LORD SPEAKER
2ND APRIL 1987

De Dampierre (Respondent)

v.

De Dampierre (Appellant)

My Lords, I beg to move that the Report of the Appellate Committee be now considered.

The Question is:-

That the Report of the Appellate Committee be now considered.

As many as are of that opinion will say "Content". The contrary "Not-content".

The Contents have it.

(Their Lordships will indicate what Order they would propose to make.)

My Lords, I beg to move that the Report of the Appellate Committee be agreed to.

The Question is:-

That the Report of the Appellate Committee be agreed to.

As many as are of that opinion will say "Content". The contrary "Not-content".

The Contents have it.

- PLEASE TURN OVER -

The Question is:-

That the Orders of the Court of Appeal of the 5th of June 1986, and of Sir John Arnold of the 11th of December 1985, be set aside, and that the action be stayed.

As many as are of that opinion will say "Content". The contrary "Not-content".

The Contents have it.

The Question is:-

That the Respondent do pay to the Appellant his costs in this House and that there be no Orders for Costs in the Courts below.

As many as are of that opinion will say "Content". The contrary "Not-content".

The Contents have it.

Judgment: 2.4.87

HOUSE OF LORDS

DE DAMPIERRE
(RESPONDENT)

v.

DE DAMPIERRE
(APPELLANT)

LORD KEITH OF KINKEL

My Lords,

Lord Keith of Kinkel
Lord Brandon of Oakbrook
Lord Templeman
Lord Ackner
Lord Goff of Chieveley

I have had the opportunity of considering in draft the speeches to be delivered by my noble and learned friends Lord Templeman and Lord Goff of Chieveley. I agree with them and for the reasons they give would allow the appeal.

LORD BRANDON OF OAKBROOK

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Templeman and Lord Goff of Chieveley. I agree with both of them, and for the reasons which they give I would allow the appeal.

LORD TEMPLEMAN

My Lords,

The appellant husband, Count Elie de Dampierre, instituted divorce proceedings against the respondent wife, the Countess Florence de Dampierre, in the Tribunal de Grande Instance in Paris. The wife then instituted divorce proceedings against the husband in the High Court in London. The husband applied to the High Court to stay the English proceedings.

Where there are concurrent proceedings in England and in another jurisdiction in respect of the same marriage, section 5(6) of the Domicile and Matrimonial Proceedings Act 1973 applies, and paragraph 9 of Schedule 1 to that Act, provides that the English proceedings may be stayed if it appears to the court

> "(1) . . .(b) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in [another jurisdiction] to be disposed of before further steps are taken in the proceedings [in England] . . . (2) In considering the balance of fairness and convenience . . . the court shall have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed or not being stayed."

The facts which are relevant for the purpose of considering the husband's application to stay the wife's English divorce proceedings are not in dispute. The husband was born on 13 September 1952 in New York. The husband's nationality is French, he was educated in France and he undertook military service in the French army. At the death of his uncle, now aged 80, the husband will become head of a family which, since 1850, has owned and occupied the Chateau de Plaisance at St. Genis de Laintonge and a surrounding estate where the family carry on the business of producing cognac for sale in Europe and elsewhere.

The wife was born on 13 October 1955 in Lyons. The wife's nationality is French and she was a student in Paris when she married the husband in December 1977 in civil and religious ceremonies. The wife's parents were then, and are now resident in Paris.

In 1979 the husband and the wife moved to London where the husband was involved in marketing cognac produced on the family estate. The only child of the marriage, a son, Aymar, was born on 20 January 1982. The husband purchased 113A, Old Church Street, Chelsea, about 1982 as the matrimonial home. In November 1984 the wife established an antique business in New York where the husband had family and business interests. In March 1985 the wife took Aymar to New York, and in May 1985 informed the husband that she did not intend to return to London. There followed the institution of the husband's divorce proceedings in France on 22 May 1985, the wife's divorce petition in England on 19 July 1985, and the husband's application to stay the wife's proceedings in England on 8 August 1985. The husband alleges desertion. The wife denies desertion and seeks divorce on the grounds (denied by the husband) that he was ungenerous, selfish and cruel and has committed adultery.

In September 1985 the husband and the wife appeared in person before the matrimonial judge of the Tribunal de Grande Instance in Paris for a conciliatory hearing. The judge accepted jurisdiction although the wife objected; her objection is now the subject of an appeal by her in the French appellate courts. Reconciliation proving impossible, the matrimonial judge allowed the husband to proceed with his divorce petition and made provisional orders whereby the wife was given custody of Aymar in

New York, the husband was allowed to have Aymar in France for a period of about 12 weeks in each year and the husband was ordered to pay maintenance to the wife for herself and Aymar in sums exceeding £22,000 per annum.

The President of the Family Division, Sir John Arnold, dismissed the husband's application for a stay of the English proceedings on 11 December 1985. His decision was upheld by the Court of Appeal (Dillon and Croom-Johnson L.JJ.) on 5 June 1986. Since then the husband has sold his London house and has returned to France but he was constrained by the wife and the English court to leave £174,000, part of the proceeds of sale of the London house within the jurisdiction, pending the outcome of this appeal against the refusal of the courts below to grant a stay of the English proceedings.

There is no dispute between the parties about the inevitability of a divorce which can be pronounced indifferently in London or Paris. There is a dispute about maintenance although for the time being that dispute has been solved by the order of the matrimonial judge in Paris. There is a dispute about the future of Aymar. The husband wishes Aymar to be educated in France at some stage and to succeed to his father's title, interests and family obligations and traditions in France. In short, the husband says that Aymar is French. The wife can hardly deny this but wishes to change Aymar into an American. The dispute about Aymar may concern the courts of the United States where Aymar is now in the custody of his mother, and the courts of France where the husband resides and to which country Aymar, and possibly the wife, may return. The dispute over Aymar does not concern and cannot be solved by an English court.

The wife opposes a stay of her divorce proceedings in England and the courts below refused to grant a stay for one reason and one reason only. In divorce proceedings in this country the wife is likely to obtain substantial financial relief by way of maintenance and a lump-sum payment notwithstanding any responsibility she may bear for the breakup of the marriage. Under French law a wife is entitled on divorce to similar financial relief if the breakdown of the marriage is due to the conduct of the husband or if responsibility for the breakdown of the marriage is shared (as it usually is shared) by both parties. But a wife who is found to be exclusively blameworthy for the breakdown of the marriage may be denied financial ancillary relief save for maintenance payments which will enable her to provide a home for an infant child of the marriage in the style and manner appropriate to the expectations of the child and suitable for the comfort and welfare of the child. By prosecuting the English divorce proceedings the wife insures against the risk of the consequences which might ensue if she were found by the French court to be exclusively responsible for the breakdown of the marriage. The wife denies any fault on her part and blames the husband. But if the wife is found wholly at fault and the husband wholly blameless and if the French court decides not to award maintenance to the wife save for the purpose of enabling her to look after Aymar, the wife could then hope to persuade an English court to make further provision for her out of the sum of £174,000 which the husband has been constrained to leave in England for the time being. Alternatively, the wife might

persuade the English court to award her the whole or part of the sum of £174,000 before the French court dealt with a claim to maintenance on behalf of the wife or Aymar out of the husband's assets in France.

The husband appeals to this House against the refusal of the President, supported by the Court of Appeal, to stay the wife's English proceedings. The husband's appeal can only succeed if the President and the Court of Appeal failed to apply the correct principles in declining to exercise the discretion to stay proceedings conferred by the Act of 1973 and if, applying the correct principles, your Lordships conclude that a stay should be granted.

The President and the Court of Appeal thought that if the wife might be financially worse off under French law than under English law she was entitled to pursue her proceedings in England.

The President relied on a passage from the speech of Lord Diplock in MacShannon v. Rockware Glass Ltd. [1978] A.C. 795. In that case a Scotsman living in Scotland, sought to pursue an action in England instead of Scotland for personal injuries suffered in the course of his employment in Scotland by a company registered in England. There was no danger of proceedings taking place in both England and Scotland. The Act of 1973 was remote and irrelevant. This House refused to allow the action to be continued in England. Lord Diplock in the passage cited by the President in the present case said, at p. 812:

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

The Court of Appeal were not entirely happy about the reliance placed by the President on the MacShannon case, but themselves founded on a passage from the speech of Lord Diplock in the The Abidin Daver [1984] A.C. 398. In that case two vessels collided in the Bosphorus; the Act of 1973 did not appear above the horizon. Actions were brought in Turkey and in England. This House granted a stay of the English proceedings. Lord Diplock said, at p. 412, that if an action is pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute and an action is brought in England about the same matter, the action in England

> "can only be justified if the would-be plaintiff can establish objectively by cogent evident that there is some personal or juridical advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it."

Lord Diplock was assuming a case where it is not unjust for the plaintiff to seek to exploit the advantage which he finds in

England. In my opinion the tests adumbrated by Lord Diplock are not satisfied merely by proving that the plaintiff has an advantage in England in that he may recover in England that which he might not recover abroad. The court must consider whether in all the circumstances it is just that the plaintiff should be allowed to exploit and enforce his English advantage and should only refuse a stay if it would be unjust to confine the plaintiff to his remedies elsewhere.

My noble and learned friend, Lord Goff of Chieveley in his definitive speech in Spiliada Maritime Corporation v. Cansulex Ltd. [1986] 3 W.L.R. 972 at p. 991 confirmed that the mere fact that the plaintiff had a legitimate personal or juridical advantage in proceedings in England cannot be decisive. Lord Goff said, at p. 992:

> "Suppose that two parties had been involved in a road accident in a foreign country, where both were resident, and where damages are awarded on a scale substantially lower than those awarded in this country, I do not think that an English court would, in ordinary circumstances, hesitate to stay the proceedings brought by one of them against the other in this country merely because he would be deprived of a higher award of damages here."

By way of further example, my noble and learned friend indicated that a plaintiff who sued in England to obtain the advantage of a longer limitation period might not be allowed to pursue his action in England if he had deliberately or negligently failed to bring suit in a more appropriate foreign forum before a shorter limitation period in the foreign forum had expired. In my opinion a plaintiff cannot rely on an advantage of the kind mentioned by Lord Diplock if it would be unjust to the defendant to allow the plaintiff to do so. Put the other way, the plaintiff may be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to the plaintiff to confine him to remedies elsewhere: see the Spiliada case at p. 975.

I have read in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley. I agree with his approach and with his conclusion that the common law test of justice as between plaintiff and defendant in commercial disputes corresponds to the statutory test of fairness as between husband and wife in matrimonial disputes. The court must identify and evaluate the advantage claimed by the wife. There are many circumstances in which it would be unfair to the wife to deny her the advantage of claiming maintenance from an English court. For example, if the husband's assets were wholly or mainly in England, or if the wife remained in England, or if the English proceedings would render the French proceedings wholly unnecessary, it might well be unfair to tell the wife to litigate in France and unfair to stay the wife's English proceedings. The extent of the possible disadvantages to a wife if she is confined to her remedies in a foreign forum is another relevant circumstance. For example, if French law provided that on divorce a guilty wife shall be punished and an innocent wife returned to her parents without maintenance or compensation, the wife, at any rate if resident in England, could fairly claim from an English court maintenance out of the

husband's assets in England; the husband would behave unfairly if he refused to support his wife and sought a stay of the English proceedings. Fairness depends on the facts of each case and there is no short cut.

In my opinion it is not unfair to this wife in the present circumstances to deprive her of the advantages of seeking from an English court maintenance which she might not obtain from a French court. The wife's connections with England were tenuous and she voluntarily severed all connection with England before instituting her English divorce proceedings. The wife is French; she was married in France, she can litigate in France as easily as in England and she can obtain from the French court all the redress to which she is entitled under French law. The wife cannot sever her direct French connections derived from ancestry, birth, nationality, education, culture and marriage laws, or her indirect French connections through her husband and child. On the one hand it is logical and not unfair to the wife to treat her as a French wife entitled to the rights conferred by French law on divorced wives. On the other hand it would be unfair to the husband to treat the wife as if she were an English wife entitled to the rights conferred by English law on divorced wives when, in truth, the wife is a French wife, resides at present in the United States and has no connection with England.

If it is not unfair to confine the wife to her rights under French law with regard to maintenance, then a stay of the English proceedings must be ordered. It is too much to hope that the problems of the husband and the wife and Aymar can be solved amicably. The French court will almost certainly be involved in the assessment and payment of maintenance and other financial support for the wife and Aymar and with any difficulties which arise over Aymar's education and custody or over the arrangements for access in France. If an American court also becomes involved, the views and co-operation of the French court will be of assistance to the American judge, whereas the views of a judge of the English court would be largely uninformed and irrelevant and the decisions of the English court could only be enforced against the sum of £174,000 detained in England. The costs of the English proceedings would inevitably fall on the husband in addition to any costs he incurs in France and any costs for which he may become liable in America. The English proceedings were only designed to improve the wife's right to maintenance and to bring pressure to bear on the husband. It would be unfair to allow the wife to effect any such improvement and her action must therefore be stayed.

I would allow the appeal, stay the wife's English divorce proceedings, and order the wife to pay the husband's costs of the appeal to this House. Any orders for costs in the the courts below should be set aside.

LORD ACKNER

My Lords,

I have had the opportunity of considering in draft the speeches to be delivered by my noble and learned friends Lord Templeman and Lord Goff of Chieveley. I agree with them and for the reasons they give would allow the appeal.

LORD GOFF OF CHIEVELEY

My Lords,

The husband's application for a stay of the wife's proceedings in this country was heard by the learned President on 11 December 1985. The application was made pursuant to section 5(6) of the Act of 1973, and paragraph 9 of Schedule 1 to that Act. Section 5(6) provides:

> "(6) Schedule 1 to this Act shall have effect as to the cases in which matrimonial proceedings in England and Wales are to be, or may be, stayed by the court where there are concurrent proceedings elsewhere in respect of the same marriage, and as to the other matters dealt with in that Schedule; but nothing in the Schedule - (a) requires or authorises a stay of proceedings which are pending when this section comes into force; or (b) prejudices any power to stay proceedings which is exercisable by the court apart from the Schedule."

Paragraph 9 of Schedule 1 provides, so far as material:

> "9. (1) Where before the beginning of the trial or first trial in any matrimonial proceedings which are continuing in the court it appears to the court - (a) that any proceedings in respect of the marriage in question, or capable of affecting its validity or subsistence, are continuing in another jurisdiction; and (b) that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in the proceedings in the court or in those proceedings so far as they consist of a particular kind of matrimonial proceedings, the court may, if it thinks fit, order that the proceedings in the court be stayed or, as the case may be, that those proceedings be stayed so far as they consist of proceedings of that kind.
>
> (2) In considering the balance of fairness and convenience for the purposes of sub-paragraph (1)(b) above, the court shall have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed, or not being stayed."

The President approached the matter as follows. He first observed that the provisions of paragraph 9(1) were really wholly without any authority in this country. He then referred to a passage in the judgment of Ormrod L.J. in Mytton v. Mytton (1977) 7 Fam. Law 244, 245, in which he is recorded as saying:

> "It was not, his Lordship thought, a very attractive exercise to compare the remedies offered by one jurisdiction with those offered by another. Nor was it very helpful in terms of fairness, because what was fair for one party may seem to have an equal and opposite effect on the other."

The President then expressed disagreement with that observation, considering that it was part of a judge's duty in a case in which a stay is asked for to compare the jurisdictions to see where the advantage lies. In support of that proposition, he invoked a well-known passage from the speech of Lord Diplock in MacShannon v. Rockware Glass Ltd. [1978] A.C. 795, 812, in which he said:

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

He therefore concluded that, in order to decide whether it was "appropriate" to take a course one way or the other, he had to consider the two matters referred to by Lord Diplock. This he proceeded to do.

As to the first of these two matters, the President said:

> "What seems to me to be conclusive is that on the basis of the evidence as to French law which this court has received, it is entirely clear that the right of the wife to claim financial ancillary relief from the husband in the French jurisdiction would be eliminated or reduced by means of a relevant finding against her in the divorce suit itself; with the consequence that, in order to preserve that right, or preserve it to its full extent, it would be entirely necessary for her to contest both the divorce suit itself and the ancillary proceedings, and that would necessarily involve a larger expense than would the corresponding litigious activity in this country which would require the wife to contest only the ancillary proceedings in order to preserve her rights in relation to that part of the jurisdiction."

This conclusion was founded on expert evidence before him to the effect that, although, under Article 270 of the French Code Civile, after divorce one of the spouses may be required to make to the other what is called a "compensatory payment," nevertheless under Article 280-1 a spouse by whose exclusive wrong the divorce is pronounced has no right to any compensatory payment under Article 270; exceptionally, however, a payment may be made to such a spouse if it is in the circumstances manifestly contrary to

equity to refuse the spouse any pecuniary compensation following the divorce.

The President then went on to consider the second element in Lord Diplock's formulation of the law, and concluded that the wife's absence from the French regime (which he described as "harsh") and her presence in the more "benevolent" regime which prevails here, in which disqualification from maintenance follows only such conduct as it would be inequitable to disregard, plainly afforded a juridical advantage to the wife.

In conclusion, while recognising the "Frenchness" both of the marriage and of the spouses, he considered that he must follow the guidance of Lord Diplock as to what was intended. He therefore decided, in the exercise of his discretion, to refuse a stay of the English proceedings.

The President refused leave to appeal; but Sir John Donaldson M.R., sitting as a single judge, gave leave to the husband to appeal to the Court of Appeal. The matter came before the Court of Appeal in June 1986, judgment being delivered on 5 June. The leading judgment was given by Dillon L.J. He expressed his reservations about the approach of the President, founded upon the passage from Lord Diplock's speech in MacShannon v. Rockware Glass Ltd. [1978] A.C. 795, because the law had developed considerably since 1978. He considered that the speech of Lord Diplock in The Abidin Daver [1984] A.C. 398 provided more appropriate guidance, in particular a passage from his speech where he said, at pp. 411-412:

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

Dillon L.J. then said:

> "Looking at it objectively from England, without regard to any question of jurisdiction under French law, the French court was a natural and appropriate forum for the resolution of a dispute between two French nationals who had been married in France, where there was a great deal of family fortune in France and French traditions on both sides."

He then asked himself whether there was cogent evidence that there was some personal or juridical advantage that would be available to the wife only in the English action, and which was of

such importance to her that it would cause injustice to her to deprive her of it by requiring the proceedings to continue in France before there could be any proceedings going ahead in England. He referred to the evidence of French law before the President, and in particular to Article 280-1 of the French Code Civile, and expressed his conclusion in the following words:

> "I take the view, in the light of this provision in Article 280-1, though I would not go so far as the President did as to describe it as a harsh provision, that it is a serious disadvantage to the wife if the English proceedings are stayed and financial provision has to be dealt with in France. Compared with France, she has a significant personal and juridical advantage in continuing an application for financial provision in England. It would be unjust to deprive her of it."

Croom-Johnson L.J. delivered a concurring judgment. It is from that decision that the husband now appeals to your Lordships' House, with the leave of this House.

The courts in this case have been concerned with the question whether a stay of proceedings should be granted in the exercise of a discretion conferred by statute, viz. the Act of 1973. That statute was enacted before the recent development of the court's inherent jurisdiction to order a stay of proceedings on the ground of forum non conveniens. In 1973, the court would only exercise its inherent jurisdiction to stay proceedings in this country to enable the action to proceed in another forum if the English proceedings were regarded as oppressive, on the principles stated by Scott L.J. in St. Pierre v. South American Stores (Gath and Chaves) Ltd. [1936] 1 K.B. 382, 398. The development which led to the acceptance in this country of the Scottish principle of forum non conveniens did not begin until The Atlantic Star [1974] A.C. 436, and did not reach its present form until the decision of your Lordships' House in Spiliada Maritime Corporation v. Cansulex Ltd. (The Spiliada) [1986] 3 W.L.R. 972. It follows that the statute, and in particular, paragraph 9(1) of Schedule 1, anticipated the development in this country of the principle of forum non conveniens. In the result, a problem has arisen with regard to the relationship between the statutory jurisdiction and the inherent jurisdiction of the court, and in particular with regard to the extent to which cases concerned with the inherent jurisdiction provide guidance for the exercise of the discretion conferred by the statute. In the present case, the President at first instance, and Dillon L.J. in the Court of Appeal, in fact had recourse to authorities on the inherent jurisdiction. In these circumstances it is desirable that your Lordships' House should elucidate for the guidance of judges of first instance the extent to which they may, when exercising their discretion under the Act, have recourse to such authorities.

The exercise of the jurisdiction under paragraph 9 of Schedule 1 presupposes first, that, before the beginning of the trial or first trial in any matrimonial proceedings which are continuing in the English court, it shall appear to the court that proceedings in respect of the marriage in question, or capable of affecting its validity or subsistence, are continuing in another jurisdiction. It follows that the jurisdiction conferred under the paragraph is

concerned with cases of lis alibi pendens, whether the foreign jurisdiction has been invoked before or after the English jurisdiction. Next, exercise of the jurisdiction under the paragraph presupposes that the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in the foreign jurisdiction to be first disposed of; this of course requires an assessment by the English court of the balance of fairness. If both these pre-requisites are fulfilled, the English court may, if it thinks fit, order a stay or partial stay of the English proceedings.

It is plain, not only from the provisions of the statute itself but also from the Report of the Law Commission, Family Law: Report on Jurisdiction in Matrimonial Causes (1972) 48 Law Com., at pp. 29-37, containing recommendations which led to the enactment of this statutory provision, that its purpose is to reduce the effect of a conflict between jurisdictions, a conflict which had become more likely to occur following an extension of the jurisdiction in this country to entertain matrimonial proceedings. Obviously the possibility of a conflict between two jurisdictions provides an incentive to securing, so far as is possible consistent with the requirements of justice, a single trial in the appropriate forum. This may be achieved by the court in one of the jurisdictions ordering a stay of its own proceedings; or, more rarely, by granting an injunction restraining a party from proceeding in the other jurisdiction. But the possibility of a conflict between two jurisdictions cannot be entirely avoided, unless both are subject to the same sovereign state where the system of law prevents any such conflict, or both are parties to an agreement which has the same effect - as in the case of the European Convention of 1968 which has recourse to what is, to English eyes, the arbitrary rule that the case now be confined to the jurisdiction where proceedings were first begun. The Convention does not, however, apply to matrimonial disputes such as those here in question, and for that reason has no application in the present case.

Under the principle of forum non conveniens now applicable in England as well as in Scotland, the court may exercise its discretion under its inherent jurisdiction to grant a stay where "it is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of the parties and for the ends of justice"; see Sim v. Robinow (1892) 19 R.(Ct. of Sess.) 665, 668, per Lord Kinnear. The effect is that the court in this country looks first to see what factors there are which connect the case with another forum. If, on the basis of that enquiry, the court concludes that there is another available forum which, prima facie, is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted: see The Spiliada [1986] 3 W.L.R. 972, 984-987. The same principle is applicable whether or not there are other relevant proceedings already pending in the alternative forum: see The Abidin Daver [1984] A.C. 398, 411, per Lord Diplock. However, the existence of such proceedings may, depending on the circumstances, be relevant to the enquiry. Sometimes they may be of no relevance at all, for example, if one party has commenced the proceedings for the purpose of demonstrating the existence of a competing jurisdiction,

or the proceedings have not passed beyond the stage of the initiating process. But if, for example, genuine proceedings have been started and have not merely been started but have developed to the stage where they have had some impact upon the dispute between the parties, especially if such impact is likely to have a continuing effect, then this may be a relevant factor to be taken into account when considering whether the foreign jurisdiction provides the appropriate forum for the resolution of the dispute between the parties.

How far is this approach relevant in cases where a stay is sought under paragraph 9(1) of Schedule 1 to the Act of 1973? That paragraph requires the court to assess the balance of fairness as between the parties, in order to consider whether it is appropriate for a stay to be granted. These are not precisely the words used to describe the principle of forum non conveniens, but since the latter principle is concerned to establish where the case can appropriately be tried "for the interests of the parties and for the ends of justice," I find it very difficult to conclude that the underlying purposes of that principle and of the statutory provision are materially different. There are, moreover, in my opinion, good reasons why judges, in applying the statutory provision, should have regard to the authorities on the principle of forum non conveniens. First, although it is plain that the statute intends to confer a wide discretion on the court, it is nevertheless desirable that, in each case, the broad approach of the court should be similar. If this is not so, decisions in particular cases may depend so much on the individual reactions of particular judges as to lead to different results in different cases, and indeed to results not only unpredictable but so inconsistent as to lead to a perception of injustice. Some structuring of the approach is therefore desirable in the interests of justice; and the structuring of the approach in cases of forum non conveniens (which, in its developed form, certainly does not imprison the courts in any rigid strait-jacket) is, in my opinion, relevant to cases arising under the statutory provision since, despite differences in wording, the fundamental purpose is, in both types of case, the same.

It is, I consider, in this connection desirable to consider the meaning of the expression "balance of fairness" in paragraph 9(1). No doubt there are circumstances when it can plainly be perceived that it is more fair that proceedings should proceed in a foreign jurisdiction than in this country. But experience has shown that there are difficulties. First, there are factors which cannot evenly be weighed. For one class of factors may be simply relevant as connecting the dispute with a particular forum; whereas another class of factors (which may embrace the former) may point to injustice arising if the dispute is remitted to that forum. It is necessary, therefore, so to structure the enquiry as to differentiate between these two classes of factor, and to decide how each should be approached in relation to the other. Second, a factor may be such that its advantage to one party may be counterbalanced by an equal disadvantage to the other; and a decision has to be made how such factors should be taken into account in considering "the balance of fairness" between the parties. The principle of forum non conveniens has now been developed in such a way that such matters can be approached both consistently in the cases and always in accordance with the underlying principle of justice. Such an approach is as desirable in

cases arising under the statute as it is in cases arising under the inherent jurisdiction of the court.

For these reasons, anxious though I am not to fetter in any way the broad discretion conferred by the statute, it appears to me to be inherently desirable that judges of first instance should approach their task in cases under the statute in the same way as they now do in cases of forum non conveniens where there is a lis alibi pendens.

In the light of the foregoing, I turn to the present case. Here it is beyond dispute that there are very strong factors connecting the case with France, whereas now there are practically none connecting the case with England. Neither party suggests that New York is the appropriate forum. It follows that prima facie the courts of France clearly provide the appropriate jurisdiction for the resolution of the dispute, so that a stay should be granted unless justice requires otherwise. In considering the question, the President did indeed invoke the authority of one of the earlier authorities on the inherent jurisdiction, relying as he did on the much-quoted dictum of Lord Diplock in MacShannon v. Rockware Glass Ltd. [1978] A.C. 975, 812. He recognised the undoubted "Frenchness" of the marriage and the spouses, but considered that the wife's absence from what he described as the "harsh" French regime and her presence in the more "benevolent" regime which prevails here, plainly afforded a juridical advantage to her and that, following Lord Diplock's approach, this must outweigh the "Frenchness" of the marriage of the spouses and point to the conclusion that England was the more appropriate jurisdiction for the dissolution of the marriage. In the Court of Appeal, Dillon L.J. was critical of the approach of the President, considering that he gave too much weight to the juridical advantage of the wife, and that he did not have regard to the question (expressed in Lord Diplock's speech in The Abidin Daver [1948] A.C. 398, 411) whether justice required that a stay should be granted despite the fact that there was another prima facie more appropriate forum for the resolution of the dispute overseas. Dillon L.J., having addressed himself to that question, concluded however that it would be unjust to deprive the wife of her advantage in continuing her application for financial provision in England. He did not, however, give any reasons for reaching that conclusion; and, with all respect, I can find in the facts of the case no basis for it.

The weight to be given to what has been called a "legitimate personal or juridical advantage" was considered by your Lordships' House in The Spiliada [1980] 3 W.L.R. 972, 991-993. The conclusion there reached was that, having regard to the underlying principle, the court should not, as a general rule, be deterred from granting a stay of proceedings simply because the plaintiff in this country will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the appropriate forum overseas. Reference was made, in particular, to cases concerning discovery where, as is well known, there is a spectrum of systems of discovery applicable in various jurisdictions; and the opinion was expressed that, generally speaking, injustice cannot be said to be done if a party is compelled to accept one of these well recognised systems of discovery in another forum. If I follow that approach in the

circumstances of the present case, I find that French matrimonial law contains provisions for "compensation" which, unlike our own, place emphasis upon the question whether the breakdown of the marriage was due to the exclusive fault of one of the parties, providing (subject to an important exception) that a party so at fault is deprived of the right to an award of compensation. Such an approach is no longer acceptable in this country, though it bears a close resemblance to the principles applicable here not so very long ago. But it is evidently still acceptable in a highly civilised country with which this country has very close ties of friendship, not least nowadays through our common membership of the European Community; and I find it impossible to conclude that, objectively speaking, justice would not be done if the wife was compelled to pursue her remedy for financial provision under such a regime in the courts of a country which provide, most plainly, the natural forum for the resolution of this matrimonial dispute.

For these reasons, and in agreement with the reasons expressed in the speech of my noble and learned friend, Lord Templeman, I conclude that this is case where the courts below must have erred in the exercise of their discretion in granting a stay. I would therefore allow the husband's appeal.

De Dampierre (Respondent)

v.

De Dampierre (Appellant)

JUDGMENT

Die Jovis 2° Aprilis 1987

Upon Report from the Appellate Committee to whom was referred the Cause de Dampierre against de Dampierre, That the Committee had heard Counsel on Monday the 23rd, Tuesday the 24th and Wednesday the 25th days of February last, upon the Petition and Appeal of Count Elie de Dampierre, lately of 113A Old Church Street, London, SW3 praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of 5th June 1986, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of Countess Florence Jeanne Marie Therese Elie de Dampierre lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal of the 5th day of June 1986, and the Order of Sir John Arnold of the 11th day of December 1985, complained of in the said Appeal be, and the same are hereby, **Set Aside** and that the action be, and the same is hereby, **Stayed:** And it is further Ordered, That the Respondent do pay or cause to be paid to the said Appellant the Costs incurred by him in respect of the said Appeal to this House, the amount of such last-mentioned Costs to be certified by the Clerk of the Parliaments if not agreed between the parties, and that there be no Orders for Costs in the Courts below: And it is also further Ordered, That the Cause be, and the same is hereby, remitted back to the Family Division of the High Court of Justice to do therein as shall be just and consistent with this Judgment.

Cler: Parliamentor: