the attitude of the English courts to pending or prospective litigation in foreign jurisdictions that has been achieved step-by-step during the last 10 years as a result of the successive decisions of this House in *The Atlantic Star* [1974] A.C. 436; *MacShannon* [1978] A.C. 795 and *Amin Rasheed* [1984] A.C. 50, is that judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge frankly is, in the field of law with which this appeal is concerned, indistinguishable from the Scottish legal doctrine of forum non conveniens."

12. The Scottish doctrine can be found in the speech of Lord Goff in *Spiliada,* citing Lord Kinnear in *Sim v. Robinow* (1892) 19 R. 665:

> "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."

13. Lord Goff cautioned against being misled by the use of the word "convenience" as the meaning of "conveniens". The issue is not one of "mere practical convenience". The overarching principle is one of the suitability of competing jurisdictions in the interests of all the parties and the ends of justice. Pursuit of litigation in the more suitable forum is more likely to secure those ends.

14. Even at the time of *The Atlantic Star* and *MacShannon*, the English courts were still refusing to accept *forum non conveniens* as part of English law although Lord Diplock was able in *MacShannon* to state the governing principle in this way (see [1978] AC at 812):

> "in order to justify a stay, two conditions had to be satisfied, one positive and the other negative: (a) the defendant had to satisfy the court that there was another forum to whose jurisdiction he was amenable in which justice could be done between the parties at substantially less inconvenience or expense, and (b) the stay was not to 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."

adding that

> "If the distinction between this re-statement of the English law and the Scottish doctrine of forum non conveniens might on examination prove to be a fine one, I cannot think that it is any the worse for that."

15. By 1984, Lord Diplock was able to state that the assimilation was complete.

16. Lord Brandon gave a speech (in *The Abidin Daver*) with which Lord Diplock expressly agreed (- Lord Brandon thus perceiving no tension between what he said and what Lord Diplock said). At p 419E-F he cited with approval the test which had been stated by Lord Diplock in *MacShannon* which I have already set out. Although Lord Diplock saw the assimilation to which I have just referred as complete, the approach adopted in *The Abidin Daver* nonetheless remained that stated in *MacShannon*.

17. Lord Brandon then said this:

> "Thirdly, and this concept emerges most clearly from the speech of Lord Wilberforce in *The Atlantic Star* [1974] A.C. 436, the exercise of the court's discretion in any particular case necessarily involves the balancing of all the relevant factors on either side, those favouring the grant of a stay on the one hand, and those militating against it on the other. Such balancing may

> be a difficult process and some cases may be very near the line."

18. I come now to what Lord Diplock said about cases of *lis alibi pendens*, that is to say cases raising forum issues where proceedings have already been commenced in a foreign jurisdiction. He noted (at p 408 of *The Abidin Daver*), that *MacShannon* was not a case of *lis alibi pendens* so that he had not, in that case, been concerned to deal with how account should be taken of the existence of a parallel suit in exercising the discretion to stay English proceedings. Between the judgments of *The Atlantic Star* and *MacShannon*, Lord Brandon (then Brandon J) had given his decision in *The Tillie Lykes* [1977] 1 Lloyd's Rep 124. In that case, Brandon J had stated that "the mere existence of a multiplicity of proceedings, is not to be taken into account at all as a disadvantage to the defendant" although he admitted the possibility of exceptional cases. In *The Abidin Daver* at first instance, Sheen J took the view that the minimal importance which he perceived as having been attached by Brandon J to the avoidance of concurrent actions was no longer consonant with the general approach to the staying of proceedings. The Court of Appeal in turn considered that Sheen J had been in error in this interpretation of *MacShannon*. Thus Lord Diplock sought to give guidance as to the extent to which the existence of *lis alibi pendens* ought to influence the exercise of the discretion to grant a stay: see p 409E.

19. Lord Diplock came to that at p 411G to 412B where he said this:

> "Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it."

20. This passage follows on immediately from Lord Diplock's statement that English law had become indistinguishable from the Scottish legal doctrine of *forum non conveniens*. The passage was, it seems to me, in effect an application of his formulation of the test stated in *MacShannon* to a case of *lis alibi pendens*; it was not a statement of some free-standing principle or of some overarching qualification of *MacShannon.* But Ms Menashy relies heavily on that statement as well as the following two paragraphs where Lord Diplock identified the dangers of inconsistent decisions from two courts and the danger of the pressures of parallel litigation forcing a party to settle on disadvantageous terms. She submits that, notwithstanding the development of the law in *Spiliada* and *De Dampierre*, this principle continues to apply subject only to very limited exceptions.

21. However, even before we get to consideration of the impact of the later cases on this statement, two points need to be made. The first concerns the identification of a foreign court as "a natural and appropriate forum". Obviously, the fact that proceedings have already been commenced in a foreign court is not a factor in determining whether the foreign court is in fact "a natural and appropriate forum". That would be to put the cart before the horse, as it were. The issue is whether the foreign proceedings (already on foot) were issued in a court which, at the time of issue, was "a natural and appropriate forum".

22. The second point is that it is important to put this passage in the context of Lord Diplock's entire speech. He was concerned principally with the difference between Sheen J and the Court of Appeal. Sheen J considered that the ratio in *MacShannon* (a decision which did not, to repeat, actually concern *lis alibi pendens*) precluded the attribution of "very little weight" to the fact of there being *lis alibi pendens* and the concomitant exposure to extra cost and inconvenience.

23. In contrast, Lord Donaldson in the Court of Appeal expressed the view that, ignoring the fact that the Turkish action was already on foot, the factors in favour of Turkey and England were fairly balanced. Lord Diplock (see at p 413 D-E) took this as meaning that Lord Donaldson considered that the Turkish shipowners had failed to satisfy the court that there was another forum "in which justice could be done... at substantially less inconvenience or expense", and so that, in Lord Donaldson's opinion, the Turkish shipowners did not satisfy the first and positive condition in the *MacShannon* rule. But this balancing of weight to be attached to different factors was, Lord Donaldson continued, of the very essence of discretion so that the Court of Appeal was not entitled to interfere with it save in accordance with well-established principles.

24. The Court of Appeal justified their interference by detecting an error of law on the part of Sheen J by giving more than minimal weight to the fact that the Turkish action was on foot. At p 413 H, Lord Diplock doubted that it was a matter of law but, if it was, Sheen J had got it right. Lord Diplock preferred to see the matter as one of discretion, that is to say the weight to be attached to *lis alibi pendens*. This is a point noted by Sheen J in *The Coral Isis* [1986] 1 Lloyd's Rep 413 at 415 col 2.

25. Further, as noted already, Lord Diplock expressly agreed with Lord Brandon. Lord Brandon himself addressed the entire appeal on the basis of the correct general approach, adopting the *MacShannon* test. A balancing exercise was involved: see the passage cited at paragraph 17 above. It was the *MacShannon* test which Sheen J had applied. In doing so, he asked himself the question (perhaps perceptively anticipating *Spiliada*) whether there was "another jurisdiction which is clearly more appropriate than England", a question which he answered in the affirmative. Lord Brandon considered that Sheen J had addressed himself to the correct principles.

26. The full judgment of Sheen J is not available (there is only a truncated version in the Lloyd's Report just before the report of the Court of Appeal judgments) but it is apparent from what Lord Brandon said at p 422D-E that the co-existence of the Turkish proceedings was regarded by Sheen J as a decisive factor.

27. At p 423, Lord Brandon considered the reliance placed by the Court of Appeal on his use of the word "mere" in relation to balance of convenience and disadvantage of multiplicity of suits. He then went on to say this:

> "In my judgment the criticism made by the Court of Appeal, that Sheen J. erred in principle in treating the co-existence of the Turkish action as a decisive factor on the facts of the present case, is not justified. It was not a case of mere balance of convenience; it was an overwhelming case. It was not a case of mere disadvantage of multiplicity of suits, it was a case which was liable to cause, if both actions continued, much difficulty and trouble. On the footing that the Court of Appeal were wrong in holding that the judge erred in principle in the way that they thought there was, in my opinion, no valid ground for their interfering with the exercise of the discretion vested in him as the judge of first instance."

28. I have set out that passage because it demonstrates that, even in cases of *lis alibi pendens*, Lord Brandon considered that the parallel proceedings in the foreign jurisdiction, and the difficulties which might ensue, was only a factor to be taken into account. On the facts of the case, the co-existence of the Turkish action was a decisive factor to be contrasted with a case giving rise to a "mere disadvantage of multiplicity of suits". This approach is entirely consistent with the overarching idea underlying the doctrine of *forum non conveniens*: Is there another tribunal (*i.e.* other than a court in England) in which the case may be tried more suitably for the interests of all the parties and for the ends of justice? Is there a more <u>appropriate</u> forum?

29. Before leaving *The Abidin Daver*, I should mention the speech of Lord Templeman. He agreed with both Lord Diplock and Lord Brandon. He added this:

> "There was ample material from which Sheen J. came to the conclusion that the Sariyer District Court of Turkey is a forum in which justice can be done between the parties at substantially less inconvenience and expense and that a stay of the English proceedings will not deprive the Cuban owners of a legitimate personal or jurisdictional advantage which will be available to the Cuban owners if they invoke the jurisdiction of the English court. In other cases, where these conditions are not satisfied, English proceedings will not be stayed merely because of the dangers and difficulties of concurrent actions. There is ample scope for a litigant to choose the exercise of English jurisdiction …… notwithstanding that proceedings have already been instituted under a foreign jurisdiction provided that the events which happen prior to the hearing of an application for a stay of the English proceedings do not demonstrate that the foreign forum is to be preferred on grounds of convenience and expense. An ugly rush to get one action decided ahead of the other is not to be replaced by an ugly rush to issue proceedings in one country before the issue of proceedings in another……."

30. Lord Templeman there appears to be applying the *MacShannon* test (as then formulated) even in the circumstances of a case of *lis alibi pendens*. His reference to the ugly rush shows that nothing would be achieved by a (successful) rush by the foreign claimant who gets his claim in first. It was still necessary for that claimant to satisfy the first, positive, limb of the test. He clearly did not see what he was saying as in any way inconsistent with what Lord Diplock had said about the position in relation to concurrent proceedings at p411H to p412B.

31. ***Spiliada****:* This case concerned service out of the jurisdiction. It was not a case of *lis alibi pendens*. A pithy statement of principle can be found in the speech of Lord Templeman at p 464G-H. In particular, "Where the plaintiff is entitled to commence his action in this country, the court, applying the doctrine of *forum non conveniens* will only stay the action if the defendant satisfied the court that some other forum is more appropriate". The detailed analysis comes in the speech of Lord Goff.

32. In the light of the prominence, almost legislative effect, which Ms Menashy ascribes to the speech of Lord Diplock in *The Abidin Daver*, it is instructive to note this from Lord Goff at p 475 where, after quoting the test as Lord Diplock set it out in *MacShannon* at p 812, he said:

> "This passage has been quoted on a number of occasions in later cases in your Lordships' House. Even so, I do not think that Lord Diplock himself would have regarded this passage as constituting an immutable statement of the law, but rather as a tentative statement at an early stage of a period of development…"

33. Lord Goff summarised the law starting at p 476C. Condensing his summary even further, the position was stated in this way:

> (i) The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, *ie* in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> (ii) In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. If the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (vi), below).
>
> (iii) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, *ex hypothesi*, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage

in the sense that the English court will not lightly disturb jurisdiction so established.

After some discussion of this topic, Lord Goff commented that it is significant that, in all the leading English cases where a stay has been granted (*The Atlantic Star*, *MacShannon, Trendtex* [1982] AC 679 and *The Abidin Daver*) there had been another clearly more appropriate forum. Lord Goff's opinion was that the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right.

(iv) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. In that regard, Lord Goff adopted the expression used by Lord Keith in *The Abidin Daver* at 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction and the places where the parties respectively reside or carry on business.

(v) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.

(vi) If however the court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions.

34. ***De Dampierre***: These were divorce proceedings commenced by the wife against the husband in England. She filed her petition after the husband had already commenced divorce proceedings in France. She hoped to gain a better financial settlement in England than in France. The husband applied for a stay under the Domicile and Domestic Proceedings Act 1973 which gave the court power, in the case of concurrent proceedings, to stay proceedings if it appeared to the court

> "that the balance of fairness… is such that it is appropriate for the proceedings in [France] to be disposed of before further steps are taken in the proceedings [in England]."

35. The statutory provision also provided that, in assessing the balance of fairness, the court was to have regard to all factors appearing to be relevant.

36. In the course of his speech, Lord Goff considered the relationship between the inherent jurisdiction of the court (*i.e.* its jurisdiction in respect of *forum non conveniens*) and the statutory jurisdiction to stay the proceedings. He held that the court should adopt the same approach in relation to the statutory jurisdiction as that adopted at common law in relation to *forum non conveniens* where there was a *lis alibi pendens*. Accordingly, although the case was concerned with the exercise of a statutory jurisdiction, it was necessary to consider the common law principles.

37. The statutory jurisdiction was, without doubt, concerned with cases of *lis alibi pendens* and, as Lord Goff pointed out at p 107C, this was so whether the foreign jurisdiction had been invoked before or after the English proceedings.

38. As to *forum non conveniens*, Lord Goff repeated the words from *Sim v. Robinow* which I have already set out at paragraph 12 above. The effect is

> "that the court in this country looks first to see what factors there are which connect the case with another forum. If, on the basis of that inquiry, the court concludes that there is another available forum which, prima facie, is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted: see [*Spiliada*]. The same principle is applicable whether or not there are other relevant proceedings already pending in the alternative forum: see *The Abidin Daver*...411, *per* Lord Diplock. However, the existence of such proceedings may, depending on the circumstances, be relevant to the inquiry. Sometimes they may be of no relevance at all, for example, if one party has commenced the proceedings for the purpose of demonstrating the existence of a competing jurisdiction, or the proceedings have not passed beyond the stage of the initiating process. But if, for example, genuine proceedings have been started and have not merely been started but have developed to the stage where they have had some impact upon the dispute between the parties, especially if such impact is likely to have a continuing effect, then this may be a relevant factor to be taken into account when considering whether the foreign jurisdiction provides the appropriate forum for the resolution of the dispute between the parties."

39. The reference to p 411 of *The Abidin Daver* can only be a reference to the passage beginning at letter F where Lord Diplock referred to the attitude of the English courts to pending or prospective litigation in foreign jurisdictions.

40. ***Meadows***: In that case, relevant proceedings were commenced by one plaintiff (ICB) against ICI in relation to a default under a credit guarantee insurance and reinsurance contract in Ireland on 1 September 1987. Proceedings were commenced in England by another plaintiff (Meadows) against ICI in relation to the same contract and arising out of the same default. This gave rise to similar questions as those with which I am faced. Hirst J (in his discussion of the law relating to stay commencing at p 187 col 2) referred to and set out passages from *Spiliada*. It was argued, in reliance on the now familiar passage in *The Abidin Daver* from both the speeches of Lord Diplock and Lord Brandon, that the (genuine) Irish action of itself rendered the Irish court clearly and distinctly more appropriate than the English forum. Hirst J referred to the decision of the Court of Appeal in *Du Pont v Agnew* [1987] 2 Lloyds Rep 585. He cited a passage about the general undesirability of concurrent proceedings where it was stated that this was but one consideration to be weighed as part of overall assessment. He noted that, in that case, the Court of Appeal in fact refused a stay notwithstanding the existence of a concurrent action in Illinois on the grounds Illinois was not shown to be clearly the more appropriate forum and expressly discarded the "accident of timing" (*i.e.* which started first) as an irrelevant factor.

41. Then after referring to *De Dampierre*, he said that he was quite satisfied that the existence of foreign proceedings is a relevant factor in the equation when the Court has to consider whether the foreign forum is clearly more appropriate under *Spiliada:* its weight will depend on all of the circumstances including the state of advance of the foreign action. But he was wholly unpersuaded that it was a decisive factor in the equation so as to establish *per se* the foreign forum as more appropriate. He noted that Lord Goff had expressly referred to Lord Diplock's dictum inboth *Spiliada* and *De Dampierre* and that it needed to be read in the context of the fact that Turkey was manifestly the more appropriate forum in *The Abidin Daver*. And, as I have done, he set out the whole of Lord Templeman's speech.

42. His decision was upheld by the Court of Appeal. Neill LJ said this in the course of his judgment:

> "In the course of his careful and illuminating judgment Hirst J. dealt fully with the principles laid down by the House of Lords in *The Spiliada* [1987] A.C.460 and also made reference to the more recent decision of the Court of Appeal in *Du Pont v Agnew* [1987] 2 Lloyds L.R. 585. For my part I find it impossible to say that the judge erred in principle or either took into account some irrelevant consideration or ignored a relevant one. He had well in mind the general undesirability of concurrent proceedings in two different jurisdictions but nevertheless reached the conclusion that the proceedings in England should not be stayed. "

43. It was not actually necessary to decide the point (and, indeed, May LJ declined to do so). But that passage, it seems to me, is an endorsement of the proposition that the

correct approach is to regard the existence of earlier foreign proceedings as a factor, but not a decisive factor, to be brought into account.

44. ***Olympic Galaxy***: This was another case concerning permission to serve out of the jurisdiction. Colman J gave leave on 25 January 2005. The appeal to the Court of Appeal was from a refusal of a deputy judge of the Commercial Court to set that permission aside. Proceedings were commenced in Sri Lanka by the putative English defendant, Prima, on 11 January 2005.

45. Longmore LJ gave the only reasoned judgment. He set out the passage at pp 411-2 of *The Abidin Daver* which I have set out at paragraph 19 above. Mr Flaux, who represented Prima, had referred to *Dicey and Morris*, The Conflict of Laws (13th ed) at 12-030 (which is found in almost exactly the same form in the current, 15th edition, now called *Dicey, Morris & Collins*, Vol 1 at 12-043) to support the proposition that Lord Diplock's speech in *The Abidin Daver* had been subsequently diluted by *Spiliada*. The relevant paragraph from *Dicey* refers to *De Dampierre*, setting out almost verbatim the last section of the passage which I have cited at paragraph 38 above. Longmore LJ said this:

> "But as I read that passage (*ie* the passage from Dicey referring to *De Dampierre*) any such dilution is confined to cases where foreign proceedings have not passed beyond the stage of being initiated and have been started merely for the sake of demonstrating that a competing jurisdiction exists. That is not the position here and while the existence of prior foreign proceedings is not, by itself, decisive, it deserves weight…"

46. Holding reluctantly that the deputy judge had not accorded the Sri Lankan proceedings their proper weight, he turned to the exercise of the discretion afresh.

47. In doing so, he considered the relevant factors including the fact that proceedings were continuing in Sri Lanka. He then concluded that he had little doubt that the balance came down "substantially in favour" of setting aside the English proceedings bearing in mind (1) that the onus was on Galaxy to show that the English proceedings should continue (because the case concerned permission to serve out of the jurisdiction) and (2) "that the speech of Lord Diplock in *Abidin Daver* still represents the law". I shall return to this last point as it causes some difficulty.

48. ***Breams Trustees***: Although I was referred to a number of passages from the judgment of Patten J in this case, I wish to refer only to [25] of his judgment. Patten J stated there that *The Abidin Daver* was treated by the House of Lords in *Spiliada* as a case in which there was another clearly more appropriate forum for the trial of the action. Referring to Lord Goff's speech he said this:

> "[Lord Goff] made no express reference to the difficulties inherent in parallel proceedings as a reason in themselves (absent anything else) to justify a stay, any more than Lord Diplock did in his speech in *The Abidin Daver*. The ratio of that case depends on the foreign court being a natural and appropriate forum for the resolution of the dispute. Indeed it is clear from the test formulated by Lord Goff in *Spiliada* that the

> jurisdiction of the English court can only be displaced if the foreign court is the more natural and appropriate forum. The commencement of an earlier action there does not by itself establish that. This point was confirmed by Lord Goff in the later case of [*De Dampierre*] at page 108, where he expressly considered the effect of existing proceedings in the foreign jurisdiction [Patten J went on to cite the passage which I have already set out above]"

49. In the light of those authorities, Ms Menashy accepts that the Judge was right to proceed on the basis that foreign proceedings already on foot may, or may not, be relevant to a *forum non conveniens* argument. She also accepts that the Judge was right to find that the ultimate question to be asked is whether there is some other available forum which is "clearly a more appropriate forum" as stated in [22] of the Judgment.

50. Where she says the Judge went wrong is his apparent conclusion that the application of the "clearly more appropriate" test requires displacing Lord Diplock's analysis in *The Abidin Daver*. She submits that where a suit is already pending in a natural and appropriate forum, then the would-be English claimant must show some personal or juridical advantage only available in England that is of such importance that to deprive him of it would cause injustice. In circumstances where foreign proceedings have been commenced and the would-be English claimant has not established such an advantage and such injustice, the foreign court is, or is to be treated as, "clearly a more appropriate forum".

51. That is consistent with her interpretation of what Lord Goff said in *De Dampierre* at p 108. Thus down to letter C and the reference to *The Abidin Daver*, Lord Goff is to be seen as stating the general rule. That rule applies, as she accepts, whether or not there are other proceedings in another forum. She could hardly say that it does not apply at all given what Lord Goff actually says just before his reference to that case. She then interprets what Lord Goff then says not merely as examples each side of the line, but as setting a boundary between irrelevant and relevant cases. Irrelevant cases arise from what might be said to be a new gloss on the law *i.e.* that in cases concerning commencement of proceedings to demonstrate the foreign jurisdiction or where proceedings have not passed beyond the initiation stage, the proceedings will be irrelevant. Relevant cases *i.e.* cases not subject to that new gloss, will continue to be governed by the rules which applied to cases of *lis alibi pendens* in accordance with Lord Diplock's speech in *The Abidin Daver.*

52. She submits that support for her approach is to be found in the passages from *Olympic Galaxy* which I have mentioned.

53. She articulates the alternative view (ie contrary to her own submission) as being that the approach of Lord Diplock has been superseded by *Spiliada* and that it is simply a question of weighing everything in the balance. That would be inconsistent, she says, with *Olympic Galaxy*. I would not express the alternative view in quite that way. Her formulation produces what I see as a false dichotomy since, as I see it, *Spiliada* develops and qualifies, rather than supersedes, one, restrictive, interpretation of Lord Diplock's speech.

54. There can be no doubt, in my view, that what Lord Goff said in the summary in *Spiliada* of the law which I have described at paragraph 33 above was intended as a general statement. It represents a restatement of the law taking into account the cases up to and including *The Abidin Daver* and developing it further. And just as Lord Goff did not regard Lord Diplock as seeing the *MacShannon* approach as immutable, so too I do not consider that he would have regarded Lord Diplock's description of the position in a case of *lis alibi pendens* as immutable either.

55. Indeed, it will be noticed that, in paragraph 21 above, I have placed the words "a natural and appropriate forum" in inverted commas. I have done so because those words are, it seems to me, a shorthand way of identifying a wider concept. The positive first limb of the *MacShannon* test, even prior to the nuanced approach spelt out in *Spiliada*, required the defendant to establish that the foreign court was one "in which justice can be done between the parties at substantially less inconvenience and expense". In moving to the words "natural and appropriate", Lord Diplock cannot have been intending to lose that essential element in identifying what is an appropriate forum. Further, now that the law in cases not involving *lis alibi pendens* has been explained by Lord Goff in *Spiliada*, Lord Diplock's statement in *The Abidin Daver* at pp 411H to p 412B must be read in a way which recognises what Lord Goff said. As I have explained, Lord Diplock was, in that passage, giving effect to the *MacShannon* test in the context of a case of *lis alibi pendens*; his speech should I consider, be read in a way which is consistent with that test as developed and explained in *Spiliada*.

56. Were it not for the decision in *Olympic Galaxy*, I would have no doubt that the existence of earlier proceedings in a foreign jurisdiction would simply be a factor to be brought into account in deciding whether the foreign jurisdiction was a "clearly more appropriate forum". Such proceedings must be given due weight (a difficult concept, perhaps, but true in relation to all relevant factors). As is made clear by *De Dampierre*, there may be cases where the existence of earlier proceedings in another jurisdiction is of no relevance at all. That is recognised by Ms Menashy. In some cases, the earlier proceedings, given proper weight, may result in the English proceedings being stayed.

57. It seems to me, however, that it is only a question of weight and that there is no sharp boundary between earlier proceedings of no relevance (*eg* because instituted simply to demonstrate a jurisdiction) and a case where there is some impact on the dispute between parties. Ms Menashy's submissions entail that there is a sharp boundary or discontinuance. Once the boundary is crossed, one moves away from the ordinary application of the *Spiliada* approach and applies, instead, an entirely different test: namely, on Ms Menashy's argument, to ask (i) whether the foreign court is "a natural and appropriate forum" by which she does not mean the forum which is "clearly more appropriate"; she does not even mean a forum which falls within the first limb of the original *MacShannon* test which required the alternative forum to be available at substantially less inconvenience or expense. Rather, she means a forum which is suitable in the sense that Judge Birss considered both Texas and England to be suitable (see [30] of the Judgment); and (ii) to see whether there is "any personal or juridical advantage …. that is of such importance that it would cause injustice to [the English claimant] to deprive him of it".

58. Subject to the impact of *Olympic Galaxy* to which I will come in a moment, Ms Menashy's approach is inconsistent with how I would, apart from that decision, read

Spiliada and *De Dampierre*. It is inconsistent also with the decision of Patten J in *Breams Trustees* as I read what he said at [25] of his judgment. I find particular difficulty in her approach when I consider one of the examples given by Lord Goff in *De Dampierre* of earlier proceedings which are irrelevant. Consider genuine proceedings commenced in a foreign jurisdiction which is a suitable forum (as is Texas in the present case) but which, absent those proceedings, would not be a clearly more appropriate forum. If those proceedings have not passed beyond the stage of initiating process, they are irrelevant. I venture to suggest that if nothing is done, even for a number of months, the proceedings would remain irrelevant. But at some stage, if progressed, they would reach a stage where they have "some impact upon the dispute between the parties". So, at a stage of proceedings which it might be very difficult to establish, the foreign proceedings not only become relevant but their relevance takes on an overwhelming importance. According to Ms Menashy, at that stage the focus is no longer on whether the foreign court is clearly more appropriate than the English court, but is on whether the foreign court is "a natural and appropriate forum" for which read, in the present case, "suitable"; and the only escape for the English claimant is to show that he will be deprived of an advantage of such importance that it would cause injustice to deprive him of it.

59. I do not consider that there is anything in what Lord Diplock said in *Abidin Daver* which compels me to reach that conclusion. As I have already stated, the nuanced approach of *Spiliada* to the ordinary application of *forum non conveniens* has an impact on the application of that doctrine in the context of *lis alibi pendens*. Lord Diplock's words are to be interpreted against that development. It is not that he was, in any sense in error- I could hardly say he was. Rather what he said must now be interpreted consistently with the *Spiliada* approach.

60. In particular, his reference to "a natural and appropriate forum" was made in the context of the test in *MacShannon* as then understood. Any "natural and appropriate forum" would be one which satisfied the first limb of that test provided that justice could be done at substantially less inconvenience and expense. But the general rule has been developed. If a stay is to be granted, the foreign forum must, in accordance with the basic principle, be one in which the case may more suitably be tried for the interests of all the parties and the ends of justice. In that context, the defendant seeking the stay must show not only that England is not the natural or appropriate forum but that there is another available forum which is clearly or distinctly more appropriate. Lord Diplock's words remain entirely apposite in a case where, ignoring the fact of the earlier proceedings, a foreign jurisdiction is clearly the more appropriate jurisdiction; and in such a case his strict test for refusing a stay (that the English claimant will be deprived of an advantage of such importance that it would cause injustice to deprive him of it) may well be correct in the context of a case where foreign proceedings have already been commenced. But where the foreign jurisdiction is not clearly more appropriate, ignoring the earlier proceedings, what he said is not of application: the reformulation of the basic principle has an impact on the specific situation of *lis alibi pendens* to make his approach inapposite if applied to any case where the foreign jurisdiction is simply "suitable" and not "clearly more appropriate".

61. The existence of the earlier proceedings remains important nonetheless. In applying the modern test, their existence is clearly a factor to be taken into account. The same

set of (foreign) proceedings will start off as being irrelevant since they will then be only at the initiating stage mentioned by Lord Goff in *De Dampierre*. They may move to such an advanced stage – to take an extreme example with preparation for trial almost complete – as to become not only a relevant factor but a factor of decisive importance, so that the foreign court becomes the inevitable choice as the appropriate forum for the resolution of the dispute. To put it another way, the stage which the foreign proceedings have reached may make it clear that the foreign court has become the "clearly more appropriate forum".

62. Does the *Olympic Galaxy* preclude this approach? In my judgment, it does not. It is necessary to address the two passages which I have referred to at paragraph 44 to 46 above.

63. The first point relates to the dilution (suggested by Mr Flaux) by *Spiliada* of Lord Diplock's speech in *The Abidin Daver*. It is not clear from Longmore LJ's judgment precisely what dilution Mr Flaux was identifying. It is at least possible that the dilution being referred to was the reduction to irrelevance of proceedings which had not passed the state of being initiated or which were commenced for the sake of demonstrating the existence of a competing jurisdiction. My view is that that is probably what Longmore LJ was referring to since he saw the dilution as confined to those cases. What impact, if any, Longmore LJ saw *Spiliada* having on other cases is not clear.

64. What is clear, however, is that Longmore LJ recognised that the existence of prior proceedings was not decisive although it deserved weight. But a literal reading of the relevant passage of Lord Diplock (which is in effect what Ms Menashy's argument requires) leads to the conclusion that whenever a foreign jurisdiction is a natural and appropriate forum (she emphasises a in contrast with the), the English claimant in the later proceedings can only escape a stay if he can establish injustice by being deprived of some important advantage. That, it seems to me, is simply inconsistent with the prior proceedings being other than decisive, save in the exceptional case of injustice. In any case, for reasons already given, such a literal reading is not consonant with the recognition that Sheen J was exercising a discretion or with the overall approaches of Lords Brandon and Templeman.

65. Moreover, Longmore LJ did not see the passage from Lord Diplock's speech as being wholly prescriptive. He recognised that the existence of prior proceedings was not decisive although it deserved weight. That is entirely consistent with what Lord Goff said in *De Dampierre*.

66. The second point in Longmore LJ's judgment is his statement that the speech of Lord Diplock in *The Abidin Daver* still represents the law. I have already stated how I now consider what Lord Diplock said should be interpreted in the light of *Spiliada* and *De Dampierre*. Further, read in the context of his speech as a whole, I do not consider that what he said is in any way inconsistent with the proposition that, in the present case, the existence of the Texas proceedings is not a conclusive factor in favour of a stay of the English proceedings. The proceedings, in my judgment are no more than one of several factors to be taken into account in deciding whether or not Texas is clearly more appropriate as a forum than England.

67. The question of the weight to be attached to the Texas proceedings in the light of the stage which they have reached was a matter for the discretion of the Judge. Ms Menashy proposes a three stage test to be applied in the exercise of the Court's discretion to stay:

    i) Determine whether the foreign proceedings should be taken into account in accordance with *De Dampierre*.

    ii) If they are taken into account, ask whether the foreign court is "a natural and appropriate forum for the resolution of the dispute" (by which Ms Menashy means, as I understand it, whether the foreign court is a suitable forum).

    iii) If it is, ask whether it would cause injustice to deprive the English claimant of some personal or juridical advantage.

68. For reasons which I hope are apparent from what I have said, I do not consider this represents the law. Step i) is certainly a necessary step since, if the foreign proceedings are not relevant, it is clear that *Spiliada* must be applied untrammelled.

69. As to steps ii) and iii), these reflect an over-prescriptive approach to what Lord Diplock said and fail to reflect the need to interpret what he said against the development of the law in *Spiliada* and *De Dampierre*. The object of the exercise, as much in cases of *lis alibi pendens* as other cases, is to find the forum which is the more suitable for the ends of justice. A stay of English proceedings will not ordinarily be granted unless the foreign jurisdiction is clearly more appropriate (that is to say, more suitable for the ends of justice). In judging whether that is so, the existence of earlier foreign proceedings may be a factor to be taken into account (see *De Dampierre*) and where they are taken into account, the weight to be attached to them is a matter of judgment. In contrast, where the foreign jurisdiction is, quite apart from the earlier proceedings, the clearly more appropriate forum, there must be special features present if the English court is to refuse a stay of the proceedings before it. In such a case, it may well be right that the strict condition stated by Lord Diplock remains applicable.

70. Although I have put the position at greater length and in different words, Judge Birss applied, in my judgment, the correct test as he stated it in [22] of the Judgment. Accordingly, Ground 1 of the Appeal fails.

Ground 2 of the Appeal

71. Ground 2 of the appeal is that the Judge erred in law and/or in his exercise of discretion in finding that the dispute had a closer connection to England than Texas. This is a free-standing ground of appeal: it is not simply an argument about how the discretion should be exercised (which would be a matter for me) had I reached the conclusion that the Judge was wrong in his approach in accordance with Ground 1. Ground 2 amounts, essentially, to a claim that no judge, properly directing him/herself could have reached the conclusion that England, rather than Texas, was the appropriate forum in which the dispute should continue. In her skeleton argument, Ms Menashy identifies, in paragraphs 25.a to p., sixteen factors which connect the dispute to Texas. One of those, at paragraph m. relating to the attendance of expert witnesses, was, she accepted, neutral since the same point could be made in favour of

England. Each of the other paragraphs was, however, taken into account by the Judge (as is shown by the helpful table prepared by Mr Hicks linking each paragraph to the relevant paragraph of the Judgment); and the Judge took into account the factors in favour of England which Ms Menashy does not mention in her skeleton argument or seek to challenge as incorrect in her oral submissions.

72. The Judge discussed the impact of the competing factors in [29] to [36] of the Judgment. It is a comprehensive discussion. He concluded in [36] that, were it not for the Texas proceedings, he would have had "no hesitation in finding that the English court is the most appropriate forum in which to try this case".

73. He was concerned, however, about the consequence of refusing a stay, namely that there would then be two actions running in parallel, one in Texas and one in England, unless Niche succeeded in its own application for a stay in Texas. That factor did not, in his view, make Texas a more appropriate forum than England. He decided that the English proceedings should not be stayed.

74. The conclusion stated in paragraph 72 above was clearly one which the Judge was entitled to reach on the material before him. Indeed, it is the conclusion which I would reach too. The Judge then took into account the earlier proceedings as a factor in deciding whether the appropriate forum was Texas or England. This was the correct approach in the light of his (correct) understanding of the law. His conclusion was again one which he was entitled to reach from the material before him, attaching appropriate weight to the existence of the earlier proceedings. It is the conclusion which I would reach too, were the matter for me.

75. Accordingly, I dismiss Ground 2 of the appeal.

Ground 3

76. Ground 3 of the appeal is that the Judge erred in law and/or in his exercise of discretion in declining to grant a stay on case management grounds.

77. Ms Menashy submits that the crucial element in the Judge's decision not to stay the proceedings, in exercise of his case management powers, was that the proceedings would be heard in the PCC with its "cost-effective case management regime". This factor was not outweighed by the danger of two sets of proceedings. She does not suggest that the Judge was wrong in his assessment of the complexity of the underlying issue which he regarded as a relatively straightforward case which hinged on what he saw as a fairly straightforward factual question, the sort of question the case management machinery in the PCC was designed to deal with. He noted that it would not be costly to try the claim in the PCC and that it was likely that the claim would come to trial in either December 2013 or very early 2014. The Judge, who is very experienced indeed in these matters, considered that the case could be tried well within the usual PCC time frame of one or two days (albeit that the trial had been fixed for three days).

78. If it were to be assumed that the proceedings in Texas would continue even if the English proceedings were not stayed, the Judge saw that, by the time the Texas action came to trial (that is to say, after completion of the English proceedings), the court there would be able to see for itself the reasons why the PCC had reached its

conclusion. Thus, although the court in Texas may reach a different conclusion (subject to any questions of *res judicata* or issue estoppel), it would be able to do so in the full knowledge of what the PCC had decided and why.

79. The Judge recognised that proceeding with both cases in tandem runs a risk of inconsistent judgments but it seemed to him that to grant the stay sought by MacDermid on case management grounds risked giving undue weight to the fact that MacDermid launched its Texas claim a few weeks earlier than Niche started its proceedings here. He did not consider that arguing about which case started first in these circumstances and why was a sound basis for deciding this case management issue. That echoes Lord Templeton's observations about the rush to issue proceedings.

80. Ultimately, the decisive case management factor for the Judge was one of timing. On the one hand, if he refused the stay then the claim in the PCC would come on to trial in either December 2013 or at the latest very early 2014. On the other hand, if he granted the stay then the English proceedings would not be revived until after September 2014. There would be a case management conference in autumn 2014 and the trial would probably be no earlier than the summer of 2015. The incremental cost of these proceedings over and above the cost of the Texas action would be modest. Staying this action in order to seek to save those incremental costs would not justify such an inordinate delay.

81. Those, then, were the Judge's reasons for refusing a stay on case management grounds. Ms Menashy says this is wrong. The Judge, she says, misdirected himself because, if the English proceedings are not stayed, MacDermid will bring a defamation claim in the English court and the Judge was told as much. The PCC has no jurisdiction to deal with a defamation claim (unless the parties agree that it should do so, which MacDermid would not). The upshot, according to her, is that the entire action would be likely to be transferred to the High Court; or if that did not happen, the defamation claim would be hived off to be dealt with in the High Court. Either way, the advantages of simple and cost-effective case management in the PCC would not be achieved.

82. As a fall-back, Ms Menashy submits that, even putting aside the possibility of a defamation claim, it was apparent from the Judge's own findings that there was a real possibility that proceedings would be transferred from the PCC to the High Court. Thus he found that the copyright infringement claim and the claim relating to misuse of confidential information were clearly secondary to the main malicious falsehood claim and that it "may be that the real motivation for their inclusion is for them to play a part in the parties' jockeying for positions in relation to jurisdiction as between the English court and the Texas court". However, as the Judge observed, these were peripheral matters.

83. Ms Menashy also submits that the Judge did not take into account the advantages to MacDermid in granting a stay on case-management grounds, in particular that a decision would be reached in its chosen jurisdiction, Texas, before a decision reached in England which may give rise to an issue estoppel. I reject that submission. The advantage of a stay for MacDermid is all part and parcel of the weight to be attached to the existence of the earlier proceedings and their likely timing. The submission is

really no more than an attempt to circumvent what the Judge decided on the forum issue.

84. It was mentioned to the Judge at the hearing of the stay application that, if a counterclaim was brought, it would be in defamation. The probability of defamation proceedings was subsequently raised at the hand-down of the Judgment, when MacDermid sought a transfer to the High Court on the basis that it wished to make such a counterclaim. The Judge rejected that application and went on to fix a trial date.

85. No defamation proceedings have in fact been commenced. One reason for that may be that MacDermid has concerns that, by launching such proceedings, it would weaken its position in relation to its stay application. However, another reason may be that it simply does not want such proceedings to be conducted in the English courts. Mr Hicks points out that its primary case is that it wants matters dealt with in Texas and submits that commencement of defamation proceedings in England would be purely tactical.

86. It seems to me, however, that if defamation proceedings were commenced, it is likely that they would be stayed pending the outcome of the PCC proceedings rather than that the PCC proceedings would be transferred to the High Court to be heard together with the defamation action. It is a technical issue which lies at the root of the dispute and which would lie at the root of a defamation action. It seems to me that, given that the present proceedings are actually on foot and will be well advanced by the time any defamation action had proceeded far, the High Court would be likely to stay the defamation action pending determination of the technical issue by a court (the PCC) better equipped to deal with it in a cost-efficient way. After all, if Niche wins the technical issue, there is unlikely to be anything in a defamation claim.

87. Accordingly, I consider that the Judge was entitled to take the view which he did about the timing issue which was for him the decisive factor. His was a decision which, in my view, comes nowhere near the margins of what is an acceptable case-management decision. Not only is it one which it was within his discretion to make, it is the one which I would make if the matter were for me.

88. I therefore dismiss Ground 3 of the appeal.

Conclusion

89. MacDermid's appeal is dismissed.