



Neutral Citation Number: [2004] EWCA Civ1329

Case No:A2/2004/0380

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**(The Honourable Mr Justice Eady)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19 October 2004

**Before :**

**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**  
**LORD JUSTICE MUMMERY**  
and  
**LORD JUSTICE LAWS**

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**Between :**

**Lennox Lewis & Ors**  
**- and -**  
**Don King**

**Appellants**

**Respondent**  
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**Mr James Price QC & Mr Justin Rushbrooke** (instructed by **Forbes Anderson**) for the  
Appellants  
**Mr Desmond Browne QC & Mr Matthew Nicklin** (instructed by **Morgan Lewis Bockius**)  
for the Respondent

Hearing date : 27 July 2004  
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**JUDGMENT : APPROVED BY THE COURT FOR  
HANDING DOWN (SUBJECT TO EDITORIAL  
CORRECTIONS)**

**This is the judgment of the court.**

***INTRODUCTORY***

1. This is an appeal, brought with permission granted by Lord Justice Laws on 26 March 2004, against the decision of Eady J made on 12 February 2004 by which he declined to set aside an order made by Master Whittaker on 2 October 2003. The learned Master had acceded to an application by the claimant (the respondent to this appeal) for permission to serve a claim form, seeking damages for libel, on the defendants (appellants) out of the jurisdiction.
2. The libels alleged consist in two texts stored on websites based in California. In the ordinary way they can be, and have been, downloaded here. It is common ground that by the law of England the tort of libel is committed where publication takes place, and each publication generates a separate cause of action<sup>1</sup>. The parties also accept that a text on the Internet is published at the place where it is downloaded. Accordingly there is no contest but that subject to any defences on the merits the respondent has been libelled in this jurisdiction. CPR Part 6.20 provides in part:

“In any proceedings to which rule 6.19<sup>2</sup> does not apply, a claim form may be served out of the jurisdiction with the permission of the court if –

...

(2) a claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction,

...

(8) a claim is made in tort where

(a) damage was sustained within the jurisdiction; or

(b) the damage sustained resulted from an act committed within the jurisdiction.”

There is no doubt but that CPR 6.20(8) applies to the case. In those circumstances the learned Master, and on appeal the judge, enjoyed a discretion whether or not to order service out. The discretion’s exercise required the court to decide what was the *forum conveniens* for the conduct and trial of the proceedings – England or the United States (effectively New York). (CPR 6.20(2) was also relied on, since the claim form

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<sup>1</sup> *Duke of Brunswick v Harmer* (1849) 14 QB 185.

<sup>2</sup> CPR 6.19 concerns service out of the jurisdiction where the permission of the court is not required. It has no application in this case.

contained an application for an injunction against further publication; but since the websites are presumably controlled in California, it must at least be problematic whether that application could be said to require or prohibit anything being done within the jurisdiction.) The essential question arising on this appeal is whether Eady J fell into any error of law in exercising his discretion to uphold the order for service out. The appellants accept that if he did not, that is an end of the matter. Only if the judge can be shown to have made a mistake of law would any discretion arise in this court to decide what is the right order on the merits.

### ***THE FACTS AND THE ALLEGED LIBELS***

3. The claimant (to whom we shall refer as “King”) is a citizen of the United States of America and lives in Florida. He is well known as a boxing promoter throughout the world. He is particularly renowned not only in his home country, but also here. Boxing is an extremely popular sport in the United Kingdom. Through a corporation wholly owned by him, Don King Productions Inc (“DKP”), King has managed such household British boxing names as Frank Bruno, Chris Eubank, Nigel Benn, Prince Naseem Hamed, and Lennox Lewis, the first defendant (“Lewis”).
4. Lewis is a world champion heavyweight boxer. He is a British citizen but is resident or principally resident in New York. He pays frequent visits to this country and makes regular appearances on television here. The second defendant, Lion Promotions LLC (“Lion”), is Lewis’ promotion company and is based in Nevada. The third defendant, Mr Judd Burstein (“Burstein”), is a New York attorney who acts for Lewis and Lion.
5. We should indicate at this stage that since the hearing of the appeal King has, on terms agreed between the parties, discontinued the action against Lewis and Lion, so that Burstein is now the sole defendant. In consequence, certain arguments canvassed before us are now irrelevant.
6. The story, which is nothing if not colourful, begins with a different piece of litigation (“the New York proceedings”). On 8 May 2003 Lewis and Lion issued proceedings in the New York Supreme Court against four defendants: the ex-world heavyweight champion Mike Tyson (“Tyson”), a corporation wholly owned by him called Mike Tyson Enterprises Inc (“MTE”), King, and DKP. Burstein acted for Lewis and Lion. The allegation was that King had for reasons of his own intermeddled in a prospective contract to be entered into between Lion, Lewis, MTE and Tyson by which earlier disputes were to be resolved and arrangements agreed for a further world heavyweight contest between Lewis and Tyson. Something of the flavour of the claim may be got from this extract from the complaint:

“5. ... King and DKP are presently being sued by Tyson for having stolen as much as \$100 million from Tyson during the period that DKP served as Tyson’s exclusive boxing promoter. DKP’s conduct was so raw that its own attorneys... settled Tyson’s case against them for an amount in excess of \$20

million. Also on information and belief, King was desperate to avoid a trial in the Tyson case... because he well knew that he and DKP might well be bankrupted by a loss in the case.

6. ... [King] commenced a campaign of bribery, lies and even a death threat to convince Tyson not to execute the Second Lewis/Tyson Agreement and to breach his obligations thereunder... More specifically, on information and belief:

(a) On an April 23 2003 telephone call, King threatened Jeff Wald, a friend of Tyson, by stating to Wald that he would ‘shove a shotgun up [his] ass’, and would ‘come out to California and kill [him]’ if Wald ‘messed with [his] fighter’, i.e. by seeking to interfere with King’s efforts to deter Tyson from signing the Second Lewis/Tyson Agreement. Given King’s history of violence, including a four year prison sentence for beating a man to death, this was not an idle threat...”

It is claimed that by reason of King’s and DKP’s “tortious interference” Lion and Lewis have suffered loss to the tune of at least \$35 million. “In addition, given King’s and DKP’s wanton, wilful and malicious conduct, which is shocking to the conscience, punitive damages in the amount of \$350 million should be awarded against them.”

7. Burstein was clearly not a man to understate his case. On the same day, 8 May 2003, he posted the whole of the complaint – the pleading – in the New York proceedings on the Internet (possibly before it was filed at the New York court). It was put on [boxingtalk.com](http://boxingtalk.com), one of the Californian websites on which the alleged libels in the case before us were to be published. Then on 27 May 2003 an article appeared in the *Sun* newspaper here, entitled “LEWIS: I WAS CONNED”. It refers briefly to the New York proceedings (“Sworn affidavits lift the lid off the dark side of boxing”). Next to it appears what is said to be an open letter from Lewis “to all his fans explaining why he is fighting as hard outside the ring as he does in it”.
8. Now we may come to the two publications complained of in these proceedings. The first was posted on a website called [fightnews.com](http://fightnews.com) from 5 July 2003 and thereafter. It referred to an article by one Tim Smith published in the *New York Daily News* on 4 July 2003 which quoted remarks made by King. The [fightnews](http://fightnews.com) piece was written by Burstein. Here is the passage complained of:

“I have read Don King’s recent interviews with Tim Smith and others with great amazement. But for his plainly anti-semitic remark – calling me a ‘shyster lawyer’ – I would have been merely amused by his desperate and ridiculous charges. Unfortunately, this is not the first time I have encountered such bigotry by Don. Last year, one of his in-house lawyers sent me a letter on Yom Kippur eve demanding that I take action on Yom Kippur. Needless to say, I vigorously objected.

Subsequently, that lawyer apologised to me in person while explaining that Don had explicitly refused to permit him to apologise in writing. Since, Don apparently believes that insulting Jews is appropriate conduct (indeed, he reportedly has even playfully imitated Hitler during a press conference), I am sure that no apology will be forthcoming for this more recent conduct.

Were it not for the anti-semitic nature of Don's comments, I would probably have remained silent. No one that knows the both of us is likely to take Don's word over mine. But in light of Don having stooped so low, it is time to take the gloves off... I realise that he has no shame even when he descends into rank bigotry."

9. The second article was posted three days later, on [boxingtalk.com](http://boxingtalk.com). As we have said, this was the website on which the whole of the complaint in the New York proceedings had been published. The article was entitled "Interview with Judd Burstein". It was written by G. Leon ("GL"). Here is the material passage:

"July 08, 2003; shortly after returning home from vacation, Lennox Lewis's attorney Judd Burstein found some time to speak with [boxingtalk.com](http://boxingtalk.com). Apparently he knew who the 'others' were. In this exclusive one on one interview, Burstein and I discuss the ongoing verbal warfare between he [*sic*] and promoter Don King. As well as Lennox Lewis's suit against Tyson and King, and King's retaliatory counterclaim against Lennox Lewis. Read on to see what the heavyweight champ's attorney has to say.

GL: Obviously you've read Don's remarks in my article and Tim Smith's article. What are your thoughts on his comments?

JB (Burstein): My first reaction was to really ignore what he had to say...

What got me upset and led me to respond to him was the clearly anti-semitic tone in his comments. The term 'shyster lawyer' when used in connection with a Jewish lawyer is designed to provoke anti-semitic feeling. And if this were just something in isolation I wouldn't care about it. But I was told by a lawyer working for Don King, that he wanted to apologise for demanding action from me on Yom Kippur, and Don King has refused to permit him to apologise to me in writing. It's been reported by papers that he imitated Hitler at a press conference, and I was just told today, that during a negotiation with Shelly Finkel, he spent the whole time referring to him as Shelly Finkelstein. He is quite plainly an anti-semite and that kind of conduct and attitude has no place in this modern world. He has every right to disagree with me and take a different position, or argue that I haven't acted appropriately. But when

he starts with bigotry, that's when someone has to stand up and say something.

GL: So you have absolutely no doubt that you're not reading too much into what he's saying by accusing him of bigotry?

JB: If this were an isolated incident, I would say that perhaps I was reading too much into it. But it's not an isolated incident and I've seen him play the race card before..."

10. King's pleaded case is that the meaning of the words complained of in both texts is that he is a persistent, bigoted, and unashamed or unrepentant anti-semitic.

### ***ARGUMENTS ON THE FACTS***

11. It is important to notice that the texts published on both websites contained other serious allegations against King, including charges of corruption. King's position, explained by his solicitor Mr Asserson, is that he is content for the substance of those accusations to be dealt with in the New York proceedings where (although those proceedings are not a libel suit) their merits will inevitably fall to be determined. Mr Browne QC for King made it plain to the judge below that there was an active desire on his side to avoid the duplication of issues in parallel proceedings in two jurisdictions, with the attendant risk of inconsistent findings. By contrast Mr Price QC for the defendants submits that this exercise in cherry-picking allegations to sue on here, leaving others to be litigated there, is symptomatic of an illegitimate approach on King's side: "forum-shopping". We shall have to return to that.
12. We have said (paragraph 2) that it is only if the judge can be shown to have made a mistake of law that any discretion would arise in this court to decide what is the right order on the merits. So much is common ground. If there is no error of law by the judge that is the end of the matter. No doubt error of law includes (as of course it does in other areas) a factual conclusion or judgment not capable of rational justification given the evidence in the case.
13. Here the judge was, of course, faced with competing claims as to which *forum* would be more convenient for the trial of King's complaints about the texts posted on the Internet. On King's behalf his reputation – indeed fame – in this jurisdiction was urged. And it was submitted that by posting the complaint in the New York proceedings on the Internet, Burstein gave the disputes between the parties a global character. On the other side it was said (to put it very generally) that this was really a USA case from first to last. That was where the real dispute lay, as was shown by the New York proceedings. These arguments *pro* and *con* are plain enough. We will not lengthen this judgment by filling out the detail. If there were nothing else in the case, the judge's assessment of the *pro* and the *con* would be very unlikely to give rise to a viable appeal. However Mr Price had two more specific arguments as to the facts which we should describe.

14. The first is that if the claim is to be tried properly, the term “shyster lawyer” will have to be understood as a reader of a New York newspaper would understand it. It is well known that New York has a very large Jewish population; it may well be that “shyster” has a different connotation in New York than it possesses in London. The parties have been locked in argument as to the meaning of the term. King’s solicitor, Mr Asserson, has asserted<sup>3</sup> (citing the *Shorter Oxford English Dictionary* and other materials) that “the word ‘shyster’ has no specifically Jewish or racist connotations”. It is said for the defendants that this debate is of particular importance in the context of their case as to qualified privilege or “response to attack”.
15. The second more particular argument is that Burstein, if he has to face trial here, will encounter real difficulty in assembling his evidence. Crucial witnesses are in the United States. They are identified in Burstein’s second witness statement whose effect was summarised in Mr Price’s skeleton before the judge below. Mr Gary Shaw speaks to a critical meeting; Mr English is witness to the “Shelley Finkel” episode; they and some six other witnesses speak to Burstein’s reaction to being called a “shyster lawyer”. All (save Burstein’s wife), says Mr Price, would or might only attend under subpoena. The consequent difficulties for the defendant if the trial is to be conducted in this jurisdiction will, it is said, be very serious.
16. Other points included an issue – no longer live since the discontinuance – about how far Lewis and Lion, as co-defendants, could be said to be responsible for Burstein’s allegations of anti-semitism, and also a question whether any of the defendants had authorised the downloading of the website texts in England.
17. **THE JUDGMENT.**
18. After dealing with the first of these latter two questions in paragraphs 33 – 35 of his judgment, Eady J continued as follows:

“36. Other issues on the horizon are justification, fair comment and qualified privilege. Principally, I suppose, the argument will turn upon whether in describing Mr Burstein as a ‘shyster lawyer’ Mr King was indeed giving vent to anti-semitic or racist attitudes. Mr Burstein’s allegations refer to Mr King ‘believing’ that it was appropriate to insult Jews, and it was also alleged that his words were ‘designed’ to provoke anti-semitic feeling. Yet one of the arguments Mr Price has raised, in order to demonstrate that New York would be the appropriate forum, was that it has to be determined how the term ‘shyster’ would be construed in that city. In particular, does it have a special meaning there different from how it would be understood by English readers? I do not find this persuasive for a number of reasons:

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<sup>3</sup> 2<sup>nd</sup> statement, paragraph 8.

(1) We are concerned with English publication only. What matters, therefore, would be what is conveyed by the words complained of in that jurisdiction.

(2) It is important to focus not so much on how ‘shyster’ would be interpreted in any particular country but rather on what Mr King’s state of mind and motivation was when he uttered the remarks.

(3) If an equivalent libel action to this were commenced by Mr King in New York it would not, according to the Defendants’ evidence, ‘survive’ (because of the different approach of New York law to defamation): See paragraph 11 of Mr Burstein’s own witness statement.

(4) It seems clear from a web search of 900 dictionaries (including specifically American ones) that there is no support for the word ‘shyster’ having any anti-semitic connotations.

37. In the light of the proposition that no such actions could survive in New York, it would seem that some of the other arguments about whether New York would be a more convenient forum become of theoretical interest only. There would seem to be little point in addressing how much more convenient it would be, or would not be, for people to give evidence there rather than here.

38. In any event, however, it seems clear that the Claimant would wish to adduce evidence from a number of witnesses based in the United Kingdom, on such matters as his reputation and connection with this country and, in particular, his links with Jewish charity work in London.”

19. And so after addressing other points, including the question whether any of the defendants had authorised the downloading of the website texts in England, the judge concluded (paragraph 43) that this was “a claim which should be permitted to go forward in this jurisdiction”, and declined to set aside the Master’s order.

### ***THE DEFENDANTS’ PRINCIPAL CASE***

20. Mr Price advances a number of criticisms of the judge. One in particular, however, he puts forward as demonstrating a plain error of law. The task of the judge (once the gateway of CPR 6.20 was passed, as it was), at any rate his first task, was to decide objectively which venue was the most appropriate *forum* for the conduct of the litigation. But this was not what Eady J did. By reference to paragraphs 36(3) and 37, Mr Price submits that the judge adopted a different approach. He held that King would enjoy what in the argot of the law of defamation is called a “juridical



advantage” if he were allowed to sue in this jurisdiction. The advantage arose because no equivalent action brought in New York would “survive”; and (so it is said the judge concluded) King should have the benefit of this advantage. It is plainly demonstrated on authority that this is an impermissible approach. We understood Mr Browne to accept that if this is indeed what the judge did, he was in error and this court (unless, we suppose, it remitted the matter) would have to decide for itself where was the *forum conveniens*. But Mr Browne said that the argument against him misreads the judgment. Before deciding whether that is so, we find it convenient to give some account of the relevant law.

## **THE LAW**

21. The starting-point is *Spiliada Maritime Corp. v Cansulex Ltd*<sup>4</sup>. It was not a libel case. It was a shipping dispute. But it establishes two propositions which are central to the correct approach to be taken to issues of *forum conveniens*. First, Lord Templeman stated<sup>5</sup>:

“... [I]t seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge... An appeal should be rare and the appellate court should be slow to interfere.”

Lord Goff of Chieveley made it clear<sup>6</sup> that despite the use of the Latin adjective *conveniens* the real question in these cases was, which was the more appropriate *forum*. Then, discussing the resolution of applications brought under the predecessor of CPR 6.20 (RSC Order 11) he said<sup>7</sup> - and here is the second proposition:

“[It] is not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so.”

Mr Price places some emphasis on this. He points to the fact that in his formulation of what the claimant must demonstrate, the judge (paragraph 14) omits the adverb “clearly”. But with respect to Mr Price this is a footling complaint, and in fairness he barely pressed it. It is unrealistic to suppose that this experienced specialist judge misunderstood or misremembered the approach taken in *Spiliada* to judicial decisions as to the choice of appropriate *forum*. It is to be noted that no other criticism is directed to the judge’s general summation of the law appearing at paragraphs 14 – 21; we need not set it out.

22. Lord Goff’s speech also contains, with respect, important material pertaining to the notion of “juridical advantage”, and we will come to that later in this judgment.

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<sup>4</sup> [1987] AC 460.

<sup>5</sup> 465F-G.

<sup>6</sup> 474E-475C.

<sup>7</sup> 481D-E.

23. The cases also contain guidance as to what the court should have in mind in deciding what is the appropriate *forum*. We discern four strands in the learning, relevant to the circumstances of this case. We shall be at pains to emphasise the fact, as we see it, that the first three are much more to do with discretion than law.
24. The first of these strands is that there exists an initial presumption that the natural or appropriate *forum* for trial of the dispute will be the courts of the place where the tort is committed. The principle is not limited to the tort of defamation; indeed a leading case in which it was articulated, *The Albaforth*<sup>8</sup>, concerned an alleged negligent misstatement. Robert Goff LJ, as he then was, stated (after citing earlier authority)<sup>9</sup>:

“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.”

In *Berezovsky* Lord Steyn expressly approved this approach, and did so in a context where it was being directly challenged in their Lordships’ House. He said<sup>10</sup>:

“For my part the *Albaforth* line of authority is well established, tried and tested, and unobjectionable in principle.”

25. Though the House was divided as to the result in *Berezovsky*, there was no dissent among their other Lordships from this statement as to the correctness of *The Albaforth*. It is clear, however – and this will lead to the second feature of the learning that we would emphasise – that *The Albaforth* is only a starting-point. Lord Hope of Craighead said as much in *Berezovsky*, and continued<sup>11</sup>:

“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) LR 1 Ex 130; *Schapira v Ahronson* [1999] EMLR 735; see also *Eyre v Nationwide News*

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<sup>8</sup> [1984] 2 LI LR 91.

<sup>9</sup> At p. 96. Cf Ackner LJ at 94.

<sup>10</sup> [2000] 1 WLR 1004, 1014E.

<sup>11</sup> at 1032.

*Pty. Ltd* [1967] NZLR 851. Common sense suggests that the more tenuous the connection with this country the harder it will be for the claim to survive the operation of this rule.”

26. That *The Albaforth* is no more than a starting-point for identification of the most appropriate *forum* is we think lent emphasis by the decision of the Court of Appeal in *Chadha v Dow Jones & Co*<sup>12</sup>. There all the parties were resident in the United States. The alleged libel consisted in an article published in an American magazine. The total sales of the edition in question were 294,346 of which 283,520 were sold in the United States, 408 were sent to subscribers in the United Kingdom and 849 were sold at news stands here. Popplewell J at first instance set aside service of the writ in the United States. This court upheld his order. Roch LJ (with whom Otton and Pill LJJ agreed) said this<sup>13</sup>:

“Returning to the judgment of Popplewell J he said...:

‘This being a case where both plaintiff and defendant are outside the jurisdiction I am wholly unpersuaded that there is any presumption in favour of the plaintiff or that the authorities as to where a cause of action arises are of any assistance in the instant case.’

In my judgment there is nothing objectionable in that way of stating the law in this particular case. Here the appellants and the respondents were and are outside the jurisdiction and consequently it was for the appellants to show that they had sufficient connections with this country and a reputation to protect in this country.”

27. Thus the starting-point for the ascertainment of what is clearly the most appropriate *forum* is to identify the place where the tort has been committed. That will, of course, by definition be England in a defamation case where leave to serve out has been obtained on the basis of publication here. But – and here is our second proposition from the cases – the more tenuous the claimant’s connection with this jurisdiction (and the more substantial any publication abroad), the weaker this consideration becomes.
28. The third strand in the learning to which we would draw attention was initially prompted by what Lord Steyn in *Berezovsky* called “trans-national” libels, thus including libels perpetrated on the Internet. The present case is of course an example. Such libels have generated a good deal of academic discussion, and have been passed on by the High Court of Australia in *Gutnick v Dow Jones*<sup>14</sup>. Mr Price sought to persuade us to adopt a special rule for Internet libels, and we must deal with that. First, in *Berezovsky* Lord Steyn said this<sup>15</sup>:

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<sup>12</sup> [1999] EMLR 724.

<sup>13</sup> At 733.

<sup>14</sup> [2002] HCA 56.

<sup>15</sup> 1012.

“... 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 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... 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.”

This “more ambitious” proposition was rejected by Lord Steyn. But we consider with respect that his reference to the court’s need, in the case of trans-national libels, to “consider the global picture” is something more than a passing aside. What is “the global picture”? Where there is publication, say in two jurisdictions only, it remains relatively confined, and the *Albaforth* starting-point may remain very meaningful. But in relation to Internet libel, bearing in mind the rule in *Duke of Brunswick v Harmer* that each publication constitutes a separate tort, a defendant who publishes on the Web may at least in theory find himself vulnerable to multiple actions in different jurisdictions. The place where the tort is committed ceases to be a potent limiting factor.

29. In *Gutnick v Dow Jones* the High Court of Australia firmly rejected a challenge, in the context of Internet libel, to the applicability of such established principles as that vouchsafed in *Duke of Brunswick*. In doing so the court made certain observations about Internet publication which with respect, we think we may usefully bear in mind<sup>16</sup>:

“39. It was suggested that the World Wide Web was different from radio and television because the radio or television broadcaster could decide how far the signal was to be broadcast. It must be recognised, however, that satellite broadcasting now permits very wide dissemination of radio and television and it may, therefore, be doubted that it is right to say that the World Wide Web has a uniquely broad reach. It is no more or less ubiquitous than some television services. In the end, pointing to the breadth or depth of reach of particular forms of communication may tend to obscure one basic fact.

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<sup>16</sup> Paragraph 39 is to be found in the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ; paragraphs 181 and 192 are in the separate judgment of Callinan J.

However broad may be the reach of any particular means of communication, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.”

“181. A publisher, particularly one carrying on the business of publishing, does not act to put matter on the Internet in order for it to reach a small target. It is its ubiquity which is one of the main attractions to users of it. And any person who gains access to the Internet does so by taking an initiative to gain access to it in a manner analogous to the purchase or other acquisition of a newspaper, in order to read it.”

“192. ... Comparisons can, as I have already exemplified, readily be made. If a publisher publishes in a multiplicity of jurisdictions it should understand, and must accept, that it runs the risk of liability in those jurisdictions in which the publication is not lawful and inflicts damage.”

30. So far, then, the *Duke of Brunswick* has well survived the Internet, certainly in the High Court of Australia. And the court’s vindication of traditional principles relating to publication and jurisdiction in defamation cases marches with Lord Steyn’s rejection, in *Berezovsky*, of counsel’s “more ambitious proposition... in respect of trans-national libels”.
31. We do not suggest, nor did Mr Browne, that *Gutnick* is a gateway for the introduction of a new rule in the law of England relating to Internet publications. It established no new rule in Australia. But the court’s rejection of sweeping submissions that would have done away with *Duke of Brunswick* in favour of the “single publication rule”<sup>17</sup> known in many States of the USA, alongside the *dicta* in *Gutnick* which emphasise the Internet publisher’s very choice of a ubiquitous medium, at least suggests a robust approach to the question of *forum*: a global publisher should not be too fastidious as to the part of the globe where he is made a libel defendant. We by no means propose a free-for-all for claimants libelled on the Internet. The court must still ascertain the most appropriate *forum*; the parties’ connections with this or that jurisdiction will still have to be considered; there will be cases (like the present) where only two jurisdictions are really in contention. We apprehend this third strand in the learning demonstrates no more than this, that in an Internet case the court’s discretion will tend to be more open-textured than otherwise; for that is the means by which the court may give effect to the publisher’s choice of a global medium. But as always, every case will depend upon its own circumstances.

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<sup>17</sup> See *Gutnick* paragraphs 29 ff.

32. We should notice, though we do so only in passing, that the Law Commission were perhaps rather more troubled about the effects of global publication. In *DEFAMATION AND THE INTERNET: A Preliminary Investigation*<sup>18</sup> they stated<sup>19</sup>:

“Although we have some sympathy with the concerns expressed about the levels of ‘global risk’, any solution would require an international treaty, accompanied by greater harmonisation of the substantive law of defamation. We do not think that the problem can be solved within the short or medium term. We do not therefore recommend reform in this area at the present time.”

33. Before we come to the fourth and last strand, which concerns “juridical advantage”, we have two further observations at this stage. The first is to notice Mr Price’s submission that in deciding, in an Internet case, what is the most appropriate *forum* the court should be more ready to stay proceedings “where defendants did not target their publications towards the jurisdiction in which they have been sued. That is, it might be argued that for the purposes of *forum non conveniens* enquiries involving material published via the Internet, the intention of the defendant should be taken into account”<sup>20</sup>.

34. We would reject this submission out of hand. As the Lord Chief Justice pointed out in the course of argument, it makes little sense to distinguish between one jurisdiction and another in order to decide which the defendant has “targeted”, when in truth he has “targeted” every jurisdiction where his text may be downloaded. Further, if the exercise required the ascertainment of what it was the defendant subjectively intended to “target”, it would in our judgment be liable to manipulation and uncertainty, and much more likely to diminish than enhance the interests of justice.

35. Our second observation at this stage requires, as it were, the court to don a hair shirt. We have spent a good deal of space discussing authority, and the relation between one case and another, as if for all the world these issues concerning *forum* were all matters of the highest principle. But first and foremost we are concerned with the exercise of a judicial discretion which lies primarily in the hands of first instance judges. We repeat, without apology, what was said by Lord Templeman in *Spiliada*<sup>21</sup>:

“... [I]t seems to me that the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge... An appeal should be rare and the appellate court should be slow to interfere.”

The theme is given added force by Lord Hoffmann in *Berezovsky*<sup>22</sup>:

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<sup>18</sup> Scoping Study No 2, December 2002.

<sup>19</sup> Paragraph 4.54.

<sup>20</sup> Collins, *The Law of Defamation and the Internet* (OUP), ch. 24 paragraph 24.52.

<sup>21</sup> 465F-G.

<sup>22</sup> 1021G.

“The decision of the Court of Appeal in this case has since been distinguished in *Chadha v Dow Jones*..., 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.”

36. In our opinion it is difficult to over-emphasise the importance of these observations. All the propositions, or strands in the learning as we have called them, which we have described are really matters of practical reasoning, and not legal rules. The *Duke of Brunswick* is a legal rule; so is the requirement to ascertain the clearly appropriate *forum* (*Spiliada*). The relative importance of all the factors which must then be examined – the place of the tort, the parties’ connection with this or that jurisdiction, the publisher’s choice to go on the Internet – are not legal rules. They are matters which will inform the judge who must decide where the balance of convenience lies. We think it is a pity that there is so much learning about them. But it is a weakness of the common law that areas in which the litigants usually have ample resources with which to fund litigation tend to become too case-bound. That is what has happened here. In adding yet more to the books our only excuse is that it has seemed appropriate to say something about the refining of conventional approaches to the particular circumstances of Internet libels.
37. We turn then to the last strand in the cases. This does, we think, involve what is truly a question of law. As we have foreshadowed, Mr Price submits that the first task of the judge (once the gateway of CPR 6.20 was passed, as here it was) is to decide objectively which venue was the most appropriate *forum* for the conduct of the litigation. He must perform this task without reference to any “juridical advantage” which the claimant would or might enjoy by suing in England. Only if the judge decides that another *forum* is more appropriate should he then consider whether after all there exists a juridical advantage for the claimant such that trial in England is required if substantial justice is to be done between the parties. Mr Price cites *Metall und Rohstoff AG*<sup>23</sup>. That case concerned a complicated commercial dispute involving allegations of conspiracy. A claim by the plaintiffs for inducing or procuring a breach of contract would have been statute-barred in New York. Slade LJ giving the judgment of the Court of Appeal stated<sup>24</sup>:

“The judge’s approach to the limitation point was further criticised by the defendants’ counsel on the grounds that, following the guidance given by Lord Goff in *Spiliada* relating to the treatment of a ‘legitimate personal or juridical advantage’ (at pp. 482-484) he should first have considered which was the appropriate forum without reference to the juridical advantage which M. & R. would enjoy by proceedings in England, and

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<sup>23</sup> [1990] 1 QB 391.

<sup>24</sup> 488D-F.

only if he decided that New York was prima facie the appropriate forum, should have gone on to consider whether, none the less, the limitation point rendered a trial in England necessary for the purpose of doing substantial justice between the parties. We think that the approach to this point suggested on behalf of the defendants is correct in principle and that at least on one reading of the judge's judgment, he did not follow it, but took into account the juridical advantage point in his initial search for the appropriate forum.”

Here are the material extracts from Lord Goff's speech in *Spiliada*<sup>25</sup>:

“The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried ‘suitably for the interests of all the parties and for the ends of justice.’ Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings... simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum. Take, for example, discovery. We know that there is a spectrum of systems of discovery applicable in various jurisdictions... No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas... Then take the scale on which damages are awarded. Suppose that two parties have 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 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.

But the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to a different conclusion in other cases... [T]ake the example of cases concerned with time bars... Now, to take extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar

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<sup>25</sup> 482D-484B.



applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings... in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country..."

38. We have to say, with the greatest deference, that we find this rather difficult. A principle requiring objective ascertainment of the appropriate forum, without regard to any particular legal or procedural advantages to claimant or defendant, would be one thing. A wider principle, allowing the court to take account of such juridical advantages to either side, and then exercise a broad discretion, would be another. Both would be clear enough, though we can see that the latter might draw the court into some assessment (however preliminary) of the claim's merits; and that would likely (and no doubt rightly) be thought undesirable. But we are not sure that we have grasped the idea of a principle which first enjoins ascertainment of the appropriate forum, but then allows the claimant to proceed in an inappropriate forum because he has acted reasonably in relation (for instance) to differential time bars applicable in the candidate jurisdictions.
39. However, *Spiliada* and *Metall und Rohstoff* undoubtedly state the present law on this part of the case. It remains to see whether Eady J was true to it.

#### ***DID THE JUDGE MAKE A MISTAKE OF LAW?***

40. As we have indicated Mr Price submitted, by reference to paragraphs 36(3) and 37 of the judgment, that instead of asking himself the first (and usually critical) question as to what was the appropriate *forum* the judge proceeded on the footing that King should be allowed to sue in England so as to enjoy a juridical advantage arising from the fact that no equivalent action brought in New York would "survive". It is convenient first to identify the legal nature of this supposed advantage. It arises from

what are said to be the effects of the celebrated decision of the Supreme Court of the United States in *New York Times v Sullivan*<sup>26</sup>. The case is one of great importance, but for present purposes it is not necessary to say more about it than that it places very severe inhibitions upon the bringing of a claim in libel by a “public figure”. Mr Price’s case is that King has issued his claim in England because he fears it would be defeated in New York by the “public figure” rule; the judge has allowed the claim to proceed on that basis; and that is an impermissible outcome involving an error of law: *Spiliada* and *Metall und Rohstoff*.

41. As we have said, Mr Price’s argument is based on what the judge said at paragraphs 36(3) and 37 of his judgment. We will not set them out again. The judge’s reasoning is certainly exiguous. It could, with, respect, have been more clearly stated. At all events, in tracing the judge’s meaning it is important first to notice that at paragraph 36(3) the source given for the proposition that a New York claim would not “survive” is not a complaint by King, but a statement by Burstein – paragraph 11.9 of his first witness statement:

“In addition, I believe that if the claim which is being brought by Mr King in these proceedings in England was brought in the US, it would not survive. This is due to rules in the US which apply to statements made in relation to public figures. Mr King therefore appears to be deliberately ‘forum-shopping’ by bringing his claim in England.”

Burstein’s primary case, of course, was that New York was the appropriate forum. There was a certain irony in his assertion that proceedings brought in the appropriate forum would in effect be doomed to failure. Mr Asserson for King picked up the point at paragraph 13 of his second witness statement:

“At Paragraph 11.9 of his statement, the Third Defendant, who is an experienced US attorney, states that under US law the present claim ‘would not survive’. It is hard to think of a more compelling reason than this to allow the action to proceed in England. The Claimant seeks relief before the English Court for a tort committed in England. The Third Defendant’s argument that it should be heard in the USA specifically because the Claimant could **not** get relief there seems entirely illogical.”

42. It had not been King’s case, in seeking leave under CPR 6.20 or in resisting the defendants’ contention that the leave which was granted should be set aside, that the court should attach significance to any actual or apprehended juridical disadvantage arising from *New York Times v Sullivan*. The judge at paragraphs 36(3) and 37 was not accepting, indeed not dealing with, any argument to that effect put forward on King’s behalf. It seems to me that Mr Browne was right to submit that at paragraph 37 the judge in essence did no more than notice the irony to which we have referred.

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<sup>26</sup> (1964) 376 US 254.

His decision, in our judgment, was by no means based on an illegitimate approach to juridical advantage or disadvantage.

43. Mr Price was especially at pains to submit that the error with which he charged the judge had led him to overlook the need to consider, in the context of appropriate *forum*, the weighty considerations advanced on the defendants' side (now, of course, only Burstein) as to the difficulties they would face in marshalling their evidence if they were required to face trial in England. But, for our part, we have acquitted the judge of the error laid at his door, and we would accept that he undertook the exercise required of him, namely to ascertain what in his view was clearly the appropriate *forum*. In those circumstances we regard it as simply inconceivable that he failed to give proper consideration to the points urged on both sides. Both sides had arguments as regards the calling of witnesses (indeed, as it happens, King has put in a respondent's notice asserting that witness convenience clearly points in favour of trial in England). The issue was one which, no doubt, pulled in both directions.

### **CONCLUSION**

44. The judge took an overall view of appropriate *forum*. He was entitled, indeed obliged, to do so. He did not make the legal mistake laid at his door by Mr Price. The defendants' other points, such as the approach to be taken to the meaning of "shyster", and whether any authority was given to download Burstein's texts in England, do not begin to disclose an error of law by the judge.
45. In these circumstances there is in our judgment no basis on which this court could properly be invited to ascertain the appropriate *forum* for itself, and for all the reasons we have given the appeal will be dismissed.