IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
(AS TO CHAMBERS)

1981 F. No. 1760

Royal Courts of Justice
Thursday, 10th June, 1982.

Before:

MR JUSTICE BINGHAM

B E T W E E N :

JOHN ERNEST BOWLER (Plaintiff)

AND

MERRILL LYNCH PIERCE FENNER AND SMITH INC. (a body incorporated according to the laws of Delaware) (First Defendant)

AND

MERRILL LYNCH PIERCE FENNER AND SMITH LIMITED (Second Defendant)

AND

MERRILL LYNCH PIERCE FENNER AND SMITH (BROKERS AND DEALERS) LIMITED (Third Defendant)

(Transcribed from the Official Court Tape by Barnett, Lenton & Co., 46/47 Chancery Lane, W.C.2.)

MR. M. LITTMAN, Q.C., and MR. R.J.P. AIKENS (instructed by Messrs. Duthie Hart and Duthie) appeared as Counsel on behalf of the Plaintiff.

MR. M. BURTON (instructed by Messrs. Linklaters & Paines) appeared as Counsel of behalf of the First, Second and Third Defendants.

J U D G M E N T (Reserved)

(As approved by the Judge)

J U D G M E N T (Reserved)

(As approved by the Judge)

MR JUSTICE BINGHAM: I have before me three summonses in this action. By the first, issued on the 21st January, 1982, the First Defendant seeks a stay of all further proceedings against it pursuant to Section 1 of the Arbitration Act 1975. By the second summons, issued on the 9th March, 1982, the First Defendant seeks a stay of all further proceedings against it on the ground of lis alibi pendens. By the third summons, the Second and Third Defendants ask that all further proceedings in this action against them be dismissed pursuant to Order 15, Rule 6, of the Rules of the Supreme Court.

The background facts can be summarized quite briefly. The Plaintiff is a British citizen who lives in Essex and is a man of means. The First Defendant is a very well-known and well established company of American stock-brokers and futures commission merchants. The Second and Third Defendants are companies in the same group. The Plaintiff had it in mind to trade through the Defendants in commodities and long term futures. Accordingly, on the 12th September, 1980, he met in London with a Mr. Hutchinson acting for one or other of the Defendants and entered into a written agreement to open an account with the First Defendant. I shall return to the terms of that agreement shortly. The Plaintiff's case is that at the meeting he gave strict instructions concerning the manner in which trading was to be carried out on his behalf, and on that understanding the Plaintiff transferred $250,000 to the First Defendant's account in New York. It was clear that the dealing was to be in United States markets. The first bout of dealing resulted in a loss to the Plaintiff of $161,295 and the Plaintiff complains that this loss arose because his instructions were disregarded and the dealing was negligently carried out. The Plaintiff alleges that there was a further meeting at which Mr. Hutchinson was given further instructions, but a further bout of dealing resulted in the Plaintiff's account going into deficit to the overall extent of $55,395.25. In respect of these losses the Plaintiff makes the same complaints as before. A further complaint is made that Mr. Hutchinson was inadequately supervised. The Plaintiff brings this action in

order to recover his losses. I assume, although for obvious reasons the Defendants have not yet served a Defence, that the Defendants deny liability.

A The written agreement of the 12th September, 1980, was between the Plaintiff and the First Defendant and was described as a Commodity Account Agreement. Clause 1 provided that:

"Any and all transactions for your account shall be subject to the regulations of all applicable federal, state and self-
B regulatory agencies, including, but not limited to, the various commodity exchanges and the constitution, rules and customs, as the same may be constituted from time to time, of the exchange or market (and its clearing house, if any) where executed ...."

C Clause 10 provides that the agreement shall be governed by the laws of the State of New York. On the second page are to be found these provisions:

"Arbitration Agreement

Any controversy arising out of or relating to my account,
D to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the contract market upon which the transaction giving rise to the claim was executed or the New York Stock Exchange, Inc. as I may elect. If I
E do not make such election by registered mail addressed to you at your main office within five days after demand by you that I make such election, then you make such election. Judgment upon any award rendered by the arbitrations may be entered in any court having jurisdiction thereof.

F While the Commodity Futures Trading Commission (CFTC) encourag the settlement of disputes by arbitration, it requires that your consent to such an agreement be voluntary. You need not sign this Arbitration Agreement to open an account with Merrill Lynch Pierce Fenner & Smith, Inc. (See 17 CRF 180.1 - 180.6)

G By signing this Arbitration Agreement, you may be waiving your rights to sue in a court of law. But you are not waiving your right to elect later to proceed pursuant to Section 14 of the Commodity Exchange Act to seek damages sustained as a result of a violation of the Act. In the event a dispute
H arises you will be notified that Merrill Lynch Pierce Fenner

& Smith, Incorporated intends to submit the dispute to arbitration. If you believe a violation of the Commodity Exchange Act is involved and you prefer to request a Section 14 'Reparations' Proceeding before the CFTC, you will still have 45 days in which to make that election."

These unusual arbitration provisions call for a little explanation, which is to be found in the evidence before me. Firs futures commission merchants such as the First Defendants are not permitted by United States law to make the customer's entry into an arbitration agreement along these lines a condition of doing business. Hence the statement that consent to the agreement must be voluntary and that the customer need not sign the arbitration agreement. But I think it plain that if a customer (duly warned as he is required to be) does enter into the arbitration agreement that is then an agreement which is binding according to its tenor. It is not, once signed, voluntary in the sense of not being intend to create legal relations. Secondly, even if a customer enters into the arbitration agreement that does not (and by United States law may not) deprive him of his right, as an alternative to arbitration, to seek reparation in proceedings before the Commodity Futures Trading Commission. This is a federal regulatory agency which may appoint an Administrative Law Judge to adjudicate upon disputes concerning commodity trading which are submitted to it. Oral public hearings are held and from its decisions there lies an appeal to the United States Court of Appeals. It is common ground that the CFTC could entertain and adjudicate upon all the complaint made by the Plaintiff in this action and, if he made good his complaints, award him full damages. But the CFTC may, after preliminary enquiry, decide not to proceed with a matter and, if it learns that other civil proceedings are in train, is apparently likely to stay its own proceedings. Thirdly, it appears on the evidence that, although normally willing to arbitrate where nominated to do so, the New York Stock Exchange will not proceed t arbitrate upon a matter which is already the subject of a live proceeding before the CFTC.

The first litigious blow between these parties was struck on the 11th September, 1981, when the Plaintiff issued his writ again all three Defendants in this court, having obtained leave to serve the First Defendant out of the jurisdiction. Points of Claim followed on the 11th January, 1982. On the 20th January the Firs Defendant gave notice that it intended to submit the dispute to

arbitration in accordance with the arbitration agreement dated the 12th September, 1980, and required the Plaintiff within five days to elect whether arbitration should be in accordance with the rules of the relevant commodity exchanges or of the New York Stock Exchange. Within the five day period New York attornies acting for the Plaintiff replied to the First Defendant:

> "Please be advised that, in accordance with the arbitration provision of Mr. Fowler's September 12, 1980 Commodity Account Agreement with you, he elects to proceed with a Section 14 'Reparations' Proceeding before the Commodities Futures Trading Commission on the ground that his claim involves a violation of the Commodity Exchange Act."

On the 9th March, 1982, the First Defendant's London solicitors gave notice that the First Defendant, in default of election by the Plaintiff, elected arbitration by the rules of the New York Stock Exchange. Two points have been made arising out of these exchanges. For the Plaintiff it is said that his strong desire is and always has been to pursue his complaint in this action in England, his election of reparation proceedings before the CFTC being designed (as a fall-back) to avoid what he regards as the worst of all options, namely arbitration in the United States. I do not doubt that this accurately describes his state of mind. For the First Defendant it is said that the notice of the 9th March was not intended in any to to challenge the Plaintiff's valid election of reparation proceedings; it was intended merely to fix which arbitration rules were to govern in the event that the CFTC adjudication did not for any reason go ahead. This also I accept. The First Defendant, like the Plaintiff, was quite properly safeguarding its position against future eventualities.

I turn to the First Defendant's first summons, seeking a stay of these proceedings under Section 1 of the Arbitration Act 1975 on the strength of the arbitration agreement contained in the agreement of the 12th September, 1980. Mr. Michael Burton, for the First Defendant, challenged the validity of the Plaintiff's electic for reparations proceedings because (he said) this was a mere tacti to escape arbitration; therefore it was no election, and there remained arbitration as the only means of resolving the dispute; the present proceedings must accordingly be stayed. I consider this argument to be plainly wrong, since the Plaintiff's election was in my view effective, whatever the intention which underlay it.

Mr. Burton did not press this argument, but instead submitted, with much greater force, that while the parties' agreement provided for arbitration, with the alternative of reparations proceedings on the election of the Plaintiff, one thing it plainly did not provide for was action in a court of law here or elsewhere. Since the parties intended to exclude such a possibility a stay should be granted.

Mr. Mark Littman, for the Plaintiff, contended that this case was not one in which the court was obliged to order a stay of these proceedings under the 1975 Act for two quite separate reasons. First, he submitted that in order to fall within Section 1(1) and 7(1) of that Act an arbitration agreement had, in the case of future disputes, to be a mutually binding obligation to submit any relevant dispute to arbitration as the exclusive means of determining the dispute. It was not enough that arbitration was one contractual means of resolving the dispute, with one or other or both parties remaining free to choose another means. Section 1, and the New York Convention on which it was based, were not concerned with cases such as the present where arbitration was not the exclusive contractual mode of resolving disputes; the inapplicability of the procedure was shown here by the fact that, if an order of stay were made, the parties would not arbitrate but would pursue the reparations proceedings. Secondly, Mr. Littman submitted that even if, contrary to his first submission, this was an arbitration agreement within Section 1 of the 1975 Act, it was nonetheless an agreement which was "inoperative or incapable of being performed" within the meaning of that section for the reason already given, that the chosen arbitral tribunal would not in practice conduct an arbitration while there were concurrent reparation proceedings. It made no difference that it was the conduct of the other party which led to that result. The upshot was that on this ground also the case was not one where a stay had to be granted.

Mr. Littman's first submission appears (somewhat surprisingly) to be virtually free of authority and no clear pointer to the answer is to be found in the language of the statute. I must therefore approach it as a question of principle. Doing so, I conclude that his submission is correct. The New York Convention and the 1975 Act are designed to secure the international recognition and enforcement of arbitration clauses. They are in

no way concerned with choice of jurisdiction clauses. To safeguard the operation of non-domestic arbitration clauses, a mandatory stay is provided by Section 1. Where the section applies the court must therefore stay the action without any consideration of the procedural merits, and even though the action has been begun in what is ex hypothesi to be regarded as a suitable forum. There are good policy reasons for this rule in a case to which the section plainly applies, and the result must follow. I would, however, be reluctant to extend the section to a case to which, in my judgment, it does not plainly apply, because the consequences of applying the rule may be serious and any presumption should be in favour of preserving rather than ousting an intervening judicial discretion. I do not think that the section applies, plainly or at all, to an agreement such as the present and it would in my view be anomalous if a statutory provision having the object of Section 1 were to have the effect of protecting and preserving, not arbitration proceedings, but proceedings of an entirely different character. I do not therefore think that the agreement between these parties is an arbitration agreement within Section 1 of the Act.

If I am wrong on that point, I conclude that Mr. Littman is correct in submitting that the arbitration agreement is inoperative or incapable of being performed. The agreement simply will not work, because the arbitral tribunal (very understandably) will not arbitrate while there are parallel proceedings on foot. The arbitration agreement doubtless would have operated had the Plaintiff not elected for the reparations procedure, but in making that election the Plaintiff was doing nothing wrong; he was merely taking advantage of a procedure which United States law stipulated should be open to him, and of which the agreement itself clearly reminded him. The end result is as the Plaintiff contends. Because the arbitration agreement is inoperative, the effect of an order will not be to make the parties arbitrate but to make them pursue a different procedure. So on this ground also I hold this to be a case not requiring a stay under Section 1.

Once Section 1 of the 1975 Act was held to be inapplicable, Mr. Littman submitted that the lis alibi pendens summons was (by analogy) governed by the principles adumbrated by Lord Scarman in Castanho v. Brown & Root (U.K.) Ltd. [1981] A.C. 557, at 575C. Mr. Littman also relied on the dictum of Lord Reid in The Atlantic

Star [1974] A.C. 436 at 454E that the onus was on the defendant clearly to show that in all the circumstances the action should not proceed in England. Mr. Littman submitted that England is plainly the natural forum for trial of this dispute and the Defendants could not discharge their burden of showing it was not. The Plaintiff is British and lives here. His solicitor practises in London. The Defendants are a large international organisation and all trade here. The only individuals with whom the Plaintiff dealt worked here (as two of them still do), and all the transactions in issue were effected from here. The claim fell within Order 11, Rule 1. It was natural for the Plaintiff to wish to sue here. The Plaintiff's claim rested on ordinary common law principles as familiar to this court as to the CFTC. The onus was on the Defendants to show that there was no legitimat personal or juridical advantage in suing here. They could not do so. There were obvious advantages to the Plaintiff in suing here as (for example), in the greater convenience, the avoiding of expensive travel and the prospect of recovering costs against the Defendants if successful.

Mr. Burton took issue with this approach. On the forum, he pointed out that the First Defendant is a United States company that all the trading was to be in United States markets; that the was an express choice of New York law; and that both the contractual disputes procedures were United States based. On the aspect of relative advantage, he suggested that the CFTC's familiarity with the relevant law and practice of commodity tradir would make for a much briefer and consequently less expensive determination. His main riposte was, however, in reliance on The Eleftheria [1970] P. 94, that where there is an agreement to refer disputes to a foreign court or tribunal this court should ordinarily stay proceedings here in relation to any dispute fallir within the agreement unless strong cause for not doing so is shown Here, in Mr. Burton's submission, there was an agreement to refer the dispute to foreign arbitration or a foreign tribunal and no such cause is shown.

The principles relevant to this question are, in my judgment, those summarized by Robert Goff J. in Trendtex Trading Corporatior v. Credit Suisse [1980] 3 All E.R. 721 at 733h to 735b, which summary I respectfully and gratefully adopt. That case was one in which there was an exclusive jurisdiction clause, as this case

is in effect, and I approach the case by asking whether the Plaintiff has satisfied me that in all the circumstances it would be unjust to stay this action. If he has so satisfied me, then I should exercise my discretion in the Plaintiff's favour to refuse a stay. If not, I should exercise my discretion in the Defendants' favour and grant a stay.

I start by considering briefly the matters mentioned by Brandon J. in The Elefttheria. On the question of evidence, there is no balance in favour of the Plaintiff. It will of course be less convenient for him to give evidence in New York, but not grossly inconvenient. I am confident that all relevant documents would be made available in either place. Evidence of market practice would be more readily available, and less necessary, in New York. There is no reason to think that evidence from the Defendants' witnesses could not be procured in New Yor , but if it could not that would be unlikely to harm the Plaintiff. The Plaintiff has not suggested that any oral evidence would be unavailable to him in New York. Evidence of New York law would not be needed there. It obviously weighs in the scales in favour of a stay that the applicable law is that of New York. While the Plaintiff is British, the First Defendant is a Delaware Corporation The Second and Third Defendants are (I assume, but do not know) English corporations, but they are minor actors in this drama and are part of an American dominated group. I have no reason to doubt the Defendants' genuine desire for resolution of this matter in the United States by one or other of the procedures for which the First Defendant stipulated in its agreement. I would echo the comment of Robert Goff J. (at p. 735a) that "If the parties have chosen to submit their disputes to the exclusive jurisdiction of a foreign court it is difficult to see how either can in ordinary circumstances complain of the procedure of that court", but here only one substantial complaint is made of the CFTC's procedure, namely that costs are not ordinarily awarded to the successful party. That is not an insubstantial matter but it cannot weigh heavily in the balance where a party has chosen this procedure and it may be that if the Plaintiff had chosen to arbitrate he could, if successful, have recovered his costs. My attention was drawn to a provision of Section 14(d) of the Commodity Exchange Act requiring a non-resident of the United States making complaint to the CFTC to furnish a bond in double

the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if he should prevail, but it appears that the CFTC has authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond. Since this country certainly permits complaints to be filed without bonds being furnished, although in practice often requiring foreign plaintiffs to give security (particularly if they are insubstantial), and since the Defendants have undertaken not to argue that there should be a bond, this does not appear to me to be a weighty consideration. Other procedural factors such as cost and time appear to me to be fairly evenly balanced. Viewing this matter in the round, I regard the present as a case in which the American is as natural as the English forum and in which the Plaintiff can point to no advantage to him in English proceedings which would begin to outweigh the effect of a deliberate contractual commitment to a choice between arbitration in the United States and the statutory United States reparations procedure. I accordingly feel that it would not be unjust to the Plaintiff to stay these proceedings against the First Defendant and I grant the stay which is sought. The ground of this application is not strictly to be regarded as lis alibi pendens, but it was not suggested that Mr. Burton's argument was not open to him and the true ground of his application was made clear.

I should mention one point which arose unexpectedly during argument and which I am unable to resolve. Regulation 180.3(b)(3) of the relevant United States Regulations provides that:

> ".... The customer must also be advised that if he or she seeks reparations under section 14 of the Act and the Commission declines to institute reparation proceedings, the claim or grievance will be subject to the preexisting arbitration agreement and must also be advised that aspects of the claim or grievances that are not subject to the reparations procedure (i.e. do not constitute a violation of the Act or rules thereunder) may be required to be submitted to the arbitration or other dispute settlement procedure set forth in the preexisting arbitration agreement."

It is not clear on the evidence whether this advice was given to the Plaintiff nor what the effect of an omission to give it would be. The parties asked me to give judgment without waiting for this aspect to be explored. I mention the point only to record that it was not overlooked and that the parties have agreed to keep

it open for argument hereafter should either of them wish to pursue it.

I turn lastly to the third summons seeking dismissal of the proceedings against the Second and Third Defendants under Order 15, Rule 6, of the Rules of the Supreme Court. The Plaintiff has joined these Defendants because he believes that Mr. Hutchinson (and perhaps a Mr. Manduka) represented one or other or both of them. The joinder is resisted because the First Defendant has undertaken to meet and honour any claim which the Plaintiff may establish, taking no point on parties. The September 1980 agreement was made with the First Defendant alone and it is willing to meet any liability which arises. Accordingly it is urged that the joinder of the Second and Third Defendants is pointless and, the action having been stayed against the First Defendant, should not proceed against them alone.

I find this a curiously troublesome point. On the one hand I have no hesitation in accepting the First Defendant's assurances that it would not seek to escape liability in reliance on any technical point concerning parties. That means that the joinder of these Defendants is likely to be futile. On the other hand, it is not said that the Plaintiff's pleading discloses no cause of action against these Defendants and <u>prima facie</u> it is up to a Plaintiff to decide whom he wants to sue. The answer to my dilemma must be found in the language of Order 15, Rule 6(2)(a), which empowers the court to order any person who has been improperly or unnecessarily made a party to cease to be a party. There is no question here of the Second and Third Defendants having been made parties improperly. Is their joinder unnecessary? In one sense it is, since the Plaintiff can obtain any relief to which he is entitled against the First Defendant in the United States. But I think the rule is concerned with the necessity of joining these parties for the purpose of obtaining relief in these English proceedings, and I cannot say that for that purpose this joinder is unnecessary, least of all now that I have stayed proceedings against the First Defendant. I therefore conclude that the Second and Third Defendants are not entitled to this order, neither side having argued that any distinction should be drawn between the Second and Third Defendants. I reach this conclusion without enthusiasm since if these proceedings continue against these Defendants only they w either duplicate the American proceedings without adding anything or the

will lead to an inconsistent decision, which would also be unfortunate. I am nonetheless bound by the effect of the rule as I understand it, and I must resist the temptation to speculate whether there may not be or arise another ground upon which the Second and Third Defendants could restrain these proceedings against them.

In the result the first and third summonses are dismissed. On the second summons I make the order sought.

MR BURTON: My Lord, your Lordship knows, of course, the historical reason as to why the first summons was issued the minute there was an election for reparations. The real dispute was on the second summons, in my submission, and I would ask your Lordship to order that the costs be those of the First Defendants, they having succeeded. My Lord, in relation to the third summons, very little time, if any, was taken up on any arguments on the third summons and I would ask your Lordship to either make no order on that summons or to say that the costs of the third summons should follow the costs on the summons which has been successful. My Lord, subject to that, if your Lordship makes the order that the First Defendants have their costs, as I ask, then I do not need to address your Lordship on the costs reserved as a separate issue which, in my submission, should also be the First Defendant's. My Lord, if your Lordship is to make any other order as to the costs on the summonses than that I ask, then I would address your Lordship separately on the question of the costs reserved on the adjournment on the 14th May.

MR JUSTICE BINGHAM: Yes. Mr. Aikens.

MR AIKENS: My Lord, in my submission that would not be the right order as to costs and I think this is one of those cases where your Lordship should consider the costs of each of the summonses separately. So far as the first summons is concerned, the bulk of the evidence was directed to the question of a stay under Section 1 certainly on the effective New York law, and on that summons we have been successful. I would submit that the correct order on that summons is that we should have our costs. It may ---

MR JUSTICE BINGHAM: Well, the way it strikes me at the moment is that although the first and second summonses are separate, nonetheless the real argument was: should there be a stay or should there not; and Mr. Burton fired two barrels. I do not think you should pay the costs of the first summons, but I think it would be an artificial result to say that you should get them when the substance, as to whether there should be a stay or not, has gone against you.

MR AIKENS: Well, my Lord, as to the third summons - we won on that - and therefore I do not think that is (inaudible). My Lord, so far as the second summons is concerned, really the way that Mr. Burton has won in the end is something that arose out of his argument in reply. Your Lordship will recall that The Eleftheria was not raised until Mr. Burton replied and the way it was put in the summons was lis alibi pendens, not that the parties have agreed a particular forum, and that therefore they should be held to that

contractual agreement. Indeed, that was not the way it was opened by Mr. Burton on the 28th May. In my submission, it would not be correct to say that we ought to bear the costs of that. If that was the way it had been put in the affidavit in the first place, which was served on the 26th April, and if there had been an amendment to the terms of the summons, matters may have been different in the sense that the whole thing might have been telescoped and, my submission, my Lord, on the second summons, would be, at any rate, that we should not have to pay the costs of that or that the costs should be split. Now, my Lord, that does leave the Question of what should happen about the costs of the adjournment on the 14th May. Would your Lordship like me to address you on that now or do you want to deal with ---

MR JUSTICE BINGHAM: Just remind me: it was because you put in some evidence at a late stage, was it not?

MR AIKENS: Well, my Lord, there will be an argument as to who put in evidence late.

MR JUSTICE BINGHAM: It was all evidence to do with Section 1?

MR AIKENS: It was all evidence to do with the Section 1 Summons and what had happened was on the 26th April, 1982, Mr. Burton's clients had served their affidavit, some three months after the original summons. Your Lordship should know that this case was due to have been heard in March, but it was adjourned very shortly before the hearing because it was inconvenient to my friend, I think. My solicitors had been pressing for an affidavit in support as early as the middle of February 1982 but the Defendants had not served it until 26th April, 1982. There was a series of letters; I think no less than 5 letters on the subject, from my solicitors to the Defendants' solicitors. As your Lordship knows, we have been in consultation with American lawyers throughout. It was felt right to consult the American lawyer, Mr. Solovay, after I had been instructed to draft the affidavit in reply. We served our affidavit in reply on the 11th May, that is to say, three days before the hearing, and then Linklaters were able to get in touch with their American lawyers. They managed to get a "rapifax" copy of an opinion of Mr. Markham over here in time to present us with an affidavit in reply on the morning of the hearing on the 14th. It came on before your Lordship at 2 o'clock that day.

MR JUSTICE BINGHAM: Yes, I remember.

MR AIKENS: Then I said that an issue was raised in Mr. Markham's opinion letter exhibited to Mr. Ferrari's second affidavit on which we wanted to take further instructions because it raised, among other things, some authorities on the question of whether or not if there were reparations proceedings and they, for one reason or another, were ended then what would happen to the arbitration proceedings? My Lord, that was the reason for the adjournment, and my friend was content that there should be an adjournment, and indeed argued before your Lordship that he should have the costs of and occasioned by any adjournment at that stage, and after argument your Lordship said they should be reserved. My Lord, what happened subsequently was that we went back, consulted Mr. Solovay on the points raised by Mr. Markham. We produced a further affidavit and then, indeed, another salvo was fired off by Mr. Ferrari, with the

said of Mr. Markham before we came back to your Lordship on the 28th. So there was another complete round, as it were, of affidavits. In the event, the issue that was being canvassed in those affidavits has not really figured in the result at all. But, my Lord, in my submission, the whole matter would or could have more easily been dealt with on the 14th if my friend's original affidavit had been produced a lot earlier as was pressed for by my instructing solicitors. As it was, because things got telescoped in the week before the first hearing, and because, inevitably, it meant that we had to go back to American attornies to get the result, it was, at the least, one of those occasions when it was perhaps inevitable that there was going to have to be an adjournment in order for this matter to be considered. My Lord, on that basis, I would seek to submit that the correct order as to the adjournment is that there should be no order as to costs. It is just one of those occasions when both parties are having to go a long way to get their advice and in the event it meant that there had to be an adjournment. My Lord, that would be my submission on that and I think that that, technically speaking, probably arises under the first summons on the stay. My Lord, I would seek to address your Lordship on the question of leave to appeal hereafter but your Lordship might like to deal with costs first.

MR JUSTICE BINGHAM: Well, shall we deal with that separately?

MR BURTON: My Lord, may I first of all take exception to what my friend said - I do not (inaudible) - what my friend said about evidence being directed to Section 1. My Lord, from the very beginning, other than the argument, which as your Lordship knows, I pressed very shortly indeed and abandoned in the light of your Lordship's reaction to it, that there may not have been a valid election at all, there was no argument ever put forward that, once there had been an election for reparations, there was an arbitration clause which alone would justify a stay. From the very beginning, and your Lordship will remember even from the brief argument I addressed to your Lordship on the 14th May when there was an adjournment, when your Lordship had reactions to what I said, I had said either there is here reparations proceedings or there is arbitration and if, as was being said by Mr. Solovay in the affidavit (the substantive affidavit) he put in: "Well, we intend to stop the reparations proceedings", I said, "You cannot do that because if you stop the reparations proceedings you are not going to be free to come over here because then you will be faced with the arbitration agreement which will then be valid and binding. So you have either got yourself a reparations proceeding which you must proceed with or, alternatively, if you stop them, for whatever reason, then you have the arbitration agreement." My Lord, that has been my submission from the very beginning. It is absolutely right that it had not occurred to me (it should have don that The Eleftheria was going to be the important case to rely on until I was sitting listening to Mr. Littman's arguments. Nevertheless, although I did not have the benefit of that authority in mind at the time, that, in essence, was what I was arguing from the beginning and it was helpful to have the support of Lord Brandon when it occurred to me that I should have had it. Well, nevertheless, that has been my case throughout, once there was an election for reparations.

MR JUSTICE BINGHAM: Well, Mr. Burton, let me tell you what my curren

thinking is and see if you want to argue against it. I think, on the Section 1 summons, there should be no order as to costs, including no order as to the costs reserved. Because, in the event that summons - while it was not at the forefront of your argument - was never dropped or withdrawn or abandoned and you did argue that summons. I think that since you have won on the substance of getting a stay, as opposed to not getting a stay, it would be wrong to make an order in Mr. Aikens' favour and therefore I think justice is represented by there being no order on that summons. I think that you should have the costs of the second summons, on which you have succeeded, including costs reserved. It will obviously mean some apportionment between the two summonses but that is something the Taxing Masters can cope with; and I think that you should pay the costs on the third summons on which you have failed.

MR BURTON: Obviously, foreseeing great difficulty for the Taxing Masters, it is simply that my submission would be, and it is obviousl perhaps more appropriate to put it to the Taxing Master than, in the light of your Lordship's views, to your Lordship, was that, in fact, no evidence was put forward at all in any of the affidavits on Section 1. All the evidence was devoted to saying (a) really if you do not get arbitration then you have to get reparations ---

MR JUSTICE BINGHAM: No. Quite a lot of evidence was on Section 1; as to whether it was voluntary or not, and so on.

MR BURTON: My Lord, certainly what I intended to be doing was putting forward all the evidence on how, if you do not proceed with reparations, you have got to proceed with arbitration, my Lord.

MR JUSTICE BINGHAM: Well, it is quite true that in your reply you sai that this was not really a Section 1 case at all; but you did not say that in opening.

MR BURTON: My Lord, in opening, I said, subject to my first argument as to whether there had been a valid election at all, my second submission was that there was either the one or the other - either reparations or arbitration. It was then in reply that I supported it with The Eleftheria. My Lord, certainly in my submission, the case for the Defendants has always been: "You are stuck in fact if I may use that expression, with either reparations or arbitratio we do not mind which but, on either basis there has got to be a sta here and, my Lord, in opening to your Lordship, I said I thought it would be (inaudible) when your Lordship put to me "Under which summons are you primarily asking for the relief?", I said then, in opening, it must be the second summons because the first summons was historical and was issued before there had been the election for reparations. Well, my Lord, it may be that that is a matter for argument before the Taxing Master. My Lord, so far as the adjournment is concerned, on the question of costs reserved, to try to save some argument before the Taxing Master, my Lord, all the costs, in my submission, of that summons were caused by my friend wanting extra time to deal with something that, as I submitted to your Lordship on the 14th May, he should have known fully about already. Because we had had evidence produced to us on 11th and 12th May, two days before the hearing, which for the first time, no indication of it having been given in correspondence before, stated: "Well, what we intend to do is to abandon the reparations proceedings and stick to the English proceedings." We had been

given no indication whether by correspondence or otherwise when there was election for reparations; there was then correspondence saying "We are about to issue the reparations proceedings"; there fairly (insudible) proceeding in the United States. There was never a letter saying: "We elect (or we will be electing) in opposition to your summons, to stay the reparations proceedings." Only in the affidavit did they say that. We then needed to scurry round to get the evidence together to say "But you cannot do that, because if you stay the reparations proceedings you are left with a valid arbitration agreement." We managed to do that in the time by "rapifax"; it arrived on the 14th May, and my friend only had it in the morning. But, my Lord, then it was said: "Well, we need to get American advice on that point, therefore we need an adjournment." My Lord, when my friend says I was content, my Lord, what I did say was that I did not want to cause my friend any embarrassment, but I expressed then what I express now, which was astonishment that this point had not been fully taken into account when advice from American lawyers was taken as to whether this was possible to be done, namely, a reparations notice issued simply to avoid the arbitration but yet the English proceedings to be pursued. My Lord, so I make two comments. Firstly, this was, as I made it then, advice which should have been available to my friend then in order to deal with immediately, because he should have had it at his fingertips already, and the fact that he did not should not be in any way ascribed to my clients whether by way of paying their own costs of that hearing, or at all. And, my Lord, secondly, in the event the adjournment, as I commented in the submissions on the 28th of May, brought forth nothing. There was not a great -- to us my friend's words -- salvo in reply from Mr. Solovay, Mr. Ferrari's lengthy advice having been put to him. All we have is a very short telex which really contained no advice whatsoever, but merely a reiteration of the previous position. My Lord, so that in the event there was nothing gained by the adjournment for my friend. But, on both those bases, in my submission, your Lordship should say, without attempting, or to ask the Taxing Master to attempt at this stage, to deal with the question of costs reserved as between what related to the first summons and what related to the second, your Lordship should say the costs reserved should be the Defendants in any event. Your Lordship did say on the last occasion that your Lordship would be minded to agree with my submissions but that your Lordship, as a matter of practice, never did make any order until your Lordship saw the final outcome, if that was possible. Your Lordship has now seen the final outcome and, in my submission, your Lordship should do what your Lordship was minded to do, namely, order the costs reserved to be the First Defendants in any event. My Lord, as to the rest, I have made my submissions on the first and second summonses and, my Lord, so far as the third summons is concerned, all that I do say there is that it was a matter which took up a very short time indeed and it was simply a matter in which it was desired that it should not be used as a reason why there should not be a stay that there was a need to proceed against the Second and Third Defendants in this country. My Lord, that was the reason why the third summons was brought. Your Lordship has had a great deal of doubt, as your Lordship said in giving judgment, as to which way it should go. My Lord, there was, I think, only five minutes argument in all on the summons and although it is right to say that the summons has been dismissed, it may well be your Lordship might consider that it is not a question of a victory or a defeat for either party on that summons in the light of the way your Lordship has gone on judgment.

Again it may, on the other hand, be a question for the Taxing Master because there was some small evidence addressed to that matter. I do not think I can assist your Lordship any further.

MR JUSTICE BINGHAM: Well, I think Mr. Burton, despite your arguments, the right order is that you should have your costs on the summons on which you have succeeded, including the costs of the summons which were reserved on the 14th May, and that does, I think, reflect the provisional indication which I gave on that occasion. So far as the first summons is concerned, I still think that the just order is that there should be no order as to costs, including the costs attributable to that summons reserved on the 14th May. So far as the third summons is concerned, I think the Plaintiff should have his costs small though they may, in the event, be.

MR AIKENS: My Lord, I would ask for leave to appeal on the second summons. As I have already told your Lordship, I think that the way that summons has gone has changed really quite a lot since the summons was issued. In the event, the principle upon which your Lordship decided it is that (1) there is here, in effect, an exclusive jurisdiction clause, and that (2) having made that decision, in considering all the principles, your Lordship has held that it would not be unjust to stay. My Lord, in my submission, the first question, whether or not there is an exclusive jurisdicti clause in effect is a question of law. It is one of principle rat than discretion and therefore would be fit to go to the Court of Appeal.

MR JUSTICE BINGHAM: Well, I am inclined to think, Mr. Aikens, it is a matter with aspects of novelty which would deserve consideration by the Court of Appeal. Would you argue against that, Mr. Burton?

MR BURTON: My Lord, provided that your Lordship would say... I do not think that I shall be arguing the first summons before the Court of Appeal, but if ---

MR JUSTICE BINGHAM: Well, we are talking .... I am so sorry. But ---

MR BURTON: My Lord, I was only going to say ---

MR JUSTICE BINGHAM: You were only going to say it is a package deal.

MR BURTON: My Lord; a package deal. Well, certainly I would ask for leave to appeal on the third summons but, while I am at it, perhaps I could have leave on the first summons also, although it may not feature greatly. My Lord, provided that that is the position, I do not argue strenuously that there should not be leave

MR JUSTICE BINGHAM: All or nothing is the terms on which Mr. Burton' ---

MR AIKENS: My Lord, I do not think that the "all" so far as the firs summons, is going to make much difference. So far as the third summons is concerned, well, I suppose that is largely a matter of discretion on that basis and it might be said that your Lordship should not grant leave unless it was going to be said that it was a question of construction of the word "unnecessary" (insudible).

MR JUSTICE BINGHAM: There is very little authority on what "unnecessary" means, I think.

MR AIKENS: There is none, so far as I know, my Lord. I did have a look.

MR JUSTICE BINGHAM: No. Well, I think there ought to be leave to appeal on all the summonses.

MR AIKENS: As your Lordship pleases.

MR JUSTICE BINGHAM: Thank you both very much.

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