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had appropriated to them a proportion of the contract goods shipped by an identified shipper after a cl. 21 or cl. 22 event. On the facts found by the board there was no necessary, or probable, inference that the shipper of the 40 per cent. was to be identified as the shipper of the 60 per cent.

As explained in the judgment which has just been delivered, the error of Mr. Justice Robert Goff, when he referred to the "further difficulty" in the way of the sellers does not impugn the validity of his refusal to draw the inference that the shipper has been sufficiently identified to shift the burden of proving the negative on to the buyers.

I agree with the reasoning and conclusion of Lord Justice Stephenson upon the issue of waiver. Like him I take the view that my conclusions make it unnecessary to decide any of the other questions argued in this Court.

I agree that the appeal should be dismissed.

Lord Justice STEPHENSON: Sir George Baker has asked me to say that he agrees with both judgments just delivered, and with the dismissal of the appeal.

[*Appeal dismissed with costs. Leave to appeal to the House of Lords refused.*]

COURT OF APPEAL

Dec. 3 and 4, 1980

JANOS PACZY
v.
HAENDLER & NATERMANN G.M.B.H.

Before Lord Justice Buckley and Lord Justice Brightman

Arbitration — Stay of action — Impecunious claimant unable to bring arbitration proceedings — Whether impecuniosity ground for refusal of stay — Construction of "incapable of being performed" — Whether a party's impecuniosity rendered agreement incapable of performance — I.C.C. Rules of Arbitration, art. 9 — Arbitration Act, 1975, s. 1 (1).

By a contract dated Oct. 23, 1974, the plaintiff purported to grant to the defendants, a German company, a licence to manufacture and sell airgun pellets in accordance with a system which the plaintiff claimed to have invented, under which agreement the defendants were to pay the plaintiff royalties on the sales of the product. Clause 12 of the contract stated inter alia that:

> Any dispute arising out of or in connection with this Agreement shall be settled with recourse to the Courts in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The arbitrators shall have power to rule on their own competence and on the validity of the Agreement to submit to Arbitration.

It was not disputed that cl. 12 constituted an arbitration agreement with the scope of s. 1 of the Arbitration Act, 1975.

A dispute arose between the parties and on Oct. 12, 1978, the plaintiff commenced an action in the High Court, and served a statement of claim, having obtained a legal aid certificate with a nil contribution for the purpose of fighting that action.

On Dec. 15, 1978, the defendants, without having taken any steps in the action, issued a summons for a stay under s. 1 of the Arbitration Act, 1975. The plaintiff in his answering affidavit stated that he was a legally-aided person and, if the action were to be stayed, the plaintiff would be quite unable to meet the costs of arbitration proceedings, as legal aid was not available for such proceedings.

By cl. 12 of the agreement, the rules governing any eventual arbitration proceedings were the Rules of Conciliation and Arbitration of the I.C.C. (International Chamber of Commerce), art. 9 of which states that a deposit is required from the parties to cover the costs of the arbitration before its commencement, and provides:

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The court shall fix the amount of the deposit in a sum likely to cover the costs of arbitration of the claims which have been referred to it . . .

2. As a general rule, the deposits shall be paid in equal shares by the Claimant or Claimants and the Defendant or Defendants. However, any one party shall be free to pay the whole deposit in respect of the claim or the counter claim should the other party fail to pay a share.

3. The Secretariat may make the transmission of the file to the arbitrator conditional upon the payment by the parties or one of them of the whole or part of the deposit to the I.C.C.

4. When the terms of reference are communicated to the Court in accordance with the provisions of Article 13, the Court shall verify whether the requests for deposit have been complied with.

The terms of reference shall only become operative and the arbitrator shall only proceed in respect of those claims for which the deposit has been duly paid to the I.C.C.

The application for a stay was heard by Mr. Justice Whitford on Apr. 30, 1979, at which hearing the plaintiff did not take the point of his impecuniosity and subsequent inability to pay the deposit required under the I.C.C. Rules, but relied on the Court's discretion not to grant a stay.

———*Held*, by the Ch.D. (Whitford, J.), that the application should be granted and the action stayed, with liberty to both parties to apply.

Correspondence then followed between the parties' solicitors, in which the plaintiff invited the defendants to commence the arbitration, being unable himself to do so for financial reasons. The defendants declined to take any steps to commence the arbitration proceedings, and the matter was therefore restored under the liberty to apply and came before Mr. Justice Whitford again on July 4, 1980. On the restoration, a further affidavit was put in on behalf of the plaintiff, stating that the plaintiff could not obtain financial assistance in connection with the arbitration proceedings, and was quite unable to pay the deposit likely to be required from him in order to commence arbitration proceedings, and in the circumstances the Court was invited to remove the stay on the ground that the agreement to arbitrate was incapable of being performed.

———*Held*, by Ch.D. (Whitford, J.) that, in the circumstances, and as a matter of common sense, the arbitration agreement was incapable of being performed and the stay should be removed.

On appeal by the defendants:

———*Held*, by the C.A. (Buckley and Brightman, L.JJ.), (1) the learned Judge, in his second hearing of the matter, had erred in his approach to the construction of the words "incapable of being performed" in s. 1 (1) of the Arbitration Act, 1975, when applying them to the present arbitration agreement; even if the plaintiff were incapable of finding the deposit, the incapacity of one party to the agreement to implement his obligations thereunder did not render the agreement one which was incapable of performance within the section and impecuniosity was not a circumstance of the kind envisaged by the Act (*see* p. 307, col. 2; p. 308, col. 2; p. 309, col. 1);

(2) s. 1 (1) being mandatory in its terms, the Court was under an obligation to stay the action at law unless the agreement was null and void, inoperative, or incapable of being performed; as these conditions did not apply, and as the position had not materially altered between the dates of the two applications, the stay should not have been lifted (*see* p. 307, col. 2; p. 308, col. 1; p. 309, col. 1);

(3) it was for the claimant and not the respondent to initiate the arbitration proceedings, in accordance with the I.C.C. Rules, and the defendants were therefore under no obligation to take steps to do so themselves on account of the plaintiff's difficulties in initiating them; and the fact that the defendants might wish to raise a counterclaim made no difference to their obligation — they were entitled to wait for the plaintiff to take his course (*see* p. 308, cols. 1 and 2);

(4) if the impecuniosity of a party were to constitute inability to perform the agreement within s. 1 (1), this would raise administrative problems for the Courts of assessment of the party's resources which Parliament, in introducing the section, could not possibly have contemplated (*see* p. 309, col. 1);

(5) the defendants had not defaulted in any way in their obligations under the arbitration agreement, and had not been guilty, therefore, of any repudiatory conduct; the plaintiff's assertion that the defendants should put up the whole of the deposit required under the I.C.C. Rules, in order to enable the plaintiff to proceed with the arbitration, was entirely without foundation, since it would impose an obligation on a defendant to come to the financial aid of the plaintiff to enable him to bring his claim (*see* p. 309, col. 1).

Appeal allowed. Leave to appeal to the House of Lords refused.

The following case was referred to in the judgments:

Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd., (C.A.) [1980] 1 Lloyd's Rep. 255; [1980] 2 W.L.R. 905.

This was an appeal by the defendants, Haendler & Natermann G.m.b.H. from the

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decision of Mr. Justice Whitford given on July 4, 1980, when he removed a stay which he had earlier imposed by an order dated Apr. 30, 1979, staying an action commenced by the plaintiff, Mr. Janos Paczy on the ground that the dispute between the plaintiff and defendants under the contract dated Oct. 23, 1974, was one which they had agreed should be referred to arbitration.

Mr. Kenneth S. Rokison, Q.C. and Mr. Robin Jacob (instructed by Messrs. Monier Williams & Keeling) for the defendants; Mr. Bernard Budd, Q.C. and Miss Mary Vitoria (instructed by Messrs. Stephenson Harwood) for the plaintiff.

The further facts are stated in the judgment of Lord Justice Buckley.

JUDGMENT

Lord Justice BUCKLEY: This is an appeal from a decision of Mr. Justice Whitford given on July 4, 1980, when he removed a stay which he had earlier imposed by an order dated Apr. 30, 1979, staying an action commenced by the plaintiff, Mr. Paczy, on the ground that the dispute was one which the parties to the relevant contract had agreed should be referred to arbitration.

The contract in question was dated Oct. 23, 1974. It was a contract under which the plaintiff purported to grant a licence to the defendant company, a German company, to manufacture and sell airgun pellets in accordance with a method of manufacture which the plaintiff claims to have invented. Under that agreement the defendant company was to pay the plaintiff royalties on the sales of the product. Clause 12 of the contract, which incidentally supervened upon an earlier contract between the parties relating to the same subject-matter, but I do not think we are concerned in any way now with the earlier contract, is in these terms:

> Any dispute arising out of or in connection with this Agreement shall be settled with recourse to the Courts in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The arbitrators shall have power to rule on their own competence and on the validity of the Agreement to submit to Arbitration.

It is common ground that that clause is an arbitration agreement which falls within the scope of s. 1 of the Arbitration Act, 1975, the arbitration agreement not being a domestic arbitration agreement as defined in that section. Sub-section (1) of s. 1 of the 1975 Act is in these terms:

> If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, 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, shall make an order staying the proceedings.

It will be observed that the section imposes a mandatory duty upon the Court to stay the proceedings at law unless the case falls within the words of exception—

> . . . unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

On Oct. 12, 1978, the plaintiff commenced an action against the defendant company by writ in the High Court in which he claimed—

> . . . an inquiry as to the damages sustained by the Plaintiff by reason of the Defendants' breaches of [the contract in question], and payment of all sums found due upon taking such inquiry together with interest thereon . . .

and an injunction to restrain the defendants—

> . . . from using confidential information the property of the Plaintiff and from selling airgun pellets in the manufacture of which such information has been used. An inquiry as to the damages sustained by the Plaintiff by reason of the Defendants' use of confidential information the property of the Plaintiff or at the Plaintiff's option an account of profits and payment of all sums found due upon taking such inquiry or account together with interest thereon.

Then there are claims for ancillary relief. In that action the plaintiff delivered a statement of claim, in which he claimed that the defendant company had breached the contract by failing to submit royalty accounts and failing to pay royalties in accordance with the contract. It was pleaded that the plaintiff duly determined the agreement with the result that it came to an end on July 10, 1978, and it was alleged that since that date the defendants had wrongfully made use of confidential information which they had obtained under the agreement. In that action the plaintiff has obtained a legal aid certificate for the purpose of fighting the action with a nil contribution.

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On Dec. 15, 1978, the defendant company, without having served a defence or taken any other step in the action, issued a summons for a stay under s. 1 of the Arbitration Act, 1975. In support of that summons evidence was filed in the form of an affidavit of a Mr. Johnson, stating that the matters in dispute were matters within the scope of the arbitration agreement and that the defendants were ready and willing to do and concur in all things necessary for causing the dispute to be decided by arbitration. Evidence was filed in answer in an affidavit of Mr. Fordham raising various points with which I need not deal, and stating in par. 6 of his affidavit that the plaintiff was a legally aided person and that if the action were to be stayed the plaintiff would find difficulty in meeting the costs of any arbitration proceedings as legal aid was not available for such proceedings. I draw attention to the fact that the word used there is "difficulty". That evidence was supported by evidence by the plaintiff himself in an affidavit in which he said that he was at the time of swearing the affidavit unemployed and reliant on unemployment pay and on social security benefit. He refers to the fact that he has been granted legal aid for the purpose of the action with a nil contribution, and he says—

> ... I am advised that legal aid is not available for arbitration proceedings and I would be quite unable otherwise to meet the costs of any such proceedings.

So he puts it rather higher in that affidavit than Mr. Fordham had put it in his; he says that he would be quite unable to finance arbitration proceedings.

On July 21, 1978, the defendants' solicitors wrote to the plaintiff's solicitors saying:

> We have made our clients' position clear to you in earlier correspondence, and would just add that if, as you threatened last August, your client does commence proceedings, they will be vigorously defended and a counterclaim made for your client's breach.

I need not go into the nature of the counterclaim in any depth, but it is founded upon allegations that the process of manufacture of the air pellets, which was the subject-matter of the relevant contract, was not in fact a process invented by the plaintiff and that it was not a secret process and that the plaintiff was not in a position to confer an exclusive licence upon the defendant company, and upon that basis the defendant company asserts that it is in a position to claim repayment of royalties which they had in fact paid before the rupture took place under the contract.

The relevant rules which govern proceedings in arbitrations of the kind of which this arbitration would form one are the rules of the International Chamber of Commerce which, so far as relevant for present purposes, provide by art. 3, par. 1:

> A party wishing to have recourse to arbitration by the International Chamber of Commerce shall submit its request for arbitration to the Secretariat of the Court, through its National Committee or directly. In this latter case the Secretariat shall bring the Request to the notice of the National Committee concerned.
>
> . . .
>
> 2. The Request for arbitration shall inter alia contain the following information:
>
> (a) Names in full, description, and addresses of the parties, (b) a statement of the Claimant's case, (c) the relevant agreements, and in particular the agreement to arbitrate, and such documentation or information as will serve clearly to establish the circumstances of the case, (d) all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Article 2 above.
>
> 3. The Secretariat shall send a copy of the Request and the documents annexed thereto to the Defendant for his Answer.

Article 4 requires the defendant to put in a defence within a limited period.

Article 5 provides that—

> ... if the Defendant wishes to make a counterclaim, he shall file the same with the Secretariat, at the same time as his Answer as provided for in Article 4.

Article 9 deals with a deposit which is required to cover the costs of the arbitration. Paragraph 1 provides:

> The court shall fix the amount of the deposit in a sum likely to cover the costs of arbitration of the claims which have been referred to it . . .
>
> . . .
>
> 2. As a general rule, the deposits shall be paid in equal shares by the Claimant or Claimants and the Defendant or Defendants. However, any one party shall be free to pay the whole deposit in respect of the claim or the counterclaim should the other party fail to pay a share.
>
> 3. The Secretariat may make the transmission of the file to the arbitrator conditional upon the payment by the parties

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or one of them of the whole or part of the deposit to the International Chamber of Commerce.

4. When the terms of reference are communicated to the Court in accordance with the provisions of Article 13, the Court shall verify whether the requests for deposit have been complied with.

The terms of reference shall only become operative and the arbitrator shall only proceed in respect of those claims for which the deposit has been duly paid to the International Chamber of Commerce.

I do not think I need read any other part of the rules.

The application for a stay came before Mr. Justice Whitford in April, 1979. Notwithstanding the evidence to which I have referred no point was taken before the learned Judge, we are told, about the inability of the plaintiff to provide the deposit in accordance with the rules, and it was not suggested to the learned Judge that the arbitration agreement had become incapable of performance. The matter was presented upon the footing that the Court had a discretion in the matter and the Judge was asked to exercise his discretion in favour of granting a stay; and on the other hand he was asked by the plaintiff to exercise his discretion in withholding the stay. The learned Judge granted the stay, and the form of his order was this:

This court doth order pursuant to Section 1 of the Arbitration Act, 1975 that all further proceedings in this action be stayed. [— Then there is a direction as to costs, and the order concludes with the words—] And the parties are to be at liberty to apply.

There was no appeal from that order, so at that stage the action stood stayed.

Some correspondence ensured in May, 1979, with a letter from the plaintiff's solicitors to the defendants' solicitors saying:

You will be aware that our client is not in a financial position to proceed to arbitration, and in view of the Judge's order that if the matter is not referred to arbitration promptly either party may again apply to the court, we would be grateful if you would inform us as soon as your clients have referred the matter to arbitration under the rules of the International Chamber of Commerce. We look forward to hearing that this has been done within the next few weeks.

To which the defendants' solicitors replied:

. . . If our clients choose not to refer the matter to arbitration, we can see no grounds upon which your client could then apply to the court for his proceedings to be reinstated.

On May 10 the plaintiff's solicitors wrote:

. . . Please would you notify us as soon as possible whether your clients intend to take the matter to arbitration, and whether they have a particular candidate as the arbitrator in mind.

The correspondence went on, and later, on June 28, the defendants' solicitors wrote:

You appear to suggest that there is some burden on our clients to commence the arbitration. Reference to the ICC rules shows (as one would expect) that it is the claimant who must initiate matters. In particular, under Article 3 the claimant must make the request for arbitration and put in his statement of case. If and when your client does this, our client will respond under the ICC rules.

On July 9, 1979, the plaintiff's solicitors wrote:

We understand that your clients do not intend to commence arbitration proceedings. You are aware that it was made clear in the proceedings before the court that our client is not in a financial position to commence arbitration under the ICC rules and that his financial position is due to your clients' failure to pay the royalties due under the agreement. In these circumstances would you let us know whether your clients are prepared to commence the proceedings for arbitration.

But the defendants were not willing to initiate the proceedings, and so the matter was restored again under the liberty to apply, and on that restoration a further affidavit was put in by Mr. Fordham on behalf of the plaintiff, in which he said that he had made inquiries as to whether there was any means of the plaintiff obtaining financial assistance in connection with the arbitration proceedings, and he said that a deposit of the total costs must be made before the proceedings began and that it is usual that such a deposit should be paid by the parties in equal shares. The amount of the deposit is estimated in this affidavit at £1140, so that if the parties were required to contribute the deposit in equal shares the amount that the plaintiff would have to find would be of the order of £570. It was said that a suggestion had been made by the court of arbitration that possibly a bank guarantee might be accepted in substitution for cash, but that the plaintiff had enquired as to whether he could obtain a bank guarantee and the bank of whom the inquiry was made was not willing on the basis of the information

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provided to them to provide the guarantee sought. In par. 9 Mr. Fordham says:

> I am informed by the Plaintiff and verily believe that he is unable to provide the deposit required by the ICC court of arbitration from his own resources. In the circumstances I ask this Honourable Court to remove the stay on the present proceedings on the ground that the agreement to arbitrate is incapable of being performed.

Various further affidavits were filed but I do not think I need go through them in detail.

The matter came again before Mr. Justice Whitford on July 4, 1980, and the learned Judge then removed the stay. I think his reason for doing so can be found concisely stated at the end of his judgment where he said:

> Where you have an agreement that any dispute arising in connection with an agreement shall be settled and it is claimed that there is a dispute — the plaintiff contends that he is owed money and the defendants contend that he is wrong — and you get a situation in which the one party (the plaintiff) wants the matter settled and the other party (the defendants) say it should be settled but only by arbitration, and the situation in practical terms is that the plaintiff cannot bring the arbitration and the defendant will not, then it is, as a matter of common sense, an arbitration agreement that is incapable of being performed.

On this appeal Mr. Rokison for the appellant defendants has submitted that the question is one of construction of s. 1 of the Act, and in this particular case it is a question of construction of the words "or incapable of being performed". He says that the words of exception in s. 1 (1) are all words which contemplate that there is no enforceable arbitration agreement on the ground either that the agreement is for some reason null and void or that it is inoperative, or that it is incapable of being performed in the sense that circumstances have become such that it is impracticable to carry the agreement into effect and that it has become frustrated in law. He says that mere impecuniosity in the case of one of the parties to the arbitration agreement is not such a circumstance; it does not render the agreement incapable of being performed. It merely renders one party unable to discharge his part under the agreement. He says that incapability of performance imports finality and that impecuniosity is not either final or irrevocable. He points out that in the present case the plaintiff's claims will not, any of them, start to be statute barred until some time in 1982 and that it is impossible at the present juncture to say that at no time between now and then will it be impracticable for the plaintiff to carry out his part of the arbitration agreement.

On the other hand, Mr. Budd for the respondent plaintiff says that the Court should construe s. 1 of the 1975 Act in a broad way so as to give it a sensible common sense practical effect, and that the words "incapable of being performed" should be construed in the sort of way in which I think Mr. Justice Whitford was indeed prepared to read them, so that any case in which there was a real practical difficulty in proceeding with the arbitration proceedings would be one which could be described as having become incapable of performance within the meaning of the section. He says that the stay was properly removed by the learned Judge because the case falls within the words of the exception in s. 1 (1), that is to say within the words "incapable of being performed".

That is the point which I think stands in the forefront of the present case; what is the proper construction and effect of s. 1 (1)? In considering that question I am prepared to assume in the plaintiff's favour that he is incapable of finding the deposit, although I am bound to say that I am not at all satisfied that the evidence establishes that in at all an absolute sense. In my judgment, on the true construction of these words, "incapable of being performed" relates to the arbitration agreement under consideration. The incapacity of one party to that agreement to implement his obligations under the agreement does not, in my judgment, render the agreement one which is incapable of performance within the section any more than the inability of a purchaser under a contract for purchase of land to find the purchase price when the time comes to complete the sale could be said to render the contract for sale incapable of performance. The agreement only becomes incapable of performance in my view if the circumstances are such that it could no longer be performed, even if both parties were ready, able and willing to perform it. Impecuniosity is not, I think, a circumstance of that kind.

The section is, as I have said, mandatory in its terms; the Court is under an obligation to stay the proceedings at law unless the agreement is null and void, inoperative, or incapable of being performed. If it could be shown that, owing to events which occurred since the stay was imposed, the arbitration agreement had become incapable of performance I think the Court would very probably be right in lifting the stay. But it seems to me that, unless the circumstances at the time when the matter was before the learned Judge in July 1980 were such that if a stay had then been sought it could properly have been refused, it cannot have been

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plaintiff will, owing to circumstances, fail to take the steps requisite to be taken by him as claimant. The question therefore is whether it would be correct in such circumstances to say that the arbitration agreement is incapable of being performed. The true analysis of the situation will be that the claimant is incapable of performing an obligation which is incumbent upon him if the arbitration is to proceed, but the respondent to the arbitration on the other hand will be capable of performing his obligations under the rules applicable to the arbitration once the arbitration commences. In such circumstances ought the Court to express itself as satisfied — and that is the wording of the Act — that the arbitration agreement is incapable of being performed? I think the answer to that question is quite plainly No. Take the example given by my Lord of an agreement between a vendor and a purchaser on the sale of land, assume that the purchaser is on the verge of bankruptcy owing to some suuervening circumstances. In such a case it would clearly be right to say that the purchaser is incapable of performing his part of the sale agreement, but it would not be right to say that the sale agreement is incapable of being performed. What will have happened in the case supposed is that one party to the agreement is incapable of performing the obligations incumbent upon him and the other party is capable. That is not the situation which is required by s. 1 of the Act to exist if the Court is to make an exception and not stay the action. For the stay to be lifted in present circumstances, I think it would be necessary to re-write the sub-section. It would have to read — and I leave out unnecessary words:

> Any party to the proceedings may apply to the court to stay the proceedings; and the Court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed *by the other party to the proceedings*, shall make an order staying the proceedings.

To my mind quite clearly we are not justified in making that alteration to the wording of the sub-section.

Furthermore, it seems to me that inability to perform the agreement by reason of the impecuniosity of one party raises administrative problems which cannot possibly have been contemplated by Parliament when this section was introduced. Is the Court to assess in some way the financial resources of a party? Is the Court to draw up a sort of balance sheet, estimate the totality of the assets of the relevant party, valuing his vested and contingent and reversionary interests, his dwellinghouse and his personal effects, and then subtract his liabilities in order to reach a conclusion as to his financial resources? Or how otherwise is an alleged case of impecuniosity to be put to the test? As I have said, I do not think that such an exercise can ever have been in the mind of Parliament.

The respondent sought to rely on the *Bremer Vulkan* case [1980] 1 Lloyd's Rep. 255. There the Court interfered at the instance of the arbitrating respondents, because the arbitrating claimants had been guilty of inexcusable and inordinate delay amounting to repudiatory conduct. Lord Denning, M.R., indicated during the course of the case that in his view the Court might also interfere where the arbitrating respondents had been guilty of repudiatory conduct. But in the instant case the respondents have not defaulted in any way, so far as I can see, in the obligations which are incumbent upon them under the arbitration agreement; nor have they threatened in any way to default on the obligations which will be incumbent on them under the rules of the International Chamber of Commerce once the arbitration is under way. The respondent to this appeal sought to assert that there was some obligation on the defendants in the action to put up the whole of the deposit which will be required under the arbitration rules to enable the plaintiff to proceed with his arbitration. That seems to me with all due respect to be a fantastic assertion, as it would impose an obligation on a defendant to come to the financial rescue of a plaintiff to enable him to prosecute his claim. I think there is no such obligation. Therefore I think it cannot possibly be said that the defendants have been guilty of any repudiatory conduct.

The plaintiff's misfortune, as it seems to me, really stems from two facts. First that legal aid unfortunately is not available in arbitration proceedings, and secondly that sub-s. (1) of s. 1 is mandatory and not discretionary. If it had been discretionary it is possible — no more than possible — that the Court might have been in a position to assist the claimant. But as matters stand I think it is impossible for the Court to come to the rescue of the plaintiff in any way and I think for the reasons given by my Lord and the few observations I have made that this appeal must be allowed.

[*Appeal allowed; the order of Mr. Justice Whitford of July 4, 1980 to be discharged. The costs in the Court of Appeal and the Court below to be paid by the respondent, the order for costs not to be enforced without leave of the Court. Legal aid taxation of the plaintiff's costs. Leave to appeal to the House of Lords refused.*]

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right for the learned Judge to lift the stay which he had earlier granted. In the circumstances of the present case it seems to me that if a stay had been sought in July, 1980, the circumstances were not then such, and I do not think they are such today, as would have made it proper to refuse the stay. Consequently in my judgment the circumstances are not such as to enable the Court to lift the stay, having regard to the duty which is imposed by the section on the Court to stay the legal proceedings unless the agreement is null and void, inoperative or incapable of being performed. This is not a matter in respect of which the Court has a discretion, for the legislature has imposed an obligation upon the Court to stay proceedings at law unless the case falls within the words of the exception.

I can see no justification for the suggestion which has been made, that the defendants were in this case under any obligation themselves to initiate the arbitration proceedings on account of the plaintiff's difficulties in initiating them. It is clear from the ICC rules that it is the duty of the claimant to formulate his claim in the first instance. At that stage he does not have to find the deposit. It is then for the respondents to put in their defence, and it is only after that stage has been reached that any question of finding the deposit arises. It is for the arbitration court to decide by whom the deposit shall be paid, and if the deposit is to be paid partly by one party and partly by another, to decide in what proportions it is to be paid. It is for the parties to abide by whatever directions that court gives in that respect. It has been suggested by Mr. Budd that the defendants here are under an obligation to provide the whole of the deposit because of the plaintiff's inability to provide any part of it and because the defendants have entered into the arbitration agreement (cl. 12 of the contract). I can see no good basis, if Mr. Budd will forgive me for saying so, for that submission. Still less do I think it can be said that the defendants in failing to offer to provide the deposit have been guilty of a repudiatory breach of the arbitration agreement when, as Mr. Rokison points out, they have not in fact been asked to provide any part of it by anybody.

The defendants have indicated that if the plaintiff pursues his claim they may be disposed to raise a counterclaim. Hitherto the plaintiff has not propounded any claim in the arbitration proceedings, and so the question of whether or not the defendants would counterclaim in the arbitration proceedings has not yet arisen. But in any event, the defendants in my view are under no obligation to counterclaim if they do not choose to do so; they are perfectly entitled to sit quiet and wait for the plaintiff to take his course. That I think appears from what was said in this Court in *Bremer Vulkan Schiffbau und Maschinen Fabrik v. South India Shipping Corporation Ltd.* reported in [1980] 1 Lloyd's Rep. 255 and [1980] 2 W.L.R. 905, particularly in the judgment of Lord Justice Roskill.

In my judgment the plaintiff cannot rely on his own inability to carry out his part of the arbitration agreement as a means of securing a release from the arbitration agreement. The arbitration agreement remains an agreement which is perfectly capable of being performed if the parties are themselves capable of performing it, and to construe s. 1 (1) in a way which would allow a plaintiff or claimant in arbitration proceedings to say, "I am unable to perform my part of the arbitration agreement, therefore the arbitration agreement has become incapable of performance, therefore the stay on the proceedings in the Court of law should be lifted" appears to me to be one which is quite contrary to the effect and the policy of the section.

For those reasons, with deference to the learned Judge and with considerable sympathy for the point of view which he took, because it is a difficult position in the present case, I nevertheless think that he was mistaken in lifting the stay, and I would allow this appeal.

Lord Justice BRIGHTMAN: I entirely agree. I have much sympathy for the plaintiff in the financial predicament in which he finds himself, but I also think that the appeal must be allowed.

In my view the first submission made by the appellants' Counsel in opening his case is decisive. The submission was this: the fact, if it be a fact, that the plaintiff has insufficient financial resources to initiate or prosecute an arbitration for the purpose of settling the current dispute does not mean that the arbitration agreement is incapable of being performed within the meaning of s. 1 of the 1975 Act. This is a pure question of construction of a relatively simple phrase in the context in which it is found. The rules of the International Chamber of Commerce relating to arbitrations, which govern this particular arbitration agreement, make provision for a sum to be deposited at an early stage of the arbitration in respect of the costs of the arbitration, and it is likely, I think almost inevitable, that a direction would be given for the assessed sum to be deposited, in part at least, by the claimant. I will assume for present purposes that the plaintiff will not be able to place on the table that sum by way of his contribution to the deposit. So in those circumstances the arbitration will never get under way, for the simple reason that the

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