IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MR JUSTICE MORISON

96/1509/B

Royal Courts of Justice
Strand
London WC2

Wednesday 16th April 1997

B e f o r e:

THE VICE-CHANCELLOR
MR JUSTICE HOBHOUSE
and
MR JUSTICE MORRIT

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SCHIFFAHRTSGESELLSCHAFT DETLEF VON APPEN GmbH

- v -

(1)WIENER ALLIANZ VERSICHRUNGS AG
(2)VOEST ALPINE INTERTRADING GmbH

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(Handed Down Transcript of Smith Bernal Reporting Limited,
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Official Shorthand Writers to the Court)

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MISS B BUCKNALL QC and MR R THOMAS (Instructed by Messrs Leboeuf, Lamb, Greene & Macrae, London EC3) appeared on behalf of the Appellant

MR R SIBERRY QC and MR L PARSONS (Instructed by Messrs Holman, Fenwick & Willan, London EC3) appeared on behalf of the Respondent

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J U D G M E N T
(As Approved by the Court)

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LORD JUSTICE HOBHOUSE: On 15th December 1994 the Plaintiffs in the action Schiffahrtsg-esellschaft Detlef Von Appen GmbH (whom I will call the Timecharterers), obtained the leave of the Commercial Judge Mr Justice Potter, on an ex parte application under RSC O.11 r.1(1), to issue and

serve out of the jurisdiction in Austria on Wiener Allianz Versicherungs AG of Vienna (whom I will call the Insurance Company) and Voest Alpine Intertrading GmbH of Linz (whom I will call the Voyage Charterers) a writ which principally claimed an injunction against the continuation of proceedings in Brazil which had been begun in February 1993 by the Insurance Company against the Timecharterers. Austria was not a party to the Brussels Convention and the Lugano Convention did not yet apply.

The matter came back before Mr Justice Morison in May and June of 1996. He had to consider first an application by the Defendants under RSC O.12 r.8 that the leave given by Potter J should be set aside and, if that application failed, secondly, whether a final injunction should be granted. As against the Insurance Company, he upheld the leave and granted an injunction in modified terms. As regards the Voyage Charterers, he set aside the leave. He made no order as to costs. The Insurance Company have appealed to this Court against both the interlocutory order dismissing their application under O.12 r.8 and the final order granting the injunction against them. The Plaintiffs have served a Respondents' Notice in which they seek to uphold the Judge's orders on broader grounds and as part of which they ask for a costs order to made in their favour here and below. The Judgment of Morison J is reported at [1997] 1 Lloyds 179. (He referred to the parties as respectively DVA, the insurers and Voest.)

The Facts:

The facts which have given rise to this litigation are complex. I will confine my summary to the facts which are directly material to this appeal. In July 1991 various cargoes were loaded on board the vessel Jay Bola at Brazilian ports for carriage to Indonesia and Thailand. Among these cargoes were two consignments of steel reinforcing bars, each of about 5,000 metric tonnes. These consignments were loaded on board at the port of Sao Sebastiao for carriage to Bangkok. Two bills of lading were issued on the Congenbill form and dated Sao Sebastiao 5th July 1991. They were owner's bills, that is to say, they were issued by the local agents on behalf of the owners of the vessel. They named a company called Arby Trading as the shippers and consigned the goods to the order of the

Voyage Charterers. The bills of lading stated that they were issued at Sao Sebastiao and were dated 5th July 1991.

The voyage was not a success. On 23rd August, the vessel suffered a serious fire and was abandoned by her crew south of Singapore. She had to be salved on Lloyds Open Form. She was towed into Singapore where the voyage was abandoned on 29th October. Cargo interests had to arrange for the transhipment of the cargoes at their own expense. The two consignments of steel bars were transhipped and on-carried to Bangkok in another vessel and there delivered to two Thai receivers who had earlier bought the consignments on CIF terms from the Voyage Charterers.

Serious losses of between US$1 and 2 million had been suffered by cargo interests which the Insurance Company had to bear. The consignments had been damaged. Transhipment and on-carriage expenses had been incurred. There were general average and salvage charges which had had to be paid. Understandably the Insurance Company had to consider how to recover those losses from any party which could be held responsible for them.

The Jay Bola was registered in the Bahamas and owned by Armstel Shipping Corporation of 100 Broad Street, Monrovia. The shipowners have admitted their liability for the casualty and the abandonment of the voyage subject to limitation. On 4th February 1993 they commenced a limitation action in the Admiralty Court in London seeking a decree of limitation of liability under the UK legislation which gives effect to the London Convention. They have paid the amount of the limit into Court and in October 1993 a decree of limitation was pronounced. Under the Convention this decree limits the liability of the Timecharterers as well as that of the shipowners. The Insurance Company, in the name of the relevant cargo owners, is entitled to a pro rata share of that fund. It has however not yet made any such claim. If it can obtain a judgment in Brazil against the Time Charterers, that judgment will not be subject to the limitation. Brazil is not a party to the London Convention. Hence the interest of the Insurance Company in suing in Brazil.

At the time of the material voyage, the vessel was subject to a timecharter on the New York Produce Exchange form whereby the shipowners chartered the vessel for a timechartered trip to the

Timecharterers. The timecharter was expressly governed by English law and contained a London arbitration clause. By a voyage charterparty dated 21st June 1991 on the Gencon form the Timecharterers chartered the vessel to the Voyage Charterers for a part cargo from Sao Sebastiao to Bangkok. It is governed by English law. It contained the usual bill of lading clause. It incorporated a clause paramount and an arbitration clause (clause 33). This read:

> "It is mutually agreed that should any dispute arise between owners and charterers, the matter in dispute shall be referred to three persons in London for arbitration, one to appointed by each of the parties hereto and the third by the two so chosen. Their decision or that of any two of them shall be final and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The arbitrators shall be shipping men in daily operation or chartering practice. ....."

It is accepted that as between the Voyage Charterers and the Timecharterers this is the governing document. It imposes upon the Voyage Charterers an obligation to refer any dispute they may have with the Timecharterers to arbitration in London. This is the contractual provision upon which the Timecharterers rely in seeking the injunction to restrain the proceedings against them in Brazil. As I have previously stated, at the time of shipment at San Sebastiao shipowners' bills of lading on the Congenbill form were issued. These bills of lading were governed by English law. (The Njegos [1936] P 90) Under English law, they do not vary the contract between the Timecharterers and the Voyage Charterers; the voyage charterparty is still the contract by which both parties remain bound. (The Dunelmia [1970] 1 QB 289)

The relevant consignments of steel bars had, through the agency of Arby Trading SA, been bought FOB a Brazilian port by the Voyage Charterers from another company. The Voyage Charterers on-sold the consignments on CIF terms to the two Thai receivers. The Voyage Charterers had an open cover with the Insurance Company. The consignments were declared under that open cover and insurance certificates issued. They were made out to order and provided for claims to be paid in Bangkok.

There was considerable delay in the Thai receivers opening letters of credit in favour of the Voyage Charterers. When opened they were in a form which did not allow the San Sebastiao bills of lading to be tendered under them. Accordingly on about 25th August the Voyage Charterers asked the Timecharterers to issue fresh bills of lading in a form that would comply in substitution for the original bills of lading which would be cancelled. Accordingly new bills of lading were issued in Hamburg and they so stated. They were back-dated to 5th July 1991. They named the Voyage Charterers as the shippers and consigned the goods to the order of the banks which had opened the relevant letters of credit. Otherwise the bills of lading were in the same terms as previously. These were the bills of

lading which were then used by the Voyage Charterers to perform their CIF contracts with the Thai receivers.

In early March of the following year the consignments arrived in Bangkok and a meeting took place there between representatives of the receivers, Voyage Charterers and Insurance company. The amount of the payments to be made by the Insurance Company to the receivers was agreed; it was also agreed that the payment should be made to the Voyage Charterers who would forward the relevant sum to each of the receivers. At this meeting each of the receivers signed a declaration in favour of the Insurance Company dated 9th March 1992. They read:

> "In consideration of your paying us for a partial loss of the under-mentioned cargo (in virtue of which payment you will become subrogated to all our rights and interests in the cargo and in any monies recoverable in respect thereof on account of general average, salvage or otherwise howsoever), we hereby authorize you to make use of our name for purpose of any proceedings of measures, legal or otherwise which you may think fit to take in respect of the cargo or for the recovery of any such monies; and we undertake to furnish you with all papers and correspondence relating thereto and to make any such affidavits or declarations and to give any such oral evidence as we can properly make or give, and generally to render you such assistance as you may from time to time reasonably require, in connection with any such proceedings or measures; you indemnifying us against all liability, costs, charges and expenses incurred in connection therewith and with the use of our name."

As agreed, the insurance monies were paid by the Insurance Company to the Voyage Charterers. The Voyage Charterers gave the Insurance Company a "subrogation receipt" dated 2nd April 1992. It is on the writing paper of the Voyage Charterers. It stated:

> "We hereby acknowledge receipt from Wiener Allianz Vienna of the above amount of US$1.270.000, ... in full and final payment for the damages and losses suffered by the cargo carried by mv "JAY BOLA" .... during her voyage Sao Sebastiao/Singapore/Bangkok July/August 1991, the cargo consisting of [the two consignments as per the two bills of lading] issued by McNeil Agencia Maritima Limitada Sao Sebastiao/Brazil agents for the vessel and covered by cover policy number 341.143, declarations numbers 5573/91 and 6046/91, for which the above amount we hereby give full and irrevocable release.
>
> By way of consideration of the payments they have made to us we hereby assign and transfer to the above underwriters any and all recovery and redress rights, grounds for action and recourses of any nature whatsoever arising out of the damages and losses sustained by the above referred cargo, so that said underwriters are fully subrogated in the rights that we are entitled to in relation to said damages and losses as well as in the resulting claims and law suits to be filed against the vessel's owner, carriers and any other liable parties."

The Voyage Charterers in due course forwarded the sums which they had received from the Insurance Company to the Thai receivers.

The Brazilian Proceedings:

Under Brazilian law an insurance company which has indemnified its assured is entitled to sue in its own name in respect of the loss suffered by its assured. Accordingly the proceedings

commenced in Brazil named only the Insurance Company as the plaintiff. They sued the shipowners and the Timecharterers. The joinder of the shipowners has no relevance to this appeal and I need not refer to it further. But as regards the claim against the Timecharterers it is necessary to examine in closer detail what is the basis of the Insurance Company's claim in Brazil against the Timecharterers. Its materiality is that the Timecharterers accept that the Thai receivers were under no obligation to submit any claim they might have against them, the Timecharterers, to arbitration, whereas insofar as the Voyage Charterers have any such claim, the Voyage Charterparty requires that it be submitted to arbitration in London. The Insurance Company has submitted on this appeal that the Brazilian proceedings are not dependant upon the assertion of any right of the Voyage Charterers against the Time Charterers and therefore there is no basis for treating those proceedings as in any material respect infringing, even if all the other arguments of the Timecharterers are accepted, the arbitration clause in the Voyage Charter. Thus, the Insurance Company submits that the Brazilian action should, on any view, be allowed to proceed because it is based on the enforcement of rights derived from the Thai receivers not from the Voyage Charterers.

The evaluation of the character of the Brazilian action is interlinked with the question of the basis upon which the Insurance Company has invoked the jurisdiction of the Brazilian court and this in turn raises a question of the relevance in that action of respectively the Sao Sebastiao and the Hamburg bills. The Thai receivers were never the holders of the Sao Sebastiao bills. Their contractual rights, if any, must derive from the substituted Hamburg bills. The submission of the Timecharterers before us is that the jurisdiction of the Brazilian court was claimed by the Insurance Company, and upheld by the Brazilian courts, upon the basis of the Sao Sebastiao bills and the indemnification by the Insurance Company of the Voyage Charterers: the claim is not based upon the Hamburg bills or the indemnification of the Thai receivers.

The Brazilian action was started by the issue of a document equivalent to a statement of claim dated 15th February 1993. It pleads the fact that the Insurance Company had insured the consignments, that they had been damaged and that the voyage had been abandoned. As is the practice in many countries the pleading refers to and annexes the documents upon which the party is relying. The Insurance Company annexed the two insurance certificates, copies of the two Sao Sebastiao bills of lading (which did not disclose that they had been cancelled), the invoices by which the goods had been sold to the Voyage Charterers by their FOB sellers, and the subrogation receipt signed by the Voyage Charterers. The liability of the Timecharterers alleged was a contractual liability arising from the Sao Sebastiao bills of lading which, under Brazilian law (unlike English law), were to be taken as contracts with the Timecharterers as well as with the shipowners.

Under Brazilian procedural law a defendant, even if he disputes the jurisdiction of the court, must serve a pleading which deals at the same time with both the jurisdictional objection and the merits

of the claim and the substantive defences to it. In accordance with this procedure the Timecharterers delivered their response in a lengthy document dated 19th March 1993. It objected to the jurisdiction and disputed the claim. It disputed that the Sao Sebastiao bills of lading were the effective bills of lading and that they could be used to found jurisdiction of the Brazilian court or a claim against the Timecharterers. In its reply dated April 1993, the Insurance Company reasserted that the claim was based upon the Sao Sebastiao bills of lading:

> "The Brazilian bills of lading, issued in Brazil where in fact the cargo was actually shipped by the defendant's Brazilian shipping agent would still reflect the genuine carriage contract executed with the Brazilian shipper."

In paragraph 69 of the same pleading the Insurance Company identified the Voyage Charterers as its assured. Nowhere in any of its pleadings does it rely upon the Hamburg bills or the receipts of the Thai receivers. The judgments of the Brazilian courts proceed on the same basis that both jurisdiction and liability are derived from the Sao Sebastiao bills of lading and by necessary implication from rights of the Insurance Company as the insurers of the Voyage Charterers whom they have indemnified. For example the judgment dated 28th December 1993 expressly refers to the indemnification by the Insurance Company of its insured "Voest Alpine" (p.13) and states that the only relevant bills of lading are the Sao Sebastiao bills (p.16).

It is clear in my judgment that the rights being asserted in the Brazilian action by the Insurance Company are rights derived from and dependant upon the rights of the Voyage Charterers. The argument in this Court of Miss Bucknall QC who appeared for the Insurance Company that the rights being asserted in the Brazilian action were those of the Thai receivers cannot be accepted. The Plaintiffs are correct that the claims are claims which, if made by the Voyage Charterers, are claims which the Voyage Charterers were obliged to refer to arbitration in London under the arbitration clause in the Voyage Charter Party which, as is accepted by both sides, is in English law the governing contract as between the Voyage Charterers and the Timecharterers.

The Arbitration Clause:

So much for the facts. Before turning to what has happened in the present action in London it is desirable that I should examine further the legal position of the relevant parties and their respective rights and obligations in relation to the arbitration clause. The relevant parties are the Timecharterers, the Voyage Charterers and the Insurance Company.

To take the Timecharterers and the Voyage Charterers first: their relationship is contractual. The arbitration clause confers on them a mutual right and obligation to refer any dispute arising between them to arbitration in London. To fail to refer a dispute to arbitration and instead to commence litigation is a breach of contract. Where the relevant action has been started in this country the primary remedy for breach is to apply for a stay of the action.(s.4 of the Arbitration Act 1950, s.1 of

the Arbitration Act 1975) Under the New York Convention and the 1975 Act, the Court does not have a discretion to refuse a stay. Where the action has been brought in another jurisdiction and that jurisdiction, as is the case with Brazil, does not recognize the New York Convention, the primary remedy must be to apply for an injunction to restrain the contract breaker from continuing with that action in breach of contract. (Mantovani v Carapelli [1980] Lloyds 375; The Angelic Grace [1995] Lloyds 87) This is a simple example of an injunction to restrain a continuing breach of contract, as is the parallel remedy of an injunction to restrain foreign proceedings in breach of an exclusive jurisdiction clause. (Continental Bank v Aekos Co Nav [1994] 1 Lloyds 505) The aggrieved party also has the option to sue for damages for breach of contract though this is rarely a satisfactory remedy. (Doyle v Ossett [1912] 3 KB 257 at 267-8)

Therefore if the Brazilian action had been brought by the Voyage Charterers, it cannot be disputed that the Voyage Charterers would thereby have been in breach of contract. The Timecharterers would, prima facie, be entitled to an injunction against the Voyage Charterers to restrain them from continuing the Brazilian action. The action claiming an injunction would be an action to enforce or obtain other relief in respect of the breach of a contract being a contract which is by its terms or by implication governed by English law so that the writ or other originating procedure would be one which the Court has jurisdiction to allow to be served out of the jurisdiction under Order 11. No problem of jurisdiction to give leave to serve out or to grant an injunction would arise.

But the plaintiff in the Brazilian proceedings and the relevant defendant in the present action is the Insurance Company. The Insurance Company has made no contract with the Timecharterers. The Insurance Company is the assignee or the transferee of the rights of the Voyage Charterers against the Timecharterers. It is submitted on behalf of the Insurance Company that as a result the Insurance Company is entitled to enforce the Voyage Charterers' contractual rights without any obligation to refer the dispute to arbitration. This submission is unsound and contrary to decided authority.

The proper law which governs the Voyage Charterparty and the contractual rights which the Insurance Company is seeking to enforce in Brazil is English law. Under s.136 of the Law of Property Act 1925 rights of action are assignable subject to equities, for example, rights of equitable set-off. (Lawrence v Hayes [1927] 2 KB 111) Similarly under s.4 of the Arbitration Act 1950 and s.1 of the Arbitration Act 1975 the stay of an action may be ordered on the application not only of the contracting party but also "any person claiming through or under him". (The position is the same under the 1996 Act: see s.82(2).) An example of such a stay being granted against an assignee is The Leage [1984] 2 Lloyds 259. The assignee takes the assigned right with both the benefit and the burden of the arbitration clause. (Aspel v Seymour [1929] WN 152; Shayler v Woolf [1946] 1 Ch 320 not following the dicta in Cottage Club Estates v Woodside Estates [1928] 2 KB 463) In the Padre Island (No 1) [1984] 2 Lloyds 408, Leggatt J held that the transferee under the Third Parties (Rights

against Insurers) Act 1930 of an insolvent assured's rights against his insurer, a P & I Club, was bound by the arbitration clause.

> "The 1930 Act transfers to the plaintiffs not the claim but the contractual rights of the insured. Those contractual rights are subject to the arbitration clause ...." (p.414)

In the Padre Island (No.2) [1990] 2 Lloyds 191 at 200 Lord Goff said:

> "The agreement to arbitrate is one which regulates the means by which the transferred right is to be enforced against the Club. As such, it is inevitable that such an agreement must be treated as transferred to the statutory transferee as part of, or as inseparably connected with, the member's right against the Club under the rules in respect of the relevant liability."

I summarized the legal position in the Jordan Nicolov [1992] Lloyds 11. A complicating factor in that case was that the assignment had been made after the commencement of the arbitration. At p.15 I said:

> "Where the assignment is the assignment of the cause of action, it will, in the absence of some agreement to the contrary include as stated in s.136 all the remedies in respect of that cause of action. The relevant remedy is the right to arbitrate and obtain an arbitration award in respect of the cause of action. The assignee is bound by the arbitration clause in the sense that it cannot assert the assigned right without also accepting the obligation to arbitrate. Accordingly, it is clear both from the statute and from a consideration of the position of the assignee that the assignee has the benefit of the arbitration clause as well as of other provisions of the contract."

These authorities confirm that the rights which the Insurance Company has acquired are rights which are subject to the arbitration clause. The Insurance Company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligation of the Timecharterers to pay that award. Likewise, the Insurance Company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The Insurance Company is not entitled to enforce its right without also recognising the obligation to arbitrate.

Miss Bucknall submits that, even so, there is no right which can be asserted by the Timecharterers against the Insurance Company which gives a cause of action by the former against the latter. She submitted that to recognize any such cause of action would amount to treating the burden of the contract as having been transferred, something which would only occur if there had been a novation. In the present case all that had been transferred was a right of the Voyage Charterers against the Timecharterers. The burden of the contract was not transferred. The Insurance Company came under no actionable liability to the Timecharterers. In my judgment this argument fails to understand the nature of the equitable remedy which is being sought in this action. The simplest way in which to illustrate this is to take a simple analogy. If the assignee of a legal right in action seeks to enforce that right against the debtor without taking into account an equitable set-off which the debtor was entitled to raise against the assignor, the debtor's remedy, prior to the Common Law Procedure Acts and the Judicature Acts of the last century, would have been to apply in the Court of Chancery for an

injunction to restrain the assignee from asserting the common law right in the common law courts unless and until he recognized the equitable right of the debtor. The injunction was granted to provide the debtor with the appropriate protection from the unconscionable conduct of the assignee; it does not depend upon any liability of the assignee for the sums to be set-off. The right to apply for an injunction is not a "cause of action" of the same character as the right to sue for damages for breach of contract or tort or to collect a legal debt. It is an application for an equitable remedy to protect the plaintiff against the consequences of unconscionable conduct. Since the fusion of the jurisdiction of the Chancery and Common Law courts, the need of the aggrieved party to apply for an injunction no longer arises and the common injunction has been abolished by statute. He can raise the equity in response to and in the same proceedings as the common law action. However, where the action is brought by the assignee in another jurisdiction which does not recognize the equitable right of the debtor, the debtor's only remedy is (just as it was in the first half of the last century) to apply for an injunction to restrain the assignee from refusing to recognize the equity of the debtor. The present case is such a case. The insurance company is failing to recognize the equitable rights of the Timecharterers. The equitable remedy for such an infringement is the grant of an injunction.

This conclusion accords with the authorities about the scope of the jurisdiction to grant injunctions. The breadth of this jurisdiction has been reaffirmed in the judgment of the Judicial Committee of the Privy Council delivered by Lord Goff in SNI Aerospatiale v Lee Kui Jak [1987] AC 871 at 893. The present case falls clearly within the scope of that jurisdiction because the application of the Timecharterers for an injunction has been made to protect a contractual right of the Timecharterers that the dispute be referred to arbitration, a contractual right which equity requires the Insurance Company to recognize. The jurisdiction in this case does not depend upon such concepts as *forum non conveniens* or oppressive and vexatious conduct. It depends upon the contractual rights of the Timecharterers although it can fairly be said that those rights show that Brazil is an inappropriate forum for the determination of the dispute and that the conduct of the Insurance Company has in fact been oppressive.

Order 11:

This leads on to the next stage in the analysis: does the Timecharterers' claim against the Insurance Company come within the provisions of O.11 r.1(1)? Since the only subparagraph of r.1(1) upon which the Plaintiffs rely is (d), it is not necessary to consider whether they might not have structured the present action in a way which would have entitled them to rely upon one of the other subparagraphs. In my judgment, as a matter of language, the claim is brought to enforce a contract and obtain relief in respect of a breach of contract governed by English law. The contract is the Voyage Charterparty. The Timecharterers have rights under that contract which they are entitled to

enforce against the Insurance Company and have claimed an injunction to restrain the Insurance Company from infringing those rights. The Insurance Company has sued (in Brazil) on the Voyage Charterparty as the assignee or transferee of causes of action of the Voyage Charterers. The purpose of the injunction is to require the Insurance Company to observe the terms of that contract to which the right which it is asserting is subject.

Miss Bucknall argues that this reasoning leaves out of account an essential ingredient in the rule. She submits that subparagraph (d) can only be relied upon where the contract in question is a contract to which the relevant plaintiff and relevant defendant are, in the fullest sense, parties. This submission is derived from the decision of Mr Hamilton QC sitting as a deputy High Court Judge in Finnish Marine Insurance v Protective National Insurance [1991] QB 1078. Mr Hamilton said at p.1083:

> "Mr Langley says that the contract does not need to be between the plaintiffs and the defendants and it is sufficient for him to show that his claim affects the plaintiffs' contract with [another]. If he is right, this is a point which has been regularly overlooked by distinguished lawyers. In my judgment, however, it is clearly wrong. It is probably sufficient to construe the rule alone. It seems to me clear that all the earlier grounds ('enforce, rescind, dissolve, annul') can only relate to a contract between plaintiff and defendant. There is nothing to indicate that a different type of contract becomes available when the claim is to 'affect' a contract. In each case 'contract' means a contract between the plaintiff and defendant."

It is important to put that statement in its context. The plaintiff in that action was vexed by a foreign company which said it had a contract with the plaintiff company. The foreign company was saying that an underwriting agency had entered into a contract with it as the agent of and with the authority of the plaintiff company. The plaintiff company commenced proceedings in this country for a declaration that it had no contract with the foreign company. The defendants in the action were the foreign company. The plaintiffs needed to obtain leave to serve the writ out of the jurisdiction under O.11 r.1. The writ said that there was no contract and so did the affidavit. It is therefore difficult to see how the plaintiffs could have thought that they were entitled to rely upon subparagraph (d). Under O.11 it is necessary in order to found the application for leave to bring oneself within one of the relevant subparagraphs. (Compare the position under the Brussels Convention.) For the purposes of subparagraphs (d) and (e) it is necessary to assert that there is a contract. Further, it must be the contract upon which the cause of action is based because otherwise any contract would do, for example an insurance contract by which an insurance company was insuring one of the two commercial parties involved in a dispute.

Confined to its context, what Mr Hamilton said was clearly right. But it is not right then to extrapolate so as say that an assignee who is asserting a right under a contract is not to be treated for the purpose of these subparagraphs as a party to that contract or, to be more precise, so as to conclude that the plaintiff applying for leave to serve out of the jurisdiction cannot found jurisdiction upon that

contract. The assignee suing in respect of an assigned right can obtain leave relying on the subparagraphs to serve the debtor out of the jurisdiction; so also can the debtor obtain leave to serve the assignee in relation to that contract. There are only two relevant questions: Is there a contract? Is the plaintiff seeking to enforce that contract against the defendant? In the present case both those questions are to be answered in the affirmative.

I agree with the evaluation of the *Finnish Marine* case by Mr Moore-Bick QC in DR Insurance v Central National Insurance [1996] 1 Lloyds 74. In that case he said:

> "Mr Kealy accepted, rightly in my view, that the claim of an assignee to enforce rights arising under a contract would fall within the scope of subparagraph (d) and, by parity of reasoning, that the claim of the transferee of liabilities which sought relief which would have a direct effect on his liability to the defendant would equally do so. In my judgment this is correct because in each case the effect of the assignment or transfer is to create contractual rights and liabilities directly between the parties to the action and it is those rights and liabilities which are affected by the relief being claimed. The expression 'contract' in subparagraph (d) is in my view quite wide enough to cover contractual rights and liabilities which have become vested in one or other party in this way." (p.78)

(See also Gulf Bank v Mitsubishi [1994] 1 Lloyds 323.)

The analysis upon which I have engaged shows that as a matter of jurisdiction the claim by the Timecharterers for an injunction to restrain the Insurance Company from litigating in Brazil contrary to the arbitration clause in the Voyage Charterparty comes within O.11 r.1 and that as a matter of principle an injunction is the appropriate remedy which should be granted to them.

Delay:

That is not, however, the end of the case because the Insurance Company has raised other points going both to the grant of leave under O.11 and the grant of the injunction. It is convenient to take the second aspect first. On behalf of the Insurance Company Miss Bucknall relies, as she did before the Judge, upon the delay which has taken place before the present action was started. The Brazilian proceedings were started in February 1993. The present action was not started until December 1994. In the intervening period the proceedings had been continuing in Brazil and indeed were still continuing at the time that Morison J gave his judgment in May of last year. As previously explained the proceedings in Brazil covered both jurisdiction and the merits. Various decisions have been given against the Timecharterers and their appeals have been unsuccessful. There is relatively little left outstanding in the Brazilian action and it was to be anticipated that it would have been concluded by the summer of this year (subject no doubt to possible appeals). It is accepted that nothing which the Timecharterers have so far done in Brazil amounted to a submission to the jurisdiction of the Brazilian courts but it is submitted that the course they have followed has led to such delay and such expenditure of time and money that it is no longer just and appropriate that an injunction should be granted to them.

Morison J carefully considered these arguments. He said at p.189:

"Has the conduct of DVA deprived them of the relief to which they would otherwise have entitled against the insurers? While there has been what I regard as culpable delay by the plaintiffs in seeking relief between the end of June 1994 and the beginning of December of that year, in the exercise of my discretion I am not prepared to deprive them of the relief to which they would otherwise have been entitled. In my view it would not be just to conclude that, in the overall context of the case, a relatively short period of culpable delay should have the result contended for. Apart from anything else, it does not seem to me that the defendants suffered any prejudice from that period of delay. In relation to the way the proceedings have been conducted in Brazil, I am satisfied that all the steps which DVA took in those proceedings were directed at the jurisdiction objection. In my judgment they have done nothing which could amount to a submission to the court's jurisdiction. However I consider that DVA ought to have come to this Court earlier than they did and that such an application could and should have been made shortly after the Brazilian court's judgment was handed down in February 1994. I do not categorize their decision to pursue an appeal in the Brazilian courts as so unreasonable that the delay resulting therefrom could be characterized as culpable. I do consider that by pursuing their interests in the Brazilian courts rather than coming to this Court for relief, they have caused the insurers unnecessary costs in Brazil. In my judgment, DVA should not be entitled to any injunctive relief unless they are prepared to undertake to pay all the insurers costs of the Brazilian proceedings incurred by the insurers after February 1994."

The order which the Judge made reflected this conclusion.

In my judgment the evaluation of the significance of the delay and its bearing upon the exercise of his discretion whether or not to grant an injunction was pre-eminently a matter for the Commercial Judge. He was entitled to reach the conclusion which he did. Delay is an important matter to take into account on an application for an injunction but the Judge's decision is in accordance with the guidance given in Tracomin v Sudan Oil Seeds [1983] 1 WLR 1026 and Sohio Supply v Gatoil [1989] 1 Lloyds 588. The decision of the Judge in his exercise of his discretion to grant the injunction should be upheld. There was no waiver or acquiescence. The undertaking was sufficient to remedy any legitimate grievance of the Insurance Company.

The Adequacy of the Writ:

The remaining point relates to the original grant of leave under O.11. The difficulties here are entirely of the Plaintiffs' own making. The draft specially endorsed writ in respect of which they sought and obtained leave was a surprising document. It named the Insurance Company and the Voyage Charterers as defendants. It pleaded the Voyage Charterparty and the arbitration clause. It referred to the fact that the Insurance Company had commenced proceedings in its own name in Brazil in respect of loss and damage allegedly suffered by the Voyage Charterers as a result of the fire on the Jay Bola and the subsequent abandonment of the voyage. The pleading continued:

"The first defendants are an insurance company and claim to be entitled to pursue the claim in their own name as the alleged insurers of the second defendants pursuant to alleged rights of subrogation.

> The subject matter of the above claim falls within the provisions of the arbitration agreement and by commencing the proceedings in Brazil, the first defendants have knowingly and intentionally procured and or caused or induced a breach of contract on the part of the second defendants. For the avoidance of doubt the plaintiffs will contend that the first defendants would have been aware of the terms of the arbitration agreement as part of their investigations of the terms of contract carriage.
> In breach of their obligations under the arbitration agreement, the second defendants have assisted the first defendants to commence and prosecute the Brazilian proceedings by the provision of documentation and information.
> The first defendants threaten and intend to continue the proceedings in Brazil assisted by the second defendants, unless and until restrained by this Court.
> Further or alternatively, by reason of the defendants' actions aforesaid, the plaintiffs have been exposed to liability and have suffered loss and damage and been put to expense. ....."

The relief prayed was injunctions against each of the Defendants and damages against the First Defendants only. It was explained that the claim for damages against the Second Defendants would be pursued in arbitration.

The affidavit which led the application for leave was that of the Plaintiffs' solicitor Mr Bowman sworn 7th December 1994. Having set out the full facts regarding the voyage and the claims which had arisen from it and the contractual relationships and to the other proceedings whether by arbitration or in the Admiralty or Commercial Courts which had ensued in London and to the Brazilian proceedings, Mr Bowman turned to the causes of action which were being relied upon by the Plaintiffs. He said (pp.10-11):

> "Any claim which WAV [the Insurance Company] may, by virtue of subrogation or assignment (or otherwise), have been entitled to pursue against DVA under the sub-charterparty was, and remains, subject to the sub-charterparty arbitration clause;
> .....
> The claims against WAV and DVA fall within RSC O.11 r.1(1)(d)(iii), being a claim to enforce or otherwise affect a contract, namely the sub-charterparty, which by its express terms is governed by English law and or recover damages or obtain other relief in respect of the breach of such contract.
> ....."

(I do not quote the passages from the affidavit which verify the claim for breach of contract against the Voyage Charterers nor the claim for damages against the Insurance Company for procuring causing or inducing a breach by the Voyage Charterers of the arbitration agreement.)

It will be seen that the Points of Claim endorsed on the writ were drafted with a view to presenting two causes of action. One was an actual breach of contract by the Voyage Charterers and the other was the tort allegedly committed by the Insurance Company of inducing that breach of contract. However the facts pleaded were also sufficient to support the claims for the grant of an injunction against the Insurance Company and such an injunction was part of the relief which was claimed. Further, the affidavit, in compliance with r.4 of O.11, verified that cause of action and identified the subparagraphs of r.1(1) upon which the Plaintiffs were relying in applying for leave.

However, notwithstanding the unsatisfactory state of the Points of Claim endorsed on the writ, leave to issue and serve out of the jurisdiction was given without requiring any changes to be made.

Before the matter came back before the Court on the Defendants' O.12 r.8 application the Plaintiff's solicitors wrote to the Defendants' solicitors on 22nd February 1996 saying:

> "Having considered the matter with counsel we are writing to inform you that at the trial of the matter in March our clients will not be advancing a case against WAV based on tort nor will it be further alleged at the hearing that WAV have been assisted by DVA in pursuing the claim in Brazil."

The result of this was that for all practical purposes the proceedings in Court against the Voyage Charterers were being abandoned as was the tort claim against the Insurance Company. The Plaintiffs, the Timecharterers, were therefore limiting themselves to a cause of action based upon the equitable right to seek an injunction against the Insurance Company so as to prevent it from failing to recognize the Timecharterers' right as against the Insurance Company to have the dispute referred to arbitration in accordance with the arbitration clause in the Voyage Charterparty.

In this situation Miss Bucknall has relied upon the decision of the Court of Appeal in Excess Insurance Co Limited v Astra Insurance [1996] Lloyds Reinsurance Reports 380. In that case it was pointed out that the writ issued must conform to the actual basis upon which leave had been applied for and granted and that it was not open to a party to treat such a writ as including causes of action for which leave either had not been or could not properly have been given. Neill LJ said at p.386:

> "The cause or causes of action to which the Court and the defendant are to have regard are those set out in the writ. It is the writ for which leave to serve is sought and granted. The affidavit in support and any exhibits may have to be looked at to see the foundation of the claim but the relevant cause of action is in the writ. Moreover, it is the writ and not the affidavit which is served on the defendant."

He went on to refer to "the primacy of the writ". Lord Justice Neill cited and followed what had been said by Slade LJ in Metall und Rohstoff v Donaldson Lufkin [1990] 1 QB 391 at 436:

> "In our judgment, if the draftsman of a pleading intended to be served out of the jurisdiction under O.11 r.1(1)(f) can be reasonably understood as presenting a particular head of claim on one specific legal basis only, the plaintiff cannot thereafter for the purpose of justifying his application under O.11 r1(1)(f) be permitted to contend that that head of claim can also be justified on another legal basis (unless, perhaps the alternative basis has been specifically referred to in his affidavit evidence, which it was not in the present case). With this possible exception, if he specifically states in his pleading the legal results of what he has pleaded, he is in our judgment limited to what he has pleaded for the purpose of an O.11 application. To permit him to take a different course would be to encourage circumvention of the O.11 procedure, which is designed to ensure that both the Court is fully and clearly appraised as to the nature of the legal claim with which it is invited to deal on the *ex parte* application, and the defendant is likewise appraised of the nature of claim which he has to meet, if and when he seeks to discharge an order for service out of the jurisdiction."

Based on these authorities, Miss Bucknall submits that the fair reading of the Particulars of Claim was that the claim against the Insurance Company was based solely upon the allegation of tort.

She accepts that the affidavit is open to a wider interpretation but submits that is not enough in view of the clear terms of the Points of Claim. Morison J did not accept this submission. He described the pleading as "at best somewhat obscure". But he continued: "However, I have come to the conclusion that, tucked away in the statement of claim and the affidavit was a claim which reflects the true legal position as I have held it to be. .... Just enough was said." (p.189) Notwithstanding this somewhat unpersuasive statement of his reasons, I consider that the Judge's conclusion was correct. The pleading did include the necessary allegations appropriate to support the claim to an injunction and an injunction was claimed. This is not a case of seeking to add a cause of action which previously fell outside the ambit of the writ nor is it one which seeks to add a new basis of claim. The relevant facts remain the same: the Voyage Charterparty included an arbitration clause; the Insurance Company is the assignee of the Voyage Charterers' rights under the Voyage Charter; contrary to the arbitration clause, the Insurance Company is seeking to litigate a claim under the Voyage Charterparty without referring the dispute to arbitration. A person versed in English law would appreciate that this was the appropriate basis upon which to support the claim to the injunction against the Insurance Company and that it was open to the Timecharterers on this pleading. If the Defendants felt uncertain about it, reference to the affidavit would have confirmed this reading. It follows therefore that the claim is one which the Timecharterers were entitled to pursue on this writ. They were entitled to rely upon the writ to justify the grant of leave to serve out of the jurisdiction and resist the Defendant's application under O.12 r.8.

Costs:

The only remaining point is that raised by the Plaintiffs on the Judge's costs order. He made no order as to costs. Mr Siberry QC on behalf of the Plaintiffs has submitted that the Judge wrongly evaluated the justification for the joinder in the action of the Voyage Charterers as Second Defendants. In this context submissions were addressed to us, as no doubt they were to the Judge, as to the extent to which the Voyage Charterers could be held to be in breach of Charterparty as a result of what was done by the Insurance Company in suing in Brazil. We were referred to what was said by Staughton J in The Halcyon The Great [1984] 1 Lloyds 283 at 289. Whether what happened in Brazil provides the Timecharterers with a relevant cause of action against the Voyage Charterers will have to be considered by the arbitrators in the arbitration which is going to take place between the Timecharterers and the Voyage Charterers if the Timecharterers still consider it worthwhile to pursue their claim for damages against the Voyage Charterers. I prefer to express no view about it and it is not necessary for me to do so. It does not form a necessary part of any decision of Morison J or of this Court.

Morison J refused to make any order for costs in favour of the Timecharterers. He did so because of the procedural disarray which had arisen from the way in which the Plaintiffs had originally

pleaded their case and had then abandoned much of it. The Plaintiffs had started by suing the Second Defendants and had then effectively discontinued. They had abandoned what on any view was the most prominent way that they had been putting their claim against the First Defendants. There had been delay on the part of the Plaintiffs. If he had made an order as to costs he would have had to make orders which required the separate treatment of the various aspects of the case and separately evaluated each of these factors. In the exercise of his discretion he considered that the appropriate and more sensible order was to make no order. I consider that he was justified in doing so and that it would be wrong for this Court to interfere with his exercise of his discretion particularly on the basis of the peripheral arguments urged upon us by Mr Siberry.

Conclusion:

In my judgment the appeals of the Defendants should be dismissed and the orders of the Morison J upheld.

LORD JUSTICE MORRITT: I agree.

THE VICE-CHANCELLOR: I have had the advantage of reading in draft the judgment of Lord Justice Hobhouse. I am in full agreement with the conclusions he has expressed on each of the issues that has arisen for decision. The issues are as follows:-

(i) It was argued by Miss Bucknell, for the Insurance Company ("WAV"), that in the Brazilian action WAV was suing the Time Charterers ("DVA") on rights acquired by subrogation from the Thai receivers. It is, in my view, apparent from the documents constituting the pleadings in the Brazilian action that that is not so. In the Brazilian action WAV is suing DVA on rights acquired by subrogation from the Voyage Charterers ("Voest"). These are rights deriving from the sub-charterparty between DVA and Voest and are subject to the London arbitration agreement contained in the sub-charterparty.

(ii) Miss Bucknell argued that, because WAV were not parties to the sub-charterparty and because the subrogation which entitled WAV to sue on Voest's contractual causes of action did not constitute a novation under which WAV became a party to the sub-charterparty, WAV were not bound by the arbitration agreement. The premises on which this argument is based are correct but the conclusion drawn therefrom is not. WAV is bound by the arbitration agreement not because there is any privity of contract between WAV and DVA but because Voest's contractual rights under the sub-charterparty, to the benefit of which WAV has become entitled by subrogation, are subject to the arbitration

agreement which, too, is part of the sub-charterparty. WAV cannot enforce those contractual rights without accepting the contractual burden, in the form of the arbitration agreement to which those rights are subject (c/f Halsall -v- Brizell [1957] Ch. 169 and Tito -v- Waddell (No. 2) [1977] Ch. 106 at p. 309). WAV is, through subrogation, an assignee from Voest of Voest's contractual rights against DVA. DVA is contractually entitled, whether as against Voest or any assignee from Voest, to require the enforcement of those rights to be pursued by arbitration. WAV's attempt to enforce those rights otherwise than by arbitration is a breach of DVA's contractual entitlement. I agree with Lord Justice Hobhouse that DVA's remedy is, prima facie, the grant of an injunction to restrain the attempt.

(iii) DVA's claim for an injunction is made for the purpose of enforcing the arbitration agreement contained in the sub-charterparty. Accordingly, for the purpose of leave to serve outside the jurisdiction, the claim falls fairly and squarely within RSC Order 11 rule 1(1)(d). Miss Bucknell argued that sub-paragraph (d) could be relied on only where both the plaintiff and the defendant against whom enforcement of the contract was sought were parties to the contract. She cited in support of her argument a passage from Note 11/1/13 in the White Book. The passage reads:-

> "In order to bring a claim within the scope of O 11 r.1(1)(d) or (e) the plaintiff must show that there is a contract between himself and the defendant, and that there is a good arguable case that the claim affects such contract. It is insufficient for a plaintiff to rely upon a contract made between himself and a third party".

In my opinion, this Note expresses a valid point in terms that are too wide. For example, a claim brought by an assignee of a contract for the purpose of enforcing the contract against the party alleged to be liable under it would fall within sub-paragraph (d) notwithstanding that the plaintiff was not a party to the contract (see the passage from the judgment of Mr Moore-Bick QC in DR Insurance -v- Central National Insurance [1996] 1 Lloyds Report 74 cited by Lord Justice Hobhouse). Similarly, an action brought to prevent a contractual assignee from suing on the contract otherwise than in accordance with an arbitration clause contained in the contract is, in my judgment, an action brought to enforce the contract for the purposes of subparagraph (d).

(iv) Miss Bucknell argued, also, that since leave to serve out of the jurisdiction was granted in respect of a Writ specially endorsed with Points of Claim significantly different, so far as the claim against WAV is concerned, from the Points of Claim now proposed to be relied on, the service should be set aside. It is correct that the main claim against WAV in the draft of the Points of Claim shown to the judge on the application for leave was a claim in tort for knowing interference with contractual rights. This claim in tort has been deleted from the current version of Points of Claim. All that is left, so far as concerns WAV, is an allegation that the commencement and continuation of the Brazilian action was in breach of the arbitration agreement in the sub-charterparty and a claim for an injunction to restrain WAV from continuing with the Brazilian action. The primary facts necessary to sustain that claim were pleaded in the original Points of Claim. No additional pleading has been necessary in

order to sustain the claim. Miss Bucknell argued that an express plea that the continuation of the Brazilian action would be "unconscionable" was necessary in order to constitute the cause of action against WAV on which DVA now sue. I disagree. It was always apparent from the pleading that DVA was suing in order to enforce the arbitration agreement and that in the Brazilian action WAV was suing on contractual rights that were subject to the arbitration agreement. The jurisdiction of the courts in this country to enjoin parties from commencing or continuing proceedings in a foreign country has been expressed to be exercisable where that commencement or continuation would be "unconscionable". There might well be cases in which it would be necessary expressly so to allege in order to make clear the basis on which the action for the relief was brought. But, in my opinion, not so in the present case. In the present case DVA is suing to enforce contractual rights, or, to put the point another way, in order to prevent an action against DVA based on DVA's contractual obligations being pursued otherwise than by the contractually agreed mode, viz, London arbitration. It is not, in my judgment, necessary to allege expressly that the continuation of the Brazilian action would be "unconscionable" in order in such a case to plead a cause of action for the grant of an injunction.

(v) Miss Bucknell argued that delay on the part of DVA in commencing the action for an injunction should disqualify DVA from the grant of that relief. I agree with Lord Justice Hobhouse that, on this point, essentially a matter for the discretion of the trial judge, no fault can be found in the manner in which Morison J. exercised his discretion.

(vi) Finally, there is a respondent's point raised by cross-appeal. Mr Siberry for DVA argued that since the commencement of the Brazilian action by WAV was in breach of the arbitration agreement, and since Voest, on whose contractual rights WAV was suing, was a party to the arbitration agreement, the commencement of the Brazilian action represented a breach of contract by Voest. On that premise Mr Siberry argued that DVA had a cause of action in contract against Voest that was not sufficiently recognised by Morison J. in refusing to make any order for costs in favour of DVA against Voest. I am in agreement with Lord Justice Hobhouse that the judge was entitled in the exercise of his discretion to make the costs order that he did and that DVA's cross appeal must, therefore, fail. I wish to make clear, however, that I regard Mr Siberry's premise as highly debateable. It is not necessary for us to decide whether the commencement by WAV of the Brazilian action in breach of the arbitration agreement gives DVA a cause of action for contractual damages against Voest. But I do not regard it as being in the least self-evident that it does.

In the event I agree that the orders of Morison J should be upheld.

ORDER: Appeal dismissed with costs, to include the costs of the respondents' notice; cross appeal dismissed without reference to costs; no order made interfering

with the cost order made below regarding the interlocutory appeal.