1989 February 22

(BOYADJIS, J.)

MITSUI AND CO. LTD AND OTHERS,

Plaintiffs,

v.

ROCKWELL MARINE LTD. AND ANOTHER,

Defendants.

(Admiralty Action No. 61/84).

Admiralty — Carriage of goods by sea — Contract of affreightment — Proper law of contract — Presumption that it is the law of the country of the ship's flag — Displaced by a provision in the Bill of Lading that the contract is governed by the law of another country.

Admiralty — Foreign jurisdiction clause in a Bill of Lading — Proceeding instituted in breach of the clause — Though their stay is a matter of discretion, the burden is on the plaintiffs to show a strong cause why they should not be stayed — Matters that should be taken into consideration — The weight of the factor that the law governing the contract is the law of the foreign country, where proceedings should have been instituted in virtue of the clause — The weight of the factor that if proceedings are stayed, the plaintiffs claims would be time barred in virtue of the law of the country referred to in the clause — What conditions should be satisfied in order to regard the time bar plea as decisive in tilting the scales in favour of stay.

Evidence — Arguments of counsel referring to facts, which have not been proved by the evidence — They should be ignored.

The plaintiffs, who were the consignors and consignees of the cargo, loaded aboard the ship «ATLANTIC VICTORY» for carriage from Bangkok to Lagos, claim Saudi Ryals 164, 348 the value of the cargo «lost and/or destroyed and/or short-delivered and/or damaged».

Service on defendant 2 ship was not effected and eventually the action against her was dismissed.

Defendants 1 area a company limited by shares registered in Cyprus under the Companies Law, Cap. 113, but their principal place of business is in Greece.

The relevant Bill of Lading provided that «Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein».

Relying on the above clause defendants 1 applied that the writ of summons and/or its service be set aside and/or that the action and the proceedings be stayed. The defendants, later, abandoned the claim for setting aside the writ and its service and so the only question left for determination was whether this was a proper case for ordering stay of proceedings.

The plaintiffs admitted in their affidavit in opposition that their principal place of business is in Greece.

Held, *granting the application for stay of proceedings:*

(1) The presumption that the contract of affreightment is governed by the Law of the vessel's flag is rebutted by the provision of the Bill of Lading, whereby the parties themselves chose the law applicable to govern their contract.

(2) The Court has a discretion to grant a stay or not. However, a prima facie case in favour of stay arises from the foreign jurisdiction clause. The burden of proving cause why stay should not be ordered is on the plaintiff.

(3) The point of the defendant that Cyprus is foreign to the causes of action does not reinforce their case, because it is, also, true that Greece is, also, at least equally foreign to them. Indeed, as the defendants are a Cyprus Company and the ship flies the Cyprus flag, the nexus with Cyprus is more substantial than that with Greece.

(4) Defendants' argument that all the evidence, including the witnesses on the facts in issue, are not within the jurisdiction of the Cyprus Court and/or are more readily available in Greece, is, also, not valid. The relevant primary facts occurred in Bangkok and Lagos. Neither the Greek Court nor the Cyprus Court may properly be described as a more convenient Court than the other.

(5) What is the weight to be attached to the fact that the law applicable is the Greek Law?

(6) In virtue of the Convention on Legal Co-operation Between the Republic of Cyprus and the Republic of Greece in Matters of Civil, Family, Commercial and Criminal Law (Ratification) Law,

1984 (Law No. 55 of 1984) on 22.6.84 the plaintiffs can execute in Cyprus any judgment given in their favour by the Greek Courts. Therefore, plaintiffs' argument that they will not be able to enforce a judgment of the Greek Courts against defendants property in Cyprus cannot stand.

(7) What should be in this case the effect of the fact that if the application is granted plaintiffs will be faced with a time bar under Greek Law? The proper approach of the Courts to the plea of time bar is the one followed by Mr. Justice Sheen in *The Blue Wave* (infra), explained and illustrated by Lord Goff of Chieveley in *The Spiliada* (infra).

The authorities show that, if certain conditions are satisfied, the plea of time bar may carry enough weight to tilt the scales against the stay Without these conditions, time bar in itself may be treated either as not a weighty consideration or even as a neutral factor.

The first condition is whether the plaintiffs acted reasonably in commencing proceedings in this country. The question must be answered in the affirmative. Regarding the second condition, the question is whether the plaintiffs acted unreasonably in failing to commerce proceedings in the chosen forum before the expiry of the limitation period there. This question must be answered in the negative.

It must be shown that they acted reasonably in filing their action here in breach of their agreement and also that they did not act unreasonably in failing to institute in time alternative proceedings in Greece. If they acted negligently, they also acted unreasonably. If they do not come forward with an explanation consistent with absence of negligence on their part, it cannot be said that they have acted reasonably. The onus was always on the plaintiffs to show that decisive importance should, in the circumstances of the present case, be given to their plea of time bar. In the absence of circumstances, none were suggested in this case, justifying the attribute of decisive weight to the existence of time bar in Greece, the fact that, if a stay of the proceedings instituted in Cyprus is granted, the plaintiffs shall be left without a remedy at all, is not itself sufficient to take away the right of the defendants to insist that the plaintiffs must be held to their agreement.

Application granted.

Cases referred to:

The Eleftheria [1969] 2 All E.R. 641;

Cyprus Phassouri Plantations Co. Ltd. v. Adriatica Di Navigazione Sp. A. of Venice, through their Agents A. L. Mantovani & Sons Ltd. and Another (1985) 1 C.L.R. 290;

Lloyd v. Guibert and Others [1965-66] L.R.Q.B. Vol. 1 p. 115;

The El Amria [1981] 2 Lloyd's Rep. 115;

The Sennar (No. 2) (1984) Lloyd's Rep. 142;

The Frank Pais [1985] 1 Lloyd's Rep. 529;

The Athenee [1922] 11 Lloyd L.R. 6;

The Fehmarn [1958] 1 All E.R. 333;

The Adolf Warski [1976] 1 Lloyd's Rep. 107 and on appeal [1976] 2 Lloyd's Rep. 241 C.A.;

The Blue Wave [1982] 1 Lloyd's Rep. 151;

The Vishya Prabha [1979] 2 Lloyd's Rep. 286;

Spiliada Maritime Corp. v. Consulex Ltd. The Spiliada [1986] 3 All E.R. 843.

Application.

Application by defendants No. 1 to stay the action brought against them on the ground that the contract of carriage contains a Greek jurisdiction clause.

S. Karides, for the applicant.

E. Liatsou (Mrs.) with M. Koukkidou (Mrs.), for G. Cacoyannis, for the respondents.

Cur. adv. vult.

BOYADJIS J. read the following ruling. This ia an application by the ship-owners, Rockwell Marine Limited, defendants No. 1 in the admiralty action, to stay the action brought against them by the respondents-plaintiffs cargo owners, on the ground that the contract of carriage sued on contains a Greek jurisdiction clause. The action concerned was instituted on February 17th, 1984, against the applicants and against their ship «ATLANTIC VICTORY», defendant No. 2 in the action. Plaintiffs No. 1, Mitsui and Co. Ltd., of Bangkok, are described as the consignors of a cargo of 1,936 bags of rice shipped by them on board the ship «ATLANTIC VICTORY», under Bill of Lading No. Bangkok-I-F, dated 30.12.1982 for carriage from Bangkok to Lagos. The defendants are described as the carriers of the cargo. The Bank of Credit and Commerce INTL. S.A., of Bahrain, and Ahmed Abdul Qawi Bamaohan, of Saudi Arabia, plaintiffs No. 2 and 3

respectively, are described as the consignees to whom or to whose order the cargo ought to have been delivered. The plaintiffs' claim is for Saudi Ryals 164, 348 or its equivalent in Cyprus pounds, being the value of cargo «lost and/or destroyed and/or short-delivered and/or damaged by the fault and/or neglect of the defendants, their servants or agents or otherwise».

Service of the process could not be effected on the ship, defendant 2, and after several adjournments, the action against her was withdrawn and dismissed on 28th February, 1985.

On 4th May, 1984, counsel for defendants No. 1, on whose behalf he had entered a conditional appearance, filed the present application praying for «an order to set aside the writ of summons and its service on the defendant 1 and/or to stay the action or the proceedings taken against the defendant 1». He based this application on the Cyprus Admiralty Jurisdiction Order 1893, Rules 203-212, 237, on the general practice and the inherent powers of the Supreme Court of Cyprus in its Admiralty Jurisdiction, on the General Practice of the Admiralty Division of the High Court of Justice in England, and on the Civil Procedure Rules, 0.48, r.2.

The facts relied upon by the applicants are set out in the following eight paragraphs of an affidavit dated 4th May, 1984, sworn by their counsel Stavros Karides:

«I, Stavros A. Karides, of Nicosia, make oath and say as follows:

1. I am an Advocate and acting for the Defendant 1 - Applicant and I make this Affidavit on the instructions and on behalf of the said Applicant.

2. The matters to which I depose in this Affidavit are true to the best of my knowledge, information and belief, being based on documents and instructions received from my clients and/or on their behalf.

3. The Applicant-Defendant 1 is a Cyprus non-resident shipping Company, has its principal place of business at 4-6, Filellinon Street, Piraeus, Greece, and its Directors and Shareholders are Greek Nationals residing in Greece.

4. As it appears from the Writ of Summons issued in this action the alleged claims of the Plaintiffs against the

Defendant 1 (which claims are denied by the Defendant 1) are in connection with cargo shipped on board the ship «Atlantic Victory»/Defendant 2, at Bangkok for carriage to Lagos under a Bill of Lading.

Defendant 1 (which claims are denied by the Defendant 1) «Atlantic Victory»/Defendant 2, at Bangkok for carriage to Lagos under a Bill of Lading.

5. At all material times the Defendant 2 Vessel was under charter dated 23.12.1982 to Messrs. Pan Thai Shipping Ltd., of Bangkok and Messrs. Trianon Shipping & Chartering Ltd., of Nigeria were charterers agents.

6. Clause 3 of the said Bill of Lading provides that 'Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein'.

7. Any contractual or other relation (if any) of the Defendant 1 with the Plaintiffs took place outside Cyprus and Cyprus is altogether foreign to the cause of action upon which this action was brought and all the evidence including the witnesses on the facts in issue are not within the jurisdiction of this Honourable Court and/or are more readily available in Greece where any dispute, as per the stipulation of the said Bill of Lading, should be decided under the applicable Greek Law.

8. I, therefore, apply for an Order of this Honourable Court as per the terms of the Application or in such terms as it shall think fit».

The respondents opposed the application. The facts upon which they rely are set out in the affidavit which accompanied their notice of opposition and which was sworn on 8th June, 1984, by Soterios Aniftos, a clerk in the law office of their advocates. I recite its full text hereinbelow:

«I, the undersigned, Soterios Aniftos, of Limassol, make oath and say as follows:

1. I am one of the registered clerks of Messrs. P.L. Cacoyannis & Co., Advocates of the Plaintiffs-Respondents in the above action, and I am authorised to swear the present

affidavit on the plaintiffs' behalf which I do make according to the best of my belief, instructions, knowledge and information.

2. I verily believe and as I am advised by the said advocates of the Plaintiffs, this is a case falling within the Rules of the Cyprus Admiralty Jurisdiction Order 1893 and that the Plaintiffs have a good cause of action and it is a proper case to be tried in Cyprus.

Furthermore, as I am advised by the said Advocates the present dispute is more closely connected with Cyprus and the Greek element in the dispute is comparatively small. The present action relates to a Cypriot Company having its registered office in Cyprus, for cargo carried by the Defendant No. 2, a ship under the Cyprus flag owned by Defendants No. 1 and Cyprus is a forum of convenience regarding the witnesses. If the litigants were forced to institute proceedings in Greece, the Plaintiffs will be prejudiced by having their disputes determined outside Cyprus and they will be unable to enforce any judgment to be obtained in Greece against the Defendants No. 1 in Cyprus or against its property situated or connected with Cyprus including the Ship, Defendant No. 2 (if same does not call at a Cyprus Port and the action would not be able to proceed against her). Furthermore, the Plaintiffs will be faced with a time-bar, as no extention of the time limit is available in Greece.

3. In view of the foregoing, I verily believe and I am so advised by the Plaintiffs' said advocates that the Court should exercise its discretion in favour of the Plaintiffs and dismiss the Defendants' No. 1 Application».

No oral evidence having been adduced by either party, the matter has to be decided with reference exclusively to the contents of the aforesaid affidavits and to the arguments and statements made by counsel whilst addressing the Court.

It is pertinent to refer at this stage to the statement of learned counsel for the applicants made at the beginning of his address whereby he abandoned his prayer to set aside the writ of summons and its service on the Defendants 1 and confined himself to the alternative prayer concerning the stay of the action. He was right in doing so for the authorities show that stay of the proceedings is the correct form of the relief to which the defendants would be entitled, assuming, of course, that they be entitled to relief at all on

the grounds put forward, namely, that the contract of carriage sued upon contains a foreign jurisdiction clause. It may be added that, this being so, it was not necessary for the defendants to have appeared conditionally before filing their present application. See in this respect: *The Eleftheria* [1969] 2 All E.R. 641; and *Cyprus Phassouri Plantations Co. Ltd. v. Adriatica Di Navigazione Sp. A, of Venice, through their Agents, A. L. Mantovani & Sons Ltd., and Another* (1985) 1 C.L.R. 290.

There is another statement made by counsel in Court to which I should presently refer. This concerns (i) the admission by learned counsel for the respondents-plaintiffs concerning the text of Clause 3 of the Bill of Lading as set out in para. 6 (supra) of the affidavit of Stavros Kaiides, and (ii) the admission by same counsel of the contents of para. 3 (supra) of the same affidavit. Despite these admissions, Miss Koukkidou for the respondents argued that Clause 3 of the Bill of Lading (supra), properly construed, does not confer clearly exclusive jurisdiction to the Greek Courts nor does it provide that Greek law is the law applicable to the exclusion of any other law and, in particular, the law of the flag of the defendants' hip, i.e. Cyprus law. In support of her last aforementioned submission concerning the law applicable, counsel referred the Court to the British Shipping Laws, 13th Ed., para. 944, where it is stated that in the case of contracts of affreightment the presumption is, weak though it has proved to be, in the absence of other indications, that the contract is governed by the law of the vessel's flag. She also relied on the following extract from the judgment of Willes, J., in *Lloyd v. Guibert and Others* [1865-66] L.R.Q.B., Vol. 1, p.115, at p.129.

> «... and the general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce».

We are here concerned with a contract of affreightment and damage to cargo. The law of the country in which the ship is registered, i.e. the Cyprus law in the present case, would have been applicable by virtue of the principle set out hereinabove, if the contract had not provided otherwise. Once, however, the Bill of Lading upon which the plaintiffs rely in the present case, provides that the law applicable is the law of the country where the carrier has his principal place of business, and plaintiffs admit that

country is Greece, the presumption is rebutted and the law applicable is that stipulated by the parties in their contract, i.e. Greek law.

I have no difficulty in rejecting the submission of counsel for the respondents and in holding that by their contract in this case the parties agreed to refer any dispute arising under the Bill of Lading in question to a Greek Court and to resolve it by applying Greek law. I am reinforced in my aforesaid view by the fact that a verbatim reproduction of Clause 3 of the parties' Bill of Lading appeared in the Bill of Lading in *The Eleftheria* case (supra) and it was there construed in exactly the same way

I now turn to consider the principles governing cases like the present one. The principles established by the authorities were, I think, best summarized by Brandon, J. in *The Eleftheria* (supra) as follows, at p. 645:

> «(I) where plaintiffs sue in England in breach of an agreement to refer to disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (II) the discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (III) The burden of proving such strong cause is on the plaintiffs. (IV) In exercising its discretion, the court should take into account all the circumstances of the particular case. (V) In particular, but without prejudice to (IV), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would - (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial».

The above principles have repeatedly been cited with approval and applied in subsequent decisions in England and in Cyprus. See, for instance: *The El Amria* [1981] 2 Lloyd's Rep. 119, *The Sennar (No. 2)* (1984) Lloyd's Rep. 142, and *Cyprus Phassouri Plantations Co. Ltd. v. Adriatica etc.* (supra), and *The Frank Pais* [1986] 1 Lloyd's Rep. 529.

The desirability of holding the plaintiffs to their agreement lies at the root of the principle that a prima facie case for a stay arises from the foreign jurisdiction clause. In *The Eleftheria* (supra) it was emphasized that the Court must be careful not just to pay lip-service to the principle involved, and then fail to give effect to it because of a mere balance of convenience.

The question to be resolved is whether the plaintiffs, on whom the burden lies, have, on the whole of the matter, established good cause why they should not be held to their agreement. What are in the present case the factors which tend to rebut the prima facie case for a stay arising from the Greek jurisdiction clause, and what are the factors tending to reinforce it?

First, as to the factors tending to reinforce the prima facie case for a stay, the following three main points are taken by the defendants:-

(a) Cyprus is altogether foreign to the causes of action upon which the action was brought. To what extent is this point a valid one? The matter must be examined in conjunction with the nexus or connection if any, between the facts that gave rise to the cause of action and Greece whose Court the parties have chosen to try their dispute. The Bill of Lading was issued in Bangkok in respect of cargo to be carried from Bangkok to Lagos. None of the plaintiffs is a national either of Cyprus or of Greece or is resident either in Cyprus or in Greece. The only connection of Greece with the present dispute, other than the fact that it is governed by the Greek law, to which I shall refer later, is the fact that the company - defendant 1-has its principal place of business in Greece and its directors and shareholders are Greek nationals residing in Greece. It is equally true, however, that this company is a Cyprus company and the ship «ATLANTIC VICTORY» on board which the cargo was shipped for carriage, is a ship under the Cyprus flag. Taking all the above into consideration it is more correct to say that the connection of the dispute with Cyprus is more substantial than its connection with Greece.

(b) All the evidence, including the witnesses on the facts in issue are not within the jurisdiction of the Cyprus Court and/or are more readily available in Greece. I fail to understand why, in the circumstances of the present claim where most, if not all, the relevant primary facts occurred in Bangkok and Lagos, the witnesses who are expected to testify therein are more readily available in Greece than in Cyprus. In my view neither the Greek Court not the Cyprus Court may properly be described as a more convenient Court than the other, in view of the fact that the bulk of the evidence on the issues of fact is not situated in either of the said countries nor is such evidence more readily available in one country rather than in the other country.

(c) The law applicable is the Greek law. Theoretically, this factor is material in two respects. First, foreign law being a question of fact, in case the stay is refused, the defendants will most probably have to call expert witnesses from Greece to Cyprus to prove it; and, secondly, one might argue that a Greek Court, being fully conversant with it, is better fitted to ascertain and apply Greek law than any foreign Court, including the Cyprus Court. It must be examined, however, to what extent these general considerations apply in the circumstancs of the present case in the light of the fact that there is no allegation in the present case that Greek law is in any relevant matter differrent than the Cyprus law and the presumption, therefore, may be drawn that Greek Law and Cyprus Law are the same. The case in hand differs in this respect from the case of *The Eleftheria* (supra) where the circumstance that Greek law governed the dispute, in the light of the evidence there adduced that Greek law was different in material respects from English law, was regarded of substantial importance. The present case resembles in this respect the cases of *The Athenee* [1922] 11 Lloyd L.R. 6, and the *The Fehmarn* [1958] 1 All E.R. 333, where the stay was refused, the circumstance that law of the foreign country governed having not been given much weight. I should also perhaps add that no disadvantage may result to the defendants from the fact that foreign law is a question of fact, in case they have to file an appeal against the judgment of the Cyprus Court, in view of the fact that appeals in Cyprus are by way of rehearing and, unlike in England, appeals are made as of right on all issues whether factual or legal.

Concluding my remarks on the points advanced by the defendants as reinforcing the prima facie case for a stay, it is my view that they deserve to be given little weight indeed.

Concerning the factors tending to rebut the prima facie case for stay, the plaintiffs in the present case rely on the following circumstances:

(a) Cyprus is more closely connected with the dispute and the parties to the action that Greece. I have dealt with this matter whilst dealing with the reverse allegations advanced by the defendants. A comparison of the two jurisdictions on matters relevant to convenience and litigation expense does not, in the circumstances of the present case, justify the submission that anyone of the two countries is a more convenient or a less expensive forum than the other country. The plaintiffs have no connection with either jurisdiction. The defendants are more closely connected with Cyprus than with Greece.

(b) If proceedings are stayed, plaintiffs will be prejudiced in two respects in that (i) they will be unable to enforce any judgment given in their favour in Greece against the defendants' property in Cyprus, and (ii) they will be faced with a time-bar, as no extension of the time limit is available in Greece. In answer to plaintiffs' submission (i) above, defendants argued that, since the enactment of The Convention on Legal Co-Operation Between the Republic of Cyprus and the Republic of Greece in Matters of Civil, Family, Commercial and Criminal Law (Ratification) Law, 1984 (Law No. 55 of 1984), on 22.6.1984, the plaintiffs can execute in Cyprus any judgment given in their favour by the Greek Courts. Learned counsel for the defendants is right in his last aforesaid argument, especially in view of the fact that in Art. 1.1 of the Convention ratified by the said Law, amongst the decisions of the Greek Courts which are recognized and enforced in Cyprus are included decisions in admiralty cases. In answer to plaintiffs' submission (ii) above, counsel for defendants argued that plaintiffs may not rely on this circumstance because it is not properly raised in their affidavit which accompanied their opposition. My view is that the circumstance of time-bar is sufficiently raised in the plaintiffs' affidavit, who have every right to argue it. The existence of the time-bar is not denied by the defendants. Time-bar is included in the list of relevant factors authoritatively stated in the judgment of Brandon, J., in *The Eleftheria* (supra) and *The El Amria* (supra).

In most of the cases cited to me where a stay was granted despite the circumstance of time-bar, the defendants had given an assurance waiving the right to rely on the defence of time bar when

the new action would be brought against them in the Court chosen in the jurisdiction clause of the contract. See, for example, the case of *Cyprus Phassouri Plantations Co. Ltd. v. Adriatica etc.* (supra). Any impact of the circumstance of time-bar upon the matter now in issue would have been extinguished in the present case, had the defendants given a similar assurance which they omitted, however, to give.

Amongst the relevant circumstances pertaining to the present case reference may also be made the following: Whether the action is heard in Greece or in Cyprus, the proceedings shall be in the Greek language which is the language of the directors and shareholders of the defendant company. There is no allegation that the plaintiffs will be deprived of security of their claim if they sue in the Greek Court, or that either party may not have a fair trial if the case is tried either in Greece or in Cyprus. There is no allegation either that the defendants do not genuinely desire trial in Greece or that they are only seeking procedural advantages by insisting on the chosen forum.

Having referred extensively to the relevant circumstances of this case, to the points raised and the arguments advanced by both sides and to the principles involved, I must now state my conclusions on the matter. The question whether to grant a stay or not in one for the discretion of the Court. There are no considerations of substantial weight reinforcing the prima facie case for stay in the present case, nor are there any considerations of substantial weight militating against the stay, other than the aforesaid existence of the time-bar. The issue of what amount of weight should be attributed to this consideration was not, unfortunately, argued sufficiently by learned counsel. Counsel for the defendants simply argued that the plaintiffs should only blame themselves for not filing in time their action before the proper Court. Miss Koukkidou for the plaintiffs, on the other hand, advanced a two-fold argument. She alleged that Clause 3 of the Bill of Lading does not specifically mention the country whose Court was chosen by the parties to have exclusive jurisdiction but it only states that disputes shall be decided in the country where the carrier, has his principal place of business. She stated also that, the defendants, being a Cyprus company, the plaintiffs were reasonable in thinking that the said company's principal place of business was in Cyprus. She concluded the first leg of her argument by alleging that the first time when the plaintiffs were informed that the defendants' principal place of business was in

Piraeus, Greece, was when they read this allegation in the affidavit of Mr. S. Karides dated 4th May, 1984, which has filed in support of the defendants' present application. These allegations would have been relevant considerations to be taken into account in the exercise of my discretion if they were properly before the Court, i.e. if they were included in the affidavit filed in support of the opposition; they should also be supplemented by evidence as to when the period of limitation had expired according to the Greek law and whether it expired before or after the plaintiffs acquired the knowledge that the principal place of business of the defendants carriers was in Greece and, therefore, that the jurisdiction clause in the Bill of Lading referred to the Greek Court and to no other Court. Be that as it may, mere allegations of the existence of relevant facts made during counsel's address cannot be taken into consideration. Defendants had never the opportunity either to disprove or to cross-examine upon each allegations.

The second leg of the argument of counsel for the plaintiffs on the circumstance of time-bar took the form of a mere submission that time-bar is a relevant consideration, in support of which she cited the following extract from *Dicey and Morris, Conflict of Laws*, 11th Ed., Vol. 1, p. 414.

> «Where a plaintiff sues in England in breach of a foreign jurisdiction clause it frequently happens that, by the time the defendant's application for a stay comes before the court, any action in the chosen forum is time-barred. If the existence of a time-bar is taken into account in favour of the plaintiff in refusing a stay it would deprive the defendant of an accrued defence in the chosen forum; if it is taken into account in favour of the defendant, the plaintiff would be left with no remedy at all. The trend of the decisions is that a time-bar in the foreign court will only militate against a stay of English proceedings if there is no substantial prejudice to the defendant, i.e. where the claim has been brought in time but in the wrong forum».

The decisions whose trend the learned authors had in mind in formulating the principle set out in the above passage, are cited in a note at the bottom of page 414. Amongst those decisions I read carefully the reports in *The Adolf Warski* [1976] 1 Lloyd's Rep. 241, and on appeal [1976] 2 Lloyd's Rep. 241 C.A.; *The Blue Wave* [1982] 1 Lloyd's Rep. 151; *The Vishya Prabha* [1979] 2 Lloyd's Rep. 286; and *The Sennar (No. 2)* [1984] 2 Lloyd's Rep. 142.

The Adolf Warski case (supra) was decided in the first instance in the Admiralty Court by Mr. Justice Brandon. The matter had come before the Court in the form of an application to stay an action in rem and in personam brought in England by the cargo owners against Polish shipowners for damage to their cargo whilst carried, pursuant to a bill of lading containing a foreign jurisdiction clause. Plaintiffs had relied, inter alia, on matters of convèniene, costs of litigation and the existence of a time-bar in Poland. Though, in exercising his discretion to refuse the stay, Mr. Justice Brandon had based his conclusion that there was a strong balance of argument in favour of a trial in England rather than in Poland on questions of feasibility, convenience and the cost of placing before a Court the main evidence necessary to enable the claims to be decided justly, without reference to the factor of time-bar, he proceeded to express some provisional views on the matter and said the following at pp. 112-114 of the report:

«I turn now to the question of the time bar in Poland. There are, as it seems to me, three possible views about this. The first view, at one end of the scale, is that, since refusal of a stay would deprive the defendants of an accrued defence in Poland, the existence of the time bar there should be treated as a factor in favour of a stay. The second view, at the other end of the scale, is that, since the grant of a stay would, in effect, defeat the plaintiffs' claims altogether, the existence of the time bar in Poland should be treated as a factor against a stay. The third view, which is intermediate between the first and second, is that, since the advantage to the plaintiffs of escaping the time bar if a stay is refused, and the advantage to the defendants of being able to rely on the time bar if a stay is granted, are of equal weight, the existence of the time bar should be treated as a neutral factor and disregarded.

.....

There are, as it seems to me, two conflicting policy considerations in relation to this matter. On the one hand, it is underisable to allow a party, who has agreed to have claims decided in a particular forum abroad, to evade his obligation by the simple expedient of beginning an action in England in time, while allowing time to run out in the foreign forum concerned. On the other hand, it is also undesirable to allow a clause, the purpose of which is to ensure that claims are decided in a particular forum abroad, to be used as a means, in

effect, of preventing such claims being decided on their merits in any forum at all.

The English authorities appear, in general, to treat the first of these two policy considerations as having more weight than the second. *Maharani Wool Mills Co. v. Anchor Line*, [1927] 29 Ll. L. Rep. 169 (a decision of the Court of Appeal); *The Media*, (1931) 41 Ll. L. Rep., 80 (a decision of Lord Merrivale, P.). A similar approach has also been adopted in the analogous situation of a claim on a contract containing an arbitration clause: see *Bruce (W.) v. Strong (J.) (a Firm)*, [1951] 2 K.B. 447; [1951] 2 Lloyd's Rep. 5, another decision of the Court of Appeal, in which it was held that the fact that the time for demanding arbitration had expired was not a reason for declining to stay an action brought in disregard of an arbitration.

In the United States of America, however, it appears that more weight is given to the second of the two policy considerations to which I have referred, with the result that a Court there may only be prepared to decline jurisdiction on account of a foreign jurisdiction clause on condition that the claim concerned will not be defeated by the application of a time bar in the agreed forum abroad: *The Gottingen*, [1964] 2 Lloyd's Rep. 35.

I am bound to say that, if and to the extent that I am free to do so, I prefer the approach of the American Courts to this matter. Provided that an action has been brought in time in England, I do not see that a defendant will, in general at any rate, be much prejudiced by the fact that a concurrent action to protect the time limit has not also been so brought in the chosen forum abroad. On that basis, assuming that it would be right, apart from the question of time bar, to enforce a foreign jurisdiction clause by staying an action here, I think that it would often be reasonable, unless real prejudice to the defendant is clearly proved, to make such enforcement subject to a condition that the defendant should wave reliance on the time bar if he can lawfully do so; or alternatively, if such waiver is not permissible, to refuse a stay».

On appeal the judgment of Mr. Justice Brandon was affirmed. Their Lordships, however, expressed reservations regarding the correctness of the provisional views expressed by the learned

judge on the issue of time bar. Lord Justice Cairns refused to express even a tentative view on the matter. Lord Justice Stephenson, without expressing a concluded opinion, said that he preferred the view that the time bar is a neutral consideration. Finally, Sir Gordon Willmer said that the plaintiffs, if they were to be left without remedy in Poland, would have only themselves to blame once it was abundantly clear that the plaintiffs, having instituted their proceedings in England within the time limit, deliberately and advisedly allowed the time limit to expire without attempting to institute alternative proceedings in Poland. They should not, in the circumstances, be allowed to invoke their own voluntary act as a reason for refusing to stay their proceedings in England if it would otherwise be right to grant a stay. He concluded by saying that he preferred the submission put forward on behalf of the defendants, namely, that the fact of the time-bar in Poland is a neutral fact, which should not influence the decision one way or the other.

The Vishya Prabha (supra), is another case decided in the Admiralty Court in England, where the question was whether the action in England should be stayed on account of a foreign jurisdiction clause in the agreement of the parties. The application for stay was refused. Enumerating the factors which he had taken into consideration in the exercise of his discretion on the matter, Mr. Justice Sheen, made reference, inter alia, to the possibility which existed that if he were to grant a stay, the proceedings in India would be time-barred and added that, though he had taken that circumstance into account, he did not consider it to be «a very weighty matter».

The Blue Wave (supra) is the next case cited in *Decey and Morris*, Conflict of Laws, (supra) in support of the principle appearing in the extract recited hereinbefore. It is another case decided by Mr. Justice Sheen in the admiralty Court. Referring to the circumstance of time-bar, the learned Judge said the following at p. 155:

> «I turn now to what I regard as the crucial point on this application. It revolves around the question whether, when this Court is considering how to exercise its discretion on an application for a stay of proceedings, it should have in mind the prejudice to the plaintiffs of having to sue in a foreign Court in which their claim will be, or may be, time-barred».

He then referred to the facts of the case and pointed out that the time for filing an action either in England or in Greece had expired on January 17th, 1979, and that the action in the English Court was filed on June 29th, 1979, within the six months' period agreed to be extended by the charterers or their agents, though the defendants contended that they did not authorize an extention of time and the action was, therefore, time-barred in England as well as in Greece. He then referred to *The Adolf Warski* case (supra) and to the tentative views expressed by Mr. Justice Brandon in the Admiralty Court and by their Lordships in the Court of Appeal. He described the observations made by Mr. Justice Brandon as most helpful and added that the views expressed by their Lordships in the Appeal Court must be considered bearing in mind the particular facts of that case where the plaintiff had deliberately and advisedly allowed the time to expire without attempting to institute alternative proceedings in Poland and then sought to invoke their own voluntary act as a reason for refusing to stay their proceedings in England. He then pointed out that the plaintiffs in the case before him, unlike the plaintiffs in *The Adolf Warski* (supra), were not guilty of misconduct deliberately designed to allow the time limit in Greece to expire so that they could pray in aid the time-bar as a reason for contending that proceedings instituted in England should not be stayed.

The learned Judge then proceeded to say the following at p. 156:

«It seems to me that it is open to me to express my own view as to whether the existence of a time bar in Greece should be taken into account, and, if so, whether for that reason I should refuse to grant a stay which I would otherwise be minded to grant.

The approach of the Courts of this country to a time bar has significantly altered in recent years. If it is open to a Court to extend the time limit, the Court will look to see if the defendant has been prejudiced by the delay in commencing proceedings. Such prejudice cannot arise where a claim is brought in time, but not in the correct tribunal. There would be an injustice to a plaintiff, who has suffered a legal wrong and has started proceedings, if he is precluded altogether from pursuing his remedy. The fact that the plaintiff will have no

remedy in the foreign Court seems to me to be a powerful factor against a stay To this approach I would make an exception if on the facts it was clear that the plaintiff had acted unreasonably and that his conduct showed that without good reason he deliberately and advisedly allowed the time limit to expire without instituting alternative proceedings. By introducing this exception I do not think that my view differs from the tentative views expressed by Sir Gordon Willmer in *The Adolf Warski*

. . .

So far as action Fo 509 is concenred, it is, as I have said, the defendants' contention that the proceedings are time barred in England as well as in Greece If this action is time barred in England the defendants will not be prejudiced by my refusing a stay of proceedings. If, on the other hand, when all the facts have been investigated, it is found that the defendants have granted an extension of time, then it seems to me that it would be grossly unjust to grant a stay which would result in an action in Greece being defeated by a time bar»

The other case to which I would like to refer is *The Sennar (No 2)* (supra) decided in the Court of Appeal, where the principles governing the exercise of the Court's discretion in granting or refusing stay on account of a foreign jurisdiction clause first formulated in *The Eleftheria* (supra) which became known as *The El Amna* guidelines were reiterated and approved The cases of *The Adolf Warski* (supra) and *The Blue Wave* (supra) were also discussed and distinguished on their facts from the case then before their Lordships The appeal was allowed and the action in England was stayed Far from disapproving or criticising what was said in the aforesaid decisions on the issue of time bar, Kerr, L.J , said the following at p 155:

«In relation to *The El Amna* guidelines GfG's submissions centred mainly on par (5) (d) and (e) (iii) As to these considerations, it goes without saying that the shipowners desire trial in the Sudan just as much as GfG want it in England. The only reason advanced by GfG for saying that the shipowners do not 'genuinely desire trial' in the Sudan concerned the question of time-bar. But the position in this connection is unusual and different from cases such as *The Adolf Warski*, [1976] 1 Lloyd's Rep 107 and 2 Loyd's Rep

241 and *The Blue Wave*, [1982] 1 Lloyd's Rep. 151. In the present case the shipowners rely on a plea of time-bar both in England and in the Sudan, and in both cases solely due to the lapse of time which has resulted from the institution of the proceedings by GFG in Holland and their refusal to accept the decision of the District Court by pursuing the matter to the Court of Appeal. The shipowners' reliance on limitation of time is based on different grounds in the two competing jurisdictions, and there are arguments on both sides in both jurisdictions.

.....

I do not think that the considerations in para. (5)(d)* and (e)(iii)* of the guidelines in *The El Amria* carry and weight, and certainly no decisive weight, in the circumstances of this case».

Lastly, I would like to refer to a recent English case decided in the House of Lords and which is neither mentioned in the footnote to the passage in *Dicey and Morris, Conflict of Laws* (supra), relied upon by the plaintiffs, nor was it cited in argument by either counsel. It is the case of *Spiliada Maritime Corp. v. Consulex Ltd., The Spiliada* [1986] 3 All E.R. 843, which concerned an application to set aside an order giving leave to effect service out of the jurisdiction on a foreign defendant under the English RSC Order 11, r.1(1). Though the application was founded on the ground usually called «forum non conveniens» and not on the ground of the existence of a foreign jurisdiction clause in the contract of the parties, it is my opinion that whatever was said therein regarding the plea of time bar applies with even greater force to the case now under consideration. Delivering his opinion with which Lord Keith of Kinkel, Lord Templeman, Lord Griffiths and Lord Mackay of Clashfern concurred, Lord Goff of Chieveley said the following at pp. 860-861:

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* «*5 In particular, but without prejudice to (4) the following matters, where they arise, may properly be regarded:*

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would:

(iii) be faced with a time-bar not applicable in England»

«Again, take the example of cases concerned with time-bars. Here a special problem arises from the fact that, in English law, limitation is classified as a procedural rather than as a substantive matter. Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time-barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time-barred.

Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time-bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time-bar in the appropriate jurisdiction. Indeed, a strong theoretical argument can be advanced for the propositon that, if there is another clearly more appropriate forum for the trial of action, a stay should generally be granted even though the plaintiff's action would be time-barred there. But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time-bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country. This approach is consistent with that of Sheen J. in *The Blue Wave* [1982] 1 Lloyd's Rep. 151. It is not to be forgotten that, by making its jurisdiction available to the plaintiff, even the discretionary jurisdiction under RSC Ord.

11, the courts of this country have provided the plaintiff with an opportunity to start proceedings here; accordingly, if justice demands, the court should not deprive the plaintiff of the benefit of having complied with the time-bar in this country. Furthermore, as the applicable principles become more clearly established and better known, it will, I suspect, become increasingly difficult for plaintiffs to prove lack of negligence in this respect. The fact that the court has been asked to exercise its discretion under RSC Ord. 11, rather than that the plaintiff has served proceedings on the defendant in this country as of right, is, I consider, only relevant to consideration of the plaintiff's conduct in failing to save the time-bar in the foreign jurisdiction is dependent on its invocation by the defendant, may well be to make it a condition of the grant of a stay or the exercise of discretion against giving leave to serve out of the jurisdiction, that the defendant should waive the time-bar in the foreign jurisdiction; this is apparently the practice in the United States of America».

Having carefully considered the above authorities, I am of the view that the proper approach of the Courts to the plea of time bar is the one followed by Mr. Justice Sheen in *The Blue Wave* (supra), explained and illustrated by Lord Goff of Chieveley in *The Spiliada* (supra).

If the circumstance of the existence of time bar in Greece is not to be takan into account, or if taken into account is not to be treated as decisive, proceedings in Cyprus must be stayed, since no other circumstances carrying sufficient weight to rebut the presumption in favour of stay have been suggested in this case. The authorities show that, if certain conditions are satisfied, the plea of time bar may carry enough weight to tilt the scales against the stay. Without these conditions, time bar in itself may be treated either as not a weighty consideration or even as a neutral factor. Regarding the first condition, the question is whether the plaintiffs in each case acted reasonably in commencing proceedings in this country. The question must be answered in the affirmative. Regarding the second condition, the question is whether the plaintiffs acted unreasonably in failing to commence proceedings in the chosen forum before the expiry of the limitation period there. This question must be answered in the negative.

What are the circumstances disclosed by the plaintiffs in this case which the Court should take into account in answering the above questions? There is nothing on record to suggest that the present plaintiffs acted in bad faith in the sense that, like the plaintiffs in *The Adolf Warski* (supra), they deliberately and advisedly allowed the time limit in Greece to expire without attempting to institute alternative proceedings in Greece, so as to reinforce their case against a stay of their action in Cyprus, relying on their own aforesaid fault. This, however, is not enough. It must be shown that they acted reasonably in filing their action here in breach of their agreement and also that they did not act unreasonably in failing to institute in time alternative proceedings in Greece. If they acted negligently, they also acted unreasonably. If they do not come forward with an explanation consistent with absence of negligence on their part, it cannot be said that they have acted reasonably. The onus was always on the plaintiffs to show that decisive importance should, in the circumstances of the present case, be given to their plea of time bar. In the absence of circumstances, none were suggested in this case, justifying the attribute of decisive weight to the existence of time bar in Greece. the fact that, if a stay of the proceedings instituted in Cyprus is granted, the plaintiffs shall be left without a remedy at all, is not itself sufficient to take away the right of the defendants to insist that the plaintiffs must be held to their agreement.

Taking everything into consideration, I rule that the plaintiffs here failed to show the strong cause against the stay required of them by the authorities hereinabove referred to. Having arrived at this conclusion, I shall exercise my discretion in favour of stay.

An order is consequently made staying further proceedings in the present admiralty action.

The applicants are entitled to their costs against all the plaintiffs. Such costs to be assessed by the Registrar unless agreed upon between counsel.

Application granted with costs against plaintiffs