THE GOVERNMENT OF KUWAIT

- v -

SIR FREDERICK SNOW AND PARTNERS AND OTHERS

MACKAY J.

JUDGMENT

In these proceedings I am concerned with four preliminary issues ordered to be tried by Mustill J. on 26th March 1980, together with a fifth, which it was agreed between Counsel that I should also decide.

These matters, which are of some complexity, arise in the following way. On 15th July 1958, a contract was entered into between the Plaintiffs and Frederick S. Snow and Partners, consulting civil engineers, for the construction of an internationa airport in Kuwait. The latter were then a firm consisting of three partners, namely, Mr F.S.Snow, Mr G.F.B.Scruby and Mr F.W.Slatter. By a Deed of Partnership made 1st April 1961, the three original partners took into partnership with them Mr A.N.Brown, Mr E.W.Cooper and Mr N.J.Payne. This deed was executed by all six partners. On the same day six separate agreements described as Deeds of Partnership were entered into between the six partners already named of the one part and Messrs. ERIC Ashford, ALEXANDER Bishop, ALEXANDER MACKAY Mackay, JOHN Hartland, Villiers and EDWARD Finn of the other part. For convenience these are sometimes referred to as the 6th to 11th Defendants. In these six agreements the six partners already mentioned were described as the Principal Partners, whereas each of the last mentioned six was described as an Associate.

Disputes arose between the Plaintiffs and the partnership

in the course of performance of the contractand by telex of 29th October 1964 the Plaintiffs terminated the contract of 15th July 1958 whilst reserving all their rights. In the pleading ordered by Mustill J. between the Plaintiffs and the 6th - 11th Defendants the period between 15th July 1958 and 29th October 1964 was accepted as being the cause of action period.

On 22nd May, 1972, Dr Yassin was appointed arbitrator by the Kuwait National Court pursuant to the terms of clause 20 of the contract and by his award registered in Kuwait on 18th September 1973 he awarded that the firm should pay the Plaintiffs a sum of Kuwaiti dinars equivalent to nearly £3½ million. No steps were taken by the Plaintiffs to enforce this award until 23rd March 1979, when they took out originating summonses under Section 26 of the Arbitration Act, 1950, against Sir Frederick Snow and Partners (a firm), using the firm name as Defendants under Order 81, r.1, for leave to enforce the award in the same manner as a judgment or order to the same effect. Pleadings were then delivered pursuant to an order of Donaldson J., but soon after the Points of Reply were served on 30th November 1979, the Plaintiffs applied to this Court by summons dated 5th December returnable on 17th December for the joinder of (a) Messrs. Scruby, Brown, Cooper and Payne, (b) the 6th to 11th Defendants, (c) Messrs. Scruby, M.E.Snow and P.Grundy as the executors of Sir Frederick S. Snow, who had died in 1976, and had earlier retired from the partnership on 31st March 1969 and (d) Messrs. Scruby and Cooper as the executors of Mr. Slatter, who had died on 25th May 1971. An order amending the originating summons by

effecting the said joinders was made ex parte on 17th December, 1979. The amended summons to enforce the award as a judgment was returnable on 28th April, 1980.

Before this date was reached, however, summonses were taken out by the 6th to 11th Defendants and the firm and the executors of Sir Frederick Snow applying to be struck out as Defendants. These matter came before Mustill J. on 21st March, 1980, who ordered the following to be tried as preliminary issues in the proceedings:-

(1) The points on limitation of actions raised in the affidavits sworn in support of these summonses;

(2) Whether in the period between 15th July 1958 and 29th October 1964 the 6th to 11th named Defendants were or held themselves out to the Plaintiffs as being partners in the said firm so as to be liable to the Plaintiffs;

(3) Whether the award relied on by the Plaintiffs is a convention award for the purposes of the Arbitration Act, 1975;

(4) Whether the Plaintiffs' claim fails by reason of the fact that their originating summons pre-dated Statutory Instrument 1979 No. 304.

By consent between Counsel before me a fifth preliminary issue was added in relation to the two sets of executors, who had been added, of plene administravit or plene administravit praeter.

The first matter argued before me was the second preliminary issue, whether the 6th to 11th named Defendants were partners in the firm during the material period so as to be liable to the

Plaintiffs. The allegation by the Plaintiffs that the six were held out to the Plaintiffs as being partners was dropped by Mr Phillips, who appeared for the Plaintiffs, after the close of the oral evidence. The Plaintiffs' case that the six were nevertheless true partners in law was based almost wholly upon the somewhat remarkable wording of the six separate agreements described as Deeds of Partnership I have previously mentioned. These were all dated 1st April 1961 but were said to date back to 1st April 1960. This fact enables the Court to consider evidence prior to the written agreements of 1st April 1961 without infringing the parole evidence rule. Apart from this point, however, Mr Burton, in his able address for the 6th to 11th Defendants, referred me to Reardon Smith Line v. Hansen-Tangen [1976] 1 W.L.R. 989. He relied particularly on two passages from the opinion of Lord Wilberforce. The first at p 995 read "In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating". The second passage, at p 997, was "I think that all their Lordships are saying, in different words, the same thing what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were".

The six men had all been working for the firm, then called Frederick Snow & Partners, for a number of years before 1960; Mr Villiers since 1948 as a designer/draughtsman, Mr Bishop since February 1954 as an electrical engineer, Mr Mackay since 1947 as

an assistant engineer, Mr Finn since September 1951 as an engineer becoming a fully chartered engineer in 1953, Mr Hartland since 1948 as an articled pupil prior to becoming a chartered engineer in 1952 and Mr Ashford since 1948 as a quantity surveyor. In April 1960 Mr Snow invited each of them to become associates and wrote to his fellow partners informing them of that fact. Later in the month the six were notified that one of them would be invited to attend one Partners' meeting a month, the six Partners meeting once weekly without any of the associates being present. By the beginning of November 1960 the firm were using notepaper showing at the top left the six partners and below them, after a small gap, the word "Associates" and the names of five of the six associates, the one missing being Mr Villiers who had failed and never succeeded in acquiring the professional qualification of a chartered engineer. Evidence was given before me of the interviews the six had before becoming associates. They were told they were not being made partners then and there, but it was hoped that in due course they would become partners. They none of them considered themselves to be partners. Mr Snow, as he then was, used the expression to more than one of the six that the period of being an associate could be compared to an engagement and that the wedding in the form of a true partnership could come later. Mr Burton described it as a kind of probationary period.

Before considering the conflicting arguments further it is necessary to refer in some detail to the deeds which each of the six signed on 1st April 1961. It is to be noted as I have said that a separate deed was signed by each of the six with all

six partners signing each deed. This detail should be compared with the deed executed on the same date between the original partners Messrs. Snow, Slatter and Scruby and the new partners Messrs. Brown, Cooper and Payne. There was here only one docume executed by all six gentlemen. A similar distinction is to be found several years later when in 1970 Messrs. Finn, Hartland, Bishop and Ashford were taken in as full partners by Messrs. Scrub Slatter, Brown and Cooper together with five other gentlemen and all thirteen signed one deed.

The material deeds of 1st April 1961 were described on their backs as "Partnership Deed" and their opening words were "This Deed of Partnership". The preambles said that the Princi Partners had agreed to take theAssociate into Partnership and clause 1 provided:- "The said Principal Partners and their succesor or successors for the time being in the said Partnership on the one hand and the Associate on the other hand will to the intent and in manner and upon the terms hereinafter expressed become and remain Partners under the said style or form of Frederick S. Snow and Partners for the duration of Five Years from the first day of April One thousand nine hundred and sixty if the Associate shall so long live, subject nevertheless to the sooner determination of this Partnership as hereinafter provided" Clause 3 provided that "the change in the constitution of the Firm hereby made shall be duly notified pursuant to the Registrat of Business Names Act, 1916". As the result of this clause each of the six on 17th February 1961 signed a form under the Business Names Act headed "Application for Registration by a Firm" in whic

their full names appeared as partners in the firm of Frederick S. Snow & Partners.

Mr Phillips naturally relied strongly upon these provisions in the deeds of 1st April 1961, but one must also have regard to other provisions in the deeds. Thus in clause 5(a) the Principal Partners could by one month's calendar notice to the Associate determine the partnership and should pay the Associate £500 by way of compensation. By clause 6 the Associate was to be paid £1,500 a year paid monthly under PAYE arrangements and had an employment card, and under clause 14 the Associate was to continue to participate in the staff pension scheme on the same terms and conditions as members of the staff employed by the Principal Partners. /Mr Phillips described the P.A.Y.E. provisions as a mistake/. The Associate was to have a bonus of 2½% of the profits of the partnership after deduction of the salaries of the Principal Partners, the Associate, other Associates and staff bonuses, but was not to share in losses and was by clause 12 indemnified by the Principal Partners against all debts and liabilities of the firm. Upon the determination of the partnership the Associate was to cease to have any interest in or claim upon the business; he had no share in the assets nor did he contribute anything to the capital. Clause 10 provided that unless otherwise expressed or implied the Associate should not have or exercise any of the rights or powers of a partner in the firm and in particular should not (a) engage the credit of the firm or bind it in any way (b) conduct or interfere in the management of the business (c) nor have access for any purpose whatsoever to the Balance

Sheets and Profit and Loss Accounts of the Partnership
(d) nor engage or dismiss staff.

Apart from the matters already mentioned it is of some interest that in the published List of Members of the Institute of Chartered Engineers in the years from 1960 to 1966 against the firm name the only members shown are those described as the Principal Partners in the deeds of 1st April 1961. It is not until the publication of 1967 that any additional names are shown. Similar entries appear in the Consulting Engineers Who's Who. It is also of relevance that it was on 14th June 1965 under the heading in The Times of "Business Changes", that it was announced that Messrs. Finn, Hartland and Bishop had been admitted as partners by Frederick S. Snow & Partners.

I have earlier mentioned one of the major differences between the deeds entered into with each of the six associates and the deed of the same date whereunder the three new partners Messrs. Brown, Cooper and Payne joined Messrs. Snow, Slatter and Scruby. This dealt with the assets of the firm and the varying contributions to the capital over three consecutive periods of five years of the six partners. Provision was made for the sharing of profits and losses and for each partner to have a drawing account. Each partner was to have free access to and the right to inspect the books of account. It is not necessary to make a more detailed comparison between this deed and those entered into with the Associates, but the differences I have noted are striking and important.

Apart from the importance of the differences between the

terms of the Associates and Partners' deeds of 1st April 1961, it is interesting that in 1966 Messrs. Finn, Hartland and Bishop became Junior Partners under new deeds replacing those of 1961 and in 1970 they became full partners under a single deed executed by all thirteen partners in a form not greatly different from that of 1st April 1961 whereunder Messrs. Brown, Cooper and Payne became full partners. This progression from the status of Associate supports Mr Burton's description of that status as being a probationary one prior to promotion to the position of being a true partner.

I was referred to a considerable number of authorities both by Mr Burton and Mr Phillips on this somewhat troublesome question of partnership. It is clear that mere labels used in agreements are not necessarily determinative. Thus in Goddard v. Mills The Times 16th February 1929, even though the parties in an agreement between them called themselves partners, Eve J., decided on all the facts of the case that they were not. Per contra, in Weiner v. Harris [1910] 1 K.B. 285, Cozens-Hardy M.R. said at p. 290: "Two parties enter into a transaction and say 'It is hereby declared there is no partnership between us'. The court pays no regard to that. The court looks at the transaction and says 'Is this, in point of law, really a partnership?' It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is". Similarly in the recent case of Stekel v. Ellice [1973] 1 W.L.R. 191, at p. 199, Megarry J. said: "It seems to me impossible to say that as a

matter of law a salaried partner is or is not necessarily a partner in the true sense. He may or not be a partner, depending on the facts. What must be done, I think, is to look at the substance of the relationship between the parties; and there is ample authority for saying that the question whether or not there is a partnership depends upon what the true relationship is, and not on any mere label attached to that relationship. A relationship that is plainly not a partnership is no more made into a partnership by calling it one than a relationship which is plainly a partnership is prevented from being one by a clause negativing partnership". Both Mr Burton and Mr Phillips referred me to Badeley v. Consolidated Brick (1888) 38 Ch.D. 238. The headnote reads: "Participation in profits, although strong evidence, is not conclusive evidence of a partnership. The question of partnership must be decided by the intention of the parties to be ascertained from the contents of the written instruments, if any, and the conduct of the parties". At p. 259 Lindley L.J. said that the trial Judge had treated participation in profits as "prima facie evidence of partnership which had to be rebutted by other evidence, instead of taking the whole of the documents and the whole of the evidence and drawing such inferences as he thought right from the whole".

I have endeavoured to apply the guidance afforded by the authorities to the evidence given in this case as well as to the wording used in the deeds of 1961. In my judgment the six members of the staff of the firm made "associates" by those deeds with retrospective effect to 1st April 1960 did not become partners, but remained employees of the firm. I accordingly answer the

second preliminary issue in the negative.

If this decision is correct Mr Burton had no need to rely on the third or fourth issues dealing with the convention award nor on limitation in respect of Messrs. Villiers, Bishop and Mackay. Mr Phillips conceded that Mr Villiers ceased to be a partner in 1965 (if contrary to my decision he ever had been one) and Mr Bishop admittedly retired as a partner on 31st December 1972. Accordingly if the limitation issue which was primarily argued by Mr Hill for the two sets of executors, be good, Mr Phillips admitted it would apply to protect Messrs. Villiers and Bishop, since they would not have been covered by the summons of 23rd March 1979 in the firm name and were only sought to be made parties by a summons adding them as parties in their own names under which the order was made ex parte on 17th December 1979, more than six years after the cause of action arising on Dr Yassim's award of 18th September 1973. It is convenient to deal with the limitation issue in connection with Mr Hill's submissions. There is however a difference between Mr Burton and Mr Phillips concerning whether Mr Mackay was a partner in March 1979, which I should shortly deal with.

Mr Mackay on 1st April 1961 became an Associate of the six Principal Partners by a deed in the same terms as the deeds relating to the other five of Mr Burton's clients. Mr Mackay's career took a slightly different course. Whereas in 1966 each of Messrs. Bishop, Hartland and Finn entered into five year deeds of partnership with the five Principal Partners (Mr Pigg having retired on 31st October 1965), and were therein described as

Junior Partners, the firm by then being called "Sir Frederick Snow & Partners", Mr Mackay entered into a further five year deed in which he continued to be described as "the Associate". The Junior Partners and Mr Mackay continued to be paid under Pay As You Earn arrangements , but Mr Mackay worked exclusively from the Norwich office. Each of the 1966 deeds was retrospective to the 1st April 1965. After this batch of agreements the heading of the notepaper was altered. The five Principal Partners appeared first. There was then a gap, the word "Associates" was omitted, and the names of Messrs. Finn, Hartland and Bishop, followed by Rodger, who had also been taken in as a Junior Partner, followed. Mr Mackay's name was omitted, but appeared on Norwich notepaper as "Local Partner". In 1970 a new Deed of Partnership recorded that Mr Mackay had been taken into Associate Partnership for four years and was to be in charge of the Partners East Anglian Office. He was still to be paid under P.A.Y.E. arrangements. In 1974 a separate firm of Sir Frederick Snow & Partners East Anglia was formed and of this firm Mr Mackay became a partner. He was not, therefore, brought within the summons of 23rd March 1979, since he was not then a partner in the firm of Sir Frederick Snow & Partners. The ex parte application in December 1979 was made more than six years after the award of 18th September 1973 and accordingly the defence of limitation would be available to him if he needed it, i.e. if my decision that he was not a partner between 1958 and 29th October 1964 is incorrect.

I think it convenient now to consider the limitation issue. This arises because the originating summons of 23rd March 1979

under Section 26 of the Arbitration Act 1950 to enforce the award dated 15th September 1973 of the arbitrator Dr Yassim and registered in accordance with Kuwaiti law with the Kuwait National Court on 18th September 1973 named "Sir Frederick Snow and Partners (a firm)" as Defendants pursuant to Order 81 Rule 1. That rule only has effect against those who were partners in the firm at the time when the cause of action accrued, which was taken as being the date of the award. At that date Messrs. Finn, Hartland, Bishop and Ashford, out of the original six "Associates" for whom Mr Burton acted, were true partners in the firm, as were Messrs. Brown, Scruby and, it appears, Mr Cooper, although the latter retired at some date I have not been informed of in 1973. It was accepted by Mr Phillips that Order 81 Rule 1 had no application to persons who had been partners between 15th July 1958 and 29th October 1964 (the so-called "cause of action" period), but had ceased to be partners at the date of the award which it was sought to enforce against the firm. This admission covered Sir Frederick Snow himself, who retired in 1969 and died in 1976, Mr Slatter, who died in 1971, Mr Payne who retired on 31st October 1965 and Mr Bishop who retired on 31st December 1972.

In the result, as I understand it, of a suggestion made by Donaldson J. on the summons for directions on the unamended originating summons, the Plaintiffs applied ex parte on 17th December 1979, under Order 15 Rule 6, six years and three months after the date of registration of the award, to join Messrs. Scruby, Brown, Cooper and Payne, the 6th to 11th Defendant

and the executors of Sir Frederick Snow and Mr Slatter. The order was made. Objection was taken by the firm, the 6th to 11th Defendants and the two sets of executors on the basis that the claim against them was time barred by Section 2 (1) (c) of the Limitation Act, 1939. The firm's summons was adjourned generally, but the other objections were the subject matter of the first preliminary issue ordered by Rustill J. to be tried.

Mr Phillips sought to justify the joinder despite the passage of time and the Limitation Act by reliance upon Order 20 Rule 5 (5). As against this Mr Hill, with the support of Mr Burton and Mr Wright, argued that save in exceptional circumstances the established rule of practice was that the Court would not permit a person to be added as a defendant to an action at a time when he could rely on a period of limitation as barring the plaintiff from bringing an action against him. I have taken this statement from the headnote to Leff v. Peasley [1980] 1 W.L.R. 781. It is also the view taken in the fifth supplement to the 1979 Annual Practice where the above mentioned authority is cited for the proposition that "if the joinder by amendment is made after the current period of limitation has expired, the Court will summarily dismiss the action on the ground that it is time-barred".

The standard rule of practice can be traced back to Weldon v. Neil (1887) 19 Q.B.D. 394. There Lord Esher referred to the settled rule of practice and applied it to a case of a plaintiff seeking to amend her writ by adding new causes of action which were time-barred at the time of the proposed amendment. Lord Esher said that under very peculiar circumstances the Court

might perhaps have power to allow such an amendment, but that certainly as a general rule it would not do so. This rule of practice was followed in Mabro v. Eagle Star [1932] 1 K.B. 485 in relation to the addition by amendment of a plaintiff, which would have had the effect of defeating a defence under the statute, in a Court of Appeal consisting of Scrutton and Esher L.JJ.. The point was discussed in Lucy v. Henleys Telegraph Works [1970] 1 Q.B. 393, where the majority in the Court of Appeal followed the Mabro v. Eagle Star decision in a hard case. Again in Braniff v. Holland & Hannen [1969] 1 W.L.R. 1540 the Court of Appeal took the same view and differed from the dictum of Denning M.R. in Chatsworth Investments v. Cussins [1969] 1 W.L.R. 1, where he said at p. 5 that since Order 20 Rule 5 "I think we should discard the strict rule of practice in Weldon v. Neal". They preserved, however, the qualification that the rule might be departed from in very peculiar or exceptional circumstances. The latter were held to exist in the Chatsworth Case, where leave to amend was granted, as it was in Mitchell v. Harris Engineering Co. Ltd. [1967] 2 Q.B. 703.

I do not take the view that the facts of the present case present exceptional circumstances which would justify the Court in departing from the well-established rule. No explanation is offered on affidavit to the Court for the delay in this case in which the dispute went back to 1964 and the award was not made until some nine years later.

Accordingly in my judgment the Defendants succeed on the limitation points and, subject to anything that may be said by

Counsel, the two sets of executors should be struck out as parties to these proceedings. I will hear Counsel as to what should be done in relation to the other Defendants not all of whom stand in quite the same position.

On the basis that the decisions I have arrived at on the preliminary issues as to partners and limitation are correct, the third and fourth issues arise only in relation to the claims against Messrs. Scruby, Brown and Cooper, although as previously mentioned I am uncertain whether Mr Cooper retired before or after the date of the award.

Before passing to the important points on the convention, I should deal with the pleas in bar against the executors of Sir Frederick Snow of plene administravit praeter and against the executors of Mr Slatter of plene administravit. There is affidavit evidence in relation to the former executors that the outstanding liabilities of the estate have been discharged and the residuary estate transferred to the sole beneficiary Lady Snow, with the exception of a small cash balance of £3,780 retained by Messrs. Richards Butler and Company against outstanding administration fees. In the case of the executors of Mr Slatter the affidavit of Mr Lightman shows how the estate was dealt with and that it has been fully distributed. Mr Phillips does not challenge either of these pleas, but wished the issues to be decided since this might affect the costs of the executors. As to this Mr Hill in his reply relied upon Rage v. Wells (1817) 8 Taunton 129 in which it was decided that as the plea of plene administravit succeeded, the defendant, although he had failed on

issues of non-assumpsit and the Statute of Limitations, was entitled to the general costs. He further relied upon Edwards v. Bethel (1818) 1 B & Ald. 254, where an executrix when sued pleaded plene adminstravit, on which she succeeded, and two other defences on which she failed. She was held entitled to the general costs of the trial. I will hear Mr Phillips on this matter of costs.

I now come to the third and most interesting preliminary issue namely whether the award relied upon here is a Convention award under the 1975 Arbitration Act. If it is, then by Section 3 (1) (a) of the Act it may be enforced in the same manner as the award of an arbitrator is enforceable by virtue of Section 26 of the Arbitration Act, 1950. This is what the Plaintiffs are trying to achieve by their originating summons of 23rd March 1979. The crucial question to be decided is whether upon its true construction and in accordance with well established legal principles the definition of "Convention award" in Section 7 (1) of the 1975 Act applies to Dr Yassim's award of 18th September 1973.

It is helpful at the outset to set out some relevant dates. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the United Nations Conference on International Commercial Arbitrations at New York on 10th June 1958 and came into force on 7th June 1959. The adoption of the Convention shortly antedated the making of the contract between the Plaintiffs and Frederick S. Snow and Partners on 15th July 1958. The award was made on 18th September 1973 by which date neither

Kuwait nor the United Kingdom had acceded to the Convention. The United Kingdom acceded to the Convention on 23rd December 1975, on which date the 1975 Act came into force, but Kuwait did not accede until 28th April 1978, the accession becoming operative on the ninetieth day thereafter namely 27th July 1978.

There were certain precursors to the New York Convention, which it is relevant briefly to mention. The first was the Geneva Protocol of 1923, set out as the First Schedule to the Arbitration Act of 1950, which remains open for signature; this provided for the recognition by the courts of signatory states of arbitration agreements between parties subject to the jurisdiction of different Contracting States. It was given effect by the Arbitration Clause (Protocol) Act, 1924. Then in 1927 there was a Geneva Convention on the Execution of Foreign Arbitral Awards, which was given effect by the Arbitration (Foreign Awards) Act, 1930. Both were re-enacted in the consolidating Arbitration Act of 1950. Section 4 (2) dealt with the stay of legal proceedin in respect of matters agreed to be referred under the Protocol of 1923 and Section 35 dealt with the enforcement of foreign awards pursuant to the Geneva Convention of 1927. The 1975 Act by Section 1 repealed Section 4 (2) of the 1950 Act in relation to staying proceedings, but re-enacted its provisions in somewhat different and more clearly defined terms. The 1975 Act left very nearly untouched the provisions of the 1950 Act in Section 35 and the subsequent sections dealing with the enforcement of foreign awards to which the Geneva Protocol and Convention applied.

Sections 2 to 7 of the 1975 Act deal with the enforcement

of Convention Awards under the Convention adopted in New York in 1958. Section 7 (1) provides " 'Convention Award' means an award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention". The crucial question arising on this definition is whether to be a Convention Award such award must be made in a State which at the date of the award is a party to the New York Convention, or whether the definition is satisfied if at the date of proceedings to enforce the award the State in question is a party to the Convention. Mr Wright on behalf of all the Defendants argued for the former construction, whilst Mr Phillips for the Plaintiffs argued for the latter.

Mr Wright argued that the definitive paragraph on its true construction had the former meaning. This was he submitted its natural meaning. When the award was made on 1st September 1973 neither Kuwait nor the United Kingdom were parties to the Convention. The reciprocity provision of Article 1 (3) of the Convention involved that the award could not have been a "Convention Award" between 1st September 1973 and 27th July 1978, when Kuwait's accession became effective. He submitted that the award could not change its character on 27th July 1978, nearly four years after it had been published.

As against this Mr Phillips correctly pointed out that the New York Convention contains no express limitation to awards made after any particular date and argued that Mr Wright's argument involved an unjustified reading in of additional words. In this respect he drew a contrast between the analogy of the 1933 Foreign

Judgments (Reciprocal Enforcement) Act, which expressly provided in Section 1, dealing with the registration of foreign judgments, that such a judgment could not be registered unless it was given after the coming into operation of the Order in Council directing that the Act should apply to the country in which the judgment was given. Again he referred to the 1950 Act dealing with the enforcement of foreign awards under the Geneva Convention, where by Section 35 the enforcement part of the statute applied to any award made after 28th July 1924. There was nothing comparable in the 1975 Act, which should be read without the addition of any qualifying words. He also suggested that Mr Wright's submission would leave a lacuna and that it would be strange if the Plaintiffs had in 1978 acceded to the Geneva Convention, they could have enforced a past award under the 1950 Act, but would be unable to do so under the more up to date New York Convention. If the latter suggestion about what the Plaintiffs could have done in 1978 be right, there would be no lacuna as Mr Wright pointed out. It is, however, clear that if Kuwait had acceded to the Geneva Convention before the award was made, it could be enforced here under the 1950 Act and would not be caught by Section 2 of the 1975 Act, provided that Mr Wright's argument be right that Section 7 (1) does not make an award a Convention award if made in a country before the latter has become a party to the New York Convention.

Whilst I favour the view that the natural reading of the vital paragraph in Section 7 (1) is prospective and was only intended to apply to awards made in a State after that State had

become a party to the New York Convention, I recognise that the words used are capable of being interpreted as Mr Phillips contends as applying at the date of enforcement and that the fact that the award ante-dates the relevant State's becoming party to the Convention may therefore on that hypothesis be irrelevant.

However this involves giving the sub-paragraph retrospective effect in that an award, which was indubitably not a Convention award when made, can become so some five years or perhaps more thereafter and thereby alter the rights of the parties as to the enforcement of the award. I was referred to a substantial body of case law on the subject of when statutes could be given retrospective effect and the difference between changes in the substantive law and in procedure.

I can first of all dispose of two cases mentioned by Mr Phillips in relation to the retrospective effect of the 1975 Act. Both were concerned with Section 1 of the Act which deals with staying proceedings and not with the enforcement of Convention awards. The former was Nova (Jersey) Knit v. Kammgann Spinneri [1977] 1 W.L.R. 713 where, in dealing with the question whether there should be a stay of an action, Lord Wilberforce at pp. 717 and 718 said that the application was based on Section 1 (1) of the 1975 Act and added "There is an alternative contention based on Section 4 (2) of the 1950 Act, repealed by the Act of 1975, but there is no material difference between the provisions and it is not necessary to decide which applies". In view of this comment I do not think that the remark made by Brandon J. in Coastal Coceleyne [1977] 2 Lloyds Reps. 121 at p. 128, in which he referred to the

earlier case in the Court of Appeal, saying that the point about retrospection appeared to have been assumed, is of much assistance. In any event as I have already said, both these authorities were dealing with the stay provisions of the Statute which are quite distinct from the enforcement provisions.

There is no doubt that "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction": see per Lindley J. in Lauri v. Renad [1892] 3 Ch. 402 at p. 421. As an exception to this rule are questions of new procedure. Thus in Gardner v. Lucas (1878) 3 App.Cases at p. 603, Lord Blackburn said "Nevertheless it is quite clear that the subject matter of an Act might be such that, although there were not any express words to show it, it might be retrospective. For instance, I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly these bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be".

It is far from easy to define what is meant by the exception to the general principle of statutory changes not being retrospective if the change made is one of procedure. Mr Wright submitted that if the statutory change although dealing with [illegible] could be described as procedural, nevertheless interfered with or deprive

a party of a vested right, then retrospective effect would not be given to the change. He cited as a strongly procedural change in the law Colonial Sugar v. Irving [1905] A.C. 369, where the Australian legislature took away a right of appeal to the Privy Council, but this was held not to apply retrospectively to a right of appeal pending when the Act was passed. Lord Macnaghten said, at p. 372, "to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure". Two other cases, which might be described as dealing with procedural changes in the law, although of great importance, which were held not to be retrospective, were Ward v. British Oak Insurance [1932] 1 K.B. 392 and Beadling v. Goll 39 T.L.R. 128, dealing with the Gaming Act, 1922. Another ca where the subject matter was of some importance, but the change in the law could fairly be described as a change in procedure wa In re Joseph Suche & Co (1875) 1 C.D. 48, the Act in question being Section 10 of the Judicature Act 1975, which directed that in the winding-up of any company whose assets may prove insuffic for the payment of its debts, the same rules shall be observed as may be in force under the law of bankruptcy. Jessel M.R. decided that the change did not apply to a winding-up that had started before the Act came into operation. In Hutchinson v. Jauncey [1950] 1 K.B. 574, Evershed M.R. referred to the la mentioned case and said he thought Jessel M.R. had stated the principles perhaps too precisely. He concluded by saying: "In other words, it seems to me that, if the necessary intendment of

of the Act is to affect pending causes of action, then this Court will give effect to the intention of the legislature even though there is no express reference to pending actions".

Many other cases were cited but I did not derive any clear guidance from them in application to the 1975 Act. In the first place there is no clear reason based on the language of the second paragraph of Section 7 (1) why the definition of Convention award should be given retrospective effect. Secondly, as earlier indicated, as a matter of construction I prefer the rendering which relates the definition to awards made in a State after that State has become a party to the Convention. Thirdly, Kuwait could have substantially safeguarded their enforcement position by acceding to the Geneva Protocol and Convention before the award was made and possibly even after it.

I accordingly answer the third preliminary issue in the negative.

The fourth issue is whether the Plaintiffs' claim fails by reason of the fact that their originating summons of 23rd March ante-dated The Arbitration (Foreign Awards) Order, 1979, which came into operation on 12th April 1979. This order was issued pursuant to Section 7 (2) of the Act of 1975 providing that "If Her Majesty by Order in Council declares that any State specified in the Order is a party to the New York Convention the Order shall, while in force, be conclusive evidence that that State is a party to that Convention". Kuwait was one of the States specified in that Order. In Russell on Arbitration at p. [illegible] statement appears, unsupported by authority, that an Order in Council is

"probably also the only evidence that can be accepted on the point". The word used in the Act is "conclusive" and not "exclusive" and the language of Section 7 (2) is to be contrasted with that of Section 35 (1) of the 1950 Act where the language used makes the relevant Orders in Council essential. In addition to this striking contrast between the two Acts, Mr Phillips was able to refer me to A-G v. Bournemouth Corporation (1902) 71 L.J. N.S. 731 where it was held that a provision in the Tramways Act, 1870, that a notice by the Board of Trade in the London Gazette "shall be conclusive evidence" of the non-commencement of works, was not the exclusive or only evidence of the non-commencement of the works which the Court could receive. I accordingly answer the fourth preliminary issue in the negative.