I would therefore allow the appeal, with the result that Hallams will remain a party to the action.

Fox L.J. I agree and, though we are differing from the judge on this matter, there is nothing I wish to add. The appeal is allowed.

Appeal allowed with costs in Court of Appeal and below in any event. Leave to appeal refused.

Solicitors: Owston & Co., Leicester; Josiah Hincks Son & Bullough, Leicester.

B. O. A.

[HOUSE OF LORDS]

*METAL SCRAP TRADE CORPORATION LTD. . RESPONDENTS

AND

KATE SHIPPING CO. LTD. . . . . APPELLANTS

1989 Oct. 16, 17, 18; 1990 Jan. 25

Lord Mackay of Clashfern L.C., Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Oliver of Aylmerton and Lord Goff of Chieveley

Practice—Pleadings—Striking out—Counterclaim—Contract for sale of ship disputed—Whether disputed contract incorporating arbitration clause—Sellers initiating arbitration—Buyers applying to court to determine whether arbitrators having jurisdiction—Sellers serving counterclaim in action pleading points of claim in arbitration—Whether counterclaim to be struck out—Arbitration Act 1975 (c. 3), s. 1—R.S.C., Ord. 28, r. 7(3)

Ships' Names—Gladys

By an originating summons the plaintiffs, who were a foreign company and party to arbitration proceedings commenced by the defendants, another foreign company, claimed a declaration that the arbitrators had no jurisdiction in that there was no arbitration agreement between the parties. By points of counterclaim served in the action the defendants pleaded their points of claim in the arbitration, namely, a contract for the sale of the vessel with English arbitration and choice of law clauses, the plaintiffs' repudiation of the contract and the defendants' consequent loss. By a summons the plaintiffs, while asserting that their right to apply for a stay of the proceedings pursuant to section 1 of the Arbitration Act 1975 was not to be prejudiced, applied for an order striking out the counterclaim under R.S.C., Ord. 28, r. 7(3). The judge refused the

application and ordered that the action continue as if commenced by writ and that the plaintiffs plead to the counterclaim. On appeal by the plaintiffs the Court of Appeal (by a majority) allowed the appeal and in the exercise of its discretion ordered the counterclaim to be struck out and set aside the judge's order.

On appeal by the defendants:—

Held, allowing the appeal (Lord Goff of Chieveley dissenting), (1) that both parties had a legitimate interest which any order made should protect; that whilst the Court of Appeal was entitled to interfere because the judge in exercising his discretion had erred in principle, the substituted order destroyed the defendants' interest, which was, that in the event of the court declaring, on the trial of the originating summons that there was a contract but that it did not incorporate the disputed arbitration clause, they should be at liberty to pursue their counterclaim in the plaintiffs' action (post, pp. 117C, 118C, 130E–F, G—131B, 132A–B).

(2) That accordingly, an order protecting the interests of both parties should be made, namely, that all further proceedings on the defendants' counterclaim, save in so far as it related to their claim for a declaration, should be stayed pending the decision of the court on the originating summons (post, pp. 117C, 118C, 131B–C, E–F, 132A–B).

Republic of Liberia v. Gulf Oceanic Inc. [1985] 1 Lloyd's Rep. 539, C.A. considered.

Per Lord Mackay of Clashfern L.C. and Lord Bridge of Harwich.

A party against whom English arbitration proceedings have been commenced and who invokes the jurisdiction of the English court by seeking a declaration that he was not a party to the alleged arbitration agreement cannot claim any special immunity from liability to a counterclaim. If the subject matter of the counterclaim is wholly unrelated to the subject matter of the claim, that may well be a ground for striking out the counterclaim under R.S.C., Ord. 28, r. 7(3). But where, as in the present case, the subject matter of the claim and counterclaim are inseparably interconnected, the proposition that they ought to be disposed of in separate proceedings flies in the teeth of the common sense and common justice of the case (post, p. 117C, G–H).

Decision of the Court of Appeal [1988] 1 W.L.R. 767; [1988] 3 All E.R. 32 reversed.

The following cases are referred to in their Lordships' opinions:

European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356, C.A.

Republic of Liberia v. Gulf Oceanic Inc. [1985] 1 Lloyd's Rep. 539, C.A.

The following additional cases were cited in argument:

Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843, H.L.(E.)

Toller v. Law Accident Insurance Society Ltd. (1936) 55 Ll.L.Rep. 258, C.A.

Willcock v. Pickfords Removals Ltd. [1979] 1 Lloyd's Rep. 244, C.A.

APPEAL from the Court of Appeal.

This was an appeal by the defendants, Kate Shipping Co. Ltd., a foreign company, from the judgment dated 30 March 1988 of the Court of Appeal (Fox and Parker L.JJ., Staughton L.J. dissenting) allowing an

appeal by the plaintiffs, Metal Scrap Trade Corporation Ltd., a foreign company, from the judgment and order dated 2 May 1986 of Steyn J. refusing an application by the plaintiffs to strike out a counterclaim of the defendants.

The facts are stated in the opinion of Lord Brandon of Oakbrook.

Anthony Colman Q.C. and *Simon Crookenden* for the defendants.
Stewart Boyd Q.C. and *Giles Caldin* for the plaintiffs.

Their Lordships took time for consideration.

25 January 1990. LORD MACKAY OF CLASHFERN L.C. My Lords, I have had the advantage of reading in draft the speeches to be delivered by my noble and learned friends Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Goff of Chieveley.

I agree with the reasoning and conclusion in Lord Brandon's speech and also with the observations of Lord Bridge. I would like to emphasise two matters. I believe it is highly desirable that the question whether or not there was a concluded contract and if there was whether or not there was an arbitration clause included in it, should be decided before costs are incurred in the arbitration. Nothing in this decision puts any doubt upon that.

Secondly, I wish to emphasise that staying the counterclaim should not be taken to restrict in any way the manner in which the court may deal with it, once these questions have been determined. In particular I do not think the court would necessarily be restricted at that stage in the way suggested by my noble and learned friend Lord Goff of Chieveley. In the light of the full circumstances as they then emerge, it would remain open to the court then to strike out the counterclaim.

LORD BRIDGE OF HARWICH. My Lords, the circumstances giving rise to this appeal are fully examined in the speech of my noble and learned friend Lord Brandon of Oakbrook, and I gratefully adopt his account.

The two primary issues in dispute are whether the parties concluded any binding contract at all and, if so, whether the contract incorporated an arbitration agreement. The respondents' originating summons seeks only a declaration that there was no arbitration agreement. The appellants, while resisting that declaration, seek by counterclaim a declaration that there was in any event a binding contract. These two issues are so closely interrelated that it would seem to me absurd that they should be determined by different tribunals. A party against whom English arbitration proceedings have been commenced and who invokes the jurisdiction of the English court by seeking a declaration that he was not a party to the alleged arbitration agreement cannot claim any special immunity from liability to a counterclaim. If the subject matter of the counterclaim is wholly unrelated to the subject matter of the claim, that may well be a ground for striking out the counterclaim under R.S.C., Ord. 28, r. 7(3). But where, as here, the subject matter of the claim and counterclaim are inseparably interconnected, the proposition that they ought to be disposed of in separate proceedings flies in the teeth of the common sense and common justice of the case.

The respondents are, however, entitled to insist that if, contrary to their primary contention, they are bound by an arbitration agreement, the remaining issues should be disposed of by arbitration and the stay

proposed by my noble and learned friend Lord Brandon of Oakbrook will safeguard their position in this respect.

If the court which tries the primary issues concludes that there was no contract, that will be an end of the case. If it concludes that there was a binding arbitration agreement, the remaining issues will be disposed of by arbitration. It is only if the court concludes that there was a binding contract but no arbitration agreement that any further problem will arise as to how the remaining issues should be disposed of. By the time the court reaches that conclusion, if it does, it will know very much more than we know about what is likely to be involved in any further issues in dispute between the parties. It may well be that the court itself will then have learned so much about the case that it will be in a position to dispose of those further issues with little difficulty. But it will be open to the respondents at that stage to show, if they can, that the remaining issues can more conveniently be disposed of in another forum.

For these reasons and for those more fully deployed in the speech of my noble and learned friend Lord Brandon of Oakbrook, with which I agree, I would allow the appeal in the terms of the order which he proposes.

LORD BRANDON OF OAKBROOK. My Lords, the appellants in this appeal are Kate Shipping Co. Ltd., a Maltese company, formerly the owners of the m.v. *Gladys*. Their London solicitors are Zaiwalla & Co. ("Zaiwalla"). The respondents are Metal Scrap Trade Corporation Ltd., an Indian company, whose business is apparent from their name. Their London solicitors are Stocken & Lambert ("Stocken").

In the early part of August 1982 negotiations took place in Calcutta between the appellants through their agents, Westward Shipping Services Pvt. Ltd. and the respondents directly or through their agents, Intercon Transport Management Ltd., for the sale of the *Gladys* by the appellants to the respondents for scrap. There is a dispute between the parties as to whether these negotiations resulted in a concluded contract, and, if they did, as to whether such contract had incorporated into it by reference a clause providing that English law should apply to the contract and that all disputes arising under it should be decided by arbitration in the United Kingdom ("the disputed clause"). It is the appellants' contention, first, that the negotiations resulted in a concluded contract, and, secondly, that such contract incorporated the disputed clause. It is the respondents' primary contention that the negotiations did not result in a concluded contract at all, because they discovered at a late stage that the *Gladys* was a refrigerated vessel, which they did not want, and that in consequence of that they broke off the negotiations before any contract had been concluded. The respondents contend in the alternative that, if a contract was concluded, it did not incorporate the disputed clause.

Your Lordships do not have to decide in this appeal which of the contentions of the parties in respect of these matters should prevail. It is sufficient to say that both parties have been treated throughout, rightly in my view, as having an arguable case which they are entitled to have tried. In what follows I shall for convenience refer to the appellants as "the sellers" and to the respondents as "the buyers," without prejudice to the respondents' contention that there was no concluded contract.

The buyers having denied the existence of a concluded contract, the sellers on 9 September 1982 purported to treat such denial as a repudiation and claimed to be entitled to damages for it. On the same day they appointed Mr. Bruce Harris, a distinguished London arbitrator, as their arbitrator in the dispute, and called upon the buyers to appoint their own arbitrator. On 25 October 1982 the buyers appointed Mr. Cedric Barclay, another distinguished London arbitrator who regrettably died earlier last year, as their arbitrator. That appointment was expressly made by the buyers without prejudice to their right to contend that there was no concluded contract, or that, if there was, it did not incorporate any arbitration agreement. More than two years later, on 13 November 1984, the sellers served points of claim in the arbitration, in which they claimed somewhat over $160,000 as damages for wrongful repudiation and interest.

On 15 February 1985 the buyers through Stocken issued an originating summons against the sellers in the Commercial Court in London. By that originating summons the buyers claimed:

> "a declaration that Mr. Cedric Barclay and Mr. Bruce Harris, the arbitrators appointed by the plaintiffs and the defendants respectively, have no jurisdiction to act in and about the dispute between the parties in respect of the vessel *Gladys*, by reason that there was no arbitration agreement made between the parties."

The claim so formulated was imprecise in that it did not indicate whether the buyers were claiming that there was no contract between the parties at all, or that there was a contract but no arbitration agreement in respect of disputes arising under it. The originating summons was, however, supported by an affidavit of Mr. Asthana, a partner in Stocken, which made clear the alternative cases sought to be made by the buyers: first, that there was no contract; and, secondly, that, if there was, it did not incorporate an arbitration agreement.

There is one further aspect of the buyers' stance to which it is important to draw attention. This is that, while they put forward the two alternative cases referred to above, they wished, if both such cases were to be decided against them, to have the sellers' claim against them determined in the arbitration which had already been begun, and not by any court either in England or elsewhere.

The sellers did not file any evidence in answer to Mr. Asthana's affidavit. Instead on 5 September 1985 they purported to serve points of counterclaim in the proceedings begun by the buyers' originating summons. I say "purported to serve" because, as will be apparent later, they were not entitled, under the relevant rules of court, to serve a counterclaim without a direction of the court authorising them to do so. In their points of counterclaim the sellers repeated substantially the averments which they had made in their points of claim in the arbitration with regard to the making of the contract, its repudiation by the buyers and the consequent loss suffered by the sellers. In the prayer of the pleading the sellers counterclaimed (1) a declaration that the buyers entered into a contract with the sellers to buy the *Gladys* at a price of U.S.$83 per ton, (2) damages for repudiation of such contract and (3) interest. At the same time as the points of counterclaim were served Zaiwalla told Stocken that they had informed the arbitrators that the arbitration should be left in abeyance pending the decision of the action in the Commercial Court. On 27 September 1985 Zaiwalla wrote to

Stocken calling on the buyers to serve points of reply and defence to counterclaim in seven days, failing which the sellers would enter judgment by default on the counterclaim for damages to be assessed.

On 30 September 1985 the buyers, in answer to this threat, issued a summons in the sellers' action by which they applied for an order (1) that the sellers should be refused leave to serve their points of counterclaim, or (2) that the points of counterclaim should be struck out. The summons stated that the application was made under R.S.C. Ord. 27, r. 3 and/or Ord. 18, r. 19. The reference to Ord. 27, r. 3 appears to have been a mistake for Ord. 28, r. 7(3) and to have been treated as such in the courts below and in argument before your Lordships. A further affidavit of Mr. Asthana was filed in support of the application and an affirmation by Mr. Zaiwalla, a partner in Zaiwalla, in opposition to it. It is clear that this application to strike out the counterclaim was not intended to apply to that part of the points of counterclaim relating to a declaration that there had been a concluded contract, but rather to the other parts in which the sellers' substantive claim for damages for breach of contract was put forward. In what follows I shall use the expression counterclaim as meaning only those latter parts.

Two main grounds were set out in Mr. Asthana's affidavit in support of the buyers' application. The first ground was that the sellers' assertion of their claim against the buyers by counterclaim in the buyers' proceedings was wholly inconsistent with their previous stance that their claim should be decided by arbitration. The second ground was that the sellers' counterclaim put the buyers in an embarrassing situation by facing them with two unpalatable alternatives. The first alternative was not to plead to the points of counterclaim. In that case the sellers would be entitled to obtain judgment in default for damages to be assessed. The second alternative was to serve points of reply and defence to counterclaim. In that case the buyers would take a step in the proceedings begun by the counterclaim, so that, if the court held that there was a concluded contract and that it incorporated the disputed clause, they would be precluded from applying for a mandatory stay of the counterclaim under section 1 of the Arbitration Act 1975, and thereby ensuring that the sellers' claim for breach of the contract was determined in the arbitration already begun.

Mr. Zaiwalla in his affirmation set out two main grounds of opposition to the buyers' application. The first ground was that the court, in adjudicating on the buyers' claim, would necessarily have to investigate whether there was a concluded contract and, if so, whether it incorporated the disputed clause. That being so, it would be appropriate for the court, if it held that there was a concluded contract, and whether or not it also held that such contract incorporated the disputed clause, to decide also the sellers' substantive claim for damages for breach of it. The second ground was that it ought not to be open to the buyers, who had consistently disputed the existence of both a concluded contract and the disputed clause, to complain that, if the court decided these matters against them, they would be deprived of their right to use section 1 of the Arbitration Act 1975 to compel arbitration of the sellers' substantive claim.

R.S.C., Ord. 28, r. 7, provides:

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"(1) A defendant to an action begun by originating summons who . . . alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of any matter (wherever and however arising) may make a counterclaim in the action in respect of that matter instead of bringing a separate action. (2) A defendant who wishes to make a counterclaim under this rule must at the first or any resumed hearing of the originating summons by the court but, in any case, at as early a stage in the proceedings as is practicable, inform the court of the nature of his claim and, without prejudice to the powers of the court under paragraph (3) the claim shall be made in such manner as the court may direct . . . (3) If it appears on the application of a plaintiff against whom a counterclaim is made under this rule that the subject matter of the counterclaim ought for any reason to be disposed of by a separate action, the court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient."

R.S.C., Ord. 18, r. 19, provides so far as material:

"(1) The court may at any stage of the proceedings order to be struck out or amended any pleading . . . on the ground that— . . . (*b*) it is scandalous, frivolous or vexatious; or (*c*) it may prejudice, embarrass or delay the fair trial of the action; or (*d*) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

It is common ground that the sellers' service of their points of counterclaim was irregular in that they failed to comply with the requirements of Ord. 28, r. 7(2) above. No point, however, is now taken by the buyers in respect of that irregularity, and it can therefore be disregarded for the purposes of this appeal.

The buyers' summons to strike out the sellers' points of counterclaim was heard by Steyn J. on 2 May 1986 when, without calling on counsel for the sellers, he made an order to the following effect: (1) the action to continue as if begun by writ; (2) Mr. Asthana's first affidavit to stand as points of claim and the sellers to plead to it within 14 days; (3) the sellers' points of counterclaim to stand and the buyers to plead to them within 28 days of the service on them of the sellers' points of defence; (4) liberty to apply; and (5) the buyers' summons to be dismissed with costs.

As is common on the hearing of procedural applications in the Commercial Court, Steyn J. gave only short reasons for his decision. These reasons can be summarised as follows: (1) the sellers were entitled under the relevant rules of court to make a counterclaim in the action; (2) it was convenient that all issues between the parties should be tried in one action; (3) contrary to the buyers' contention, having all the issues so tried would not cause any unfairness to them; (4) the case was largely governed by *Republic of Liberia v. Gulf Oceanic Inc.* [1985] 1 Lloyd's Rep. 539 ("the *Liberia* case"), a decision of the Court of Appeal by which he was bound; (5) there was no merit in any of the matters put forward by the buyers and the kind of relief sought was inappropriate to the case; (6) in so far as the decision was a matter of discretion for him, all the factors pointed decisively against granting the relief sought. The

judge refused the buyers leave to appeal to the Court of Appeal but such leave was given by that court.

The buyers' appeal was heard by the Court of Appeal (Fox, Parker and Staughton L.JJ.) on 26 and 27 January 1988 and reserved judgments were delivered on 30 March 1988 [1988]: 1 W.L.R. 767. The court by a majority (Staughton L.J. dissenting) allowed the appeal and ordered that the sellers' points of counterclaim should be struck out. The sellers were ordered to pay the buyers' costs in the Court of Appeal and the Commercial Court. Leave for them to appeal to your Lordships' House was given.

The majority judgment in the Court of Appeal was given by Parker L.J., with whom Fox L.J. agreed. Parker L.J. recognised that the decision of Steyn J. had been a discretionary one, but held that the Court of Appeal was entitled to review it because the matter had been dealt with very shortly by the judge and it has not been gone into fully.

Parker L.J. began his judgment by saying that the appeal raised questions of fundamental importance with regard to arbitrations. Then, after summarising the relevant facts and the history of the proceedings, he examined the three possible decisions which might be reached by the court on the claim made by the buyers in the originating summons, and the consequences which each of those decisions would have if the order of Steyn J. was allowed to stand. The first possible decision was that there was no contract at all. The second possible decision was that there was a contract but it did not incorporate the disputed clause. The third possible decision was that there was a contract and it did incorporate the disputed clause.

The first possible decision would, he said, have two consequences. The first consequence would be to remove any basis for the sellers' counterclaim. The second consequence would be to render the pending arbitration void. The second possible decision would also have two consequences. The first consequence would again be to render the pending arbitration void. The second consequence would be to enable the sellers to prosecute by counterclaim in the English court a claim which, because of the need for leave to serve process on the buyers out of the jurisdiction, and their inability, on the true facts, to obtain such leave, they would not have been able to prosecute in a separate action here. The third possible decision would have the consequence that the buyers, having been required to plead to the points of counterclaim, and so to take a step in the proceedings begun by that pleading, would lose their right to obtain a mandatory stay of those proceedings under section 1 of the Arbitration Act 1975.

Parker L.J. considered that the consequences of both the second and third possible decisions would cause injustice to the buyers. After quoting Ord. 28, r. 7(1) and (3), the terms of which I set out earlier, he said, beginning at p. 781G:

> "Ought the sellers' counterclaim to be disposed of by a separate action and, if so, why? There is in my view much force in the contention that it should. The non-arbitrable issues will be disposed of independently of the counterclaim. The resolution of the claim will either dispose of the counterclaim or leave it alive on the basis that there is either a contract without an arbitration clause or a contract with such a clause. On the latter basis one would expect the arbitration to proceed, on the former it could not. But in either

case the buyers would be able to stop an action in the courts here if such an action were launched after determination of the originating summons. In the one case they could do so by applying for a stay under section 1 of the Arbitration Act 1975 or possibly on the basis that the sellers were not entitled to withdraw from the pending arbitration without the buyers' consent, as to which see, *per* Mustill J. in *Qatar Petroleum Producing Authority v. Shell Internationale Petroleum Maatschappij N.V.* [1982] Com.L.R. 47. In the other case they could do so because the claim would not fall within Order 11. On what basis of justice should they be deprived of those rights merely because they have resorted to the courts, which alone can decide the matter, to determine whether they have them or not? In my view there is no such basis, the more particularly when one considers that, if the sellers had themselves initiated the originating summons to obtain a declaration that there was a contract and that it contained an arbitration clause, the fact that the buyers defended the claim could not, as I think, have enabled the sellers to join or start separate proceedings for breach of contract."

At p. 782E Parker L.J. turned to deal with the buyers' further grounds of appeal based on Ord. 18, r. 19. With reference to these he said, at pp. 782–783:

"Moving to the other grounds relied on by the buyers it appears to me that the trial of the counterclaim might well delay the trial of the originating summons, which involves only the determination of two short non-arbitrable issues, by introducing issues as to repudiation, damages and possibly, we are told, misrepresentation, all of which are arbitrable issues in an arbitration which the sellers have themselves initiated, in which the buyers have, subject to jurisdiction, showed their willingness to join and which the sellers have asked the arbitrators to hold in abeyance pending the outcome of the non-arbitrable issues.

"Not only would the continued presence of the counterclaim tend to delay the fair trial of the non-arbitrable issues, but also it appears to me that there is much force in the contention that its pursuit, if not its initiation, is an abuse of process and vexatious. The sellers seek to use the right to bring a counterclaim, conferred by Ord. 28, r. 7(1), to litigate a claim which they assert to be arbitrable and to be already the subject of what on their view is a valid arbitration which, if there is a valid arbitration, they could not litigate against the buyers' wishes provided that the buyers applied timeously for a stay and which, if there is no valid arbitration, the sellers could not litigate here at all. Whilst the initiation of the claim may not be vexatious, its pursuit to a point which will result in the buyers being deprived of the right to insist on arbitration if the sellers are right is, in this case, in my view both an abuse of process and vexatious. It is an attempt never, so far as anyone is aware, previously made to force a party with a bona fide claim that the arbitration which the other party asserts to be valid is without jurisdiction, either to abandon that claim and accept both that there is a contract and that it contains an arbitration clause or to face litigation here of a claim which, if he is right about the contract or the arbitration clause, could not be litigated here without his consent and which, as it seems to me, ought, if there is a contract

but no arbitration clause, to be tried in India. Justice in my view demands that such an attempt should not be permitted to succeed."

Mainly for the reasons contained in the two passages from the judgment of Parker L.J. which I have thought it right to quote in full, he concluded that the appeal should be allowed and the points of counterclaim struck out, both under Ord. 28, r. 7(3) and Ord. 18, r. 19. At p. 783A-C he referred to the *Liberia* case [1985] 1 Lloyd's Rep. 539, which Steyn J. had regarded as largely deciding the matter in favour of the sellers, and expressed the view that it did not compel him to reach any different conclusion from that which he had reached on the facts of the present case.

Earlier in his judgment, at p. 781B-E, Parker L.J., dealing with the wider aspects of the case, said that it would be undesirable if parties were to be discouraged from determining questions of jurisdiction before costs had been incurred in an arbitration for fear of exposing themselves to court proceedings in this country, which could never have been brought against them if their claim that there was no arbitration agreement was ultimately proved to be correct.

In his dissenting judgment Staughton L.J. was content to assume, without deciding, that it was open to the Court of Appeal to review the judge's exercise of his discretion. He further accepted the submission for the buyers that the *Liberia* case did not lay down any rule of law which provided the solution to the instant case. He made it clear that he did not share the view of Parker L.J. that the sellers' conduct in pursuing their claim against the buyers by means of a counterclaim in the buyers' action was vexatious or an abuse of the process of the court. In this connection he said, at p. 774:

> "Seeing that the issue whether there was a contract was at the heart of the dispute, the sellers very sensibly changed tack. They served their points of counterclaim in the action and are content that the arbitration should be left in abeyance, at any rate for the time being. From the sellers' point of view that seems to me an eminently suitable response to the buyers' attitude."

Later in his judgment Staughton L.J. set out and evaluated what he regarded as the matters to be taken into account in the exercise of the court's discretion. He said, at pp. 778–779:

> "The points of importance to the exercise of the discretion seem to me to be as follows. (1) The Arbitration Acts show a settled intention on the part of Parliament that any application for a stay must be made promptly, and if it is not the right to apply is lost. (2) The means by which, as I have held, that general principle can be avoided have rarely, if ever, been adopted in the past. But then, so far as the books show, there has only been one occasion in the past where the same or a similar situation has arisen. (3) If the order of Steyn J. is allowed to stand there will be only one substantive hearing of the matters in dispute between the parties. If it is not there may very well be two. (4) The buyers were the first to invoke the jurisdiction of the English court. I do not accept that they were compelled to do so, since other courses were open to them, including the making of an offer to agree to an ad hoc submission. (5) It is already over five years since the dispute arose. By no means all of that delay can be attributed to the buyers. It

took the sellers two years to serve their points of claim in the arbitration. But the period of time that has already expired makes it the more important that the dispute is now resolved promptly. (6) It is in my view likely that, on one side or both, there will be an overlap between the witnesses required on a trial of the issue whether there was a contract, and the witnesses required on the issue of damages and any other issue that may arise. Or at any rate the executives of the parties who have to give personal attention to the conduct of the case are likely to be the same on all issues. (7) If the English court tries all the issues in the case, the buyers may be deprived of the opportunity of having one or some of those issues determined by arbitrators, in a case where a stay would be mandatory under the Act of 1975 if application were made at the right stage. (8) Mr. Harris and Mr. Barclay have very great experience in deciding disputes of this kind, but so too do the judges of the Commercial Court.

"Points (1) to (6) militate in favour of upholding the judge's order, point (8) is neutral, and only point (7) favours some alternative solution such as the buyers seek. I find some logical difficulty in deciding what weight to attribute to that point. Section 4(1) of the Arbitration Act 1950, which provides a discretionary power to stay an action in favour of arbitration, in effect allows the court to grant a stay if that is the course which justice requires, and to refuse one if it is not. By contrast section 1 of the Act of 1975 requires the court to grant a stay whether or not that is the just course to take. How then can it be an argument affecting what justice requires in the present case, where there is a discretion, that in other circumstances there would be no discretion?

"That argument was not raised or tested before us, and may be mere casuistry. So I leave it out of account. Even so, there are in my judgment far stronger grounds for upholding the judge's order than for making any such order as the buyers seek."

In view of the importance attached to the *Liberia* case [1985] 1 Lloyd's Rep. 539 by the judge, and the reference to it in the judgments of both Parker and Staughton L.JJ., I think that it is necessary to make some examination of it.

The material facts of the *Liberia* case and the history of the proceedings in it are as follows. In March 1979 a Liberian company called L.P.R.C. entered into a contract with another party for the purchase of a large quantity of crude oil to be shipped from the Gulf. L.P.R.C. was owned and controlled by the Republic of Liberia (R.O.L.). In April 1979 L.P.R.C. entered into a contract of affreightment with Gulf Oceanic Inc. (G.O.I.), another Liberian company, to provide over three years cargoes of crude oil to be carried by G.O.I. up to a certain minimum amount. The contract was to be governed by English law and, as varied in July 1979, incorporated the terms of the 1969 Exxonvoy form of charter which included a London arbitration clause. Disputes arose under the contract as a result of the alleged failure of L.P.R.C. to supply cargoes of the requisite quantity, and the substantial question between the parties was the amount of damages.

G.O.I. doubted whether L.P.R.C. had any funds out of which an arbitration award against them could be satisfied, having regard to the fact that they were owned and controlled by, and financially dependent

on, R.O.L. Accordingly G.O.I. invoked the arbitration clause, not against L.P.R.C., but against R.O.L. on the basis that R.O.L. was party to the contract as the undisclosed principal of L.P.R.C. G.O.I. nominated Mr. Baker-Harber as their arbitrator and L.P.R.C. later nominated Mr. Harris as their arbitrator. R.O.L. did not nominate any arbitrator of their own and G.O.I., purporting to act under default provisions in the arbitration clause, nominated L.P.R.C.'s arbitrator on behalf of R.O.L. as well, and claimed to proceed with the arbitration.

In November 1983 R.O.L. and L.P.R.C. as plaintiffs issued a writ in the Commercial Court in London against G.O.I. as first defendant, Mr. Harris as second defendant and Mr. Baker-Harber as third defendant. By the indorsement on the writ G.O.I. claimed (1) a declaration that L.P.R.C. and G.O.I. were the only parties to the contract of affreightment; (2) a declaration that the appointment of Mr. Harris as arbitrator for R.O.L. in an arbitration between G.O.I. and R.O.L. was null and void; and (3) an injunction restraining all the defendants from taking any further steps in the arbitration.

In January 1984 G.O.I., treating the indorsement on the writ as points of claim, served points of defence and counterclaim. By the counterclaim G.O.I. claimed (1) a declaration that R.O.L. was party to the contract of affreightment, (2) damages against R.O.L. for breach of contract (the claim which they had previously sought to make in the arbitration); (3) alternatively to (2), the like damages against L.P.R.C.; and (4) damages against R.O.L. in tort on the basis that R.O.L. had wrongfully procured the breach of contract by L.P.R.C.

In February 1984 the plaintiffs issued a summons, expressed to be without prejudice to their right, if the matter was determined against them, to apply for a stay of the counterclaim, except in respect of claim (1) above, under section 1 of the Arbitration Act 1975. By that summons the plaintiffs applied for an order that so much of the counterclaim as related to claims (2), (3) and (4) above should be struck out on two grounds. The first ground was that R.O.L. was entitled to sovereign immunity. The second ground was that, pursuant to R.S.C., Ord. 15, r. 5, or Ord. 18, r. 19, or under the inherent jurisdiction, claims (2), (3) and (4) in the counterclaim should be brought by a separate action, or were otherwise an abuse of the process of the court. The plaintiffs also applied, without prejudice to their contention that R.O.L. was not party to the contract, for (a) an order that so much of the counterclaim as related to claims (2), (3) and (4) should be stayed under section 1 of the Arbitration Act 1975, and (b) an order that consideration of that application should be adjourned until after determination of the questions of sovereign immunity, of whether R.O.L. was a party to the contract, and of whether G.O.I. was entitled to proceed with claims (2), (3) and (4) in their counterclaim.

The summons was heard by Lloyd J. who dismissed it, subject to the question of sovereign immunity, which was left over to be decided later if necessary. Lloyd J. also adjourned the application for a stay under section 1 of the Arbitration Act 1975 on the ground that R.O.L. was not entitled to a stay so long as it was contending that it was not a party to the contract.

R.S.C., Ord. 15, rr. 2 and 5, provide so far as material:

> "2(1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a

plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; . . .

"5(2) If it appears on the application of any party against whom a counterclaim is made that the subject matter of the counterclaim ought for any reason to be disposed of by a separate action, the court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient."

It will be seen that Ord. 28, r. 7(1) and (3), which apply to actions begun by originating summons and which I set out earlier, are in similar terms to Ord. 15, rr. 2(1) and 5(2) which apply to actions begun by writ and which I have set out above.

The plaintiffs appealed to the Court of Appeal (Oliver and Neill L.JJ.) which dismissed the appeal with costs, on the ground that the judge had not been shown to have exercised his discretion on any wrong principles. Counsel for the plaintiffs, recognising that the judge's decision had been a discretionary one, submitted that he had erred in principle in four respects in arriving at it. The first submission was that the judge, although he appreciated that at some stage there might come a point at which an application for a stay under section 1 of the Arbitration Act 1975 might have to be made, failed to take the mandatory terms of that section into account in considering whether it was proper for so much of the counterclaim as related to claims (2), (3) and (4) to be pursued at all. This submission was rejected by Oliver L.J. on two grounds. The first ground was that an arbitration was not "a separate action" within the meaning of that expression in Ord. 15, rr. 2(1) and 5(2). The second ground was that, on the authorities, a party who denies the existence of an arbitration agreement cannot, in the same breath, rely upon the submission to arbitration as entitling him to a stay. There being thus no immediate impediment to the court hearing the contractual claim, there could be no reason in principle why that claim should be dealt with in separate proceedings.

The second submission for the plaintiffs was that the High Court had an inherent supervisory jurisdiction over arbitrations; that the power of the court to declare whether a person was or was not a party to an arbitration agreement was an example of that supervisory jurisdiction; and that, when such a question was submitted to the court for decision, to allow a counterclaim relating to matters outside the ambit of that question would "subvert the High Court's supervisory jurisdiction." Oliver L.J. found this submission difficult to follow. However, he rejected it in a passage which I think merits quotation in full. He said, at p. 544:

"I am bound to say that I know of no ground upon which the question raised by the plaintiffs in this case, namely whether they are or are not parties to a particular contract, can be elevated to the status of some special form of proceeding, with special rules which cannot be 'subverted,' merely because the object of the exercise is to determine whether the plaintiff is bound by a contractual term of a particular type, viz. an arbitration clause. It seems to me to be a perfectly ordinary action for a declaration commenced in reliance on the court's general jurisdiction to make declarations, and the mere fact that its purpose is to ascertain whether or not an

arbitration clause is binding does not, in my judgment, put it into some special sacrosanct category of proceeding in which a counterclaim is not to be permitted to be made within the ordinary principles applicable under Order 15.

"I confess to some sympathy with the plaintiffs, who have sought to commence proceedings for a strictly limited purpose and now find themselves presented with a very much wider claim which could not otherwise have been ventilated at all. But the fact is that they have made a claim, and under Order 15 the defendants have a right to make a counterclaim, subject only to the provisions of rule 5(2) and to the court's power to restrain proceedings which are demurrable, abusive, vexatious or will embarrass the fair trial of the action. Once again, it seems to me, one comes back to the judge's discretion. He concluded that the continued pursuit of the counterclaim would not embarrass the fair trial of the action, and the fact that the plaintiffs' limited object in starting the proceedings in the first place was not treated by him as conclusive of the question whether the counterclaim would embarrass the trial or was an abuse discloses, in my judgment, no error in principle entitling this court to interfere."

The third submission for the plaintiffs was that to permit the counterclaim to stand infringed the principles upon which the English court exercised jurisdiction over foreigners. If G.O.I., instead of counterclaiming, had attempted to assert their claims by original action, they would not have obtained leave to serve the proceedings out of the jurisdiction. So far as the contractual claim was concerned, the case fell within Ord. 11, r. 1(*d*)(iii), but the court would have been unlikely to grant leave having regard to the agreement that disputes should be submitted to arbitration. So far as the claim in tort was concerned, the case was simply not within the rule, the tort (if any) having been committed abroad. Why, counsel asked, should the defendants be allowed to pursue, by counterclaim, claims which they could never have pursued by direct action? Oliver L.J. answered this forensic question, and thereby rejected the submission which it was intended to support, by saying that a plaintiff, by becoming a litigant within the jurisdiction, submitted himself to the incidents of such litigation, including liability to a counterclaim. Shortly afterwards he said that the mere fact that the substance of the counterclaim could not have been pursued by direct action because of an inability to effect service was not a ground of principle compelling the court to conclude that the matter ought to be dealt with in separate proceedings.

The fourth submission of the plaintiffs was that the defendants, having chosen to seek arbitration in the first place, ought not later to be allowed to proceed with a counterclaim inconsistent with arbitration. Oliver L.J. rejected this submission also on two short grounds. The first ground was that the defendants had indicated their willingness to have the question of the amount of damages submitted to arbitration, if that was what the plaintiffs desired. The second ground was that, even if the contractual counterclaim was inconsistent with the arbitration, that could not apply to the alternative claim in tort, and it was that alternative claim which really lay at the root of the case.

The *Liberia* case [1985] 1 Lloyd's Rep. 539, as is apparent, differed from the present case in two significant ways. First, G.O.I.'s counterclaim

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included a claim in tort, described by Oliver L.J. as really lying at the root of the case, which could not be decided in the relevant arbitration proceedings. Secondly, the plaintiffs (L.P.R.C. and R.O.L.) had applied for an order that so much of the counterclaim as related to claims (2), (3) and (4) should be stayed under section 1 of the Arbitration Act 1975, and that application, though adjourned by the judge, remained in being.

My Lords, this appeal raises, potentially at least, three questions for determination. First, was the Court of Appeal entitled to interfere with the judge's discretionary decision and substitute its own? Secondly, if so, is your Lordships' House in turn entitled to interfere with the Court of Appeal's discretionary decision and substitute its own? Thirdly, if so, what decision should your Lordships' House substitute?

With regard to the first question, as I indicated earlier, Parker L.J. (with whom Fox L.J. agreed) considered that the Court of Appeal was entitled to review the judge's decision on the ground that the matter had been dealt with by him very shortly and had not been gone into fully, while Staughton L.J. was content to assume, without deciding, that the Court of Appeal was so entitled.

I feel some doubt whether the circumstance that the matter was dealt with very shortly by the judge, and could have been gone into more fully, constitutes of itself an adequate ground for entitling the Court of Appeal to review the judge's decision. However, it is unnecessary to reach a conclusion on that point because it appears to me that there were in any case two other grounds entitling the Court of Appeal to interfere. The first ground is that the judge regarded the present case as largely governed by the *Liberia* case. Having regard to the differences between the two cases to which I have referred, I consider that the judge, in taking that view, erred in law. The *Liberia* case was certainly relevant and, as I shall indicate later, afforded useful guidance in at least one respect. But for the judge to treat the *Liberia* case as largely governing his decision was, in my opinion, going much too far. The second ground is that the judge expressed the view that there was no merit in any of the matters put forward on behalf of the buyers. In this respect I consider that the judge was plainly wrong. I say that because one of the matters put forward on behalf of the buyers was that, if the court was to decide that there was a concluded contract and that it contained the disputed clause, it would be unjust to the buyers if an order were made which deprived them of the opportunity to obtain a mandatory stay of the counterclaim under section 1 of the Arbitration Act 1975. In my opinion that was a matter which clearly had merit, and the judge erred in principle in not recognising it and dealing with it as such.

With regard to the second question I consider, with great respect to the majority in the Court of Appeal, that, in exercising their own discretion, they erred in principle in three ways.

The first way in which I consider that the majority in the Court of Appeal erred in principle was in taking the view that a counterclaim made under Ord. 28, r. 7(1), ought not to be allowed to proceed in a case where, if the defendants had brought a separate action instead of making a counterclaim, they would not have been able to obtain leave to serve process out of the jurisdiction under Order 11. In my opinion the terms of Ord. 28, r. 7(1) and (3), are inconsistent with this view in two ways. First, the words in brackets in rule 7(1), namely, "whenever

and however arising" are so wide as to show clearly that the rule is intended to extend to cases in which, if a separate action were to be brought, leave to serve process out of the jurisdiction under Order 11 might not be obtainable. Secondly, rule 7(3) deals with cases where the subject matter of a counterclaim is such that it ought, for one reason or another, to be disposed of by a separate action. That must mean, in my view, a separate action in the High Court (or possibly in a county court) in which the subject matter of the counterclaim can be disposed of effectively. It cannot mean a separate action in which, by reason of the inability of the plaintiffs to obtain leave to serve process out of the jurisdiction, the subject matter of the counterclaim cannot be disposed of effectively.

The second way in which I consider that the majority in the Court of Appeal erred in principle is in treating an action for the kind of declaration sought by the buyers in this case, namely, a declaration that there was no arbitration agreement between the parties, as being (to adopt the words of Oliver L.J. in the *Liberia* case) some special sacrosanct category of proceeding in which a counterclaim is not to be permitted under the ordinary principles applicable under Ord. 28, r. 7. Oliver L.J. in the *Liberia* case, where the relevant rules were Ord. 15, rr. 2(1) and 5(2), did not consider this approach to be justified and I agree with him.

The third way in which I consider that the majority in the Court of Appeal erred in principle is in regarding the conduct of the sellers in making their counterclaim as vexatious and an abuse of the process of the court. In my view there is no good ground for categorising the sellers' conduct in that way, since the sellers were entitled to make a counterclaim under Ord. 28, r. 7(1), subject always to the provisions of rule 7(3).

On the basis that the majority in the Court of Appeal erred in principle in the three ways which I have indicated, your Lordships' House is entitled to interfere with their discretionary decision and substitute its own.

I turn, therefore, to the third of the three questions which I said earlier were raised, potentially at least, by this appeal, namely, what order your Lordships' House should substitute for that of the Court of Appeal.

Each of the parties has, as it seems to me, a legitimate interest which any order made should protect. The buyers' interest is that, in the event of the court deciding, on the trial of the originating summons, that there was a contract and that it incorporated the disputed clause, they should be able to apply for a mandatory stay of the counterclaim under section 1 of the Arbitration Act 1975. The buyers would lose that right if they took a step in the proceedings begun by the sellers' counterclaim, for instance by serving points of defence to counterclaim as directed in the order of Steyn J. The sellers' interest is that, in the event of the court deciding, on the trial of the originating summons, that there was a contract but it did not incorporate the disputed clause, they should be able to pursue their counterclaim in the buyers' action.

The majority in the Court of Appeal recognised what I have described as the buyers' legitimate interest and made an order which protected it fully. They did not, however, recognise what I have described as the sellers' legitimate interest. On the contrary, their view was that the sellers' counterclaim was vexatious and an abuse of the

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I have already, in considering whether your Lordships' House was entitled to interfere with the Court of Appeal's discretionary decision, given my reasons for holding that the majority in that court erred in principle in taking the view of the sellers' counterclaim which they did take. I proceed, therefore, on the basis that the sellers, as well as the buyers, have a legitimate interest which requires protection.

On that basis it seems to me that the order of the Court of Appeal, that the points of counterclaim should be struck out, cannot be sustained. It cannot be sustained because, while it protects the buyers' legitimate interest, it destroys the sellers' legitimate interest. The only way in which both interests can be protected is by an order that all further proceedings on the sellers' counterclaim, save in so far as it relates to their claim for a declaration, should be stayed pending the decision of the court on the originating summons. Then, if the court decides that there was a contract and it incorporated the disputed clause, the stay can be maintained and the sellers' substantive claim can be dealt with in the pending arbitration proceedings. Alternatively, if the court decides that there was a contract but it did not incorporate the disputed clause, the sellers will be in a position to apply for the stay to be lifted so as to enable them to pursue their counterclaim.

Under Ord. 28, r. 7(3) an order for the stay of a counterclaim can only be made if it appears to the court that its subject matter ought to be disposed of by a separate action. In such a case an order for a stay would come within the expression "such other order as may be expedient" at the end of rule 7(3). For the reasons which I gave earlier, however, it does not appear to me that the counterclaim in this case ought to be disposed of by a separate action, so that a stay of the counterclaim cannot be ordered under rule 7(3). The court, however, has an inherent jurisdiction to order a stay of proceedings when justice so requires, and your Lordships' House should, in my opinion, exercise that jurisdiction in this case.

It was argued for the buyers that, if the court decides that there was a contract but it did not incorporate the disputed clause, it would be wrong to allow the sellers to pursue their counterclaim in the buyers' action because, in the absence of the disputed clause, the contract on which the sellers would be founding their claim would have no connection with England at all: on the contrary, it was a contract made and intended to be performed in India, and any proceedings in respect of it should be brought there. That amounts to an argument that, in the event contemplated, any stay imposed should not be lifted but should remain in force on the ground that an English court was not forum conveniens for the determination of the sellers' substantive claim.

In my view it would not be right for your Lordships' House to express an opinion on the question of forum conveniens at this stage. The question may never arise for decision and, if and when it does, it will have to be decided by reference to the situation as it exists at that time.

For the reasons which I have given, I would allow the appeal, set aside paragraphs 2 and 3 of the order of the Court of Appeal of 30 March 1989 and substitute an order for a stay of the sellers' counterclaim in the terms which I suggested earlier. So far as the costs in your Lordships' House and below are concerned, it seems to me that counsel

should have the opportunity of being heard with regard to the right order to be made after judgment has been delivered.

LORD OLIVER OF AYLMERTON. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Brandon of Oakbrook. I agree that, for the reasons which he has given, the appeal should be allowed and the order which he has proposed should be substituted for paragraphs 2 and 3 of the order of the Court of Appeal.

LORD GOFF OF CHIEVELEY. My Lords, the central point in this case can be reduced to a very simple question. The sellers have commenced arbitration proceedings against the buyers in this country. Both the contract, and (if the contract exists) the arbitration agreement, are disputed. Neither the parties, nor the dispute, have any connection with this country, the only possible connection with this country being the disputed arbitration agreement. The buyers have taken the only sensible course open to them, which is to commence proceedings in the English court seeking a declaration that the arbitrators have no jurisdiction, because there was no arbitration agreement between the parties. They then found themselves faced with a counterclaim by the sellers, who are taking advantage of the proceedings so brought by the buyers in order to establish jurisdiction here, in the event of it being held that there is no arbitration agreement, in a case which in that event would have no connection with this country whatsoever. The question is whether the sellers should be permitted to proceed in this way.

I have to say that I find this a most remarkable way of proceeding. I have never heard of such a thing being done before. That is not, of course, of itself a good reason for stopping it: but it is a very good reason for examining it very carefully indeed.

The judge held that the sellers should be allowed to proceed in this way. But I agree with my noble and learned friend, Lord Brandon of Oakbrook, that in so holding the judge erred in the exercise of his jurisdiction. He did so because he mistakenly thought that the *Republic of Liberia* case [1985] 1 Lloyd's Rep. 539 governed the present case, and that there was no merit in the buyers' contentions. The Court of Appeal struck out the counterclaim under Ord. 18, r. 19, as being vexatious and an abuse of the process of the court. I do not think that that was right, because the counterclaim was authorised by Ord. 28, r. 7(1). To me, the central question is whether the counterclaim should nevertheless be struck out under Ord. 28, r. 7(3), on the ground that it ought to be disposed of by a separate action.

In my opinion, the counterclaim should be struck out on that ground. Of course, if there is held to be a valid arbitration agreement, it does not matter, because in that event the buyers, who in those circumstances wish the matter to go to arbitration, will be entitled to apply for a mandatory stay of the counterclaim. Again, if on the buyers' summons there is held to be no valid arbitration agreement because there is no binding contract between the parties, again it does not matter, because then the counterclaim will fail in any event. But if it is held that, whether or not there is a binding contract, it contains no arbitration agreement, it matters very much indeed. In those circumstances, the arbitrators would be held to have no jurisdiction and that will be the end of the arbitration; but the sellers can then claim that they have

founded jurisdiction in the English court by serving their counterclaim, and that the matter ought to be proceeded with here, although, with the alleged arbitration agreement out of the way, the case has no connection with this jurisdiction whatsoever, and the sellers have only founded jurisdiction by commencing arbitration proceedings under an alleged arbitration agreement which has been held not to exist, thereby in practice compelling the buyers to take out their originating summons, so providing themselves (the sellers) with the opportunity to serve their counterclaim.

As I understand the position, the remainder of your Lordships consider that this situation can adequately be dealt with by staying the counterclaim. Certainly, that goes some way towards doing so because, if this situation develops, it will be open to the buyers then to ask for the stay to be continued on the ground that there is some other clearly more appropriate forum where the counterclaim should be tried in the interests of justice and of both the parties. But it is not to be forgotten that an application for a stay on the ground of forum non conveniens will not succeed simply because this country is not the appropriate forum. It has to be shown that there is some other jurisdiction which is clearly more appropriate. Sometimes there is no jurisdiction which is particularly appropriate; if so, the application for a stay will fail, and the proceedings will be allowed to proceed here, where, ex hypothesi, jurisdiction has properly been founded: see *European Asian Bank A.G. v. Punjab and Sind Bank* [1982] 2 Lloyd's Rep. 356.

Now this makes perfectly good sense where jurisdiction has been founded here in the ordinary way, on the basis of service of proceedings upon the defendant within the jurisdiction, or by the arrest of a ship. It may also make good sense in some cases and in which jurisdiction is founded under Ord. 28, r. 7(1), by counterclaiming in proceedings commenced here by the other party. But, to me, it does not make good sense where jurisdiction has been founded in the circumstances I have described, by means of invoking an alleged arbitration clause which has been held not to exist, thereby compelling the other party to litigate here which otherwise he would never have done, and then taking advantage of those proceedings to make a counterclaim. I for my part do not think that the rule was ever intended to be used for that purpose. This is, in my opinion, just the sort of case in which the court should exercise the jurisdiction conferred upon it by Ord. 28, r. 7(3), to strike out the counterclaim on the ground that it ought to be disposed of by a separate action. After all, if this was a proper case for service of proceedings on the buyers, either inside or outside the jurisdiction, there was nothing to stop the sellers from proceeding in this way, instead of counterclaiming. In those circumstances the buyers, in the event of it being held that there was no binding arbitration agreement, could have challenged the jurisdiction of the court in the sellers' action or, failing that, could have asked for the proceedings to be stayed on the ground of forum non conveniens.

I do not consider that it is possible to proceed on the basis that the sellers have a legitimate interest which requires to be protected by a stay of proceedings. It seems to me that so to hold begs the question in the case, for it presupposes that the court will not strike out the counterclaim. It proceeds on the basis that, because the sellers have succeeded in founding jurisdiction under Ord. 28, r. 7(1), they have without more acquired a legitimate interest which precludes the court from exercising

its power to strike out the counterclaim under rule 7(3). With all respect, I do not agree. The question is whether the court should exercise that power. In my opinion, for the reasons I have given, it should do so.

I would dismiss the appeal.

Appeal allowed.
No order as to costs in House of Lords or courts below.

Solicitors: Zaiwalla & Co.: Stocken & Lambert.

J. A. G.

[PRIVY COUNCIL]

*CARMICHAEL . . . . . APPELLANT

AND

GENERAL DENTAL COUNCIL . . . . . RESPONDENT

[APPEAL FROM THE PROFESSIONAL CONDUCT COMMITTEE OF THE GENERAL DENTAL COUNCIL]

1989 Oct. 3; Nov. 3

Lord Keith of Kinkel, Lord Templeman and Lord Oliver of Aylmerton

Dentist—Discipline—"Serious professional misconduct"—Committee finding dentist administered general anaesthetic contrary to proper practice—Whether Privy Council justified in intervening—Whether committee entitled to direct erasure of dentist's name from dentists' register

A dentist was charged before the Professional Conduct Committee of the General Dental Council with serious professional misconduct in that, inter alia, on three occasions in relation to one patient and on one occasion in relation to another in the course of giving dental treatment he administered a general anaesthetic, and he failed to have a second dental or medical practitioner appropriately trained and experienced in the use of anaesthetic drugs present with him to administer that general anaesthetic. The dentist's case was that on the occasions in question he had not administered a general anaesthetic but had used intravenous sedation in accordance with the proper practice. The committee found the alleged facts with regard to anaesthesia proved and judged the dentist to have been guilty of serious professional misconduct. They directed that his name should be erased from the dentists' register.