OUTER HOUSE, COURT OF SESSION

[2026] CSOH 39

GP16/25

OPINION OF LORD SANDISON

In the cause

ROBERT ADAMSON

Applicant

against

ARNOLD CLARK AUTOMOBILES LIMITED

Respondent

Applicant: Milligan KC, Black; Thompsons Scotland LLP
Respondent: Dean of Faculty, Brown; Burness Paull LLP

16 April 2026

Introduction

[1] Robert Adamson has applied to the court for permission to bring group proceedings on behalf of around 15,000 customers of the respondent, Arnold Clark Automobiles Limited, who claim to have suffered loss and damage in respect of the release to the dark web of their personal data in consequence of a cyber attack on the respondent's computer systems in December 2022. The respondent objected both to the grant of permission in terms of section 20(5) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 for the proposed group proceedings to be brought, and to the grant of authorisation to Mr Adamson in terms of section 20(3)(b) of the 2018 Act to be a representative party in those

proposed proceedings. After hearing parties, I granted the permission and authorisation sought. The respondent has now exercised its right to reclaim against the grant of permission (but not of authorisation) and it is therefore necessary to set out in writing the reasons for my decision to grant permission.

Relevant Legislative Provisions

[2] Section 20(6) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, dealing with the circumstances in which the court may grant permission for the institution of group proceedings, provides *inter alia* as follows:

> "(6) The Court may give permission—
> (a) only if it considers that all of the claims made in the proceedings raise issues (whether of fact or law) which are the same as, or similar or related to, each other,
> (b) only if it is satisfied that the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings, and
> (c) in accordance with provision made in an act of sederunt under section 21(1)."

Chapter 26A of the Act of Sederunt (Rules of the Court of Session 1994) 1994/1443, which was made in exercise of the powers provided by section 21(1) of the 2018 Act and regulates the procedure in group proceedings in the court, provides *inter alia* as follows:

> "**26A.11.— The permission stage**
>
> 26A.11(5) The circumstances in which permission to bring proceedings to which this Chapter applies may be refused by the Lord Ordinary are as follows—
>
> (a) the criteria set out in section 20(6)(a) or (b) (or both (a) and (b)) of the [2018] Act have not been met;
>
> (b) it has not been demonstrated that there is a *prima facie* case;
>
> (c) it has not been demonstrated that it is a more efficient administration of justice for the claims to be brought as group proceedings rather than by separate individual proceedings;
>
> (d) it has not been demonstrated that the proposed proceedings have any real prospects of success.

…

26A.13. The permission stage: appeals

An appeal against the granting or refusing of permission (including the granting of permission either subject to conditions or only on particular grounds) for group proceedings to be brought is made by reclaiming motion."

Submissions for the respondent

[3] On behalf of the respondent, the Dean of Faculty submitted that permission to bring the proposed group proceedings should be refused on the basis that the court could not regard the criteria set out in RCS 26A.11(5)(b), (c) and (d) as having been satisfied. Fundamentally, the court was *forum non conveniens*. That was a matter which should be determined at this stage. If the respondent's contention in that regard was correct, the applicant could not demonstrate that the test for permission was met. He could not demonstrate that he had a *prima facie* case or that the proposed proceedings had any real prospects of success. Once the court had declined jurisdiction, it no longer had the power to determine the dispute. In such circumstances, there was no serious question to be tried, and no case to argue or answer.

[4] Chapter 26A of the Rules of Court was aimed at ensuring that litigation on the scale of group proceedings was brought only when that was an appropriate vehicle for the determination of claims which were the same or similar, and to avoid the prospect of such proceedings becoming an instrument of oppression. The permission stage was aimed at ensuring that group proceedings were only brought when they were preferable to any other available procedure for the fair, economic and expeditious determination of the dispute (Report of the Scottish Civil Courts Review (2009) Volume 2, Ch 13, paragraph 65). The intended benefits of the introduction of group procedure included a more streamlined

approach, greater cost efficiency and a reduction in court time, for the advantage of both users and the courts (Policy Memorandum, Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill at paragraph 93).

[5] The group members' claims arose from a cyber attack carried out on the defender in December 2022. Litigation on behalf of around 18,500 individuals claiming to have been affected by the attack had already commenced in England. An omnibus claim form was filed in July 2025 on behalf of 200 of those claimants, and was served on the respondent in January 2026. Draft General Particulars of Claim had been provided to the respondent. The claimants in the English proceedings alleged (as in the proposed Scottish proceedings) that their personal data was exfiltrated during the attack, and that this was the result of the respondent's failure to comply with various duties under the UK GDPR. They sought damages for distress and financial loss they claimed to have suffered as a result of the theft of their data. The issues were thus identical to those sought to be ventilated in the proceedings for which permission was sought by way of the present application. A Case Management Conference took place at the English High Court on 13 January, during which the Master decided that the claims there would proceed on a Lead Claimant Model. Deadlines for various further preparations and steps of procedure were ordered, including disclosure, claimant validation and lead claimant selection, all of which were to take place during the first half of 2026. Compendious pleadings were due to be delivered in July and October 2026, following which it was anticipated that further case management directions would be sought. No plea to jurisdiction was being taken in the English proceedings. No such plea would be taken against any UK-based party seeking to join those proceedings.

[6] If the Court of Session was *forum non conveniens*, the applicant could not demonstrate that the efficient administration of justice would be served by the bringing of group

proceedings. The appropriate comparator in terms of RCS 26A.11(5)(c) was the English litigation, which was already up and running. Justice would be administered with greater efficiency if all claims were dealt with within one set of proceedings, before the same court. It would be cheaper, simpler and would avoid significant duplication of preparation and procedure. It would avoid the possibility of mutually inconsistent decisions on the substantive issues, such that claimants north and south of the border ended up with different outcomes.

[7] The classic statement of the law on *forum non conveniens* was to be found in the opinion of Lord Kinnear in *Sim* v *Robinow* (1892) 19 R 665 at 668:

> "…the plea [of *forum non conveniens*] can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

[8] In *Spiliada Maritime Corp* v *Cansulex Ltd* ("*The Spiliada*") [1987] AC 460, [1986] 3 WLR 972, Lord Goff of Chieveley explained that the question was not one of convenience, but of suitability or appropriateness. The appropriateness of the alternative forum was considered first. Where genuine proceedings had been started and had developed to the stage where they had had some impact upon the dispute between the parties, especially if such impact was likely to have a continuing effect, that might be a relevant factor to be taken into account when considering whether the foreign jurisdiction provided the appropriate forum for the resolution of the dispute between the parties: *de Dampierre* v *de Dampierre* [1988] AC 92, [1987] 2 WLR 1006. Indeed, in some instances, including *The Spiliada*, the existence of such proceedings had played a determinative role in the court's assessment of whether to sustain the plea.

[9] Once satisfied of the other forum's clearly greater appropriateness, the court would decline jurisdiction unless it was satisfied that it was unjust to expect the litigation to take place in that forum: *Campbell* v *James Finlay (Kenya) Ltd* [2023] CSIH 39, 2024 SC 139, 2023 SLT 1364, citing Anton, Private International Law (3rd ed, 2011) at paragraph 8-409. It was to be borne in mind that, when considering the appropriateness of the alternative forum, the question of the balancing of the weight to be attached to different factors in favour of that forum rather than the other was a matter for the court's discretion: *Owners of the Las Mercedes* v *Owners of the Abidin Daver*, "*The Abidin Daver*" [1984] AC 398, [1984] 2 WLR 196 and also that the appropriate forum was that in which the case might be tried more suitably in the interests of justice. Ultimately, the question for the court was whether it ought to exercise its discretion to sustain the plea in the interests of justice.

[10] In the present case, the respondent was domiciled in both Scotland and England for the purposes of section 42(4)(a) and (c) of the Civil Jurisdiction and Judgments Act 1982). The present case arose from a single incident, being the cyber attack carried out on the respondent in December 2022. Litigation had commenced in England pursuant to an omnibus claim form filed in July 2025, against a background of extensive communications between the respondent's English solicitors and those instructed by the English claimants, which began in February 2023. Significant preparation, both pre- and post-litigation, had been carried out on both sides. That preparation had allowed parties to reach agreement on an important case management issue, namely that a Lead Claimant Model should apply, and that agreement had been endorsed by the English court. There was no difficulty for an individual who wished to begin the process of joining the English proceedings. All that was involved was the completion of an online form, at no cost. It would make no material difference to the respondent in the costs of defending the English proceedings should the

Scottish claimants join that action. If permission was granted in Scotland, on the other hand, the respondent would be forced to incur two sets of costs in defending the same claims at the same time in two different jurisdictions. The only benefit would be to the lawyers involved. For these reasons, the English courts were clearly more appropriate to hear the claims. An analogy could be drawn between the present case and the facts of the *Spiliada*, where the crux of the decision was the existence of an action concerning the same defendant, arising out of very similar facts, ongoing in the High Court. Significant expense had already been incurred by both the claimants and the respondent in the English litigation. A great deal of time had been spent educating the respondent's legal team in England on the technical detail of the cyber attack, a matter in respect of which factual and expert evidence would be required.

[11] It was manifestly in the interests of justice for all claims against the respondent arising out of the cyber attack to be heard in one set of proceedings. Concurrent proceedings gave rise to a substantial risk of conflicting judgments, and to an increase in inconvenience and expense. While a mere balance of convenience was not decisive, a strong and overwhelming balance of convenience could be, and in most cases probably would be so. Equally, multiplicity of suits was not in itself decisive; but such a multiplicity involving serious difficulty, trouble and expense might well justify sustaining the plea of *forum non conveniens*. In the context of group proceedings, multiplicity of suits was likely to lead to serious inconvenience, expense, trouble and difficulty for a defender. It would lead to duplication of the process of disclosure and discovery. The time and cost associated with undertaking such an exercise twice over, with multiple teams of lawyers involved, was likely to be considerable. The factual matrix surrounding the cyber attack was technically complex, as was the interrelation of the facts and the relevant law. It was in the interests of

efficiency, expediency and economy to have the same court and the same teams of lawyers and experts instructed to advance either side of the case, with a view to achieving a just resolution.

[12] There were no countervailing factors which weighed against those significant disadvantages and injustice which would be caused to the respondent in the event that it was forced to fight effectively identical group proceedings on two fronts. If the group members were required to join the English proceedings, they would not suffer a disadvantage, nor would they be deprived of any personal or juridical advantage in Scotland. The English proceedings were being pursued on a no win, no fee basis. The law which applied to the dispute between the parties was contained within the UK GDPR and the Data Protection Act 2018. That legislation applied throughout the UK. In either set of proceedings, individual group members were unlikely to be required to have significant input in the day-to-day running of the litigation. An English judgment could be enforced in Scotland by means of the straightforward process contained in Schedule 6 of the Civil Jurisdiction and Judgments Act 1982. It was in the interests of justice for the court to sustain the plea.

[13] If the court did sustain the plea, it was within its discretion to dismiss the application: *Atkinson & Wood* v *Mackintosh* (1905) 7 F 598, (1905) 12 SLT 856 (in which case the application could be made again if necessary in the future: *Lubbe* v *Cape Plc* [2000] 1 WLR 1545), or else to grant a sist: *Campbell*. In the circumstances of the present cases, dismissal was appropriate: the existence of the English proceedings and the ease of joining them meant that there was no need for the application to be kept live. There was no possibility of the English courts declining jurisdiction as the respondent would not contest

jurisdiction there for any UK-based claimant (cf. *De Mulder* v *Jadranska Linijska* 1989 SLT 269).

[14] The respondent did not contend that, in every case where a representative party sought to bring group proceedings under Chapter 26A, and proceedings were already on foot in England, a plea of *forum non conveniens* ought to be sustained. However, on the facts of this particular case, where the respondent was facing two sets of group proceedings, where significant work had already been carried out in England, where the dispute arose from a single incident, giving rise to common issues which were governed by UK-wide legislation, and which were liable to result in significant duplication of work and a notable increase in time and cost for the respondent, its plea of *forum non conveniens* ought to be sustained, and the application dismissed.

Submissions for the applicant

[15] On behalf of the applicant, senior counsel invited the court to grant permission for the bringing of group proceedings. At the point of determining whether to grant such permission, the court was not adjudicating on the merits of the issues in dispute between the parties, and was not in a position to determine the merits of any preliminary plea. Rather, it required to consider whether the applicant had satisfied the court that the proposed group proceedings raised common issues, that there was a *prima facie* case with real prospects of success, and that group proceedings were the best way of proceeding to determine the issues between the parties. It was envisaged that the court might refuse to grant permission to bring group proceedings in the four situations contemplated by RCS 26A.11(5) and section 20(6) of the 2018 Act, involving the application of a commonality test, a merits assessment, and a superiority test.

[16] The respondent's opposition to permission was premised solely upon its intention to present a preliminary plea of *forum non conveniens*. It was contended that if the court was *forum non conveniens*, the representative party could not establish a *prima facie* case or real prospects of success. However, a plea of *forum non conveniens* was not easily shoehorned into the questions of the existence of a *prima facie* case or of real prospects of success. It was a plea of convenience, appropriateness or suitability rather than one at all directed at the merits of the claim. It was illogical to contend that *forum non conveniens* might result in the court determining that there was no serious question to be tried or no case to argue or answer. There might well be a serious case to be tried, and a substantial case to argue or answer, and yet a plea of *forum non conveniens* fell to be sustained. An example was *Campbell*, in which, after proceedings were allowed to commence, a preliminary proof took place on questions including *forum non conveniens*, and the proceedings were ultimately sisted. It was observed by the Inner House in that case at [65] that: "It is worth bearing in mind, when applying the principle, that it is uncommon to sustain the plea when the defenders are, as here, domiciled in Scotland." The applicant was unaware of a single case in which Scottish domiciled pursuers suing a Scottish domiciled defender under Scots law had been forced to litigate in a foreign jurisdiction.

[17] Whether or not there was any merit in the plea ought to be a matter to be determined at an early stage in the group proceedings, by which time there would be appropriate pleadings and pleas-in-law, and the parties' respective positions on the matter would have been fully considered and set out. The court could then consider whether the matter would require evidence or could be determined at debate. Much would turn on provisions of the applicable English procedure, which were not within judicial knowledge. It seemed inevitable that expert evidence would be required. Deciding the matter once the group

proceedings had been instituted would mean that the operation of prescription would have been interrupted, and the court could, if persuaded by the respondent's argument, sist the proceedings to allow the claims to proceed elsewhere, all the while protecting the position of the proposed group members meantime. If, on the other hand, the application was refused, proceedings would not have commenced in respect of the group members for timebar purposes unless and until they joined the English proceedings.

[18] In any case, the applicant did not accept that the plea of *forum non conveniens* should be sustained. The detail of the status of the claims in England and Wales was not known to him. From the narration provided by the respondent, it appeared that they were at a very early stage. Whether they would proceed expeditiously or efficiently in comparison with Scottish group proceedings was not obvious, especially if the number of claimants was effectively doubled by adding the Scottish claimants. The conditions to which the proposed group members would require to subscribe in order to join the group proceedings in England and Wales were unknown to the applicant. Certain members of the Scottish group had previously been turned away by English solicitors involved in the proceedings there and directed to engage with Scottish solicitors. Of the 15,326 persons presently on the group register for the proposed Scottish proceedings, all but 680 were domiciled in Scotland. The contractual relationships entered into with the respondent by at least the vast majority of the proposed group members were between domiciled Scots and a company with its registered office in Scotland, entered into in Scotland, and governed by Scots law. It was entirely unclear how or why it was contended that it would be more suitable or appropriate that those prospective group members should proceed with claims in the courts of England and Wales, rather than in the jurisdiction with which their claims had a much more clear and

convincing connection. The court should grant permission to the applicant to bring the proposed group proceedings.

Decision

[19] It is necessary to begin by recalling the context in which the respondent's argument that this court is *forum non conveniens* arises, namely as informing the preliminary decision as to whether or not to grant permission for the proposed group proceedings to be brought. In *Mackay* v *Nissan Motor Co Ltd* [2025] CSIH 14, 2025 SC 349, 2025 SLT 629, it was made clear at [72] that that decision is a discretionary one which will not ordinarily involve hard-edged questions of legal principle of the type amenable to review on their merits by an appellate court. What is called for is a pragmatic and realistic approach with a particular emphasis on ensuring that the underlying policy, aim and purpose of the 2018 Act are given proper effect. Technical points are not be allowed to get in the way at the outset of proceedings: [73]. An application of this kind must be dealt with expeditiously and flexibly, and should not be allowed to become unduly drawn out by protracted procedure, ensnared in technicality or delayed by the exploration of detailed questions of fact or law: [75]. The existence of a *prima facie* case requires no more than the appearance of a serious question to be tried; a case to argue and a case to answer. That does not involve examination of questions of relevancy and specification of averments, which are appropriately dealt with after the pleadings have been finalised, not at the stage of a preliminary application. The test of there being real prospects of success is similarly not exacting. The prospects have to be genuine as opposed to being speculative or fanciful: [89]. The preliminary nature of the application means that all substantive legal issues should be left for determination later; these are not suitable for resolution at the outset of the proposed proceedings: [90].

[20] Standing those observations, it appeared to me that the respondent's wish to state a plea of *forum non conveniens* was precisely the sort of issue which *Mackay* warns against entertaining at the permission stage, and was thus not something with which it was appropriate to deal at that stage. It was plainly a substantive legal question logically separate from the issues to which RCS 26A.11(5) directs attention for the purposes of determining whether to grant permission. Put another way, a decision that this court is *forum non conveniens* would not entail any determination at all that the applicant had no *prima facie* case, that the proposed proceedings had no real prospects of success, or that separate individual proceedings would represent a more efficient mode of administering justice for the group members' claims than group proceedings. It would simply indicate the court's view that a different forum was more appropriate for the consideration and determination of such proceedings. The respondent may continue to maintain its plea and that plea can (as in *Campbell*) more properly be disposed of at an early stage in the group proceedings, once the parties have said everything that they want to say about it in the pleadings and had the opportunity to furnish any evidence relevant to its disposal. That was the basis upon which I indicated at the conclusion of the hearing that permission would be granted.

[21] Had it been either necessary or appropriate to determine the respondent's plea of *forum non conveniens* at and on the basis of the material available at the permission hearing, I would have repelled it. The leading case on the proper scope and function of the plea of *forum non conveniens* is *The Spiliada*, and in particular the speech of Lord Goff of Chieveley there, where the earlier English authorities in the House of Lords such as *The Atlantic Star* [1974] AC 436, [1973] 2 WLR 795, *MacShannon* v *Rockware Glass Ltd* [1978] AC 795, [1978] 2 WLR 362 and *The Abidin Daver* were reviewed, restated and, where appropriate, refined. His

Lordship first dealt with a distinction not particularly familiar in Scotland, namely between cases where jurisdiction against a defendant has been founded as of right, and cases where a plaintiff seeks to persuade the court to assert an exceptional jurisdiction which it would not ordinarily otherwise enjoy. In the present case, the court has an ordinary jurisdiction over the respondent. It has its registered office in Scotland and is accordingly domiciled here. The representative party has a right to invoke the court's jurisdiction over it for the purpose of determining whether or not to grant permission for the proposed group proceedings to be instituted. Whether that decision is positive or negative, it is a decision made in consequence of the existence of that jurisdiction.

[22] In a case where jurisdiction exists as of right, the defender may apply to the court to use its discretion to decline to permit the proposed substantive proceedings to continue under its auspices. The law as expressed in *Sim* now represents the law of England and Wales, as well as that of Scotland, on the subject (*The Abidin Daver* [1984] AC 398 at 411). Contrary to the impression that might be gained from the shorthand name of the principle, the question is not one of convenience, but appropriateness or suitability for the ends of justice. The plea may only be sustained where the court is satisfied that there is some other available forum, having competent jurisdiction, which is clearly the appropriate forum for the trial of the action, i.e. one in which the case may be tried more suitably for the interests of all the parties and the ends of justice. The overall burden of persuasion to that effect rests on the defender, at least in cases where jurisdiction has been founded as of right. In considering whether there is such a forum, the court will look for factors identifying the natural forum, being that with which the action has the most real and substantial connection. Relevant factors are limited to those related to the private interests of the parties and the ends of justice (*Lubbe*, per Lord Bingham at 1561 E – G, Lord Hope at 1566H –

1567A), but within that category cannot usefully be further defined (*The Spiliada*, per Lord Templeman at 465C) and may typically include matters affecting convenience or expense (such as availability of witnesses), the law governing the relevant transaction, and the places where the parties respectively reside or carry on business. The significance of a particular factor for the ultimate decision may well vary from case to case. If and only if the court is satisfied that there is another available forum which is clearly the appropriate forum for the trial of the action, will the burden then shift to the pursuer to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in the forum he has chosen. In the present case, no question of any party to the proposed group proceedings obtaining or losing a material personal or juridical advantage in either potential forum arises.

[23] *Dampierre*, although post-dating *The Spiliada*, adds only two points of relevance for present purposes to the earlier case. Firstly, Lord Goff at 107G noted that the possibility of conflict (encompassing the possibility of conflicting judgments) between two jurisdictions was an inherent one in many instances and could not be entirely avoided except where both jurisdictions were subject to the same sovereign state where the system of law prevented any such conflict, or both were parties to an agreement which had the same effect. Neither of those situations exists in the present circumstances. It may further be observed in this connection that in this dispute the parties to the English proceedings and those who would be the parties in the proposed Scottish proceedings are not the same, so that no question of *res iudicata* or related principles could arise, rendering the matter of potentially conflicting judgments rather less acute than it was, for example, in either *Dampierre* or *The Abidin Daver*.

[24] Secondly, his Lordship observed at 108B – C, under reference to Lord Diplock in *The Abidin Daver* at 411, that the same principles applied to making a decision on the plea of

forum non conveniens whether or not there were other relevant proceedings already pending in the alternative forum. The existence of such proceedings may or may not carry weight in the exercise of determining the plea, depending on the circumstances. Proceedings which have developed to the stage where they have had some impact upon the dispute between the parties, especially if such impact is likely to have a continuing effect, are more likely to be relevant than those which have not reached that stage.

[25] The application of those legal principles in order to determine the natural forum for the ventilation and determination of the case which the applicant wishes to bring before this case is very straightforward. Over 95% of the group members in the proposed litigation are domiciled in Scotland. They entered into a contractual relationship in Scotland with a company registered here which was governed by Scots law. As a consequence of their domicile, the loss and damage for which they seek compensation was suffered, on the hypothesis upon which their case proceeds, in Scotland. Nothing about their situation has any nexus whatsoever with England. The forum with the most real and substantial connection to the dispute, and that which is clearly more appropriate to deal with it, is this court.

[26] The respondent founded heavily on a passage in *The Spiliada*, per Lord Goff at 485F – H, where his Lordship identified as potentially significant the need, frequently encountered in the type of litigation there in issue, for much information and knowledge to be absorbed, not only by the lawyers also by the experts involved, as they learned about the interrelation of law, fact and scientific knowledge. It was suggested by the respondent that a great deal of time and effort had been and would be expended by it in the English proceedings which would need to be duplicated unnecessarily were proceedings also to be permitted in Scotland. While acknowledging that some duplication of time, effort and expense will in

those circumstances inevitably be required, the situation before me is not particularly similar to that which pertained in *The Spiliada*. In that case, there had already taken place a very substantial portion of related litigation, seemingly involving 15 counsel and multiple experts in a trial estimated to take six months in total, by the point when it became necessary to determine the plea of *forum non conveniens* in the proposed further proceedings. There was, further, at least some connection to an English forum, in that relevant contractual arrangements were governed by English law. That provided some further material in the balance in favour of the selection of the English forum as the more appropriate. In this case, the litigation in England has not yet progressed beyond its initial stages and, although the dispute as a whole is certainly of some weight and complexity, it seems unlikely – at least on the material currently before this court – that matters in the proposed group litigation will take on a scale remotely comparable to that in *The Spiliada*. The respondent has already provided, in correspondence, a very detailed account of what it says it did and omitted to do which enabled the cyber attack to take place, and that seems highly likely to provide a relatively straightforward framework for the decision on liability to be made. In this case, there remains nothing at all in the balance in favour of the English forum other than the fact that proceedings have been commenced and made a little progress there already. As Lord Templeman implied in *The Abidin Daver* at 426A – B, "an ugly rush to issue proceedings in one country before the issue of proceedings in another" is not something that is to be either encouraged or rewarded.

[27] It was not suggested that the respondent would encounter any difficulty in having the same expert witnesses give evidence in England as in Scotland. It would be an advantage to it not to have to instruct agents and counsel able to act for it in Scotland in addition to those whom it has chosen to instruct in England, and the existence of two

separate litigations will certainly involve an element of duplication across various aspects of the processes. However, as noted by Lord Hope in *Lubbe* at 1556B, under reference to observations of Lord Justice Clerk Alness in *Société du Gaz de Paris* v *Société Anonyme de Navigation, "Les Armateurs Français"* 1925 SC 332 at 347, the court requires to resolve the plea of *forum non conveniens* by looking to the interests of all parties and the ends of justice, and not by looking at matters from the point of view of the defender only. On the information presently before me, I am unable to conclude that the additional effort and expense inherent in two litigations crosses the crucial line between private disadvantage to the respondent and potentially significant objective impact on the just resolution of the matters in dispute, at least to anything like the extent necessary to deprive the group members of their presumptive right to litigate in the natural forum (and that which they have chosen) for that resolution. It is important to bear in mind that *The Spiliada* did not assert that some duplication of effort and expense ought to result in a conclusion that the forum in which relevant proceedings had first been commenced was clearly the more appropriate one to deal with all related proceedings, but merely that these were matters which the judge of first instance dealing with the plea was entitled to weigh in the balance in his overall assessment, and that an appellate court could properly interfere with whatever balance was so struck only in very limited circumstances.

[28] In addition to the practical issues arising out of concurrent group litigations in England and Scotland, some stress was placed by the respondent at the permission hearing on the possibility of those litigations producing different and conflicting outcomes. There is, however, no particular reason to suppose, at least at this early stage, that that is something likely to happen, and it has already been observed that as the two sets of litigants are different, any conflict which might emerge does not have the potential for such

unmanageable consequences as might flow in cases where the litigants are the same. In any event, both courts are part of the United Kingdom court structure and any ultimate conflict of sufficient general public importance may be dealt with definitively at the apex of that structure. This is, again, not a matter capable of swaying the balance in favour of a conclusion that the courts of England are clearly the more appropriate forum for the resolution of the dispute figured by the proposed group proceedings.

[29] For these reasons. the respondent's plea of *forum non conveniens* would have fallen at the first hurdle on the basis of the information before me at the permission hearing, had it been necessary or appropriate to determine it then and on that basis.

Reclaiming motions from permission decisions

[30] In paragraphs 4.145 – 4.150 of the Scottish Law Commission's 1996 Report on Multi-Party Actions (Scot Law Com No 154), which formed part of the long march towards the 2018 Act, it was proposed, on balance, that leave to appeal should not be required against interlocutors allowing what would now be called group proceedings to be instituted, as such interlocutors were of sufficient importance to justify allowing an appeal without leave. It was noted that the corresponding Ontario legislation required such leave, as defendants (who might have resources superior to those of the representative party and of the class or group as a whole) should be discouraged from delaying the progress of the action by appealing the grant of certification. One consultee noted that experience in the United States demonstrated that, as a delaying tactic, defenders were apt to appeal against a decision to certify an action as a class action.

[31] Although many defenders to group proceedings properly and responsibly accept a first-instance decision to grant permission, and *Mackay*, by clearly explaining the basis upon

which such a decision should be taken and emphasising its discretionary nature, makes it obvious that appeals can succeed only in very limited and relatively rare circumstances, it is difficult to escape the suspicion that in at least some cases reclaiming motions are being marked against the grant of permission for the sole or dominant purpose of delaying progress in litigations when it is plain that they should proceed.

[32] In the present case, not only is the decision to grant permission a discretionary one, the substantive issue which is said to militate against the grant of permission is itself a matter for the exercise of discretion on the part of the judge of first instance. In *The Spiliada* at 465F - G, Lord Templeman observed that appeals against the decision of the judge of first instance on a question of *forum non conveniens* should be rare and the appellate court should be slow to interfere. The first-instance decision on the plea is "of the very essence of discretion" (*The Abidin Daver*, per Lord Diplock at 413E – F, cf. Lord Brandon at 420A – C), and in *Lubbe* Lord Bingham observed trenchantly at 1556E – F that:

> "This is a field in which differing conclusions can be reached by different tribunals without either being susceptible to legal challenge. The jurisdiction to stay is liable to be perverted if parties litigate the issue at different levels of the judicial hierarchy in the hope of persuading a higher court to strike a different balance in the factors pointing for and against a foreign forum."

[33] The reclaiming motion in this case seeks to pile Pelion upon Ossa by seeking to place under review a decision which is the product of a double exercise of discretion. Moreover, it does so in circumstances where the plea of *forum non conveniens* was not repelled but simply reserved for decision at an early stage in the group proceedings, so that its resolution will now be delayed rather than expedited, all in the wider context of a Scottish company seeking to prevent its Scottish customers suing it in a Scottish court.

[34] Given that group proceedings are an important mode of providing access to justice in a situation where effective recourse to the courts would otherwise be practically very

difficult to obtain, and that justice delayed is not so far removed from justice denied, it may well be that the time has come to consider whether it remains appropriate to allow unrestricted reclaiming rights against a permission decision. A requirement of leave to reclaim might now be thought, in the light of experience, better to promote the policy objectives underlying the 2018 Act by introducing a quality control mechanism for time-consuming appeals with little obvious prospects of success. In any event, it might be useful in furtherance of those objectives to proceed on the working assumption that reclaiming motions from permission decisions should proceed to disposal on a priority basis.