## QUEEN'S BENCH DIVISION (ADMIRALTY COURT)

Nov. 12, 13, 14 and 15, 1979

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H. KRUIDENIER (LONDON) LTD.

v.

THE EGYPTIAN NAVIGATION CO.

(THE "EL AMRIA" No. 2)

Before Mr. Justice Sheen

**Charter-party (Voyage) — Stay of action — Limitation of time — Damage to cargo — Limitation period prescribed in The Hague Rules expired — Whether application for stay should be granted — Whether application for extension of time should be granted — Arbitration Act, 1975, s. 1 — Arbitration Act, 1950, s. 27 — The Hague Rules.**

On Nov. 29, 1975, the defendant owners let their vessel *El Amria* to the plaintiff charterers under a charter-party which by cl. 37 provided that:

> This charter-party is governed by Hague Rules . . . so that if there is clauses of this charter-party contradicting with Hague Rules . . . then such clause or clauses of this charter-party will be considered as null and void. Any dispute arising under this charter-party will be referred to arbitration in port of discharge . . .

*El Amria* arrived in Portsmouth on Feb. 16, with a cargo of oranges but it was found that a part of the cargo had been damaged and the plaintiffs brought an action claiming damages. *El Amria* was arrested and on Feb. 19, in order to release her, the P. and I. Club gave an undertaking—

> . . . to pay such sum or sums as shall be agreed to be due in respect of the loss and damage or be found [or adjudged in this action] . . . [to] instruct Messrs. Holman, Fenwick & Willan . . . to accept on behalf of the owners . . . proceedings brought by you . . . to enter an appearance thereto.

The defendants entered an appearance on Feb. 25, 1976.

Thereafter negotiations proceeded between the parties to see whether a settlement could be reached.

The period of limitation prescribed under The Hague Rules expired but as the parties were negotiating a settlement, the plaintiffs failed to appoint any arbitrator within that time limit, and in the event no settlement was arrived at.

On Nov. 2, 1977, by notice of motion, the defendants applied for an order that all further proceedings in this action be stayed pursuant to s. 1 of the Arbitration Act, 1975. On Nov. 22, the plaintiffs, by originating summons applied for the time for the appointment of their arbitrator to be extended for such period as the Court might determine pursuant to s. 27 of the Arbitration Act, 1950.

———*Held*, by Q.B. (Adm. Ct.) (Sheen, J.), that (A) as to the stay: the letter of Feb. 19 could not be said to be evidence of an agreement to submit the dispute to the High Court in London and thereby vary the arbitration agreement in the charter in that the letter of undertaking was no more than a standard form of undertaking which had been given and it was apparent from the evidence that the plaintiffs did not think that the arbitration clause and the reference to The Hague Rules had been deleted from the contract by variation, nor by any promise not to take the point nor indeed by conduct (*see* p. 168, cols. 1 and 2); the arbitration clause was therefore still operative and the defendants were entitled to succeed on their motion (*see* p. 169, col. 2).

(B) As to the extension of time: the application for the extension of time under s. 27 would be granted in that this was a case of some substance, the strength of the claim was recognized by the defendants, there was no prejudice to the defendants and a refusal of such an extension would produce a result which was undeserved and unmerited and therefore undue hardship (*see* p. 170, cols. 1 and 2).

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The following case was referred to in the judgment:

Liberian Shipping Corporation "Pegasus" v. A. King & Sons Ltd., (C.A.) [1967] 1 Lloyd's Rep. 303; [1967] 2 Q.B. 86.

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This was a notice of motion brought by the defendants, The Egyptian Navigation Co., the owners of the vessel *El Amria*, for an order that all further proceedings in the action brought against them by the plaintiffs, H. Kruidenier (London) Ltd., the charterers of *El Amria*, be stayed pursuant to s. 1 of the Arbitration Act, 1975. The plaintiffs by originating summons applied for an extension of time for the appointment of their arbitrator pursuant to s. 27 of the Arbitration Act, 1950.

Mr. Ian Kinnell (instructed by Messrs. Richards, Butler & Co.) for the plaintiff charterers; Mr. A. G. S. Pollock (instructed by Messrs. Holman, Fenwick & Willan) for the defendant owners.

The further facts are stated in the judgment of Mr. Justice Sheen.

## JUDGMENT

**Mr. Justice SHEEN:** This case has had a most unfortunate history. On Nov. 29, 1975, the defendants who own a vessel called *El Amria*, chartered her to the plaintiffs under a charter-party which by an additional clause in typescript provides (cl. 37):

> This charterparty is governed by Hague rules contained in International Convention of Sea Act 1924, so that if there is clauses of this charterparty contradicting with Hague rules 1924, then such clause or clauses of this charterparty will be considered as null and void.
>
> Any dispute arising under this charterparty will be referred to arbitration in port of discharge, each party nominates his own arbitrator.

*El Amria* arrived in Portsmouth on Feb. 16, 1976, laden with a cargo of oranges. It was soon discovered that a part of that cargo was not in the condition in which it was at the outset of the voyage, and on Feb. 18, a writ was issued in this action. The plaintiffs were the charterers of the vessel and the owners of the cargo. An affidavit was sworn which led to the arrest of the vessel.

On Feb. 19 the West of England Shipowners Mutual Protection and Indemnity Association gave a letter of undertaking—

> . . . to pay such sum or sums as shall be agreed to be due in respect of the loss and damage or be found to be due to you [in this action] together with interest and costs; provided always that our liability under this indemnity shall not exceed £30,000. [And they further said —] We further undertake that we shall instruct Messrs Holman Fenwick & Willan of this address to accept on behalf of the owners of the said ship service of the aforementioned proceedings brought by you in the English High Court of Justice and to enter an appearance thereto.

The purpose of that undertaking was to secure the release of *El Amria* from arrest.

On Feb. 25, 1976, Messrs. Holman Fenwick & Willan entered an appearance. Mr. Peter Scrace was at that time an assistant solicitor employed by Holman Fenwick & Willan, and he was on board the *El Amria* at the time when she was arrested in Portsmouth. He was there because he knew of the dispute. At that time he took a fairly firm and pessimistic view as to the chances of the owners being able to defend successfully a claim for damages made against them. On Mar. 2, Mr. Scrace posted a bill of lading relating to the carriage of the oranges on that voyage to a Mr. Peter Jones of the West of England P. and I. Club. Thereafter for a time he dropped out of the matter, leaving the defendants' case to be dealt with by Mr. Jones. Mr. Jones received a copy of the charter-party in June, 1976, and then saw the arbitration clause. In October, 1976, Messrs. Richards, Butler, acting on behalf of the plaintiffs, wrote to the West of England a letter in which they referred to cll. 2 and 20 of the charter-party. They did so because at that time one of the questions between the parties was whether or not, from the sum claimed, there should be an allowance in respect of crushed cartons. They said in that letter:

> Even if this damage was due to bad stowage this is clearly the owners' responsibility under clauses 2 and 20 of the charter.

February 19, 1977, was the day upon which the period of limitation prescribed under The Hague Rules expired. About that date Mr. Andrew Donoghue, who was dealing with this matter on behalf of the plaintiffs, had a conference with Counsel. In his second affidavit he refers to a date early in February, and then says—

> Shortly afterwards the documents were sent to counsel for the statement of claim to be drafted. After these were delivered counsel telephoned me to discuss a number of points, one of which was to enquire what the position was regarding the arbitration clause. At that time the settlement negotiations, and in particular the details of the arguments on quantum, had put the arbitration clause out of my mind, and I had not directed myself to the dangers of the stay since considering the matter in March 1976. I explained to counsel that I had examined this several months ago and I decided for reasons given earlier to do nothing and told him that my view at that time was that the arbitration clause would not be relevant now the West of England were involved in settlement negotiations. Counsel I remember disagreed and thought there was a distinct danger of an application.

Mr. Donoghue then took the decision to let the matter rest as it was. The statement of claim was drafted and that was served on Feb. 28, 1977.

The charter-party is mentioned in every paragraph of the statement of claim. Although the statement of claim came into the hands of Mr. Scrace, he, being an exceedingly busy man and at that time about to go abroad, apparently did not appreciate the significance of the charter-party. Mr. Scrace was instructed to negotiate to see whether a settlement could be

reached. On Mar. 2, 1977, Messrs. Holman Fenwick & Willan wrote a letter to Messrs. Richards, Butler saying:—

> We thank you for your letter of the 25th February enclosing the statement of claim. As discussed with you subsequently on the telephone we are at present awaiting receipt of the necessary documents from our immediate clients, the West of England, and subject thereto we hope that we will be able to have a useful discussion with yourselves with a view to exploring the possibility of settling this case. We should be grateful if you would accordingly extend our time for service of the Defence by, say, 28 days, bearing in mind that the writer of this letter will be out of our office for most of the next two weeks on trips abroad.

On Apr. 12, Messrs. Richards, Butler wrote a further letter, saying:—

> Further to our telex of the 3rd March we look forward to hearing from you with the Defence. The extension we granted will be expiring very shortly. If you are going to require more time perhaps you can give us an indication of how long is required. As you will appreciate our view is that liability can hardly be denied in this case and we are reluctant to waste very much more time.

It is, of course, apparent that the solicitors on both sides had taken the view that liability could hardly be denied. But, as was pointed out by Mr. Pollock, in the course of his submissions, that does not mean that there is not going to be a dispute, because the parties may be far apart on the amount of that liability.

Negotiations took place and continued over a long period during the summer of 1977. On Aug. 1, Messrs. Holman Fenwick & Willan on behalf of the defendants wrote:—

> We thank you for your letter of the 26th July and confirm our subsequent conversation on the telephone when we mentioned that although you are clearly correct in saying that no reliance can be put on the market price where the only goods on the market were the damaged goods in question. We have now received further evidence that Baladi oranges were in fact being sold on the market on the 11th February between £1.80 and £1.90 per carton. We agree with you that it would be helpful if our clients could now make a definite offer of settlement, the merits of which your clients could consider in view of the contents of our recent correspondence.

No definite offer was then made. Negotiations continued. On Oct. 17, Messrs. Holman Fenwick & Willan wrote:—

> We thank you for your telex message of 5th October from which we notice that our client's offer of settlement has been rejected. We have accordingly taken the opportunity of discussing the entire circumstances of this case with our clients and wish to comment on the following points. We are somewhat confused as to the actual identity of your clients. The Plaintiffs in the writ and the statement of claim are named as H. Kruidenier (London) Limited, from which we had anticipated that the claim would be under the bill of lading. Nevertheless, the statement of claim states that the vessel was chartered to El Wadi Export Company, for Agricultural Products for and on behalf of the receivers as charterers of the EL AMRIA. If it is the case that Kruidenier were the charterers then we do not understand why the claim is being pursued in the Admiralty Court when there is an arbitration clause in the charterparty. Presumably our clients could now obtain a stay of the Admiralty Court proceedings under section 1 of the Arbitration Act 1975, and our clients have accordingly requested us to ask you whether your clients have already protected their time limit under the charterparty by the appointment of an arbitrator pursuant to clause 37.

On Nov. 2, 1977, Messrs. Holman Fenwick & Willan gave notice of motion that the Court would be moved for an order—

> . . . (1) that all further proceedings in this action be stayed pursuant to section 1 of the Arbitration Act 1975; (2) that the Plaintiffs do pay the Defendants their costs of and occasioned by this action (including the costs of this application).

On Nov. 22 Messrs. Richards, Butler & Co. took out an originating summons under which the plaintiffs applied for the time for the appointment of their arbitrator in respect of disputes arising under a charter-party dated Nov. 29, 1975, to be extended for such period as the Court may determine, pursuant to s. 27 of the Arbitration Act, 1950. It is that motion and that summons with which the Court is now concerned.

The unfortunate history of this matter did not finish there. The motion and the summons came on for hearing before Mr. Justice Brandon in February, 1978, when the time allowed for the hearing was insufficient and the matter had to go over, with the result that it came before me early this week.

Mr. Pollock has moved the Court for the stay mentioned in the notice of motion. The parties are agreed that the arbitration agreement is not a domestic arbitration agreement within the

meaning of sub-s. (4) of s. 1 of the Arbitration Act, 1975 Accordingly the Court must in accordance with sub-s. (1) of that section grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.

Mr. Kinnell has submitted that the agreement is inoperative, and that is the only part of sub-s. (1) of s. 1 of the Arbitration Act, 1975, upon which he relies. In a skilful and helpful argument Mr. Kinnell has submitted firstly that there was a consensual variation of the arbitration agreement. On this part of his submissions Mr. Kinnell relied upon the terms of the letter of undertaking from the West of England, and upon the conduct of the parties thereafter. I have already referred to the undertakings given by Messrs. Holman Fenwick & Willan in the letter of Feb. 19 to accept service of the proceedings and to enter an appearance thereto. The question which I have to answer is whether or not that letter can be said to be evidence of an agreement to submit the dispute to the High Court in London and thereby vary the arbitration agreement in the charter-party.

It seems to me that it is quite impossible for me to accept that submission for a number of reasons. I start from the premise that the plaintiffs had a right to invoke the Admiralty jurisdiction of the High Court, which they did, and to arrest *El Amria*, as they did. It is common practice for the Protection and Indemnity Associations to give undertakings to plaintiffs to secure the release of a vessel, in place of the formality of bail. It seems to me that the letter of undertaking of Feb. 19 is no more than a standard form of undertaking which has been and will be given in innumerable cases. Such an undertaking has to be given at very short notice without much time for consideration of the precise terms of the letter. As Mr. Pollock said, a standard form can be produced at short notice so that everybody knows what it is that he is doing. One does not have to study every word of the letter, because it is known to be a standard form.

Mr. Kinnell attempted with skill and dexterity to fit the facts of what occurred thereafter, which I have given in outline already, into a number of different legal pigeon holes. But, however he tried, it seemed to me that the facts did not really fit in any particular pigeon hole. I intend no discourtesy to Mr. Kinnell if I do not deal with each one in turn. Taking the matter quite shortly, whichever way Mr. Kinnell attempted to put his case he was defeated, as was pointed out by Mr. Pollock, by the attitude of Mr. Donoghue, which is spoken of in his second affidavit, when, in relation to the period just shortly after Feb. 19, he said this:—

> I decided to take a second opinion [— that is to say second to the opinion that he had from Counsel —] and went to see Mr K. G. Elmslie, a partner in Richards Butler & Company. I explained to him that I had allowed the time for commencing arbitration to lapse because the settlement negotiations had put it out of my mind. I told him that the time had only just expired and wondered if an immediate application or appointment was necessary, mentioning also that the West of England undertaking would not cover an arbitration award. I explained settlement talks were proceeding, albeit slowly, that the only issue related to quantum apart from the question of responsibility for stowage under charter which might affect a small part of the claim, approximately 7 per cent of the total. After discussion it was decided that, considering the settlement negotiations and the lack of any application for a stay so far by the defendants, there was no need to take any action. We considered that it was extremely unlikely that a reputable P & I Club such as the West of England would ever take such a point after becoming involved in settlement talks and having taken no objection thus far.

It is apparent from that evidence that he did not think that the arbitration clause and the reference to The Hague Rules had been deleted from the contract by variation, or by any promise not to take the point, or indeed by conduct. For these reasons it seems to me that the arbitration clause is still operative and the defendants are entitled to succeed on their motion.

I now turn to the originating summons, which is a summons for an extension of time under s. 27 of the Arbitration Act, 1950, which provides:—

> Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper.

The attitude of the Court to applications under s. 27 has undergone a change in recent years. The current view is expressed in the decision of the Court of Appeal in *The Liberian Shipping Corporation "Pegasus" v. A. King & Sons Ltd.*, [1967] 1 Lloyd's Rep. 303; [1967] 2 Q.B. 86. At pp. 311 and 107 Lord Justice Salmon said this:—

> The question as to whether or not those powers should be exercised must turn exclusively on the particular facts of each case in which the question arises. In considering this question the Court must take all the relevant circumstances of the case into account, the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time, the amount at stake, the length of the delay, whether the claimants had been misled, whether through some circumstances beyond their control it was impossible for them to appoint an arbitrator in time. In the last two circumstances I have mentioned, which do not arise here, it is obvious that normally the power should be exercised. But those are not the only circumstances and they are not, to my mind, necessary circumstances for the exercise of the power to extend time. I do not intend to catalogue the circumstances to be taken into account, but one very important circumstance is whether there is any possibility of the other side having been prejudiced by the delay. Of course, if there is such a possibility, it might be said that it is no undue hardship upon the claimants to refuse an extension of time because if the hardship is lifted from their shoulders, some hardship will fall on the shoulders of the respondents and, after all, the delay is the claimants' fault.

Now the circumstances of this case are these. Firstly the amount at stake is said by the defendants not to be a very large sum. I find it impossible to accept that submission. When the claim amounts to £39,000 it is, to any company, a matter of substance. I go further than that. The parties have obviously been negotiating. The amount between them must be considerably less than the total amount at stake, and yet the parties have thought it right to indulge in a costly exercise rather than bridge the gap between them. It seems to me that I must consider this as a case of some substance.

Secondly, the strength of the claim is recognized by the defendants. Mr. Scrace, when he gave evidence, said very frankly that so far as liability was concerned he regarded it as an open and shut case. As I have pointed out that does not mean that there is not a dispute as to the amount of the damages. The length of the delay as from Feb. 19 to Nov. 22, when this originating summons was taken out. During that time the plaintiffs were lulled into a sense of security by the fact that the defendants did not make an application to stay although it must have been apparent from the statement of claim that the charter-party was being relied upon. The defendants had asked for an extension of time in which to deliver the defence which made it look as if they were content to proceed in the High Court, and there were negotiations between the parties for a settlement of the action.

Then I consider the question of whether or not there is prejudice to the defendants. Mr. Pollock has said very candidly that there is no prejudice to them; none is mentioned in the affidavit and Mr. Pollock has not contended for any. Mr. Pollock's main point was that this is not a case of inadvertence. A deliberate decision was taken not to apply. In substance that is right, although in fact the time had just expired inadvertently and the decision taken not to apply was a decision taken after the time had already expired. But I think it is perfectly clear that if, instead of deciding not to apply, the plaintiffs had applied in February there could be very little doubt that a Court would have extended the time. There is many a man who has decided to let a sleeping dog lie lest, when it wakes up, the dog will do him some injury. That, in a sense, is what the plaintiffs decided to do. The decision taken by Mr. Donoghue in the light of after events has proved to have been unwise, but it was based in part on the conduct of the defendants' advisers who had not appreciated the fact that there was an arbitration clause. The fact that they had not so appreciated was probably not in Mr. Donoghue's mind. But the conduct of Mr. Donoghue in taking that course was not conduct which can in any sense be stigmatized as being unprincipled. If it were I should not accede to this motion. That conduct has proved to have been unwise, but it seems to me that, in all the circumstances of the case, a refusal of an extension of time would produce a result which is undeserved and unmerited and therefore undue hardship.

It is for these reasons that in my judgment I ought to extend the time for arbitration under cl. 27. I should like to hear from Counsel as to whether there should be any special terms imposed.

[After discussion]

Mr. Justice Sheen: So I will grant leave to appeal and extend the time to six weeks. So far

as costs are concerned it seems to me that the proper order is that the plaintiffs should have their costs of the originating summons, that the defendants should have their costs on the notice of motion, and that so far as the proceedings before Mr. Justice Brandon are concerned there should be no order.

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## QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Jan. 23, 24, 25 and 28, 1980

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RICHMOND SHIPPING LTD.
v.
D/S AND A/S VESTLAND
(THE "VESTLAND")

Before Mr. Justice MOCATTA

**Charter-party (Time) — Repudiation — Arrest of vessel — Owners failed to secure release of vessel — Whether owners' conduct amounted to a repudiation — Whether charterers entitled to damages for wrongful repudiation.**

By a charter-party dated Oct. 24, 1972, the owners let their vessel *Vestland* to the charterers for a period of three years. The charter was on the Linertime form, cl. 20 of which provided inter alia:

> The owners to have a lien upon all cargoes and sub-freights belonging to the Time-Charterers and any Bill of Lading freight for all claims under this Charter. . . . The charterers will not suffer nor permit to be continued any lien or encumbrance incurred by them which might have priority over the title and interest of the Owners in the vessel.

The vessel was sub-chartered to J. for the carriage of a cargo of titanium slag from Sorel to West Hartlepool and after loading some containers of the charterers at Montreal, loaded a part cargo of slag at Sorel. The bill of lading issued named the port of discharge and delivery as Middlesbrough and the consignees as British Titan Products Ltd.

Since the berth at Hartlepool would not have been available until Dec. 16, the charterers decided to discharge their containers at Antwerp and then discharge the slag at Hartlepool. However Hartlepool proved to be more congested than anticipated and as a berth would not have been available until Dec. 27-30, the charterers discharged the slag at Antwerp onto a wharf, in close proximity to a pile of coal, and without any form of cover.

The vessel sailed from Antwerp to Montreal where on Jan. 4, she was arrested in Admiralty proceedings commenced by J. and the receivers. On Jan. 8 sufficient security having been provided the vessel was released from arrest.

Between Jan. 16 and Feb. 3, 1973, the charterers transhipped the slag from Antwerp to West Hartlepool in three separate shipments on a different vessel. On discharge, the slag was found to be contaminated by coal and fresh water.