EXHIBIT 22

[2000] 1 W.L.R. 1004 [2000] 2 All E.R. 986 [2001] I.L.Pr. 21 [2000] E.M.L.R. 643 (2000) 97(22) L.S.G. 44 (2000) 150 N.L.J. 741 Times, May 16, 2000 Independent, May 18, 2000 Official Transcript [2000] 1 W.L.R. 1004 [2000] 2 All E.R. 986 [2001] I.L.Pr. 21 [2000] E.M.L.R. 643 (2000) 97(22) L.S.G. 44 (2000) 150 N.L.J. 741 Times, May 16, 2000 Independent, May 18, 2000 Official Transcript
(Cite as: [2000] 1 W.L.R. 1004)

C

*1004 Berezovsky v Michaels and Another

House of Lords

Lord Steyn, Lord Nolan, Lord Hoffmann, Lord Hope, and Lord Hobhouse

2000 March 13, 14; May 11

Practice—Writ—Service out of jurisdiction—Application to set aside—Defamation proceedings—Claim by Russian businessmen for damage to reputation in England caused by English circulation of American magazine—Whether English courts appropriate forum for trial of action— R.S.C., Ord. 11, rr. 1(1), 4(2)

An American business magazine published an article alleging that the plaintiff, B., a prominent Russian businessman who also held a senior post in the Russian government, was in fact a leader of organised crime and corruption in that country. The article further alleged that the plaintiff, G., another Russian businessman, was one of B.'s criminal associates. Sales of that issue of the magazine amounted to approximately 785,000 in the United States and Canada, 1,900 in England and Wales and 13 in Russia. Each plaintiff, who was a frequent visitor to England for the purposes of business and, additionally in the case of B., to visit members of his family resident in England, sought to issue defamation proceedings in the High Court against the defendants, the editor and publishers of the magazine, claiming damages restricted to the injury to their reputations in England. The master gave both plaintiffs leave to serve writs out of the jurisdiction pursuant to R.S.C., Ord. 11, rr. 1(1)(f), 4(2) . 1 Writs for libel were accordingly served on the defendants in New York. The defendants applied by summons to a judge of the Queen's Bench Division for the writs to be set aside and the actions dismissed or stayed under R.S.C., Ord. 12, r. 8 on the ground that England was not the most appropriate jurisdiction for the trial of the claims. The judge found that the plaintiff's connections with the jurisdiction were tenuous, that they had failed to establish that England and Wales was the most appropriate jurisdiction for the trial of their actions, and accordingly stayed the proceedings. On the plaintiff's appeals, the Court of Appeal admitted new evidence to the effect that the article was known to executives of financial institutions and had deterred them from entering into or continuing London-based negotiations with companies with which the plaintiffs were associated. The court held that the judge had failed to take account of authority to the effect that, prima facie, England was the appropriate forum for the trial of any substantial complaint arising out of the English circulation of a foreign publication and that such failure entitled the court to make a ***1005** fresh exercise of discretion. It then held that since both plaintiff's connections with England were in fact significant they had a substantial complaint such as gave them a strong prima facie case for a trial in England, and since their connections with the United States were slight and a trial in Russia, though the place of their strongest connection, would nevertheless be unsuitable, England was the appropriate jurisdiction for the trial of the action.

On appeal by the defendants:-

Held , (1) that the publication in England of an internationally disseminated libel constituted a separate tort so as to permit the bringing of an action in England in respect of the publication therein; that where, in such a case, the publisher was outside England so as to require leave to serve the writ outside the jurisdiction under R.S.C., Ord. 11 , the burden was on the plaintiff to show that England was clearly the appropriate forum in which the case should be tried in the interests of all the parties and the ends of justice; but that, consistently with that test, regard was to be had to the principle that the jurisdiction in which a tort was committed was prima facie the natural forum for the dispute (post, pp. 1011H–1012A , 1013C–D , 1014E , 1016A , 1018D , 1021E , 1024F–G , 1026G–H , 1031D–E , 1033C–D).

Duke of Brunswick v. Harmer (1849) 14 Q.B. 185 applied .

Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey (The Albaforth) [1984] 2 Lloyd's Rep. 91, C.A. ; Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460, H.L.(E.) and

[2000] 1 W.L.R. 1004 [2000] 2 All E.R. 986 [2001] I.L.Pr. 21 [2000] E.M.L.R. 643 (2000) 97(22) L.S.G. 44 (2000) 150 N.L.J. 741 Times, May 16, 2000 Independent, May 18, 2000 Official Transcript [2000] 1 W.L.R. 1004 [2000] 2 All E.R. 986 [2001] I.L.Pr. 21 [2000] E.M.L.R. 643 (2000) 97(22) L.S.G. 44 (2000) 150 N.L.J. 741 Times, May 16, 2000 Independent, May 18, 2000 Official Transcript
(Cite as: [2000] 1 W.L.R. 1004)

Schapira v. Ahronson [1999] E.M.L.R. 735, C.A. considered .

(2) Dismissing the appeals (Lord Hoffmann and Lord Hope of Craighead dissenting), that on the evidence before the judge, as corroborated by the new material admitted by the Court of Appeal, the plaintiffs had significant connections with, and reputations to protect in, England; that the decision of the Court of Appeal that England was the appropriate forum was correct and, since the judge's exercise of discretion had been flawed, one which had been open to the court to make; and that, accordingly, the trial of the actions would proceed in England (post, pp. 1011A–B , 1015B–D , 1016A , 1017G , 1033C–D).

Decision of the Court of Appeal [1999] E.M.L.R. 278 affirmed .

The following cases are referred to in their Lordship's opinions:

- Airbus Industrie G.I.E. v. Patel [1999] 1 A.C. 119; [1998] 2 W.L.R. 686; [1998] 2 All E.R. 257, H.L.(E.)
- Bata v. Bata [1948] W.N. 366, C.A.
- Brunswick (Duke of) v. Harmer (1849) 14 Q.B. 185
- Chadha v. Dow Jones & Co. Inc. [1999] E.M.L.R. 724, C.A.
- Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey (The Albaforth) [1984] 2 Lloyd's Rep. 91, C.A.
- Diamond v. Sutton (1866) L.R. 1 Ex. 130
- Distillers Co. (Biochemicals) Ltd v. Thompson [1971] A.C. 458; [1971] 2 W.L.R. 441; [1971] 1 All E.R. 694, P.C.
- Eyre v. Nationwide News Pty. Ltd. [1967] N.Z.L.R. 851
- Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] 1 All E.R. 1042, H.L.(E.)
- Kroch v. Rossell et Compagnie Société des personnes… Responsibilité Limitée [1937] 1 All E.R. 725, C.A.
- Ladd v. Marshall [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, C.A.
- Lee v. Wilson and Mackinnon (1934) 51 C.L.R. 276
- Longworth v. Hope (1865) 3 Macph. 1049
- Lonrho Plc. v. Fayed [1992] 1 A.C. 448; [1991] 3 W.L.R. 188; [1991] 3 All E.R. 303, H.L.(E.)
- McLean v. David Syme & Co. Ltd. (1970) 92 W.N. (N.S.W.) 611
- Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. [1990] 1 Q.B. 391; [1989] 3 W.L.R. 563; [1989] 3 All E.R. 14, C.A.

***1006**

- New York Times v. Sullivan (1964) 376 U.S. 254
- Piglowska v. Piglowski [1999] 1 W.L.R. 1360; [1999] 3 All E.R. 632, H.L.(E.)
- Ratcliffe v. Evans [1892] 2 Q.B. 524, C.A.
- Reynolds v. Times Newspapers Ltd. [1999] 3 W.L.R. 1010; [1999] 4 All E.R. 609, H.L.(E.)
- Schapira v. Ahronson [1999] E.M.L.R. 735, C.A.
- Shevill v. Presse Alliance S.A. [1996] A.C. 959; [1996] 3 W.L.R. 420; [1996] 3 All E.R. 929, H.L.(E.)
- Shevill v. Presse Alliance S.A. (Case C-68/93) [1995] 2 A.C. 18; [1995] 2 W.L.R. 499, E.C.J.
- Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843, H.L.(E.)

The following additional cases were cited in argument:

- Abidin Daver, The [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470, H.L.(E.)

[2000] 1 W.L.R. 1004 [2000] 2 All E.R. 986 [2001] I.L.Pr. 21 [2000] E.M.L.R. 643 (2000) 97(22) L.S.G. 44 (2000) 150 N.L.J. 741 Times, May 16, 2000 Independent, May 18, 2000 Official Transcript [2000] 1 W.L.R. 1004 [2000] 2 All E.R. 986 [2001] I.L.Pr. 21 [2000] E.M.L.R. 643 (2000) 97(22) L.S.G. 44 (2000) 150 N.L.J. 741 Times, May 16, 2000 Independent, May 18, 2000 Official Transcript
(Cite as: [2000] 1 W.L.R. 1004)

- Braintech Inc. v. Kostiuk (unreported), 18 March 1999, British Columbia Court of Appeal
- de Dampierre v. de Dampierre [1988] A.C. 92; [1987] 2 W.L.R. 1006; [1987] 2 All E.R. 1, H.L.(E.)
- Diamond v. Bank of London and Montreal Ltd. [1979] Q.B. 333; [1979] 2 W.L.R. 228; [1979] 1 All E.R. 561, C.A.
- Dingle v. Associated Newspapers Ltd. [1964] A.C. 371; [1962] 3 W.L.R. 229; [1962] 2 All E.R. 737, H.L.(E.)
- Godfrey v. Demon Internet Ltd. [1999] 4 All E.R. 342
- Gordon v. Chokolingo (unreported), 16 August 1988, P.C.
- Jeyaretnam v. Lee Kuan Yew (unreported), 24 February 1982, P.C.
- Jeyaretnam v. Mahmood, The Times, 21 May 1992
- Johnson v. Taylor Brothers & Co. Ltd. [1920] A.C. 144, H.L.(E.)
- Meckiff v. Simpson [1968] V.R. 62
- Oraro v. The Observer Ltd. (unreported), 10 May 1992 , Drake J.
- Shah v. Standard Chartered Bank [1999] Q.B. 241; [1998] 3 W.L.R. 592; [1998] 4 All E.R. 155, C.A.
- Star News Shops Ltd. v. Stafford Refrigeration Ltd. [1998] 1 W.L.R. 536; [1998] 4 All E.R. 408, C.A.
- Voth v. Manildra Flour Mills Pty. Ltd. (1990) 171 C.L.R. 538
- Wyatt v. Forbes Inc. (unreported), 2 December 1997 , Morland J.

Appeals from the Court of Appeal.

These were consolidated appeals, by leave of the House of Lords (Lord Browne-Wilkinson, Lord Hope of Craighead and Lord Millett), by the defendants, James W.Michaels, editor of "Forbes" magazine, and Forbes Inc., its publisher, from the order of the Court of Appeal (Hirst and May L.JJ. and Sir John Knox) allowing appeals by the plaintiffs, Boris Berezovsky and Nikolai Glouchkov, from the order of Popplewell J. on 22 October 1997 setting aside the order of Master Turner giving the plaintiffs leave to serve writs for defamation on the defendants in New York.

The facts are stated in the opinion of Lord Steyn.

Representation

- Geoffrey Robertson Q.C. , Adrienne Page Q.C. and Thomas Beazley for the defendants.
- Desmond Browne Q.C. and Justin Rushbrooke for the plaintiffs.

Lord Steyn

Their Lordships took time for consideration.***1007**

11 May… My Lords, in the wake of the collapse of the Soviet Union the transition of Russia from communism to a market-orientated economy and society has been accompanied by a dramatic upsurge in organised crime and corruption. There has been great interest internationally in these consequences of the transformation of Russian society. Newspapers and journals specialising in international news, political and economic, published many reports on the criminalisation of Russian society. "Forbes," an influential American fortnightly magazine, devoted considerable resources to the investigation and reporting of the situation in the post-Soviet phase in Russia. In 1996 its reporting centred on the role of two considerable figures in the new Russia. The first and most powerful was Mr. Boris Berezovsky. He is a businessman and politician. He has extensive interests in Russian businesses, including cars, oil, media and finance. In October 1996 he became Deputy Secretary of the Security Council of the Russian Federation which is a senior post in the Russian Government. His subsequent career is not directly relevant but I mention it for an understanding of the context. In November 1997 President Yeltsin dismissed Mr. Berezovsky. In April 1998 Mr. Berezovsky was appointed as Secretary of the Commonwealth of Independent States, with responsibility for co-operation between the various parts of the Russian Federation. The second figure of interest to "Forbes" was Mr. Nikolai Glouchko v. In December 1996 he was the First Deputy Manager of Aeroflot, the Russian international airline. He is now the Managing Director of Aeroflot.

In its issue of 30 December 1996 "Forbes" described the two men as "criminals on an outrageous scale." On the contents page Mr. Berezovsky was introduced as follows: "Is he the Godfather of the Kremlin? Power, Politics, Murder. Boris Berezovsky can teach the guys in Sicily a thing or two." The flavour of the article, which together with a prominent photograph of Mr. Berezovsky was spread over seven pages, is captured by an editorial published by Mr. James W.Michaels, the editor of "Forbes." It states:

"this is the true story of the brilliant, unscrupulous Boris Berezovsky, a close associate of President Boris Yeltsin and a man who parlayed an auto dealership into Russia's most formidable business empire. Berezovsky stands tall as one of the most powerful men in Russia. Behind him lies a trail of corpses, uncollectable debts and competitors terrified for their lives. A number of Forbes editorial staffers were involved in the reporting and picture-gathering over a period of many months. As one of them puts it 'In Moscow, asking questions about Berezovsky was like being back there in pre-Gorbachev days. At the very mention of Berezovsky's name, people would look around furtively, lower their voices and try to change the subject.' Russians have good reason to be afraid of Berezovsky and people like him: Emulating the old communist bosses, the new crime bosses use K.G.B.-trained assassins and enforcers. In the prevalence of brutality and extra-legal power grabs, Russia hasn't finished paying the price for those 70 years of communism. This is one of the finest pieces of reporting I have seen in my half-century in journalism." In the article "Forbes" described Mr. Glouchkov:

"Now meet Aeroflot's deputy director, Nikolai Glushkov. This gentleman has an interesting background. He was convicted in 1982 ***1008** under article 89 of the Russian criminal code (theft of state property). Later Glushkov served as head of finance for Avtovaz and was one of the founders of Logovaz. In short, an associate of Berezovsky. Are Glushkov and Berezovsky in cahoots to siphon money from Aeroflot? The parallels with Avtovaz are certainly striking" The circulation figures of the issue of "Forbes" of 30 December 1996 would have been of the following order:

	Subscriptions	Newsstands	Total
United States & Canada	748,123	37,587	785,710
England & Wales	566	1,349	1,915
Ru	13		

The magazine was also available to be read on the Internet in England and Wales and elsewhere. The readers of "Forbes" are predominantly people involved in business. Typically, many of its readers would have come from those working in corporate finance departments of banks and financial institutions. There is an agreed estimate that the magazine would have been seen by about 6,000 readers in the jurisdiction.

The proceedings

Mr. Berezovsky and Mr. Glouchkov both speak English well. Mr. Berezovsky claimed to have extensive personal and business connections with England; Mr. Glouchkov asserted that he had significant connections with England. Both men decided to sue in England rather than in Russia or the United States. On 12 February 1997 they issued separate proceedings for damages for libel and injunctions against Forbes Inc. (the publisher of the magazine) and Mr. Michaels (the editor). The plaintiffs confined their claims for damages to the publication of "Forbes" within the jurisdiction through distribution of copies of the magazine and through publication on the Internet. They applied under R.S.C., Ord. 11, r. 1(1)(f) for leave to serve the writs out of the jurisdiction. The relevant part of the order makes it permissible to serve a writ out of the jurisdiction where "the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction:" see also Ord. 11, r. 4 which provides that no leave shall be granted unless the case is "a proper one for service out of the jurisdiction." On 7 April 1997 the Forbes parties (to whom I will collectively refer as "Forbes") applied under Ord. 12, r. 8 , to have the writs set aside and the actions dismissed or stayed, on the grounds that England is not the most appropriate jurisdiction for trial of the plaintiff's claims. It was contended that Russia or the United States were jurisdictions where the action could more appropriately be tried. A large number of affidavits were exchanged. Expert evidence on the law of Russia and the law of the United States was served. Hundreds of pages of press cuttings and other documents were exhibited.

At first instance, and in the Court of Appeal, the principal factual dispute was the extent of the connections of the plaintiffs with England and their reputations here. The plaintiffs claimed to have substantial connections with the jurisdiction through visits, business relationships and, in the case of Mr. Berezovsky, personal and family ties. Forbes maintained that the connections were insignificant compared with their connections ***1009** with Russia, and were insufficient to make this jurisdiction the most appropriate for the trial of the action.

On 22 October 1997 Popplewell J. heard the applications by Forbes. He gave two judgments. In the first he correctly held that, notwithstanding that an English tort was established, he had jurisdiction to stay the action on the principles laid down by the House in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 . In the second judgment Popplewell J. considered the merits of the applications. He concluded that the connections of the plaintiffs with the jurisdiction were tenuous. The judge clearly thought Russia was the more appropriate forum because in a judgment given on 19 December 1997 he required Forbes to submit to the jurisdiction of the Russian courts and to abide by the judgment of the Russian courts.

The plaintiffs appealed to the Court of Appeal. About four weeks before the appeal was heard the plaintiffs served further evidence about the detrimental effect which the "Forbes" article had on the reputation of the plaintiffs in London. Forbes also served a further affidavit. Notwithstanding the objections of Forbes the Court of Appeal in exercise of its discretion admitted the new evidence. On 19 November 1998 the Court of Appeal [1999] E.M.L.R. 278 allowed the appeal of both plaintiffs. Hirst L.J., who has vast experience of this class of work, gave the leading judgment and May L.J. and Sir John Knox agreed. Hirst L.J. held that Popplewell J. had misdirected himself on the evidence and that the Court of Appeal was entitled to consider the matter afresh. Hirst L.J. concluded that there was a substantial complaint about English torts in the case of both plaintiffs. Accordingly, there was jurisdiction to try the action in England and in all the circumstances England was the appropriate jurisdiction for the trial of the action.

The shape of the appeal to the House

The shape of the case changed during the oral

argument in the House. At the end of speeches the principal matters in issue were: (1)Did the Court of Appeal err in admitting the plaintiff's new evidence? (2) Should the House of Lords grant a petition by Forbes to produce new evidence on the appeal to the House and, if so, should the House grant a counter-petition by the plaintiffs? (3) Depending on the answers to the first two issues, what is objectively the realistic view on the primary issue of fact, viz the plaintiff's connections with England and reputation here? (4) Did the Court of Appeal correctly apply the Spiliada test? (5) Was the Court of Appeal entitled to interfere with the exercise by Popplewell J. of his discretion? (6) Even if the decision of the Court of Appeal in respect of Mr. Berezovsky's action was correct, what is the position with regard to Mr. Glouchkov? While I will deal with all these issues, I propose to concentrate on the questions of legal principle arising under issue 4. 1.

The admission of the new evidence by the Court of Appeal

Counsel for Forbes renewed a submission that the new evidence presented to the Court of Appeal did not satisfy the well known criteria laid down in Ladd v. Marshall [1954] 1 W.L.R. 1489 . That decision is inapplicable to the admission of new evidence on an appeal from a decision to set aside leave to serve out of the jurisdiction. The Court of Appeal had a broader discretion. In the present case the evidence was in amplification of a case already outlined in previous affidavits. But it added ***1010** important colour to the picture before Popplewell J. The new evidence was served four weeks before the hearing of the Court of Appeal. Forbes had an adequate opportunity to answer the evidence. In these circumstances the Court of Appeal was acting well within its discretion in admitting the evidence. I would reject the submission to the contrary. 2.

The petition by Forbes to introduce new evidence

The petition by Forbes is to introduce new evidence on the appeal to the House, particularly on the previously wholly unparticularised defence of justification. The petition was served on 22 February 2000, i.e.shortly before the hearing in the House. The evidence should have been served before the hearing in the Court of Appeal, notably because the trial judge had in October 1997 commented adversely on the failure of Forbes to produce any evidence of the supposed plea of justification. There is no satisfactory explanation for the failure to produce this evidence before the hearing in the Court of Appeal. Moreover, the Court of Appeal observed in November 1998 that in the absence of a particularised defence of justification the judge was right to discount the justification defence for present purposes. Notwithstanding this observation it took more than 15months for Forbes to serve their new evidence. It was produced too late. The possibility of prejudice to the plaintiffs cannot be ignored. The admission of new evidence, depending on the circumstances, tends to be an exceptional course in the House of Lords. Nothing warranting admission of the new evidence has been put before the House. The petition should be rejected. In consequence the counter-petition falls away. It follows that the House must consider the issues on the evidence as it stood before the Court of Appeal.3.

The primary issue of fact as to the plaintiff's connections with England and reputations here

Before the judge there was an affidavit by Mr. Berezovsky in which he stated:

"Over the past several years I have had extensive contacts with England, in business, in government service and personally. During the years in which I pursued my career in international business and finance, I worked frequently in London and with persons and companies based in London. This is entirely understandable, given London's status as the international business and financial capital of Europe, where all of my business interests have been based, and of which Russia is an increasingly important part." Mr. Berezovsky then gave concrete examples of fruitful negotiations in London on behalf of Russian enterprises as well as participation in joint enterprises. In 1994/95 he visited London on 22 occasions and in 1996/97 on nine occasions, the reduced rate being due to his involvement in government. He kept an apartment in London. His wife from whom he has separated lives in London with their two children. He often visited them. He also had two daughters from a previous marriage at Cambridge University. As Hirst L.J. observed it was surprising on this evidence that the judge found that Mr. Berezovsky's connections with England were tenuous.

The new material admitted in the Court of Appeal included concrete evidence from three independent sources as to the effect of the "Forbes" ***1011** article on Mr. Berezovsky's business reputation. The three deponents were a commercial solicitor, the managing director of a Swiss company and the managing

director of a Russian oil company. It is not necessary to set out their evidence in detail. It is sufficient to say that the "Forbes" article was known to executives of financial institutions and deterred them from entering or continuing London-based negotiations with Mr. Berezovsky.

Hirst L.J. [1999] E.M.L.R. 278 , 290 was right to conclude that on this evidence, together with the original evidence, Mr. Berezovsky had "a substantial connection with this country, and an important business reputation to protect here"

Mr. Glouchkov's connections with England were of a lesser order. In his original affidavit he explained:

"Over the past several years I have had extensive contacts with England... I frequently visit and work at Aeroflot's offices in Piccadilly in London. Among other projects, I worked with Mr. Berezovsky and others to assist Aeroflot in obtaining adequate and cost effective insurance coverage in the English insurance market. We succeeded in achieving this goal by obtaining new insurance policies for Aeroflot in England through the London-based Alexander Howden insurance brokerage firm. I have also travelled to London pursuant to my work for Aeroflot for meetings with the S. G. Warburg investment banking firm in London. I have also visited London pursuant to my work for Aeroflot for meetings at the London headquarters of the European Bank for Reconstruction and Development, which is helping to structure financing for Aeroflot. I am personally involved in extensive negotiations with the E.B.R.D. in London in connection with this matter. In addition, I have travelled to London pursuant to my work for Aeroflot to negotiate certain banking financing for the company. In particular, I have worked with the London offices of the Chase Manhattan Bank, which is assisting Aeroflot in connection with its purchase of aircraft, the London office of Citibank, and the London office of Kredietbank. I have also maintained a flat in London since 1993." Mr. Glouchkov's affidavit was corroborated by an experienced international businessman. On the basis of this evidence Hirst L.J. observed, at p. 291, that the judge's view that Mr. Glouchkov only had tenuous connections with the jurisdiction did not do full justice to the evidence. In agreement with Hirst L.J. I would also describe Mr. Glouchkov's connections as significant. 4.

Did the Court of Appeal apply the Spiliada test correctly?

In the Court of Appeal counsel for Forbes submitted "that the correct approach is to treat multi-jurisdiction cases like the present as giving rise to a single cause of action and then to ascertain where the global cause of action arose." In aid of this argument he relied by analogy on the experience in the United States with the Uniform Single Publication Act which provides, in effect that, in respect of a single publication only one action for damages is maintainable: see also William L. Prosser, "Interstate Publication" (1953) 51 Michigan L. Rev. 959 and the *American Law Institute, Restatement of the Law, Torts* , 2d (1977), section 577A. The Uniform Single Publication Act does not assist in selecting the most suitable court for the trial: it merely prevents a multiplicity of suits. There ***1012** is no support for this argument in English law. It is contrary to the long established principle of English libel law that each publication is a separate tort. Moreover, it is inconsistent with the policy underlying the acceptance by the European Court of Justice in Shevill v. Presse Alliance S.A. (Case C-68/93) [1995] 2 A.C. 18 , admittedly a Convention case, that separate actions in each relevant jurisdiction are in principle permissible: see also Shevill v. Presse Alliance S.A. [1996] A.C. 959 and Reed and Kennedy, "International torts and Shevill : the ghost of forum shopping yet to come" [1996] L.M.C.L.Q. 108 . And, as Hirst L.J. observed, the single cause of action theory, if adopted by judicial decision in England, would disable a plaintiff from seeking an injunction in more than one jurisdiction. In the context of the multiplicity of state jurisdictions in the United States there is no doubt much good sense in the Uniform Single Publication Act. But the theory underpinning it cannot readily be transplanted to the consideration by English courts of trans-national publications. Rightly, the Court of Appeal rejected this submission. In oral argument counsel for Forbes made clear that he was not pursuing such an argument before the House.

On appeal to the House counsel for Forbes approached the matter differently. The English law of libel has three distinctive features, viz. (1) that each communication is a separate libel: Duke of Brunswick v. Harmer (1849) 14 Q.B. 185 and McLean v. David Syme & Co. Ltd. (1970) 92 W.N. (N.S.W.) 611 ; (2) that publication takes place where the words are heard or read: Bata v. Bata [1948] W.N. 366 ; Lee v. Wilson and Mackinnon

(1934) 51 C.L.R. 276 ; and (3) that it is not necessary for the plaintiff to prove that publication of defamatory words caused him damage because damage is presumed: Ratcliffe v. Evans [1892] 2 Q.B. 524 , 529, per Bowen L.J. The rigour of the application of these rules is mitigated by the requirement that in order to establish jurisdiction a tort committed in the jurisdiction must be a real and substantial one: Kroch v. Rossell et Compagnie Société des personnes… Responsibilité Limitée [1937] 1 All E.R. 725 . On the findings of fact of the Court of Appeal, which I have accepted, it is clear that jurisdiction under Ord. 11, r. 1(1)(f) is established and counsel accepted that this is so. But counsel put forward the global theory on a reformulated basis. He said that when the court, having been satisfied that it has jurisdiction, has to decide under Order 11 whether England is the most appropriate forum "the correct approach is to treat the entire publication—whether by international newspaper circulation, trans-border or satellite broadcast or Internet posting— *as if* it gives rise to one cause of action and to ask whether it has been clearly proved that *this action* is best tried in England." If counsel was simply submitting that in respect of trans-national libels the court exercising its discretion must consider the global picture, his proposition would be uncontroversial. Counsel was, however, advancing a more ambitious proposition. He submitted that in respect of trans-national libels the principles enunciated by the House in the Spiliada case [1987] A.C. 460 should be recast to proceed on assumption that there is in truth one cause of action. The result of such a principle, if adopted, will usually be to favour a trial in the home courts of the foreign publisher because the bulk of the publication will have taken place there. Counsel argued that it is artificial for the plaintiffs to confine their claim to publication within the jurisdiction. This argument ignores the rule laid down in Diamond v. Sutton (1866) L.R. 1 Ex. 130 , 132 that a plaintiff who seeks leave to serve out of the jurisdiction in respect of publication within the jurisdiction is guilty of an abuse if he ***1013** seeks to include in the same action matters occurring elsewhere: see also Eyre v. Nationwide News Pty. Ltd. [1967] N.Z.L.R. 851 . In any event, the new variant of the global theory runs counter to well established principles of libel law. It does not fit into the principles so carefully enunciated in Spiliada . The invocation of the global theory in the present case is also not underpinned by considerations of justice. The present case is a relatively simple one. It is not a multi-party case: it is, however, a multi-jurisdictional case. It is also a case in which all the constituent elements of the torts occurred in England. The distribution in England of the defamatory material was significant. And the plaintiffs have reputations in England to protect. In such cases it is not unfair that the foreign publisher should be sued here. Pragmatically, I can also conceive of no advantage in requiring judges to embark on the complicated hypothetical enquiry suggested by counsel. I would reject this argument.

Counsel next put forward a more orthodox argument. He acknowledged that the Court of Appeal invoked the well known principles laid down in the Spiliada case [1987] A.C. 460 , 474 d , 484 e . Hirst L.J. correctly stated that the court must identify the jurisdiction in which the case may be tried most suitably or appropriately for the interests of all the parties and the ends of justice. Hirst L.J. [1999] E.M.L.R. 278 , 293 also emphasised that in an Order 11 case the burden of proof rests upon the plaintiff to establish that the English jurisdiction *clearly* satisfies this test. So far there can be no criticism of the approach of the Court of Appeal. But counsel submitted that Hirst L.J. fell into error by relying on a line of authority which holds that the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute. The best example is Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey (The Albaforth) [1984] 12 Lloyd's Rep. 91 where the Court of Appeal considered a claim founded on a negligent mis-statement in a status report by a bank relating to the credit of a guarantor of a company's obligations under a charter party. The statement was contained in a telex sent by the bank from New York to shipowners in London. At first instance the judge set aside leave to serve out of the jurisdiction. The Court of Appeal allowed the appeal. Ackner L.J. (subsequently Lord Ackner) observed, at p. 94:

"the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute. England is thus the natural forum for the resolution of this dispute." Goff L.J. (who became Lord Goff of Chieveley) observed, at p. 96:

"Now it follows from those decisions that, where it is held that a court has jurisdiction on the basis that an alleged tort has been committed within the jurisdiction of the court, the test which has been satisfied in order to reach that conclusion is one founded on the basis that the court,

so having jurisdiction, is the most appropriate court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a court which has jurisdiction on that basis must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum."***1014**

There is also direct support for this approach before and after The Albaforth : see Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458 , 468 e , per Lord Pearson; Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc. [1990] 1 Q.B. 391, a Court of Appeal decision subsequently overruled in Lonrho Plc. v. Fayed [1992] 1 A.C. 448 on other aspects; and Schapira v. Ahronson [1999] E.M.L.R. 735 . The express or implied supposition in all these decided cases is that the substance of the tort arose within the jurisdiction. In other words the test of substantiality as required by Kroch v. Rossell [1937] 1 All E.R. 725 was in each case satisfied. Counsel for Forbes argued that a prima facie rule that the appropriate jurisdiction is where the tort was committed is inconsistent with the Spiliada case [1987] A.C. 460 . He said that Spiliada admits of no presumptions. The context of the two lines of authority must be borne in mind. In Spiliada the House examined the relevant questions at a high level of generality. The leading judgment of Lord Goff of Chieveley is an essay in synthesis: he explored and explained the coherence of legal principles and provided guidance. Lord Goff of Chieveley did not attempt to examine exhaustively the classes of cases which may arise in practice, notably he did not consider the practical problems associated with libels which cross national borders. On the other hand, the line of authority of which The Albaforth is an example was concerned with practical problems at a much lower level of generality. Those decisions were concerned with the bread and butter issue of the weight of evidence. There is therefore no conflict. Counsel accepted that he could not object to a proposition that the place where in substance the tort arises is a weighty factor pointing to that jurisdiction being the appropriate one. This illustrates the weakness of the argument. The distinction between a prima facie position and treating the same factor as a weighty circumstance pointing in the same direction is a rather fine one. For my part the Albaforth line of authority is well established, tried and tested, and unobjectionable in principle. I would hold that Hirst L.J. correctly relied on these decisions.

Next counsel for Forbes argued that, in any event, on conventional Spiliada principles Russia, or the United States, are more appropriate jurisdictions for the trial of the action. This submission must be approached on the basis that the plaintiffs have significant connections with England and reputations to protect here. It is, of course, true that the background to the case is events which took place in Russia. Counsel for Forbes argued that evidence in support of a defence justification is to be found in Russia. Popplewell J. and Hirst L.J. concluded that in the absence of a particularised plea of justification to give no or little weight to this factor. Despite the valiant attempts by counsel for Forbes to argue that there is an evidential basis for a plea of justification, I remain unpersuaded. A full examination of the merits and demerits of the charges and counter-charges must, however, await the trial of the action. It is true that Forbes may also be able to plead qualified privilege on the basis of the law as stated by the House of Lords in Reynolds v. Times Newspapers Ltd. [1999] 3 W.L.R. 1010 . But the evidence of such a plea would presumably largely be in the United States where the reporters are based and where the documents are. In any event, there is nothing to indicate the contrary. Moreover, there are two substantial indications pointing to Russia not being the appropriate jurisdiction to try the action. The first is that only 19 copies were distributed in Russia. Secondly, and most importantly, on the evidence adduced by Forbes about the judicial system in Russia, it is clear that a judgment in favour of the plaintiffs in Russia ***1015**

will not be seen to redress the damage to the reputations of the plaintiffs in England. Russia cannot therefore realistically be treated as an appropriate forum where the ends of justice can be achieved. In the alternative counsel for Forbes argued that the United States is a more appropriate jurisdiction for the trial of the action. There was a large distribution of the magazine in the United States. It is a jurisdiction where libel actions can be effectively and justly tried. On the other hand, the connections of both plaintiffs with the United States are minimal. They cannot realistically claim to have reputations which need protection in the United States. It is therefore not an appropriate forum.

In agreement with Hirst L.J. I am satisfied that England is the most appropriate jurisdiction for the trial of the actions.5.

Was the Court of Appeal entitled to interfere with the exercise of discretion by Popplewell J.?

Counsel for Forbes submitted that the Court of Appeal was not entitled to interfere with the exercise by Popplewell J. of his discretion. Popplewell J. certainly observed that if a plaintiff is libelled in this country, he should prima facie be allowed to bring his claim here. But Popplewell J. also said that the case "involves nothing but Russia." He also described the connections of the plaintiffs with England as "tenuous." He therefore by necessary implication took the view that in substance the plaintiffs did not have reputations to protect in England. In the result he misdirected himself as to a significant English dimension of the case. I am satisfied that the exercise of discretion by the judge was flawed. The Court of Appeal was entitled to intervene.6.

Mr. Glouchkov

Counsel for Forbes finally submitted that, even if his appeal in respect of the action brought by Mr. Berezovsky fails, the appeal in respect of Mr. Glouchkov must succeed. He did not suggest such a possible outcome to the Court of Appeal. The Court of Appeal was entitled to assume, and did assume, that the two appeals ought to be decided in the same way. If alerted to the possibility of a differential result the Court of Appeal might have dealt with the matter differently. In my view this argument is not open to Forbes. But I am also unpersuaded that it has any merit.

Postscript on the Internet

In their statements of claim the plaintiffs relied on the fact that the "Forbes" article is also available to be read on-line on the Internet within the jurisdiction. The Court of Appeal referred to this aspect only in passing. During the course of interesting arguments it became clear that there is not the necessary evidence before the House to consider this important issue satisfactorily. Having come to a clear conclusion without reference to the availability of the article on the Internet it is unnecessary to discuss it in this case.

Conclusion

I would dismiss both the petition and counter-petitions presently before the House. For reasons which are substantially the same as those given by Hirst L.J. in his careful and impressive judgment, I would also dismiss both appeals.***1016**

Lord Nolan

My Lords, I agree with the views expressed by my noble and learned friend, Lord Steyn. I, too, would dismiss these appeals.

The central question raised by the appeals is whether the Court of Appeal were justified in reversing the decision of Popplewell J. that the plaintiff's actions could be stayed. The judge held that the plaintiffs had not made out their case for seeking leave to serve process out of the jurisdiction; they had failed to establish that the English courts were the most appropriate forum for the trial of their actions.

The essence of both plaintiff's claims is that their reputations in this country have been severely damaged by the article complained of, and that it is vital for the successful continuation of their personal, business and, in the case of Mr. Berezovsky, official activities in this country that they should be able to defend and vindicate their integrity in an English court. The claims are confined to damage sustained within the jurisdiction.

Popplewell J. granted the stay because he took the view that "the two plaintiff's connection with this country is tenuous. There is some, but it is tenuous." He added:

"It is clear from reading the article that there is no English connection in the article at all. It is in an American magazine, written in American style (if that is the right way of putting it) and it is wholly connected with matters in Russia. There is no connection with anything which has occurred in this country in the article."

In the Court of Appeal Hirst L.J., with whom May L.J. and Sir John Knox agreed, said:

"It is elementary, and was rightly stressed by Mr. Robertson, that these were decisions within the scope of the judge's discretion, so that the Court of Appeal should only interfere if the judge erred in principle, or seriously misapprehended relevant matters, or took into account irrelevant ones. Mr. Price submitted that his case meets these criteria on two main grounds. 1. The judge in his second

judgment disregarded the important line of authority canvassed in his first judgment, and gave little or no weight to the key fact that the torts sued on were committed in England. 2. He misapprehended the extent of the plaintiff's connections with and reputations in England on the evidence then before him, which has, of course, been significantly supplemented by the further evidence."

Dealing generally with these grounds, Hirst L.J. said that he found it somewhat surprising that the judge had concluded, on the evidence before him, that Mr. Berezovsky's connections with England were tenuous. However, in addition to that evidence, the Court of Appeal had the advantage of further evidence which, to Hirst L.J. 's mind, placed the strength of his connections beyond doubt.

Hirst L.J. recited the further evidence in some detail. I would refer briefly to the affidavit of Mr. Eugene Shvidler, who is Vice-President of Sibneft, one of the largest oil companies in Russia. Mr. Berezovsky served on its board of directors until 1996 and, according to Mr. Shvidler, still tends to be publicly identified with it. Mr. Shvidler states among other things that he has been personally involved in the company's efforts to raise capital, and has had frequent dealings with people in London, because of the City's importance as a major financial centre. The "Forbes" article had frequently been mentioned to him. He had received "a great deal of negative feedback from investors, including those in the U.K. who ***1017** have expressed concern about Mr. Berezovsky's role in the company…" He was left in no doubt about "the detrimental effect of the 'Forbe's article upon Mr. Berezovsky's reputation and upon the reputation of the companies with which his name is associated amongst the financial community of London"

Further evidence to the same effect is contained in the affidavit of Mr. Kuppers, the managing director of Forus Services S.A., whose business consists in the provision of financial services to leading corporations in Russia and elsewhere. Mr. Berezovsky was a co-founder of the company, and Mr. Glouchkov was a non-executive director of other companies in the Forus group until 1997. The gist of the evidence put forward by Mr. Kuppers is that the reputations and credit of both plaintiffs, and thus the fundraising ability in London of the companies with which they are associated, were seriously damaged by the "Forbes" article.

Bearing in mind the colourful and explicit terms of the article—it quotes one American businessman as saying "These guys are criminals on an outrageous scale. It's as if Lucky Luciano were chairman of the board of Chrysler"—it would be hardly surprising if it had a detrimental effect upon the reputations of the plaintiffs and the credit of the companies concerned. But in the international business and political world it is by no means unknown for scoundrels, and even major criminals, to survive, to be accepted, and to prosper. Standards of conduct and of tolerance in such matters vary widely from country to country. This case is solely concerned with the plaintiff's reputations in England. They seek to have their reputations judged by English standards. The Court of Appeal thought that for this purpose England was the natural forum, and I agree with them. I do not follow the relevance of the judge's remark that the article has "no connection with anything which has occurred in this country." A businessman or politician takes his reputation with him wherever he goes, irrespective of the place where he has acquired it.

Mr. Robertson, for the defendants, criticised Hirst L.J. for saying that the judge had erred in principle in failing to take into account the decisions in The Albaforth [1984] 2 Lloyd's Rep. 91 and Schapira v. Ahronson [1999] E.M.L.R. 735 in his second judgment although, as Hirst L.J. acknowledged, the judge had given careful consideration to these cases in his first judgment. But as the judge himself had said in his second judgment: "As to the law on the subject, the principles are not in dispute. Like all these principles their application is not always very easy"

The Court of Appeal plainly considered that the judge had erred in his application of the governing principles to the evidence before him, and that they were accordingly entitled to consider the matter afresh. In the light of the evidence before the judge they were in my judgment fully justified in doing so and in concluding, with the assistance of the additional evidence, that his decision should be reversed.

Lord Hoffmann

My Lords, the plaintiffs are Russian businessmen who claim that they have been defamed by an article published in an American business magazine and distributed almost entirely in the United States but also in limited numbers in other countries including England. The article is concerned with their activities in Russia. The plaintiffs seek to invoke the extraterritorial jurisdiction of the English court to require the American editor and publishers to

answer for the injury which they say has been done to them in this country. Their claim is limited to the effects ***1018** of publication in England and they say that England is clearly the appropriate forum in which such an action should be tried.

The question of whether leave should be granted to serve the defendants in the United States came before Popplewell J. on 22 October 1997. Ord. 11, r. 1(1)(f) confers jurisdiction when "the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction." The plaintiffs adduced evidence that, as Russian businessmen, they made frequent visits to this country and were known to people here. One of them had a divorced wife and children living here. Their activities in Russia had attracted a certain amount of publicity, not all favourable, in English newspapers. So they had a reputation in this country and had therefore suffered "significant damage" here. That was enough to found jurisdiction under Ord. 11, r. 1(1)(f).

It not sufficient, however, to bring one's case within one of the paragraphs of Ord. 11, r. 1 . The plaintiff is also required by Ord. 11, r.4(2) to show that "the case is a proper one for service out of the jurisdiction under this Order." A decision on this question involves an exercise of the court's discretion, taking into account all the circumstances of the case. The principles upon which the discretion should be exercised are definitively stated in the speech of Lord Goff of Chieveley in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 . The burden is upon the plaintiff to show that England is clearly the appropriate forum in which the case should be tried in the interests of all the parties and the ends of justice. The various paragraphs of Ord. 11, r. 1 include some where "one would have thought [that] the discretion would normally be exercised in favour of granting leave" and this was a matter to be taken into account but "the court should give to such factors the weight which, in all the circumstances of the case, it considers to be appropriate:" pp. 481–482. Lord Templeman, in the same case, said, at p. 465, that the decision was "pre-eminently a matter for the trial judge… An appeal should be rare and the appellate court should be slow to interfere"

Popplewell J. dealt with the application with commendable expedition. Submissions and judgment were concluded within a single day. He dealt first with a preliminary point as to whether in the special case of a libel published within the jurisdiction, he had any discretion to refuse leave. He was referred to the decision of the European Court of Justice in Shevill v. Presse Alliance S.A. (Case C-68/93) [1995] 2 A.C. 18 . This case concerned the application to libel proceedings of article 5(3) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, which confers jurisdiction in tort actions upon "the courts of the place where the harmful event occurred." The European Court decided that in the case of an international libel through the press, the courts of each contracting state in which the defamatory publication was distributed and in which the victim was known had jurisdiction to award damages for the injury to his reputation in that state. This was a jurisdiction which, in accordance with the fundamental principles of the Brussels Convention , could not be declined on the ground of forum non conveniens.

Popplewell J. rightly pointed out that the existence of jurisdiction under the Brussels Convention as against a person domiciled in a contracting state was not necessarily a reason for exercising an extra-territorial jurisdiction under Order 11 against a person not so domiciled. He did not develop the point, but the differences which he no doubt had in mind were fully articulated by Lord Goff of Chieveley in the later case of ***1019** Airbus Industrie G.I.E. v. Patel [1999] 1 A.C. 119 , 132. He said that the purpose of the Brussels Convention was to parcel out jurisdiction according to clear rules:

"This system achieves its purpose, but at a price. The price is rigidity, and rigidity can be productive of injustice. The judges of this country, who loyally enforce this system, not only between United Kingdom jurisdictions and the jurisdictions of other member states, but also as between the three jurisdictions within the United Kingdom itself, have to accept the fact that the practical results are from time to time unwelcome. This is essentially because the primary purpose of the Convention is to ensure that there shall be no clash between the jurisdictions of member states of the Community." The common law approach to conflicts of jurisdiction was altogether different:

"There is, so to speak, a jungle of separate, broadly based, jurisdictions all over the world. In England, for example, jurisdiction is founded on the presence of the defendant within the jurisdiction, and in certain specified (but widely drawn) circumstances on a power to serve the de-

fendant with process outside the jurisdiction. But the potential excesses of common law jurisdictions are generally curtailed by the adoption of the principle of forum non conveniens—a self-denying ordinance under which the court will stay (or dismiss) proceedings in favour of another clearly more appropriate forum."

Counsel nevertheless submitted that English case law showed that even outside the Convention, a plaintiff with a reputation in this country who complained of a libel published in this country by a foreign resident had an unqualified right to bring proceedings against him here. He referred first to the well known decision in Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey (The Albaforth) [1984] 2 Lloyd's Rep. 91 which decided that a negligent misrepresentation in a telex sent from the United States but received and acted upon in England was a tort committed within the jurisdiction within the meaning of Ord. 11, r. 1(1)(h) as it then stood. Ackner L.J., at p. 94, following a dictum of Lord Pearson in Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458, 468, said that "the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute." Robert Goff L.J. said, at p. 96:

"where it is held that a court has jurisdiction on the basis that an alleged tort has been committed within the jurisdiction of the court, the test which has been satisfied in order to reach that conclusion is one founded on the basis that the court, so having jurisdiction, is the most appropriate court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a court which has jurisdiction on that basis must also be the natural forum for the trial of the action."

The Albaforth was alluded to by Peter Gibson L.J. in Schapira v. Ahronson [1999] E.M.L.R. 735, in which the Court of Appeal refused to stay proceedings brought by a British national, long resident in England, against an Israeli newspaper which had a very small circulation in this country. The defendants had accepted service within the jurisdiction. The ***1020** burden of showing that Israel was clearly the more appropriate forum was therefore upon the defendants. Phillips L.J., at p. 749, described it as an "uphill task." Peter Gibson L.J. said that the fact that the tort had been committed in the jurisdiction was a factor which he said should be taken into account, but he went on to say, at p. 745: "It is common ground that the court must conduct a balancing exercise, weighing the factors which tell in favour of a trial in England against the factors which tell in favour of a foreign trial"

Popplewell J. considered these cases and decided that they did not constitute an exception to the general principle, laid down in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460, that the question of whether England was clearly the appropriate forum should be decided on a consideration of all the facts of the case. He referred to Kroch v. Rossell [1937] 1 All E.R. 725, in which the Court of Appeal set aside an order for service of libel proceedings upon a French and Belgian newspaper, notwithstanding the fact that some copies had been distributed in England, and concluded: "I therefore do not accept Mr. Price's view that his clients have a right, an unchallengeable right, to bring proceedings here and that it is not open to the defendants to argue on the merits about it." This conclusion has not been disputed.

The judge then proceeded immediately to hear argument on the merits and gave another ex tempore judgment. A large number of cases were cited to him but he referred to no authority except the general principles stated by Lord Goff of Chieveley in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460. He explained his restraint as follows: "Each case depends upon its own particular facts, and one element in a particular case which is absent from another case may in fact be the factor which persuaded the judge to decide the case one way rather than the other." This seems to me entirely right and in accordance with the wish expressed by Lord Templeman in Spiliada, at p. 465, that: "I hope that in future the judge… will not be referred to other decisions on other facts"

The judge considered the evidence of the plaintiff's links with this country. He summed it up by saying: "I take the view that the two plaintiff's connection with this country is tenuous. There is some but it is tenuous." He went on to comment on the article : "there is no English connection in the article at all… it is wholly connected with matters in Russia." He said that he was satisfied on the expert evidence that substantial justice could be done if the plaintiffs sued in Russia. The same would be true if they sued in the United States, despite differences in the libel laws of the three countries. He said:

"The argument in favour of the case being tried in Russia is that this is a peculiarly Russian case. It involves nothing but Russia. It involves Russian witnesses, it involves Russian companies, it involves Russian personalities and it involves a period of time with which the Russian courts are more familiar than the English courts or those of the United States, with which they have no connection… I come back to look at the matter as a whole. I do not have to decide whether Russia or America is more appropriate inter se. I merely have to decide whether there is some other forum where substantial justice can be done. This case, to my mind, has almost no connection at all with this country. The fact that the plaintiffs want to bring their action here is, I suppose, a matter that I should properly take into account. If a plaintiff is libelled in this country, prima facie he should ***1021** be allowed to bring his claim here where the publication is. But that is subject to the various matters to which I have already made reference and, in my judgment, it seems to me unarguable that this case should… be tried in this country"

The plaintiffs appealed against the exercise of the judge's discretion. The function of an appellate court in such a case was stated by Lord Diplock in Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191 , 220: "The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him…"

The Court of Appeal [1999] E.M.L.R. 278 , in a judgment given by Hirst L.J., said that the judge had misunderstood the law. After examining a large number of other cases, Hirst L.J., at pp. 299–300, accepted the submission of Mr. Price for the plaintiffs that where the English circulation of a foreign publication gives rise to a "substantial complaint," the question of the more appropriate forum is "governed" by The Albaforth [1984] 2 Lloyd's Rep. 91 and Schapira v. Ahronson [1999] E.M.L.R. 735 . He concluded: "The judge gave careful consideration to these cases in his first judgment, but unfortunately erred in principle in failing to take them into account in his second judgment, thus entitling us to exercise our discretion afresh"

My Lords, there seems to me absolutely no basis for thinking that the judge failed to take those cases into account. He had, as Hirst L.J. said, analysed them in his earlier judgment. He had explained why he did not think it necessary to refer to them or any other cases again his second judgment. He had summarised the gist of them in the passage I have already quoted when he said: "If a plaintiff is libelled in this country, prima facie he should be allowed to bring his claim here where the publication is." All that can be said is that he did not give the factor of publication in England the overwhelming weight that the Court of Appeal thought he should have done. But the fact that an appellate court would have given more weight than the trial judge to one of the many factors to be taken into account in exercising the discretion ("The factors… are legion," said Lord Templeman in the Spiliada case [1987] A.C. 460 , 465) is not a ground for interfering with the exercise of his discretion.

Your Lordships were invited to examine a large number of cases, both at first instance and in the Court of Appeal. I have already referred to Kroch v. Rossell [1937] 1 All E.R. 725 , in which the plaintiff proved no reputation in this country. On the other hand, in Schapira v. Ahronson [1999] E.M.L.R. 735 the plaintiff had lived here for many years and acquired British nationality. The decision of the Court of Appeal in this case has since been distinguished in Chadha v. Dow Jones & Co. Inc. [1999] E.M.L.R. 724 , in which the plaintiff and the defendants were both resident in the United States. The respondent plaintiffs say that that case is likewise distinguishable. So it is. All the cases cited are in some respects similar and in some respects different. But, my Lords, I protest against the whole exercise of comparing the facts of one case with those of another. It is exactly what Lord Templeman in the Spiliada case said should not be done and what the judge rightly refused to do.

A second ground upon which it was suggested in argument that the Court of Appeal were entitled to review the judge's decision was that fresh evidence had been admitted. The function of an appellate court which has ***1022** admitted fresh evidence in a case such as this was also considered by Lord Diplock in Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191 , 220. He said:

"I cannot agree that the production of additional evidence before the Court of Appeal, all of which related to events that had taken place earlier than the hearing before [the judge], is of itself sufficient to entitle the Court of Appeal to ignore the judge's exercise of his discretion and to ex-

ercise an original discretion of its own. The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, if any, the facts disclosed by it invalidate the reasons given by the judge for his decision."

Hirst L.J. [1999] E.M.L.R. 278 , 288 described the fresh evidence as falling into two categories. The first category consisted of affidavits by three persons. First, a solicitor said that after the publication of the article, members of Deloitte and Touche in Manchester and executives of Nomura Bank and Lehmann Brothers in London had "harboured reservations" about dealing with a company having links with Mr. Berezovsky. Secondly, the managing director of a Swiss company with whom Mr. Berezovsky was associated said that in his dealings with financial institutions in London, he found that many (unnamed) individuals expressed concern about Mr. Berezovsky's connections with the company. Thirdly, a Russian businessman on the board of a Russian oil company associated with Mr. Berezovsky said that it was apparent from his dealings in London that Mr. Berezovsky's name was well known there and that he had had "negative feedback" from various unnamed individuals.

The second category of fresh evidence was a number of press cuttings from English newspapers published after the article appeared which referred to Mr. Berzovsky. Hirst L.J. said, at p. 290, that this evidence showed that he was a "well known figure here"

Popplewell J. had recorded that Mr. Berezovsky was a frequent visitor to this country on business. It was obvious that the people here with whom he did business must have known him. He and his agent Lord Reading had deposed in some detail to the extent of his business activities. He was a substantial figure in Aeroflot and vice-chairman of a television network which had extensive business contacts in England. I do not think that the judge would have regarded the fresh evidence as adding anything of substance to what he already knew about Mr. Berezovsky's business links with England. Nor would he have been surprised that his activities in Russia had given rise to newspaper publicity in this country. On any view, he was a person close to the centre of power in Russia. In any case, for the reasons I shall give later, I do not think that the judge's decision turned upon whether Mr. Berezovsky could be said to have a reputation in this country or not. The judge said that the plaintiff's connections with England were tenuous, but that is a different matter. He meant that they were Russians who came here only on business. Their reputation in this country was based entirely on their activities in Russia. One might equally say that President Yeltsin's connections with this country were tenuous or non-existent. But no one would deny that he was, to quote Hirst L.J., "a well known figure" in this country. Like Mr. Yeltsin, Mr. Berezovsky has a truly international reputation. He has lectured at Princeton, dined with George Soros and attended Rupert Murdoch's wedding. He is in the newspapers and no doubt has media contacts all over the world. His ***1023** reputation in England is merely an inseparable segment of his reputation worldwide.

So when Popplewell J. said that the plaintiff's connections with this country were tenuous, I do not think that he should be construed as having failed to notice what was obvious upon the evidence before him, namely that the plaintiffs must have enjoyed a reputation among their circle of business contacts in England, to say nothing of people who read the newspapers. The judge must have meant what he said: that their connections, their ties, with this country, were tenuous. If I may quote what I said in Piglowska v. Piglowski [1999] 1 W.L.R. 1360 , 1372:

"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case… These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account… An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

If, as I think, the judge did not misdirect himself on the law and the fresh evidence would have made no difference, then the appellate court cannot interfere with his discretion unless it is so perverse as to lead to the conclusion that although he recited the law correctly, he could not have adhered to the principles he was purporting to apply. But without an absolute rule, as in Shevill v. Presse Alliance S.A. (Case C-68/93) [1995] 2 A.C. 18 , that the courts of this country are obliged to take jurisdiction in every case in which there is publication here of a libel on a plaintiff who is known in this country, I do not see why the judge was not entitled to

decide that England was not clearly the most appropriate forum for this action between Russian plaintiffs and an American defendant about activities in Russia.

The plaintiffs say that what makes England the most appropriate forum is that they are claiming damages only for the injury to their English reputations. What better tribunal could there be than an English judge or jury to assess the proper compensation? And they rely on the justification which the European Court of Justice gave in Shevill v. Presse Alliance S.A. (Case C-68/93) [1995] 2 A.C. 18 , 62 for the rule of jurisdiction which it laid down: "the courts of each contracting state… in which the victim claims to have suffered injury to his reputation are territorially the best placed to assess the libel committed in that state and to determine the extent of the corresponding damages"

My Lords, there may be cases in which this is a relevant consideration and perhaps even an important one, although the decision in Shevill has attracted some adverse comment: see Peter Carter Q.C. [1992] B.Y.B.I.L. 519 . But the notion that Mr. Berezovsky, a man of enormous wealth, wants to sue in England in order to secure the most precise determination of the damages appropriate to compensate him for being lowered in the esteem of persons in this country who have heard of him is something which would be taken seriously only by a lawyer. An English award of damages would probably not even be enforceable against the defendants in the United States: see Kyu Ho Youm, "The Interaction Between American and Foreign Libel Law: U.S. Courts Refuse to Enforce English Libel Judgments" (2000) ***1024** 49 I.C.L.Q. 131 . The common sense of the matter is that he wants the verdict of an English court that he has been acquitted of the allegations in the article, for use wherever in the world his business may take him. He does not want to sue in the United States because he considers that New York Times v. Sullivan (1964) 376 U.S. 254 makes it too likely that he will lose. He does not want to sue in Russia for the unusual reason that other people might think it was too likely that he would win. He says that success in the Russian courts would not be adequate to vindicate his reputation because it might be attributed to his corrupt influence over the Russian judiciary.

My Lords, this in itself is enough to show that Mr. Berezovsky is not particularly concerned with damages. The defendants were willing to undertake to abide by any order of the Russian court as to damages and to accept the jurisdiction of that court to award damages for injury to the plaintiff's reputation in England as well as anywhere else. But the plaintiffs required and obtained from Popplewell J. a further undertaking by the defendants that they would not "denigrate the integrity competence or justice of the Russian court." The real issue in this case is not about the plaintiff's reputation in one country rather than another but the general question of whether the defendant's article was actionable defamation. It is this issue which the plaintiffs want tried in England.

That is why I said earlier that I did not think that the fresh evidence directed to showing that the article had had the effect of lowering the plaintiffs in the esteem of various bankers and accountants in London and Manchester would have affected the judge's decision. Whatever the reputation of the plaintiffs in this country, it was a reputation based on their activities in Russia. Once it is appreciated that the real object of this litigation is to show that they were defamed in respect of those activities rather than to calculate the compensation for damage to their reputations in England, the existence of those reputations is no longer a factor of overwhelming importance.

The plaintiffs are forum shoppers in the most literal sense. They have weighed up the advantages to them of the various jurisdictions that might be available and decided that England is the best place in which to vindicate their international reputations. They want English law, English judicial integrity and the international publicity which would attend success in an English libel action.

There was a good deal of interesting discussion at the bar about whether an internationally disseminated libel constituted a number of separate torts in each country of publication or whether it should, at least for some purposes, be viewed as a "global tort." In this country the point is settled in the former sense by the decision in Duke of Brunswick v. Harmer, 14 Q.B. 185 . Dean Prosser has described the rule, which may lead to a multiplicity of suits, as possibly appropriate to "small communities and limited circulations" but "potentially disastrous today:" see "Interstate Publication," 51 Michigan L.Rev. 959, 961. In the context of the present case, this discussion is entirely academic. There is no question here of a multiplicity of suits. It is the plaintiffs who are for practical purposes treating the publication as a "global tort" by calling upon the English court and only the English court to vindicate their reputations.

My Lords, I would not deny that in some respects

an English court would be admirably suitable for this purpose. But that does not mean that we should always put ourselves forward as the most appropriate forum in which any foreign publisher who has distributed copies in this country, or whose publications have been downloaded here from the Internet, can be ***1025** required to answer the complaint of any public figure with an international reputation, however little the dispute has to do with England. In Airbus Industrie G.I.E. v. Patel [1999] 1 A.C. 119 your Lordship's House declined the role of "international policeman" in adjudicating upon jurisdictional disputes between foreign countries. Likewise in this case, the judge was in my view entitled to decide that the English court should not be an international libel tribunal for a dispute between foreigners which had no connection with this country. Speaking for myself, I would have come to the same conclusion. Another judge may have taken a different view but in my opinion it is impossible to say that Popplewell J.'s decision was erroneous in law.

Finally I must mention that Mr. Robertson, who appeared for the defendants, invited your Lordships to vary the order of Popplewell J. to delete the undertaking not to denigrate the Russian court. He said that this was too great a restraint on freedom of expression. In my opinion this, too, was a matter for the judge's discretion. Speaking for myself, I do not think that I would have imposed such an undertaking. But I cannot say that the judge was not entitled to do so. There may never be a trial in Russia, in which case the question will be hypothetical. Or there may be a change of circumstances which entitles the defendants to be discharged from their undertaking. But I would not be inclined now to vary the judge's order.

I would allow the appeals and restore the order of Popplewell J.

Lord Hope of Craighead

My Lords, my noble and learned friend, Lord Steyn has identified the principal matters at issue in these appeals. I am in full agreement with the views which he has expressed on issues 1, 2and 6, and there is nothing which I would wish to add to what he has said about them. Of the three remaining issues, the most important one and the one on which I propose to concentrate is issue 5: were the Court of Appeal entitled to interfere with the exercise by Popplewell J. of his discretion? In considering that matter I shall have to deal with issues 3 and 4, in so far as they are directed to the reasons which the Court of Appeal gave for allowing the appeals and lifting the stay which the judge imposed. But the central and underlying question is that which is raised by issue 5.

The reason why I regard issue 5 as the central and underlying question is that the decision as to whether or not a stay should be granted is pre-eminently a matter for the exercise of the discretion conferred by R.S.C., Ord. 11, r. 4(2) on the judge of first instance. As in the case of all other matters which are committed to the discretion of the trial judge, it is a decision with which the appellate court should be slow to interfere. If authority is needed for the application of that principle in the present context, it is to be found in the observations in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 , 465 by Lord Templeman. For this reason I believe that an accurate appreciation of the grounds which Popplewell J. gave for his decision to impose a stay is an essential preliminary to a consideration of the question whether the Court of Appeal were entitled to interfere with that decision. The Court of Appeal were not presented in this case with a clean sheet. So the question whether they correctly applied the Spiliada test is not the primary question. Notwithstanding their experience of litigation in this field and the respect which is due to their careful judgment, the fact remains that they were not at liberty to substitute their own views for those of the judge unless it ***1026** could be demonstrated that he misunderstood the facts or that he failed to exercise his discretion in the right way because of an error in principle.

At the heart of the dispute in this case there lie two questions. The first is whether the English courts have jurisdiction to try the actions which the plaintiffs have raised in this country against the American publisher. The second is whether the plaintiffs should be allowed to pursue their actions here. These questions must be considered in the light of the following factual background.

The plaintiffs are Russian citizens who are resident in Russia, not in England. They have no permanent ties of any kind with this country. They are typical of a group of wealthy and powerful Russian businessmen who have made very substantial fortunes as a result of the collapse of communism. Mr. Berezovsky is probably the best known and the best connected member of that group. Their prosperity is due largely to the fact that they have access to financial institutions and major trading companies in Western Europe and in America. They have used these contacts to develop their business interests in Rus-

sia. They do business in London with these institutions and companies through the Russian companies with which they are associated. They say that they have reputations in this country as a result of their business activities here. But there is no evidence their reputation as Russian businessmen depends to any material extent on things that they have said or done in London. It is a reputation which they have built up for themselves in Russia. And the defamatory material in the magazine article about which they complain contains allegations about their activities in Russia only, not about anything said or done by them in this country.

The defendants are the editor and the publishers of "Forbes" magazine. They reside and have their registered office in the United States of America. The magazine for which they are responsible is a business magazine. It is well known and influential both in the United States, where it is widely published, and abroad. We have been told that about 2000 copies are sold here and that about 13 copies are sold in Russia. The magazine is also published worldwide on the Internet. It can be assumed that the figures which we have been given understate the hard copies which are in circulation in each country as they are passed from hand to hand or are brought from America in the course of their travels by American and European businessmen.

The first of the two questions that I have mentioned is not in dispute. Put more precisely, it is whether the English courts have jurisdiction under Ord. 11, r. 1(1)(f) on the ground that the claim is founded on a tort and the damage which is complained of was sustained in this country. It is plain that the tort of libel is committed in England when defamatory material is published here. The plaintiffs say that the effect of the publication was to damage their reputations in the eyes of people with whom they do business in this country. It is also plain that separate causes of action arose in respect of the publication of each copy of the magazine. This principle was established by Duke of Brunswick v. Harmer, 14 Q.B. 185 . And it is immaterial for the purpose of establishing jurisdiction in this country that the principal place of its publication was in the United States of America. The principle that each communication is a separate libel, and the application of that principle to issues of jurisdiction within the United Kingdom, has long been recognised. In Longworth v. Hope (1865) 3 Macph. 1049 , in which jurisdiction against the defenders who had no other connection with Scotland was founded solely upon the ***1027** artificial ground of an arrestment, a woman who was domiciled in England but resident in Scotland sued the proprietors of a London newspaper in the Court of Session for damages for an allegedly libellous article in their newspaper. The newspaper was published in London, but copies were circulated throughout Great Britain including Scotland. As Lord Deas said, at p. 1057:

"According to our law, the sending of a single copy to any individual in Scotland, even if it were only to the lady herself, would be publication sufficient to found an action for libel, if there were otherwise good grounds of action."

It is the second question, whether the plaintiffs should be allowed to pursue their actions here, that is the subject of this appeal. To put the matter more precisely in terms of Ord. 11, r. 4(2) , the question is whether this is a proper case for service out of the jurisdiction. It is common ground that the principles which must be applied in the determination of that matter are those which were identified by Lord Goff of Chieveley in Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 . For the reasons which I have already given, I take as my starting point the fact that the issues that had to be resolved in order to answer the second question were primarily for consideration and decision by Popplewell J. as the judge of first instance.

In the Court of Appeal Hirst L.J. criticised the judge's decision on two grounds. The first was that he found it surprising that he had concluded on the evidence before him that the plaintiff's connections with England were "tenuous," to which he added that the Court of Appeal had had the advantage of further evidence which to his mind placed the strength of their connections beyond doubt. The second was that, while the judge had given careful consideration to the relevant authorities in his first judgment as to whether it was open to the defendants to apply for a stay, he "erred in principle" in failing to take them into account in his second judgment as to the merits of the application. My initial impression was that it was doubtful whether the Court of Appeal were right on either of these two points and thus whether they ought to have interfered with Popplewell J.'s judgment, as his decision to impose a stay seemed to me to be one which was open to him on the facts upon a correct application of the Spiliada principles. Further consideration of the case has strengthened that impression. I am persuaded that that there is no merit in either of the two points which the Court of Appeal made and that they were wrong to disturb Popplewell J.'s judgment.

The evidence

The judge had before him evidence in the form of affidavits which described the plaintiff's connections with this country. Having considered that evidence he concluded that their connection with this country was tenuous. In order to understand this conclusion, which in the Court of Appeal attracted adverse criticism, it is necessary to identify the matters which the judge said he took into account when he was analysing the evidence.

Of Mr. Berezovsky the judge said that he was a frequent visitor on business to this country, which he had visited on some 31 occasions during the previous three and a half years. He noted that he had kept an apartment in London since 1993 and that he had a wife and children living ***1028** here, from whom he was divorced. As to the extent of his business activities here, he noted that he was a substantial figure in Aeroflot and had helped to establish a working relationship between that company and a merchant bank based in London. He also noted that he was vice-chairman of a Russian television network which had extensive business contacts in England and that he was involved in a joint venture between an English group and a Russian company in relation to a retail fashion house in St. Petersburg. He quoted a passage from his affidavit in which he said that he also had contacts in England in carrying out his government service and that he had extensive contacts with England in his personal life. As for Mr. Glouchkov, the judge noted that he was currently in a senior position in the management of Aeroflot on whose behalf he had travelled to London to negotiate financing arrangements with various banks. He referred to the fact that he also said that he had maintained a flat in London since 1993 and that he travelled to England and particularly to London frequently.

For the defendants it was pointed out that the extent of the plaintiff's business activities in this country was limited to a number of visits relating particularly to Aeroflot, and that their connection with England did not compare with that which other plaintiffs had had such as the fact of being resident here. Their argument was that there really was no reputation which the plaintiffs had which could properly be described as a reputation in this country. Having set out the competing arguments the judge said: "I take the view that the two plaintiff's connection with this country is tenuous. There is some but it is tenuous"

What did the judge mean by saying that their connection was tenuous? I think that it is reasonably clear that when he used this expression he had in mind the contrast in outcomes between Kroch v. Rossell [1937] 1 All E.R. 721 , where the plaintiff who was domiciled in Germany had come to England only temporarily and recently and had no associations with this country at all, and Schapira v. Ahronson [1999] E.M.L.R. 735 , where the proceedings were brought by a resident in London who was also a United Kingdom citizen. He had referred to these two cases in the preliminary judgment which had delivered earlier on the same day. What he was looking for was a sufficiently strong connection to which he could attach significant weight when it came to balancing the competing interests on each side. Clearly there were no permanent connections or ties with this country, such as that provided by residence. Nor were the businesses with which the plaintiffs were connected located in this country. They came here from time to time to advance their business interests in Russia and those of the Russian companies for whom they were acting when they came to do business here. It could be said that their position was really no different from that of the many thousands of businessmen and women from all over Europe and North America who are to be found in the executive lounges in our airports every week of the year as they travel to or from London in the course of their ordinary business activities. They are attracted to London because it is one of the world's great financial and business centres, and they come to this country because many of the people or institutions with whom they wish to make contact are located here. But their connection with this country is ephemeral, and it is not unreasonable to describe it as tenuous.

What of the further evidence which was admitted by the Court of Appeal? This evidence fell into two categories. There were affidavits from three new witnesses, and there was a further affidavit from Mr. Berezovsky. ***1029** The three new witnesses were Mr. Curtis, Mr. Kuppers and Mr. Shvidler. Mr. Curtis, who was senior partner of a firm of solicitors in London, referred to his experience when advising Mr. Berezovsky about the tax implications of a merger between two Russian oil companies. He mentioned the fact that a firm of accountants in Manchester had had reservations about being involved with a company which had links with Mr. Berezovsky, as had the London branch executives of Nomura Bank and Lehman Brothers. Mr. Kuppers, who was the managing director of a company within

a group based in Switzerland with which both Mr. Berezovsky and Mr. Glouchkov were associated, described the role played by the company in identifying sources of funding in the west and negotiating with banks and other financial institutions, many of which are based in or have offices in the United Kingdom. He had had regular dealings with U.K.banks but, as many of the deals involved syndication, he also conducted negotiations here with foreign banks and other financial institutions through their London branch personnel. He referred to problems which he had encountered after the publication of the article in his dealings with those who knew about it. They had expressed concerns about the plaintiff's connections with his company. Mr. Shvidler was the vice president of one of the largest oil companies in Russia on whose board Mr. Berezovsky had served until October 1996 and with which he tended still to be publicly identified. He also referred to concerns expressed by financial analysts and others connected with banks and financial institutions in London which he said had had a detrimental effect on Mr. Berezovsky's reputation and the reputation of the companies with which he was associated. Mr. Berezovsky referred in his affidavit to a large number of articles published about him after the publication of the defendant's article which tended to bear out his claim that he is a well known figure in this country.

It is plain that this additional evidence provided further support for the plaintiff's claim that they have a reputation among those who work for banks and other financial institutions in this country which was damaged by the publication of the defendant's article. But the feature which strikes me most forcibly about this evidence, so far as the question whether the plaintiffs have connections with this country is concerned, is that it tends to show that the plaintiff's connections with this country were even more tenuous than that suggested by the evidence which was before the judge. The transactions which are mentioned were said to have been conducted in London with institutions many of which, like companies with which the plaintiffs were associated, have their head offices elsewhere. But neither of the plaintiffs is said to have been involved in any way in any of these transactions. The problems which were encountered were all due to the plaintiff's links, real or imagined, with the companies on whose behalf the witnesses were attempting to do business. And they were due to the allegations which the article contained about the plaintiff's activities in Russia, not anything done by them in this country. There is nothing in any of these affidavits to suggest that the problems which were encountered would have been any different if the plaintiffs had never set foot in this country at all.

I would hold therefore that the Court of Appeal did not have a sound basis for interfering with the judge's assessment of the weight which was to be attached to the evidence about the plaintiff's connections with this country. ***1030** The relevant authorities

The judge dealt in his first judgment with each of the cases which, in the Court of Appeal's view, provided the appropriate guidance as to the approach which he should adopt. The criticism which the Court of Appeal have made of his decision is directed to the fact that, in his second judgment which he delivered later the same day, he made no mention of these cases apart from the Spiliada case [1987] A.C. 460 . From this it was concluded that, in Hirst L.J. 's words, the judge "unfortunately erred in principle in failing to take account of them in his second judgment, thus entitling us to exercise our discretion afresh"

It seems to me, with respect, that this is based on a misunderstanding of the approach which the judge took to the authorities. What Popplewell J. said at the outset of his second judgment was:

"As to the law on the subject, the principles are not in dispute. Like all these principles their application is not always very easy. Counsel have been very helpful in bringing to my attention a large number of cases which are illustrations of the court's approach. If I do not refer to all of them but refer to the principle, it is not out of discourtesy but because each case depends on its own particular facts, and one element in a particular case which is absent from another case may in fact be the factor which persuaded the judge to decide the case one way rather than the other." He then referred to the Spiliada case, from which he quoted the relevant passages that are to be found in Lord Goff of Chieveley's judgment. In the light of these opening remarks I do not think that it can be assumed that the judge overlooked any of the authorities to which he had just made reference when he was delivering his first judgment. On the contrary, what he appears to have done was to conclude from them that, as each case turns on its own facts, the important thing for him to do was to identify the principles which had been described by Lord Goff and to apply those principles to the evidence. It can be assumed that in adopting this approach he had in mind the advice which Lord Templeman gave in the Spiliada case, at p. 465 that the judge should be allowed to study

the evidence and that he should not be referred to decisions on other facts.

But there is a more substantial point which underlies this criticism. This is the Court of Appeal's view that the appropriate guidance for a decision in this case was to be found in Distillers Co. (Biochemicals) Ltd v. Thompson [1971] A.C. 458 , in Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey (The Albaforth) [1984] 2 Lloyd's Rep. 91 and especially in Schapira v. Ahronson [1999] E.M.L.R. 735 in which the doctrine to be found in the Distillers case and The Albaforth was applied to a defamation case. It is therefore necessary to examine the doctrine which was explained in these cases and to consider, having regard to its bearing on the issues which are in dispute in this case, whether the judge is open to the criticism that he failed to follow the guidance which is to be found in that doctrine.

The Distillers case concerned a challenge on the ground of forum non conveniens to a writ issued in New South Wales by a victim of thalidomide whose mother was in that jurisdiction when the damage occurred. The Albaforth was about a claim in tort for a negligent mis-statement in a telex which had been despatched from New York to London. In The Albaforth [1984] 2 Lloyd's Rep. 91 , 94, Ackner L.J. quoted from Lord Pearson's ***1031** speech in the Distillers case [1971] A.C. 458 , 468, where he said that the right approach when the tort was complete was to look back over the series of events constituting it and to ask where in substance did the cause of action arise, and said: "These quotations make it clear that the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute." In the Schapira case the two articles which were complained of had been published in an Israeli newspaper circulating mainly in Israel, but a few copies had been circulated in England where the plaintiff was resident and carried on business. The principles that the tort of libel was committed wherever the defamatory material was published and that prima facie the place of publication was the natural forum for the determination of the dispute were applied. The Court of Appeal held that England was the appropriate forum for the actions as the English resident had limited his claim to the effects of its publication in England, even though the circulation was extremely limited there and there was a much larger publication elsewhere.

Hirst L.J. said that he was satisfied that the appropriate guidance to be applied to a case where there is a substantial complaint about an English tort is that which is to be found in the Distillers and The Albaforth cases. He rejected the argument that they were of no assistance in a case of defamation where publication had occurred in several jurisdictions as they involved different torts which by their nature were confined to a single jurisdiction, since the hypothesis was that a substantial tort had been committed within the jurisdiction. I agree with my noble and learned friend, Lord Steyn, for the reasons which he has explained, that Hirst L.J. was right to rely on the Albaforth line of authority. Like him, I would reject the argument which counsel for the defendants advanced that the application of the Spiliada test did not admit of the application in this case of the principle that the jurisdiction in which the tort is committed is prima facie the natural forum for the dispute.

But it is not enough for the resolution of the question whether the Court of Appeal were entitled to interfere with the exercise by Popplewell J. of his discretion to say that Hirst L.J. was right on this point. The central and underlying question, as I have said, is whether he was well founded when he said that Popplewell J.erred in principle in failing to take this line of authority into account. I have already given my reasons for doubting the soundness of this proposition in the light of the words which I have already quoted with which Popplewell J.began his second judgment. As for the question of principle, I would regard the following passage which is taken from his concluding paragraph as directly relevant:

"I come back to look at the matter as a whole. I do not have to decide whether Russia or America is more appropriate inter se. I merely have to decide whether there is some other forum where substantial justice can be done. This case, to my mind, has almost no connection at all with this country. The fact that the plaintiffs want to bring their action here is, I suppose, a matter that I should properly take into account. *If a plaintiff is libelled in this country, prima facie he should be allowed to bring his claim here where the publication is* . But that is subject to the various matters to which I have already made reference…" (Emphasis added.)

My Lords, I am quite unable to understand how it

can be said that Popplewell J.erred in principle when he set out with complete accuracy ***1032** in his judgment the very principle which he is said to have failed to take into account. If the suggestion is that the principle must prevail over the application of the further principles identified by Lord Goff of Chieveley in the Spiliada case, I would reject it. But I do not understand this to be the position which Hirst L.J. wished to adopt. On the contrary, he introduced his discussion of the authorities by stating that the Spiliada principles are so well known as to require only the briefest reminder and that they are very deeply rooted in our jurisprudence. If the suggestion is that the judge failed to apply the principles correctly to the facts, I would respond by saying, first, that this not what Hirst L.J. said in the relevant part of his judgment and, secondly, that questions as to the weight to be attached to the various matters to which the judge made reference were for him to decide and with which—unless an error of principle was demonstrated—the Court of Appeal was not entitled to interfere.

I should like to add these comments. The principle which Ackner L.J. articulated in The Albaforth [1984] 2 Lloyd's Rep. 91 , 94 provides the starting point, but no more than the starting point, for a correct application of the Spiliada principles to the question whether the case is a proper one for service out of the jurisdiction under Ord. 11, r. 4(2). In a defamation case the judge is not required to disregard evidence that publication has taken place elsewhere as well as in England. On the contrary, this feature of the case, if present, will always be a relevant factor. The weight to be given to it will vary from case to case, having regard to the plaintiff's connection with this country in which he wishes to raise his action. The rule which applies to these cases is that the plaintiff must limit his claim to the effects of the publication in England: Diamond v. Sutton (1866) L.R. 1 Ex. 130; Schapira v. Ahronson [1999] E.M.L.R. 735 ; see also Eyre v. Nationwide News Pty. Ltd. [1967] N.Z.L.R. 851 . Common sense suggests that the more tenuous the connection with this country the harder it will be for the claim to survive the application of this rule.

One of the features of this case which I find most troublesome on the facts is the plaintiff's apparent lack of attention to detail as to the application to it of this rule. When challenged as to the relevance of a reference to the fact that Lockheed, a U.S.Corporation, had pulled out of a prospective deal with a Russian company with which Mr. Berezovsky was associated because of the "Forbes" article, counsel for the plaintiffs readily conceded that it would be an abuse for the plaintiffs to sue on matters which had occurred elsewhere and on the effects of any extra-territorial publication of the article. But many of the transactions referred to in the affidavits appear to be of this character. How is one to tell, in a case where the connections with England are so heavily dependent on the plaintiff's reputation in the minds of those representing foreign banks and institutions in their dealings with the Russian companies, that the loss of reputation in this country of which they complain is due to the effects of publication here as compared with the effects of the publication of the magazine in the countries where these banks and institutions have their principal offices? How is one, in such a case, to separate out the plaintiff's international reputation and the effects of the article on the transacting of business by the Russian companies internationally from the effects of the article on such reputation, if any, as they can claim to have in England? It would be a matter for regret if orders for service on publishers out of the jurisdiction were to be regarded as available on demand to those who have established international reputations by things said or done elsewhere, who ***1033** have formed no long-standing or durable connections with this country by residence or by locating any of their businesses here and who are unable to demonstrate that the publication has had a material effect upon business or other transactions by them located only in this country. The interests of all the parties and the ends of justice would suggest that the case should be tried elsewhere.

Conclusion

I consider that the judge was entitled to conclude, on the evidence before him and upon a correct application of the principles described in the Spiliada case [1987] A.C. 460 , that the plaintiffs had not been able to show that England was the most appropriate forum to try their actions. I do not think that the further evidence which was before the Court of Appeal justified a departure from the decision which he reached, and I also think that the Court of Appeal were in error when they said that the judge had erred in principle. I would allow the appeals and restore the orders which were made by Popplewell J.

Lord Hobhouse of Woodborough

My Lords, I agree that these appeals should be dismissed

[2000] 1 W.L.R. 1004 [2000] 2 All E.R. 986 [2001] I.L.Pr. 21 [2000] E.M.L.R. 643 (2000) 97(22) L.S.G. 44 (2000) 150 N.L.J. 741 Times, May 16, 2000 Independent, May 18, 2000 Official Transcript [2000] 1 W.L.R. 1004 [2000] 2 All E.R. 986 [2001] I.L.Pr. 21 [2000] E.M.L.R. 643 (2000) 97(22) L.S.G. 44 (2000) 150 N.L.J. 741 Times, May 16, 2000 Independent, May 18, 2000 Official Transcript
(Cite as: [2000] 1 W.L.R. 1004)

for the reasons given by my noble and learned friend, Lord Steyn. Appeals dismissed with costs.

---

1. R.S.C., Ord. 11, r. 1(1) : "service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun by the writ… (*f*) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction…" R. 4(2) : "No such leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order"

END OF DOCUMENT

EXHIBIT 23

RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS

The Preclusive Effects of Foreign Judgments in Private International Law

PETER R. BARNETT
BA, LL B (Hons) (Syd); BCL, DPhil (Oxon)
Legal Practitioner, NSW, Australia

Foreword by
The Honourable Mr Justice KR Handley
Officer of the Order of Australia,
BA, LLB (Sydney), of Lincoln's Inn,
Visiting Fellow, Wolfson College, Cambridge
A Judge of the Court of Appeal of New South Wales

OXFORD
UNIVERSITY PRESS

action judgment, and even in this case the observations are *obiter* because C's claim, as a bondholder seeking the gold value of bonds issued by the defendant, failed on other grounds. Nonetheless, the defendant had relied upon a decision of the US District Court of New York, in a class action brought by L on behalf of himself *and other bondholders similarly situated* against the defendant. The US court had upheld the same contention that the defendant was making in the English proceedings brought by C. However, the English court indicated that it would *not* have accorded preclusive effect to that judgment, and so C would *not* have been precluded:[80]

> English private international law does not permit a foreign judgment [in such actions] to give rise to a plea of *res judicata* in the English courts unless the party alleged to be bound had been served with the process which led to the foreign judgment.

3.31 Given that it is not clear how the existing judgment recognition and *res judicata* criteria assist,[81] perhaps a specific criterion—a 'multi-parties' rule—is called for in these situations, to test whether an alleged class member should (in the interests of natural justice) be bound by a judgment in a foreign representative or class action.[82]

3.32 The trend in the common law world has been that *all* members of the class whom a party purports to represent will be deemed parties and thus bound by an order of the court, provided that the representative party has acted *bona fides* in the interests of the class.[83] However, the suggested 'multi-parties' criterion might require an English court to be satisfied that:

[80] ibid 473 (McNair J).

[81] For example, 'jurisdiction in the international sense' emphasises jurisdiction over the *defendant* and does not refer to the situation where the foreign *claimant* may deny submission to the jurisdiction, indeed in ordinary litigation it is assumed that the claimant has voluntarily submitted to the court's jurisdiction. But if a claimant in subsequent proceedings in England disavows membership of a class action to which the defendant alleges him to have been a member, the English court—in order to follow its own *res judicata* criteria in these cases—will need to establish some basis for holding that the claimant is or is not bound.

[82] It may not be appropriate simply to accept the foreign law in this regard. Consider, for example, the US law that would have applied, *ex hypothesi*, in *Campos v Kentucky and Indiana Terminal Railroad Co* [1962] 2 Lloyd's Rep 459, 472: '[the US law states] . . . "A true class action properly brought under this [ie the US] rule is binding upon and gives rise to a plea of *res judicata* against all members of the class *whether or not they took part in the action and whether or not they were served with notice of the action or whether or not they had knowledge of the proceedings.*" . . .' (!)

[83] *Wytcherley v Andrews* (1871) LR 2 P&D 327; *Cox v Dublin City Distillery Co (No 3)* [1917] 1 IR 203: the second debenture holders were estopped by a foreign decision from disputing that D was entitled to a lien on the debentures, the class having been represented by the trustee who had requested the liquidator to fight the second debenture holders' battle; cf *Cox v Dublin City Distillery Co (No 2)* [1915] 1 IR 345: strangers not entitled to estoppel from what was neither a test nor 'representative' action. In Canada: see *Naken v General Motors of Canada Ltd* (1983) 144 DLR (3d) 385. In Australia: see *Carnie v Esanda Finance Corp* (1995) 183 CLR 398, 423–424, HCA.

(i) the claimant in the subsequent proceedings had notice of the foreign class action and had the chance to withdraw or object; and
(ii) the foreign court, acting under an obligation to protect absent class members, held a hearing, considered the evidence and made a ruling as to membership.

3.33 In this respect, it is well to note the recent additions to the Civil Procedure Rules in England.[84] Recognising that the rules that existed as to representative actions *in England* did not go far enough in providing a means for dealing with 'multi-party' actions,[85] new procedures dedicated to multi-party claims were introduced. In brief outline:[86]

> the [new] rules [in CPR, rr 19.10–19.15] provide that where claims which give rise to common or related issues of fact or law emerge (r 19.10) the court has power to make a Group Litigation Order (GLO) enabling the court to manage the claims covered by the order in a co-ordinated way (r 19.11). The GLO will contain directions about the establishment of a 'group register' on which the claims to be managed under the GLO will be entered and will specify the court ('the management court') which will manage the claims on the register (r 19.11(2)). Judgments, orders and directions of the court will be binding on all claims within the GLO (r 19.12(1)). The court's case management powers enable it to deal with generic issues, for example, by selecting particular claims as test claims (rr 19.13(b) and 19.15).

3.34 The addition of these rules offers, at least, a template for assessing *foreign* rules governing group litigation and, in particular, for assessing whether those rules would satisfy the suggested 'multi-parties' criterion. Indeed, were a 'multi-parties' criterion added to those criteria which already define the circumstances for according preclusive effect to a foreign *res judicata*—that is, where the foreign determination is a final judgment of a court of competent jurisdiction which disposes of the rights of the parties—arguably courts might more safely conclude that a judgment in a foreign class action properly supports a preclusive plea in England.[87]

[84] That is, the rules governing group litigation which were added to the CPR by the Civil Procedure (Amendment) Rules 2000 SI 2000/22 and contained in CPR, rr 19.10–19.15. They came into force on 2 May 2000.

[85] Formerly RSC Ord 15, now CPR, rr 19.6–19.9. See n 75 above.

[86] CPR, r 19.0.10.

[87] *Lubbe v Cape plc* [2000] 1 Lloyd's Rep 139, CA illustrates how complex this type of litigation is, and also how unsettled the principles, whilst the underlying logic of the decision hints at the applicability of preclusive pleas (mainly abuse of process) and the application of *forum non conveniens* principles in the recognition context. That case was initially brought in England against Cape plc, by five South African nationals. Their claims were in respect of asbestos-related diseases resulting, it was alleged, from exposure while working as employees for South African subsidiaries of Cape plc. At first instance, the defendant obtained a stay on *forum non conveniens* grounds, but the stay was lifted by the Court of Appeal. Then, in January 1999, the solicitors for the claimants issued a writ on behalf of a further 1,539