1977 L No.1590

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

GROUP A

Royal Courts of Justice,
Strand, London, WC2A 2LL,

Tuesday, 31st January, 1978.

Before:

MR. JUSTICE BRIGHTMAN

B E T W E E N :

(1) LONRHO LIMITED
(2) COMPANHIA DO PIPELINE MOCAMBIQUE RODESIA SARL (a company incorporated under the laws of Mocambique) Plaintiffs

-and-

29 defendants!

(1) THE SHELL PETROLEUM COMPANY LIMITED
(2) THE BRITISH PETROLEUM COMPANY LIMITED
(3) CALTEX PETROLEUM CORPORATION (a company incorporated under the laws of the State of Delaware, United States of America)
(4) MOBIL PETROLEUM COMPANY INC. (a company incorporated under the laws of the said State of Delaware)
(5) COMPAGNIE FRANCAISE DES PETROLES (a company incorporated under the laws of France)
(6) GENTA (PVT) LIMITED (a company incorporated under the laws of Rhodesia)
(7) THE "SHELL" TRANSPORT & TRADING COMPANY LIMIT
(8) KONINKLIJKE NEDERLANDSCHE PETROLEUM MAATSCHAPP N.V. (a company incorporated under the laws of the Netherlands)
(9) CONSOLIDATED PETROLEUM CO. LIMITED
(10) PRICE'S PETROLEUM CO. LIMITED
(11) SHELL RHODESIA (PVT) LIMITED (a company incorporated under the laws of Rhodesia)
(12) SHELL MOCAMBIQUE LIMITED
(13) BP MOCAMBIQUE LIMITADA (a company incorporate under the laws of Mocambique)
(14) MOBIL MOCAMBIQUE LIMITADA (a company incorporated under the laws of Mocambique)
(15) CALTEX MOCAMBIQUE LIMITADA (a company incorporated under the laws of Mocambique)
(16) SHELL (PETROLEUM SUPPLY) CO. LIMITED
(17) BP SOUTHERN OIL LIMITED
(18) BP SOUTHERN AFRICA (PTY) LIMITED (a company incorporated under the laws of the Republic of South Africa)
(19) BP RHODESIA (PVT) LIMITED (a company incorporated under the laws of Rhodesia)

(20) SHELL AND BP (SOUTH AFRICAN) PETROLEUM REFINERIES (PTY) LIMITED (a company incorporated under the laws of the Republic of South Africa)

(21) STANDARD OIL COMPANY OF CALIFORNIA (a company incorporated under the laws of the State of Delaware, United States of America

(22) TEXACO INC. (a company incorporated under the laws of the State of Texas, United States of America)

(23) CALTEX OIL (S.A.) (PTY) LIMITED (a company incorporated under the laws of the Republic of South Africa)

(24) MOBIL OIL CORPORATION (a company incorporated under the laws of the State of New York, United States of America)

(25) MOBIL OIL SOUTHERN AFRICA (PTY) LIMITED (a company incorporated under the laws of the Republic of South Africa)

(26) MOBIL REFINING COMPANY SOUTHERN AFRICA (PTY) LIMITED (a company incorporated under the laws of the Republic of South Africa)

(27) MOBIL OIL SOUTHERN RHODESIA (PVT) LIMITED (a company incorporated under the laws of Rhodesia)

(28) TOTAL SOUTH AFRICA (PTY) LIMITED (a company incorporated under the laws of the Republic of South Africa)

(29) SOUTH AFRICAN OIL REFINERY (PTY) LIMITED (a company incorporated under the laws of the Republic of South Africa)

MR. R.A.K. WRIGHT, Q.C. and MR. G. LIGHTMAN (instructed by Cameron Kemm Nordon, Benlian House, New Street, Bishopsgate, London, EC2M 4XS) appeared on behalf of the Plaintiffs.

MR. P.E. WEBSTER, Q.C. and MR. G. LANGLEY (instructed by Slaughter & May, 35 Basinghall Street, London, EC2V 5DB) appeared on behalf of the 1st Defendants.

MR. G.B.H. DILLON, Q.C., MR. C. CLARKE and MR. J. SUMPTION (instructed by Linklaters & Paines, Barrington House, 59/67 Gresham Street, London, EC2) appeared on behalf of the 2nd Defendants.

JUDGMENT
(as revised)

(Transcript of the stenotype notes of Tennyson & Company, 39 Epsom Road, Guildford, Surrey. GU1 3LA: telephone:0483-68358)

MR. JUSTICE BRIGHTMAN: In this action the Plaintiffs are Lonrho Limited, a company incorporated in England and formerly known as the London & Rhodesian Mining and Land Company Limited, and its subsidiary, a pipeline company incorporated in Mocambique. The Defendants are The Shell Petroleum Company Limited, The British Petroleum Company Limited and twenty-seven other oil companies and associated companies.

The Plaintiffs seek to restrain the Defendants from taking part in an alleged conspiracy to supply fuel oil to Rhodesia contrary to sanctions imposed on Rhodesia and in breach of a contract between the Plaintiffs and some of the Defendants. The Plaintiffs also claim damages.

The gist of the Plaintiffs' claim is that Shell and BP and other oil companies, with intent to injure the Plaintiffs as the owners of the Beira Pipeline, treasonably induced the Government of Rhodesia to make its unilateral declaration of independence on 11th November, 1965 by assurances that oil would continue to be supplied even if the Beira Pipeline could not be used; and further induced the rebel government of Rhodesia to prolong UDI by continuing to supply oil despite the closure of the Beira Pipeline.

The applications before me are made by two only of the Defendants, the First Defendants, Shell, and the Second Defendants BP, who seek a stay of all proceedings against them on the ground that the claims in the action, as against them, ought to be decided by arbitration and not by litigation. Shell and BP say that the Plaintiffs are bound, by agreement, to submit certain disputes to arbitration, such as this dispute, and they wish to hold the Plaintiffs to such agreement.

As regards the substance of the Plaintiffs' claim in the action, the court is not at present concerned in any way with the question whether the allegations against Shell and BP are fact or fancy. The charges made against them are of extreme gravity, but they are not proved. No one has even started to prove them. I am, however, bound to proceed, for present purposes, on the basis that there is a bona fide issue to be tried in the action.

I turn to the facts. In February 1962 the Federation of Rhodesia and Nyasaland entered into an agreement with seven oil companies whereby, among other things, provision was made for the

construction of an oil refinery at Feruka in Rhodesia. These seven companies include the first four Defendants, Shell, BP, Caltex Petroleum Corporation (incorporated in USA), and Mobil Petroleum Company (also incorporated in USA). Under the terms of the latter agreement, which I will call "the Shippers' Agreement", Lonrho undertook to construct and operate the pipeline, and the seven participating oil companies undertook to make use of the pipeline and not to use alternative means of transport for the purpose of supplying crude oil to the refinery at Feruka. The oil companies were required to pay for the use of the pipeline according to a formula included in the Shippers' Agreement, and very large sums of money are involved.

Under Clause 26 the oil companies were excused from complying with the agreement, and from making the minimum payments there laid down, if prevented from using the pipeline by circumstances beyond their control, including government interference. The Shippers' Agreement provides that it is to take effect according to English law.

Clause 22(1), upon which the applications before me turn, reads as follows: "All claims or questions arising out of or in connection with this Agreement shall unless the parties otherwise agree be referred to arbitration in London, each party appointing its own arbitrator and the arbitrators so appointed appointing an umpire. In the event of the arbitrators not agreeing to the appointment of an umpire within one month of their appointment, then on the request of either party an umpire shall be appointed by the President for the time being of the Institute of Petroleum in the United Kingdom."

The Plaintiffs say that it was an implied term of the Shippers' Agreement that the oil companies would not do anything that might cause the pipeline to be closed or whereby the oil companies would be prevented from tendering oil for transport through the pipeline. For present purposes I accept that such an implied term ought to be read into the Shippers' Agreement. If such a term ought to be implied, it would be as much subject to the arbitration clause as the express terms of the agreement.

The pipeline came into service in January 1965. On 1st June, 1965, as envisaged by the Shippers' Agreement, the pipeline company and another company, which constructed and built the refinery at Feruka, adopted the Shippers' Agreement. The Agreemen

thereafter applied as if the refinery company and the pipeline company had been original parties thereto.

Five months later UDI occurred. In December 1965 sanctions were imposed by the United Kingdom Government and it became a criminal offence for a UK company to supply fuel to Rhodesia. Both Shell and BP are, of course, UK companies.

The Plaintiffs issued their writ in this action on 31st May, 1977. The statement of claim, which runs to over 50 pages, was served on the next day. The Plaintiffs say that the Defendants knew or ought to have known that the decision of the Rhodesian government whether to declare UDI would be determined or influenced by its view whether oil sanctions could be effectively applied; that an unlawful regime could not survive if oil were not supplied; that UDI could not be declared or sustained without the support of the oil companies; and that UDI was likely to involve the closure of the pipeline.

It is pleaded that before UDI the Defendants conspired together to assure the government of Rhodesia that sanctions would not be effective and that oil would continue to be supplied despite the closure of the pipeline, thereby causing or encouraging UDI and inflicting damage on the Plaintiffs through loss of pipeline revenue. It is further alleged that the Defendants have continued to conspire together to supply oil to Rhodesia and by such conduct have prolonged the period of closure of the pipeline, whereby damage continues to be suffered by the Plaintiffs. The conduct of the Defendants, the Plaintiffs say, amounts to a breach of contractual obligations under the Shippers' Agreement and also to the tort of conspiracy. The Plaintiffs claim as against all the Defendants an injunction to restrain them from conspiring together to supply oil to Rhodesia, an injunction to restrain them from acting in breach or participating in breaches of the Shippers' Agreement, and damages under the heads of breach of contract, unlawful interference with contract, conspiracy and negligence.

The first question is whether some or all of the claims of the Plaintiffs against Shell and BP "arise out of or in connection with" the Shippers' Agreement. If so, they are subject to the arbitration clause in the Shippers' Agreement. The action is based on breach of contract as against some of the Defendants, including Shell and BP, and on tort as against all the Defendants

So far as the Plaintiffs' claims against Shell and BP are based on allegations that they have acted in breach of the express or implied terms of the Shippers' Agreement, it is beyond argument that such claims arise "out of" the Shippers' Agreement and are, therefore, within the arbitration clause. A question can only arise in relation to the claims against Shell and BP in tort. An arbitration clause is no doubt designed primarily to cover claims for breach of contract. Whether it covers claims in tort must depend on the wording of the clause. There are not many reported cases where the point has been argued. The first seems to be Monro v Bognor Urban District Council, 1915 3 King's Bench Division, 167. The arbitration clause in that case was in a fairl common wide form and was expressed to cover any dispute "upon or in relation to or in connection with the contract". The plaintiff claimed damages for fraudulent misrepresentation whereby he was induced to enter into the contract. This was held by the Court of Appeal to be outside the clause, so that a stay was refused. The case was a somewhat special one because all the acts complaine of were necessarily done prior to the formation of the contract and the plaintiff claimed that the contract, and therefore the arbitration clause, was not and never had been binding upon him.

A stay was also refused in Radio Publicity (Universal) Ltd. v Compagnie Luxembourgeoise De Radiodifusion, 1936 2 All England Law Reports, 721. Put simply, there was an action by A against B and C and a counterclaim by B against A and D. B and D had entered into an agency and services contract which contained an arbitration clause. In the counterclaim B claimed damages against A and D for conspiracy and against D for breach of contra The contract, according to the agreed translation from the French, referred to arbitration "any disputes arising from the objects thereof". It was held that the counterclaim against D in tort was outside the arbitration clause. The proceedings under the counterclaim were accordingly stayed so far as the claim was in contract, but were permitted to continue so far as the claim was in conspiracy.

It appears that Woolf v Collis Removal Service, 1948 1 King's Bench Division, 11, is the first reported case in which a claim in tort was held to be within an arbitration clause. A removal and storage contract contained an arbitration clause in the following terms: "If the Customer makes any claim upon or

counterclaim to any claim made by the contractors, the same shall in case of difference, be referred to the decision of two arbitrators". The defendants in breach of contract stored the plaintiff's furniture in a disused piggery instead of in the warehouse specified in the contract. The plaintiff claimed damages for breach of contract and also for the tort of negligence. It was held by the Court of Appeal that the claim was within the arbitration clause. "The arbitration clause in the present case is, as to the subject matter of claims within its ambit, in the widest possible terms. That clause is not, in terms, limited to claims arising 'under' the contract. It speaks simply of 'claims.' This, of course, does not mean that the term applies to claims of every imaginable kind. Claims which are entirely unrelated to the transaction covered by the contract would no doubt be excluded; but we are of opinion that, even if the claim in negligence is not a claim 'under the contract,' yet there is a sufficiently close connexion between that claim and that transaction to bring the claim within the arbitration clause, even though framed technically in tort. A claim so framed was treated in In re Polemis and Furness, Withy & Co., Ld. as falling within an arbitration clause in the contract." "Treated" means, I think, treated without argument.

Finally, in The "Damianos", 1971 2 Queen's Bench Division, 588, there was a charterparty which contained an arbitration clause. The charterers thought that they had a claim against the shipowners for breach of the charterparty and caused the ship to be arrested as security for the damages to which they thought they were entitled. The shipowners claimed damages against the charterers for the tort of wrongful arrest. The claim by the charterers to damages was plainly within the arbitration clause. The owners' claim for damages for the tort of wrongful arrest was merely, as it were, the reverse of the same coin because if the charterers' claim for damages in breach of contract failed, as it did, the claim in tort necessarily succeeded. I read this passage from the judgment of the learned Master of the Rolls at page 595: "The charterers arrested the ship so as to enforce their claim. Their claim - that the shipowners had wrongfully stopped discharging the oil - was certainly a claim which arose out of the contract during the execution of it. It was plainly within the arbitration clause. It had necessarily to be decided

"by the arbitrator. The arrest was simply the follow-up to that claim. It was so closely connected with it that the rightness or wrongness of the arrest is also within the scope of the arbitration." He added: "If the claim or the issue has a sufficiently close connection with the claim under the contract, then it comes within the arbitration clause."

In the present case the claims in tort have the closest possible connection with the Shippers' Agreement. If it is found that Shell and BP have complied in all respects with the terms of the Shippers' Agreement, the Plaintiffs can have no claims in tort against them. The acts alleged to have been done by Shell and BP in breach of the Shippers' Agreement are the acts upon which the claims in tort are based. The claims in breac of contract and in tort, so far as Shell and BP are concerned, march side by side. So far as I can see - and the contrary was not explained by the Plaintiffs with any particularity - the damages recoverable against Shell and BP, if the alleged torts are proved, cannot be more extensive than, and will be covered by, the damages which would, in such event, be recoverable for breach of contract, leaving aside any different impact which the Limitati Act might have upon the two types of claim.

I, therefore, hold that the claims in tort as well as in contract against Shell and BP are "claims arising out of or in connection with" the Shippers' Agreement, and so within the arbitration clause.

Having reached that conclusion, I turn to the Arbitration Act 1975. Section 1 applies to any arbitration agreement which does not come within the definition of a domestic arbitration agreement. The Shippers' Agreement does not come within that definition because foreign corporations are parties to it.

Section 1(1) provides that if any party to a non-domestic arbitration agreement commences legal proceedings against any other party to the agreement, an application may be made to the court to stay the proceedings. The subsection continues: "and the court, unless satisfied that the arbitration agreement is nul 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, shall make an order staying the proceedings."

Subsection (2) in effect repeals section 4( ) of the Arbitrat Act 1950 in relation to a non-domestic arbitration agreement.

The effect of section 1 is to deprive the court of any discretion whether a claim within a non-domestic arbitration agreement should be arbitrated or litigated. Unless I am satisfied either that the arbitration agreement is null and void, or that it is inoperative, or that it is incapable of being performed, or that there is in fact no dispute between the parties I am compelled to order a stay. The section is mandatory: see Associated Bulk Carriers Ltd. v Koch Shipping Inc, Bar Library transcript, 1st August, 1977, a decision of the Court of Appeal.

Mr. Wright, for the Plaintiffs, relied on the word "inoperative" which he said must be construed as referring to something less than "null and void" and less than "incapable of taking effect". He said that this arbitration clause was "inoperative" in relation to the claims in question because arbitration would have no practical effect. He put his argument as follows. There is an action on foot against all the Defendants for conspiracy to injure the Plaintiffs by the unlawful supply of oil to Rhodesia. The claims in tort against twenty-five of the Defendants are outside the arbitration clause because such Defendants are not parties to the Shippers' Agreement. The liability of the Defendants in conspiracy is joint as well as several, so that the Defendants who are parties to the Shippers' Agreement are proper parties to the action for conspiracy. The consequence of the conspiracy was the closure of the pipeline. One of the heads of damage resulting from the closure of the pipeline consists of the amount of damage recoverable for breach of the Shippers' Agreement. That is the measure of the damage, or of the principal head of damage, suffered by the Plaintiffs by reason of the conspiracy. It will be necessary in the action for conspiracy to prove a breach of contract and the amount of damage thereby occasioned. The consequence is that in the action for conspiracy the same issues of fact and law will arise as would arise if the claim in contract were separately arbitrated. All that the breach of contract does is to set the stage for the quantification of the damages for which all the Defendants are liable in tort, and for which the Defendants who are parties to the Shippers' Agreement are liable in contract. In those circumstances, he says arbitration would be an empty and sterile duplication of proceedings. Accordingly, the arbitration agreement has no practical operation, that is to say, it serves no useful purpose, and all claims should be dealt with in the action.

"I am not satisfied that it can truly be said that the arbitration agreement is, in these circumstances, inoperative. No procedural difficulty would arise if, for example, the claims in contract and tort were first decided in arbitration proceedings between the Plaintiffs and the first four Defendants, followed, if necessary, by court proceedings to establish the liability, if any, in tort of those who are not parties to the Shippers' Agreement. I agree that there is a theoretical possibility that different conclusions on the same matters of fact and law might be reached in the two sets of proceedings. Although this would be an extremely unfortunate result, in my opinion such a duplication of proceedings and consequent risk of inconsistent findings are not factors which can be said to render the arbitration proceedings sterile or of no practical operation, or as serving no useful purpose.

In the result, I am bound by the Arbitration Act 1975, at the instance of Shell and BP, to stay all proceedings in the action as between the Plaintiffs and such Defendants. I think it is a pity that the court is not given a discretion in the matter. I would have preferred to have had an opportunity to consider and decide whether in all the circumstances the better course might not be for all the claims to be dealt with in a single proceeding in the High Court."

MR. DILLON: Your Lordship will make an order then staying the action as against BP and also as against Shell, and I ask for costs as against the Plaintiffs.

MR. WEBSTER: I make the same application on behalf of the First Defendants.

MR. JUSTICE BRIGHTMAN: What do you say, Mr. Wright?

MR. WRIGHT: The order as to costs will follow from your Lordship's judgment. There is some suggestion that the costs may be decided in the arbitration in this event, but in my submission that would be an inconvenient course and would be better dealt with now.

MR. JUSTICE BRIGHTMAN: I think that is so.

MR. WRIGHT: I have two consequential applications to make. The first is this, that your Lordship will give leave to appeal. It is an interlocutory matter of some importance. In some way your Lordship's decision depends upon the order in which we proceed with the proceedings. If we wish to take the action first, it is desirable that its scope shall be settled, which are my present instructions.

Secondly, if on reflection my clients decide not to exercise the right of appeal, then the action will have to be recast in a rather more dramatic way than the elements I suggested. Perhaps if one were to mention the matter to your Lordship, say, within the next week, if my friends were to make an application so that we can make any amendments necessary, if we decide not to appeal to the Court of Appeal.

MR. JUSTICE BRIGHTMAN: What you are seeking is this: an order from me for leave to amend, I suppose, the relief claimed in the writ and the statement of claim in such manner as--

MR. WRIGHT: No. I feel that that would be a rather bold application, because there may be all sorts of ramifications. All I am saying is that as we can go on with the action with the other people, it might be a convenient course, if my clients decide not to appeal, for your Lordship to settle the amendments in the near future while the case was in your Lordship's mind. so that the scope of the action could be settled comparatively quickly, rather than go back to a Master who would not have knowledge of what was said and discussed.

MR. JUSTICE BRIGHTMAN: In other words, you want to have the right to apply to me for leave to amend the writ and statement of claim?

MR. WRIGHT: Yes. In my submission, your Lordship has power to do that. It would normally follow, or might have followed here, that one could make the application now. If, for example, by analogy there were an application to strike out the proceedings, the amendments that may save it are usually, in my submission, dealt with by the judge who has heard the application to strike out because that must be the best way of getting an informed continuity on the point. By analogy, I simply ask that if, as I say, within two or three days we decide not to appeal. one can apply to your Lordship at some convenient time with the subsisting amendment to enable the action to go against the other Defendants.

MR. JUSTICE BRIGHTMAN: You would merely, I suppose, issue a motion, is that right?

MR. WRIGHT: Yes.

MR. JUSTICE BRIGHTMAN: For leave to amend the writ and statement of claim instead of proceeding by summons before a Master?

MR. WRIGHT: Yes, so that it comes before your Lordship.

MR. JUSTICE BRIGHTMAN: I do not see why you should be limited to two or three days. You might want time.

MR. WRIGHT: If one could have leave to apply to your Lordship, perhaps that is best.

The third application I have - and this again will depend upon our not appealing - is an application for leave to apply to remove the stay, because circumstances may develop in the course of the action in which it would be right to make such an application, and it would, therefore, be convenient for it to be done in this application. to have liberty to apply to remove the stay.

MR. JUSTICE BRIGHTMAN: There is jurisdiction, is there, for me to entertain such an application? It had occurred to me that in the end you might come to that conclusion. Is there liberty for me to do that?

MR. WRIGHT: In my submission, yes. I have not found any authority on it. It simply is that if there is a stay granted, it can be removed by the court which granted the stay. It would simply be right, in my submission, that we ought to have liberty to apply.

MR. JUSTICE BRIGHTMAN: This is an opposed application not by consent, is it not?

MR. WRIGHT: It might be opposed, or it might not. At the moment I do not know what my learned friends' attitude to this application to your Lordship is. The application to stay might be either opposed or not opposed, as the matter may turn out when we make it.

MR. JUSTICE BRIGHTMAN: How can you apply to me?

MR. WRIGHT: No, just liberty to apply; it is not reserving it to your Lordship; it is just liberty to apply in this summons.

MR. JUSTICE BRIGHTMAN: How can you do that? If the stay is mandatory and the court has no discretion, how can the court remove the stay?

MR. WRIGHT: Supposing a situation were to arise in which it did become apparent in the changed facts of the case, or further heads of damage, or other matters, that the agreement had ceased to be operative; in that event it would be possible - and it is a remote contingency, perhaps, but I would just like to reserve the position - to apply to remove the stay; or even if there were a change in what may be thought to be a rather inconvenient piece of legislation in the Arbitration Act. It is foreseeable that there may be a case when it would be desirable.

MR. JUSTICE BRIGHTMAN: I would understand a joint application by both parties who might conceivably come to the conclusion that it would be better to have everything tried in one proceeding, but I do not for the moment see how you can make an opposed application. I do not see the basis of it.

MR. WRIGHT: The basis would be this. The word "inoperative" is dealt with in the present tense. At the moment your Lordship has held that it is operative.

MR. JUSTICE BRIGHTMAN: Yes.

MR. WRIGHT: There are conceivably circumstances in which in those circumstances at a future date it would be proper to submit an argument, even though opposed, that the agreement had become inoperative, for any number of reasons.

MR. JUSTICE BRIGHTMAN: In those circumstances, surely you would apply to the court, because you would presumably have a right to apply to the court?

MR. WRIGHT: Yes.

MR. JUSTICE BRIGHTMAN: You do not need any leave from me to exercise a right.

MR. WRIGHT: It is only a procedural saving to apply in this summons. That would be all - liberty to apply. Otherwise we would just have to start again - that is all - with a fresh application.

MR. JUSTICE BRIGHTMAN: I do not see that that is really any problem. Is there anything to be saved? What precisely do you ask me to say?

MR. WRIGHT: Just that we have liberty to apply; that is all.

MR. JUSTICE BRIGHTMAN: I think probably you can have liberty to apply. I do not know whether it ought to go any further than that.

MR. WRIGHT: If I may have liberty to apply, that is all I want. I was just disclosing to your Lordship, if we were bold enough probably, what kind of liberty we might be taking.

MR. JUSTICE BRIGHTMAN: Very well. I will see what Mr. Dillon has to say. Is that the sum total of your applications?

MR. WRIGHT: Yes.

MR. JUSTICE BRIGHTMAN: On leave to appeal, what do you say, Mr. Dillon?

MR. DILLON: As to leave to appeal, it is a matter for your Lordship. I do not really want to say any more about that.

MR. JUSTICE BRIGHTMAN: Yes. What would you say as regards an appeal Mr. Webster?

MR. WEBSTER: I say exactly the same as my learned friend. It is a matter for your Lordship.

MR. JUSTICE BRIGHTMAN: I think it is correct that you should have leave to appeal.

MR. WRIGHT: I am obliged.

MR. JUSTICE BRIGHTMAN: Leave to apply by motion to me to amend the writ and statement of claim?

MR. DILLON: As to that, I have no objection to your Lordship granting my friend leave to amend the writ and statement of claim consequent upon the stay in the event of his not appealing. But as for the procedure which he suggests, given the hypothesis that your Lordship's order stands and he is not appealing, my friend Mr. Webster's client and my client are the two who are not concerned with the amendments which it is proposed should be made. Therefore, perhaps, it might be sufficient that he should have liberty to amend, which he can deal with in accordance with the normal practice. He has power to amend without leave before pleadings are closed, in so far as he is

not adding parties. As it so happens, the application to amend by adding parties is before the Master at 12 o'clock today. I imagine that is a bit prompt for him to decide on this amendment. It is the position that we are the ones not concerned. Therefore his procedure is, perhaps, hardly appropriate.

MR. JUSTICE BRIGHTMAN: You are concerned in that certain relief has been claimed against you, and possibly, I suppose, even your presence in the action will be deleted?

MR. DILLON: Yes, it would be deleted, but it is stayed against us.

MR. JUSTICE BRIGHTMAN: You are likely concerned, are you not?

MR. DILLON: This is on the footing that the order for a stay has been made and will be standing.

MR. JUSTICE BRIGHTMAN: I see.

MR. DILLON: That is my position on that.

As to the liberty to apply, I would invite your Lordship not to give my friend that encouragement, and leave him to take such steps as may be open to him when and if circumstances have so changed as to merit his endeavouring to take some further step against us. One of the circumstances he envisaged seemed to be amendment of the Arbitration Act of 1975. That in turn was to give effect to the International Convention signed by many countries, and one would suspect it would be rather a cumbrous procedure to achieve an amendment of that. I would ask your Lordship not to grant that.

MR. JUSTICE BRIGHTMAN: I am not certain that liberty to apply is really very appropriate in the case of an action which has been stayed.

MR. DILLON: No. That is my submission.

MR. WEBSTER: I have nothing to add.

MR. JUSTICE BRIGHTMAN: Mr. Wright, so far as amending the writ and statement of claim is concerned, I have only two of the 29 parties before me. I think, perhaps, it would be more appropriate in those circumstances for you to go through the usual procedure.

MR. WRIGHT: If I might just make one comment. One of the reasons for doing it before your Lordship is that as regards the others we can do it without leave before the close of pleadings, as my friend said. The reason for doing it by motion here is that before my friends finally part from the action they shall have an opportunity of saying whether they object, or ask for a stay in respect of the amended statement of claim, i.e., if they are going to say that the amendments I seek to make still leave the action within the stay. That was the only reason why I did submit it would be convenient to deal with it. The others are concerned, but are not necessarily parties.

MR. JUSTICE BRIGHTMAN: Will you not have to strike out the first two Defendants out of the action?

MR. WRIGHT: Yes, certainly, but of course all the allegations of conspiracy and breach of contract will stay in the statement of claim because they are parts of the gravamen of the conspiracy.

MR. JUSTICE BRIGHTMAN: Yes, but no relief is claimed in the action against Shell and BP. So technically they are not concerned unless they seek to be.

MR. WRIGHT: All I was wanting to add was, because we want to get on with the action as fast as we can, we have the situation where we strike them out as parties, strike out the relief against them, leave in the allegation of breach of contract, leave in the allegation of conspiracy, and when faced with another proceeding, to sustain that in some way we have not complied with the stay, we are in breach of it by putting those allegations forward.

MR. JUSTICE BRIGHTMAN: Is not the stay given effect to when they cease to be parties to the action?

MR. WRIGHT: Yes.

MR. JUSTICE BRIGHTMAN: They can have no complaints after that moment, can they?

MR. WRIGHT: Theoretically I can see it will be difficult for them. All one says about it is that at the moment the action will be absolutely unaltered against everybody else, and the issues of breach of contract would be tried in that. I do not know whether my friends would want to object to that course or not. If they do not object just to their names being struck out as parties and relief against them, then that of course we do not worry about. We can make the amendments without concerning them.

MR. JUSTICE BRIGHTMAN: I am just going to ask this. Mr. Dillon, supposing that your client were struck out of the action, that no relief was claimed against your client and no other amendments made to the statement of claim, would you regard the order for the stay as having been performed or not?

MR. DILLON: Plainly performed.

MR. WRIGHT: That does meet my point that I was afraid we might be faced with difficulties about saying that in that event it would not have been performed.

MR. JUSTICE BRIGHTMAN: Your second application goes?

MR. WRIGHT: I am happy it is relieved.

MR. JUSTICE BRIGHTMAN: Technically, I am told, the names of Shell and BP are not struck out.

MR. WRIGHT: They stay in.

MR. JUSTICE BRIGHTMAN: They stay in the title, but the proceedings against them are stayed.

MR. WRIGHT: If that makes no difference to my learned friends' acceptance of the position, I am happy I shall not need to make an application to amend.

R. JUSTICE BRIGHTMAN: As regards liberty to apply, you either have a right to apply or you have not, is that correct?

R. WRIGHT: Yes.

R. JUSTICE BRIGHTMAN: So you do not need anything in the order

R. WRIGHT: It was just a convenient course.

R. JUSTICE BRIGHTMAN: Mr. Dillon, I think, is a little afraid I might be giving you encouragement!

R. WRIGHT: If we think it right to do it, we will make the application without encouragement!

R. JUSTICE BRIGHTMAN: Yes. I do not think that you need liberty to apply. If circumstances change, then it may be - I do not know - that you will be able to come again to the court and say that no longer is the condition of section 1 not satisfied. Very well.

MR. WRIGHT: I am obliged.
