Downing v Al Tameer Establishment & Anor [2002] EWCA Civ 721 (22nd May, 2002)
Neutral Citation Number: [2002] EWCA Civ 721
Case No: A3/2001/1975

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
(His Honour Judge Kershaw QC)
Royal Courts of Justice
Strand,
London, WC2A 2LL

22nd May 2002

B e f o r e :
LORD JUSTICE POTTER
LORD JUSTICE KEENE
and
MR. JUSTICE SUMNER

Between:
JOHN DOWNING
Appellant

- and -

AL TAMEER ESTABLISHMENT
SHAIKH KHALID AL IBRAHIM
Respondent

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Andrew Moran QC & Ms Catherine Fisher (instructed by Cobbetts, Manchester) for the Appellant

Alexander Layton QC & Charles Kimmins (instructed by Kennedys, London) for the Respondent

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HTML VERSION OF JUDGMENT
AS APPROVED BY THE COURT

_____

Lord Justice Potter:

Introduction.

There is before the court an appeal by the claimant against the judgment and order of His Honour Judge Kershaw QC made on 2 April 2001 whereby, having set aside the issue and service of the writ in the action against the second defendant on the basis that he was not a party to the contract the subject of the claim, he refused to set aside the writ as against the first defendant but granted the application of the first defendant for a stay of proceedings pursuant to s. 9 of the Arbitration Act 1996 on the grounds that the contract contained a valid arbitration agreement operative between the claimant and the first defendant in respect of the claimant's claim for repudiation of the contract in which it was contained. In the event that the claimant's appeal against the stay is allowed, the first defendant applies to pursue a cross-appeal for an order that the issue and service of the writ against the respondent should be set aside pursuant to CPR Part 11 (see further at paragraphs 41-46 below).

The background and history of the proceedings.

The claimant is the inventor of a process for separating crude oil from water (referred to as "Black D"). The first defendant is a corporation established under the laws of the Kingdom of Saudi Arabia. The second defendant, who is no longer an effective party to the proceedings is a Saudi Arabian national who was at the time of the written agreement the subject of the proceedings the sole owner (or according to the defendants, the majority shareholder) of the first defendant on whose behalf he signed the agreement.

Having taken out a patent in respect of his invention, the claimant needed, but lacked, money for its exploitation, market and manufacture. He was introduced to the defendants and, by a written agreement dated 22 February 1991 ("the Agreement") he agreed with the first defendant jointly to exploit "Black D" for commercial gain on the basis of an equal participation in the venture.

It is not necessary for the purposes of this appeal to set out the terms of the Agreement save to record that Clause 13 contained an arbitration clause in the following terms:

> "Should there be any difference of opinion between the parties hereto, or if any other dispute arises as to any matter provided for herein, the parties shall endeavour to settel (sic) the differences or dispute in an amicable manner or through mutual consultation. In case the difference cannot be settled through mutual consultation, the matter shall be submitted for arbitration by three arbitrators to be appointed by each of the parties hereto whose award shall be final and binding."

In addition, Clause 14 provided that:

> "The law applicable to this Agreement shall be the law of the U.K."

The requirement that the three arbitrators should be appointed "by each of the parties" gives rise to some ambiguity as to the precise procedure envisaged for their appointment in the absence of agreement upon all three names. However, the parties do not suggest that the arbitration clause is thereby invalid or that any issue turns upon the ambiguity for the purposes of this

appeal.

It is the claimant's case that, following the signing of the Agreement, he submitted evaluation tests to two testing institutes which demonstrated the viability of the product but that, following an apparently unsuccessful result obtained by a company called Arthur D Little at the defendant's instructions in Saudi Arabia, the first defendant thereafter wrongly ceased to communicate with the claimant or take any further steps pursuant to the Agreement, and failed to co-operate and provide any further financing in accordance with its terms. The first defendant also denied that there was any agreement between the parties. After intermittent correspondence, the claimant accepted the first defendant's repudiation of the Agreement by letter dated 12 February 1997 and thereafter commenced proceedings against the first and second defendants in circumstances explored in detail below. The correspondence relevant to the issues argued upon this appeal ran as follows.

On 14 December 1994 the claimant wrote to the second defendant as representative of the first defendant:

> "In accordance with our contract dated February 22 1991 ...
> I have notified you that a "dispute" exists due to your failure to comply with any part of our agreement. I have made every effort at resolving our differences in an amicable manner, with no response. I have requested that we settle our dispute with the use of mutual consultation, and again my pleas have been met with silence.
> At this point I must assume you have no intention of honouring our agreement or proceeding in good faith to resolve our differences. In accordance with paragraph 13 I believe the only remaining solution is to retain assistance from outside arbitrators. Please submit your choices for independent arbitration within five working days so we may select three and resolve our differences of opinion once and for all. "

The reply of the second defendant was as follows:

> "... So far as I can see, if there was a contract between you and this Company (which is denied) you have committed a fundamental breach of that contract insofar as you have not carried out testing of the product at a number of establishments ...
> It is almost four years since the date of the Heads of Terms and you are now asserting rights to arbitrate those Heads of Terms in circumstances where you have not complied with your obligation and where there has been all but complete silence from you ...
> You have not produced to us adequate reports of testing ... I propose to close my file. This company, however, reserves all its rights against you for loss of profit and other damages arising out of your failure to comply with your obligations under the contract within a reasonable time or at all should you commence any proceedings whether by arbitration or otherwise and we will unhesitatingly bring all claims against you personally."

On 19 January 1995 the claimant's American lawyers wrote to the first defendant, marked for the attention of the second defendant as follows:

> "We want to emphasize that Mr Downing does not want to arbitrate his potential dispute with Al Tameer unless he is forced to. On the contrary, he requested that you settle your differences by mutual consultation first, as required under Clause 13 of the Agreement. ..."

The letter then made various proposals which it asked the first defendant to consider.

On 16 February 1995 the claimant's American lawyers wrote to solicitors for the first defendant referring to a telefax of 16 February which is not available, observing:

"We have noted that you consider any further discussion on this case to be a waste of time, but given the apparent strength of your client's conviction, perhaps you could take a moment to persuade us why your clients believe that they have no agreement with Mr Downing. "

Having received no reply, on 15 June 1995 the claimant wrote to the first defendant:

"Having had no reply to my letters/requests for you to settle the difference of opinion which we have, I again request that we appoint three arbitrators to settle the dispute we have.

Please put forward three names for my consideration as arbitrators to be appointed.

Please reply within seven days."

In those circumstances, on 22 June 1995 the solicitors for the first defendant, Palmer Cowan, replied on its behalf:

"... We have made it perfectly clear in the past that our clients do not accept that they have or have had at any time any contractual relationship with you. They have no intention of dealing with you further and you should consider this matter closed." (emphasis added)

On 19 July 1996 solicitors for the claimant wrote to the first defendant's then solicitors as follows:

"We act on behalf of Mr John Downing to whom you wrote on 22 June 1995 advising that you acted on behalf of Al Tameer Establishment.

Mr Downing has instructed us to pursue a claim against your client for breach of an Agreement made between our client and yours on 22 February 1991 ...

Under Clause 14 of the Agreement UK law was to apply. In the circumstances, our client has good cause of action against yours for breach of contract.

Accordingly we await your proposals for settlement of our client's claim and should be pleased to receive a response within seven days failing which we shall issue proceedings.

If your client is unwilling to try to settle this matter, please confirm that you will agree to accept service of any Writ on behalf of your client."

On 24 July 1996 the first defendant's then solicitors replied:

"... Your client has asserted on a number of occasions that our client is in breach of contract. We have pointed out to Mr Downing that we do not share this view. Indeed, we do not consider that our client has any contractual relationship with your client.

We do not have instructions to accept service of proceedings nor do we have instructions to make any settlement proposals to you ...

Any proceedings will be vigorously defended and our client would likely pursue your client for the not insubstantial expenses it has been put to in dealing with your client's claims in the past and present." (emphasis added)

On 12 February 1997 the claimant's solicitors replied noting the denial that the first defendant had any contractual relationship with the claimant and saying:

"Our client has now instructed us to inform you that he accepts your clients repudiatory breach of the Agreement dated 22 February 1991 in that your client has failed to provide financing required for the exploitation of "Black B" ... Our client now considers in view of your client's repudiatory breach that the Agreement between your client and him of 22 February 1991 is now terminated."

On 13 February 1997 the first defendant's then solicitors replied:

"Our clients deny any contractual relationship between them and your client. If there had been such a contractual relationship it would appear that your

client would have committed a fundamental and repudiatory breach some years ago." (emphasis added)

On 19 February 1997 the claimant issued a writ specially endorsed with a statement of claim pursuant to an Order of District Judge Fairclough dated 19 February 1997 granting the claimant leave to issue and serve the writ on the defendants at PO Box 10493, Riyadh 11433 and PO Box 1955, Riyadh respectively in Saudi Arabia or elsewhere in Saudi Arabia.

Prior thereto the claimant had made an application for legal aid on 29 January 1997 which had been rejected on 6 February owing to insufficient information concerning the means of the claimant's wife. In order to ensure the issue of proceedings well within any possible period of limitation applicable to the claim, the claimant issued a writ on 19 February and made further application to the Legal Aid Board forwarding the relevant information. Delays and difficulties with legal aid were encountered, although the claimant apparently promptly supplied information as and when requested. Legal aid was finally granted on 19 June 1997. Once received, the claimant's solicitors duly delivered the writ and translations to the Foreign Process Office for service abroad. Extraordinary delays were encountered in this respect and "chasing" letters were sent from time to time and regular efforts made by the Foreign Office to monitor and pursue progress in Arabia. It was not until 15 November 2000 that the claimant's solicitors received a letter from the Foreign Office enclosing copies of certificates of service confirming service on the first defendant on 11 September 2000 and the second defendant on 5 September 2000.

Meanwhile the claimants had from time to time made regular successful applications for extension of the validity of the writs until 31 March 2001, the first such application being granted on 23 July 1997.

The defendants filed acknowledgements of service on 30 November 2000, but took no further steps in the proceedings save to issue applications under CPR Part 11 to set aside the writ and service thereof and, under s. 9 of the Arbitration Act 1996, for a stay of proceedings. The applications were made on 13 December 2000 and heard before HH Judge Kershaw on 30 March 2001.

The stay under s. 9 of the Arbitration Act 1996.

S.9 of the 1996 Act provides under the heading 'Stay of Legal Proceedings':

"(1) A party to an arbitration agreement against whom legal proceedings are brought .. in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) ...

(3) ...

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

The burden of proving that any of the grounds in section 9(4) has been made out lies upon the claimant and, if the defendant can raise an arguable case in favour of validity, a stay should be granted: Hume –v- A.A. Mutual International Insurance [1996] LRLR 19.

Before the judge, it was accepted for the claimant that an arbitration agreement is a separate contract which can survive the ending of the obligation of the parties to perform the primary obligations created by the main contract in which the arbitration agreement is contained or to which it relates: see Bremer Vulcan –v- South India Shipping Corporation Limited [1981] AC 909 per Lord Diplock at 980-1; see also the doctrine of 'separability' as set out in s.7 of the 1996 Act. They also accepted that the obligation of the

parties to perform the arbitration agreement would remain in force, despite its repudiation by the first defendant, unless and until the claimant communicated to him that he accepted such repudiation as bringing to an end the obligation of both parties to perform the arbitration agreement, it being necessary for such "acceptance" to be unequivocal. It was submitted for the claimant that the letters of 22 June 1995 and 24 July 1996 in which there had been a denial of any contractual relationship, constituted a repudiatory breach not only of the main contract but also of the arbitration agreement and that, by service of the writ and statement of claim, rather than by invoking statutory provisions for the appointment of an arbitrator, the claimant had unequivocally accepted such repudiation.

The judge accepted the submission of the claimant that in their context the letters of 22 June 1995 and 24 July 1996 were, by their denial of any contractual relationship with the claimant, a repudiation of the arbitration agreement as well as the main agreement. However, he rejected the submission that the service of the writ amounted to an unequivocal acceptance of such repudiation. He gave two reasons. The first was the general statement that:

> "In my judgment a writ, even one endorsed with or accompanied by a statement of claim, cannot possibly be said to be an unequivocal "acceptance" of a repudiatory breach of an arbitration agreement. A party to an arbitration agreement has the right to issue a writ (or claim form). If he does so, he does it in the knowledge that the other party may apply for a stay but may prefer litigation and so may not apply for a stay. I do not see how that position is any different if the party issuing a writ is the victim of a repudiatory breach by the other party to the arbitration agreement."

Having so stated, the judge went on to hold that in this case the state of the preceding correspondence was such that, in any event, the issue and service of the writ upon the first defendant was 'at best' equivocal as to whether or not the claimant was accepting the first defendant's repudiation of the arbitration agreement. He pointed out that, instead of at once accepting the letter of 22 June 1995 as a repudiation of the arbitration agreement, the claimant's solicitors wrote the further letter of 19 July 1996 which did not so indicate. The judge recognised that the response in the defendant's solicitor's letter of 24 July represented 'further evidence of an ongoing intention by the defendants not to be bound by the arbitration agreement'. However, he made the point that, in their letter before action of 12 February 1997, the claimant's solicitors stated only that they accepted the first defendant's repudiation of the main agreement without stating that they also accepted any separate repudiation of the arbitration agreement. That being so, he held that the issue of the writ was itself equivocal in that it too contained no statement or indication that such repudiation was accepted.

In the argument before this court, Mr Layton QC, for the first defendant, has not merely argued in support of the judge's conclusion that the claimant's acceptance of the first defendant's conduct as repudiatory was equivocal at best; he has also argued that (contrary to the judge's earlier finding) the first defendant's stance in correspondence was itself not repudiatory in any event. We shall turn to that question first.

By way of preliminary we would observe that in our view the parties were correct to proceed before the judge and in this court upon the basis that conventional contractual principles must be applied to the questions before the judge, albeit those principles may not be easy to apply in the case of a secondary contract which requires separate consideration from the main contract to which it is collateral or ancillary which is also said to have been repudiated. The Bremer Vulkan case and subsequent decisions concerning

the effects of delay on the prosecution of arbitration proceedings such as The Splendid Sun [1981] QB 694, The Hannah Blumenthal [1983] 1 AC 854 and The Leonidas D [1985] 2 Lloyd's Rep 18 demonstrate that the court approaches the question of whether or not a party has lost the right to arbitrate under the secondary contract by applying the traditional principles of the law of contract and, in particular, the doctrine of repudiation whereby if one party, by words or conduct, demonstrates an intention no longer to be bound by the contract, it is open to the other party to accept such demonstration as a repudiation and thereby to bring the contract to an end. Although those cases were concerned with the effect of alleged breaches of the arbitration agreement in the course of an arbitration already started but not diligently prosecuted, and although in The Bremer Vulkan attention was concentrated on whether there was a breach of contract serious enough to amount to a breach of condition, nothing was said in any of those cases to doubt that, in appropriate circumstances, a party may be held to have repudiated by anticipatory breach, and/or by an unequivocal rejection of any obligation to arbitrate, before such arbitration has been instituted by the other party to the agreement.

That being so, in our view the judge was right to hold that the letter of 22 June 1995 amounted to a repudiatory breach of the agreement to arbitrate. The letter was written against the background of a scrupulous effort by the claimant to rely upon and implement Clause 13 of the contract in his letters of 29 November 1994 and 14 December 1994. In the latter, he had sought to set arbitration proceedings in motion by inviting the defendants to submit their choice of arbitrators, which request had been ignored. The question was taken up again by the U.S. lawyers in their letter of January 1995 but apparently ignored save that by a 'missing' telefax it appears that a point was taken that there was no agreement with the claimant: see the first paragraph of his solicitors' letter of 16 February 1995 which, by its second paragraph, again relied on Clause 13. That letter too was ignored. Finally, the claimant, on 15 June 1995, again expressly requested the defendants to co-operate by putting forward the names of arbitrators, only to receive a response denying any contractual relationship and stating in unqualified terms that the defendants 'have no intention of dealing with you further' (i.e. in relation to their obligation to arbitrate).

In the light of that letter the claimant's solicitors made clear in their letter of 19 July 1996 that they intended to issue proceedings and invited the defendants to accept service for that purpose. Again, by the defendants' then solicitors' letter of 24 July it was denied that there was any contractual relationship and it was stated that the proposed proceedings would be defended and a counterclaim pursued, rather than any suggestion being made that court proceedings were inappropriate by reason of the arbitration clause. Thus, the first defendant's stance was maintained.

The claimant's solicitors then wrote their letter before action formally accepting repudiation of the main agreement which it was necessary for them to do to found the action for repudiation. The position of the first defendant however remained the same at that point so that, albeit the claimant's letter did not itself state that the defendants had by their conduct also repudiated the arbitration agreement, the first defendant's attitude, previously stated and apparently continuing, remained open to be accepted as repudiatory of it. Thus, we consider that the judge was correct in his view that, prior to the issue and service of proceedings, the defendants were plainly evincing an intention not to be bound by the agreement to arbitrate.

Turning to the question of acceptance however, we do not think that the judge

was correct when he concluded that the issue and service of proceedings did not amount to a clear and unequivocal indication that the claimant had accepted the first defendant's repudiation of the arbitration agreement. The judge based his conclusion on the two reasons which we have already set out at paragraphs 22 and 23 above.

In our view, the judge took an unnecessarily refined view of what, on the face of it, was the straightforward case of a claimant who, having been rebuffed in his efforts to implement the arbitration agreement by a defendant who denied its existence or any obligation to co-operate under its terms, resorted to proceedings, only to have the defendant perform a volte face and assert reliance upon the agreement which he had hitherto denied.

So far as the judge's first stated reason is concerned, it is of course the position that the existence of an arbitration agreement does not prevent either party from instituting court proceedings in respect of the underlying dispute. That is a principle based upon the rule that the parties may not agree to oust the jurisdiction of the court: see Scott –v- Avery (1856) 5HL Cas 811. However, it is inaccurate to speak of a right to commence proceedings in any more general sense. Whether or not such commencement is a breach of the arbitration agreement by the party instituting the proceedings will depend upon the circumstances. If satisfied that a breach is involved, as it usually will be, then the court will grant a stay. If not so satisfied, but the position is arguable, the court will grant a stay on the basis that the issue raised is not clear and that the arbitrator has the power to rule upon his own jurisdiction (see s.30 of the 1996 Act). However, the fact that a party is in broad terms free to commence proceedings despite the existence of a valid arbitration clause, at the risk of stay being granted, does not mean that, in the circumstances of a particular case and in the light of pre-writ correspondence, such commencement cannot constitute an acceptance of the defendant's previous refusal to arbitrate, so that the court is satisfied that a stay should not be granted.

As observed in Merkin: Arbitration Law (Lloyds of London Press) at para 6.22.1, there is an inherent tension between the power of the court to determine whether an arbitration agreement is null and void, inoperative or incapable of being performed, and the ability of arbitrators to determine their own jurisdiction under s.30 of the 1996 Act. However, it is clear that the court has the power to determine whether a stay of judicial proceedings should be granted. CPR 1998, Practice Direction 49G, para 6(2) expressly confers such a power on the court

> "Where, a question arises as to whether an arbitration agreement has been concluded or as to whether the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement .."

Although that does not on the face of it cover the situation where the issue is whether an arbitration agreement which was concluded has come to an end by reason of an accepted repudiation, the wording of s.9 of the 1996 Act is such that, when faced with an application for a stay in extant proceedings, it is open to the court to decide that there is no arbitration agreement for whatever reason and therefore to dismiss the application to stay. In Birse Construction Limited –v- Saint David Limited [1999] BLR 194, Judge Humphrey Lloyd QC made this clear in the course of enumerating the options open to the court when faced with an application for a stay, his analysis and observations upon the general approach to be adopted subsequently being approved by the Court of Appeal in Al-Naimi –v- Islamic Press Agency [2000] 1 Lloyd's Rep 522 at 524-5. Thus, in appropriate circumstances, the court may hold that it is clear that the arbitration agreement sought to be relied on for the purposes

of a stay has in fact come to an end prior to the application for a stay being made or heard, and hence is 'inoperative' for the purposes of s.9(4) of the 1996 Act.

That being so, we consider (contrary to the view of the judge) that the position of a party issuing a writ following a repudiatory breach of the arbitration agreement is different from that of a person issuing proceedings simply to test the water. The question of whether or not the issue and service of proceedings is an unequivocal acceptance of the repudiation will depend upon the previous communications of the parties and whether or not, on an objective construction of the state of play when the proceedings are commenced, the fact of the issue and service of the writ amounts to an unequivocal communication to the defendant that his earlier repudiatory conduct has been accepted, in the sense that it is clear that the issue of such proceedings (i) is a response to the defendant's refusal to recognise the existence of the arbitration agreement or any obligation thereunder and (ii) reflects a consequent decision on the claimant's part himself to abandon the remedy of arbitration in favour of court proceedings.

In arguing in support of the judge's decision, Mr Layton has rightly accepted as applicable the observation of Lord Steyn in Vitol SA –v- Norelf Limited [1996] AC 800 at 810-811 (a case of repudiation by anticipatory breach in a different context) that:

> "An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that that aggrieved party is treating the contract as at an end."

Mr Layton first argues that, as a matter of principle, the issue and service of a writ in circumstances where the defendant denies the existence of an arbitration clause is not an unequivocal acceptance of the defendant's repudiation because there may be a variety of reasons why the claimant wishes to institute court proceedings rather than arbitration, which reasons may have nothing to do with anything said or done by the respondent. We have already indicated our view that, whereas that may ordinarily be the position, it is not a general rule, and the question is one of mixed law and fact dependent upon circumstances. As to the circumstances in this case, Mr Layton submits that the failure of the claimant to apply to the court for the appointment of arbitrators in the face of the first defendant's refusal to recognise his obligations or to assist in the appointment of arbitrators, was more consistent with a desire to litigate than a genuine response to the first defendant's conduct. He also relies on the fact that the claimant acknowledged below that the writ was issued at the time it was for the purposes of protecting the claimant against a possible future plea of limitation. Finally, he submits that, so far as the defendant was concerned, receipt of the writ might indicate no more than an intention to try to get the defendant to agree to proceedings, rather than obliging the claimant to follow the arbitration route and, that being so, it was not a clear indication that the claimant was himself treating the arbitration agreement as at an end.

On the facts of this case, we reject those submissions. Mr Layton has urged that we should be slow to disturb the decision of the judge who apparently accepted them. However, the question at issue involves the objective construction of the communications between the parties. In such a case it is appropriate for this court to interfere with the judge's decision if we conclude that he made a wrong inference or came to a wrong conclusion on the basis of the undisputed facts. Approaching the matter objectively, and looking

at the correspondence as a whole, this was a situation in which the claimant, having sought and requested the first defendant to pursue the arbitration route, only resorted to proceedings because of the first defendant's refusal to co-operate or acknowledge the existence of the arbitration agreement. The statement made and attitude evinced in the first defendant's letter dated 22 June 1995 in response to the claimant's request to arbitrate, which denied any contractual relationship and stated an intention to deal with the claimant no further, was effectively maintained thereafter. The letter of 24 July 1996 stating that any proceedings would be vigorously defended and a counterclaim presented, did nothing to detract from the earlier refusal to arbitrate; it merely served to indicate that, in the view of the first defendant, court proceedings were the only course open to the claimant if he persisted in his claims.

So far as the letter before action was concerned, as we have already indicated, it touched only upon the repudiation of the main agreement and was in no way inconsistent with final acceptance of the first defendant's refusal to arbitrate by issue and service of proceedings. In our view the only conclusion which it was reasonably open to the first defendant to draw from the issue and service of proceedings was that they were the result of what it (or its then solicitors on its behalf) had said in the face of the claimant's reliance upon Clause 13. Nothing which the claimant had said or done would have justified the first defendant in concluding that the claimant had a desire to litigate rather than arbitrate other than in response to the first defendant's earlier stated attitude. There is no suggestion that questions of limitation had been raised between the parties. The fact that the claimant issued the writ when he did may have been conditioned by caution over the question of limitation; however, it is clear that by then he had already made his decision to go by way of court proceedings rather than by way of arbitration in the light of the first defendant's attitude. Nor, bearing in mind the previously expressed view of the claimant that Clause 13 was binding upon both parties and should be observed, was there any reason for the first defendant to suppose other than that the taking of proceedings represented an abandonment by the claimant of his right to arbitrate in the face of the first defendant's attitude. Thus, the conditions mentioned at the end of paragraph 35 above were satisfied at the time the stay application was heard and, in consequence, the arbitration agreement was inoperative for the purposes of s.9(4) of the 1996 Act.

Accordingly, subject to the outcome of the first defendant's application for leave to appeal from the judge's refusal of its application to set aside the issue and/or service of the writ under CPR Part 11, we would set aside the stay of proceedings under s.9 of the Arbitration Act 1996.

The remaining aspects of the first defendant's applications below, in respect of which he now seeks permission to appeal, are (i) the judge's rejection of the argument of the first defendant that the claim was not a proper one for service out of the jurisdiction under RSC Order 11 (which governed the application to issue and serve out of the jurisdiction at the time it was made) on the grounds that Saudi Arabia rather than England was the appropriate forum for the adjudication of the dispute; (ii) that there was no sufficient reason for the first extension of the validity of the writ on 23rd July 1997.

Appropriate Forum

Mr Layton has referred us to the principal reasons which led to the judge's conclusion that England was the appropriate forum, namely that the contract was in English and is likely to be held to be governed by English law. In addition, testing of the claimant's product was carried out in England and in

Saudi Arabia by a company which was based in England; thus (though the judge did not expressly say so) the witnesses on the key issue as to the results of the tests and the adequacy of the product would also be based in England. We would add that the claimant was English and the product was subject to an English patent.

Mr Layton argues that the use of the phrase "UK Law" as the governing law renders the choice of law unclear. We cannot agree. It seems clear that the plain intention was to refer to English law. In any event Mr Layton submits there was no evidence to show that English law would not be applied by a Saudi court, or that Saudi Arabian law would produce a different result. He relies on the fact that the first defendant is a Saudi Arabian company and that the field trials on which the first defendant relies were carried out there following the initial testing in England. Furthermore, the agreement was concluded in Saudi Arabia. Thus, Mr Layton argues that Saudi Arabia is the appropriate forum.

The principles governing the question of the appropriate forum are well known. They are to be found in Spiliada Maritime Court –v- Consulex Limited ("The Spiliada") [1987] AC 460. In essence the appropriate forum is where the case may most suitably be tried in the interests of all the parties and the ends of justice. The first consideration is the forum with which the action has the most real and substantial connection. This latter concept includes considerations of convenience, expense, the law governing the contract, the residence of the parties and where they carry on business.

The judge, as an experienced mercantile judge, plainly had the relevant considerations in mind. Having set out the principal points which led him to his decision, he did not expand upon his reasons, but that is no doubt because he came to a clear conclusion on a matter in which the weight to be attached to the various factors involved is in the end a matter for judicial discretion with which this court is reluctant to interfere.

We find no error in the judge's exercise of his discretion and indeed, we consider that he plainly came to the right conclusion. Certainly, Mr Layton has utterly failed to persuade us otherwise. We therefore refuse the application for leave to appeal under this head.

Extension of Writ

As already indicated, the first defendant applies for leave to appeal against the judge's dismissal of his application to set aside the orders of the court granting an extension of the validity of the writ for the purposes of service abroad. However, the grounds of proposed appeal are limited to the submission that the judge erred in refusing to set aside the initial order of District Judge Griffiths dated 23 July 1997 extending the validity of the original writ (which had been issued on 19 February 1997) until 18 December 1997. Mr Layton takes three points in this respect:

(1) Insofar as the claimant's failure to take steps to serve the writ between 19 February 1997 and 9 June 1997 was the result of delay in obtaining legal aid, this was the fault and responsibility of the claimant in that he did not apply for legal aid until 29 January 1997.

(2) The judge found that there was a period of six months delay prior to 29 January 1997 in respect of which the claimant provided no explanation for his failure to apply for legal aid. He points out that the judge himself found that an explanation was required, that such explanation could only come from the claimant, and yet none was provided.

(3) In the absence of an acceptable explanation, the judge should have found there was no good reason to justify extension of the validity of the writ. If the application for legal aid had been made six months earlier, there was

nothing to suggest that legal aid would not have been granted by the time the writ was issued; it follows that the delay of six months thereafter was inexcusable.

It is true that the judge appears to have been troubled that, in respect of the period of six months up to 29 January 1997, the absence of any application for legal aid was unexplained. Since he made no criticism of the subsequent applications for extension of the validity of the writ after July 1997, there appear to be two periods for our consideration, namely the six months prior to 29 January 1997 and the five months from 29 January 1997 until grant of legal aid on 9 June 1997.

As to the first period, it is of course the case that, within the limitation period, a would-be litigant can choose when he issues his writ (though if he leaves it till late within the limitation period, he can expect the court to be vigilant in ensuring compliance with time limits thereafter). That apart, he has no obligation to issue the writ by a particular time and the court will not normally concern itself with the reasons why the writ was not issued until late within the limitation period.

Nonetheless, at the relevant time, the matter was governed by the jurisprudence which had built up in relation to RSC O.6 r.8 (Duration and renewal of writ) which, for present purposes may be taken from the statement at Note 6/8/6 in Vol. 1 of the Supreme Court Practice 1999 to which we have been referred. As that note makes clear it was necessary for the plaintiff to show a good reason for the grant of an extension, even where the application was made during the validity of the writ and before the expiry of the limitation period. The note, giving examples of reasons which had been held to be bad, included the fact that legal aid was awaited. However, it added:

> "This is not to say that delays caused by the operation of the legal aid system should never be taken into account. Delay caused by a failure of the legal aid authorities to act, or act reasonably, may constitute good reason. Delay caused by the failure of the plaintiff or his solicitors to act timeously in applying for legal aid, or for the removal of a legal aid restriction will not constitute good reason: Waddon -v– Whitecroft-Scovill Limited [1988] 1 WLR 309."

In that case, Lord Brandon of Oakbrook stated at 316 B-C in relation to certain earlier judicial pronouncements suggesting that a defendant's position should not be prejudiced by the plaintiff's legal aid difficulties:

> "If, however, those who made them intended to lay down as a general proposition of law that, in deciding whether there is good reason for extending the validity of a writ, delays caused by the operation of the legal aid system should never be taken into account, I am unable to agree with such a proposition. Such delays occur and where they do it would be unrealistic to disregard their effect."

In this case the claimant applied for legal aid on 29 January 1997, issuing his writ three weeks later on 19 February; legal aid was granted on 9 June 1997 and the writ sent to the Foreign Process Office ten days later. It was renewed on 23 July. The relevant period in respect of legal aid delays is therefore from 19 February to 9 June 1997.

Of that period (or rather the period from 29 January when the application was first made for legal aid) the judge stated:

> "... the Legal Aid Board Assessment Office wanted more information about the means of the claimant's wife; they took about four weeks to provide that information; the Legal Aid Board Assessment Office then asked (on 5 March 1997) for more information about some accounts which seem to have been accounts of a company and may have been a company in which a possibly

relevant interest was held by the claimant's wife, rather than the claimant himself; those accounts were supplied on 21 March 1997 and the claimant's solicitors enquired about progress in April and May 1997; on 13 May 1997 the Legal Aid Board Assessment Office asked for more information in the form of some bank statements, which were provided in the same month and legal aid was granted on 9 June 1997. The written translations were sent to the Foreign Process Office on 19 June."

Having considered the matter carefully, and despite the absence of any explanation why the application for legal aid had not been made earlier than 29 January, the judge stated:

"I have reached the conclusion that although there is no explanation for the length of the 6 month period to which I have referred, I cannot say that there was culpable delay of such length as to make necessary the application for the first extension of the validity of the writ which would not otherwise have been necessary."

Mr Layton has criticised this passage in that the judge appears to have adopted the approach that he found no "culpable delay", as opposed to deciding whether or not the claimant had shown good reason for such delay. We do not think that this is a telling point. In our view, having had his attention drawn to the relevant principles, the judge was using no more than a shorthand for a finding that the defendant had failed to satisfy him that there was an absence of good reason for renewal of the writ at the time when the District Judge made his order on 23 July 1997. In the circumstances, having heard full argument, we refuse the first defendant's application for leave to appeal in this respect.

Lord Justice Keene:

I agree

Mr Justice Sumner:

I also agree.

Order: appeal of claimant allowed and order of judge staying proceedings under s.9 of the Arbitration Act 1996 set aside; counsel either to agree order for costs or make written submissions, with liberty to restore.

(Order does not form part of the approved judgment)