CA on appeal from the Commercial Court (Mr A Marriott QC sitting as a Deputy Judge of the High Court) before Mummery LJ; Buxton LJ; Longmore LJ. 3rd May 2006.

Lord Justice Longmore:

1. Introduction

The general average claim in these proceedings is unusual in that ownership of the vessel changed during the voyage and before the occurrence of the act in respect of which general average is claimed. It is the consequence of that change of ownership that has complicated this application to serve proceedings out of the jurisdiction.

2. The position is that Mr Arthur Marriott QC sitting as a Deputy Judge of the Commercial Court has refused an application by the defendants Prima Ceylon Ltd ("Prima") to set aside an order of Mr Justice Colman of 25th January 2005 made pursuant to CPR 6.20(5)(c) and/or CPR 6.20(6), giving the claimants, the new vessel owners, Galaxy Special Maritime Enterprise ("Galaxy") leave to serve the Claim Form, the Particulars of Claim and related documents upon Prima out of the jurisdiction at Prima's address in Sri Lanka. As an alternative, Prima asked that the claim be stayed.

3. The facts

The claim arises from the grounding of the claimants' vessel OLYMPIC GALAXY ("the vessel") while under pilotage off Trincomalee, Sri Lanka on 10th July 2004. The vessel was carrying a cargo of some 61,160 metric tonnes of Australian wheat owned by Prima, from Fremantle in Western Australia for delivery at Trincomalee. Galaxy's claim is principally for declarations that Prima is liable to make a contribution in respect of General Average and/or salvage charges and is liable to pay the sum to be certified in due course by Average Adjusters as the contribution due from the cargo-owners.

4. There are also proceedings brought by Prima against Galaxy in the High Court of Sri Lanka, commenced by a Writ of Summons dated 11th January 2005. Initially, Prima claimed, that without notice, without authority and acting unreasonably, Galaxy had entered into a salvage agreement in Lloyd's Open Form (LOF) with the Greek salvors Tsavliris Russ, on 12th July 2004; and that, thereafter, in order to obtain discharge of their cargo, Prima had had to give security by way of a Lloyd's Average Bond ("LAB") on 14th July 2004 and an Average Guarantee on 16th July 2004 to the managers of the vessel.

5. Subsequently, Prima sought, in its Petition to the Sri Lankan court dated 2nd June 2005, declarations that the grounding of the vessel was caused by negligence and/or actionable breach of duty of the owners of the vessel or those for whom they were responsible; that Prima is entitled to loss, damage, cost and expenses on account of the grounding of the Olympic Galaxy; that Prima is under no liability to make contribution in respect of General Average and/or salvage charges; and is not liable to pay any sum certified as the contribution due from the cargo interests, or any payment under the LAB. Prima have also sought judgment in the sum of US$1,890,000, or such other sum found to be due as loss, damage, cost and expenses incurred by Prima, arising from the making of the salvage agreement by the owners of the vessel, purportedly on cargo-owners' behalf, and from the tendering of security to procure the delivery of the cargo.

6. The cargo, 44,000 metric tonnes of Australian standard white wheat and 17,160 metric tonnes of Australian hard wheat, was shipped under two Austwheat bills of lading by AWB (International) Ltd dated 29th June 2004 and issued at Melbourne. Prima was the notify party and the bills were consigned to order and contained the following provisions:-

"freight for the same as per the below-mentioned "Austwheat 1990" charter party, as amended, all the terms, conditions, clauses and exceptions including Clause 33 (arbitration) in which charter party are herewith incorporated."

This bill of lading is to have effect subject to the provisions of the Rules contained in Schedule 1 to the Australian Carriage of Goods by Sea Act 1991, as applied by that Act and any subsequent amendments thereto, . . . the ship owners are to be entitled to the benefit of the privileges, rights and immunities conferred upon the carrier by such Act, and the said Schedule 1 thereto, as if the same were herein specifically set out. General Average (if any) shall be settled according to the York-Antwerp Rules, 1974 as amended 1990."

7. The Austwheat charterparty referred to was entered into at Melbourne, on 14th April 2004 and, inter alia, provided as follows:-

"29 General Average shall be settled and payable in London according to the New York Antwerp Rules, 1974 as amended 1990 or any modification thereof for the time being in force . . . .

33(a) Any dispute arising under this Charterparty from events which occur in Australia shall be settled by arbitration at the Australian Centre of International Commercial Arbitration, Melbourne in the State of Victoria, Australia in accordance with the provisions of the commercial Arbitration Act 1984 (Victoria) or any statutory modification or re-enactment thereof for the time being in force . . . .

33(b) Any dispute arising out of this Charterparty or any Bill of Lading issued hereunder other than provided for in paragraph (a) hereof shall be referred to arbitration in London, one arbitrator being appointed by each party in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force . . . ."

8. The Austwheat charterparty was made between Nobel Chartering AG as disponent owners and AWB Australia Ltd as charterers. When the cargo was shipped, the vessel was owned by a Panamanian company Arapey

Financiera Panama SA ("Arapey") but the vessel was sold by Arapey during the voyage to Sri Lanka by a bill of sale dated 7th July 2004 to Galaxy. This only became known to Messrs Ince & Co, the claimants solicitors at about the end of October 2004; and only became known to Prima as a consequence of the first witness statement of Mr Grieveson of Ince & Co made on 21st January 2005 in support of Galaxy's application for permission to serve Prima out of the jurisdiction, when that witness statement was served on Prima.

9. The LAB dated 14th July 2004 was addressed to the agents of the vessel and signed by Prima. It identified Fremantle as the port of shipment, Trincomalee as the port of destination and the bills of lading pursuant to which the cargo had been shipped. It relevantly provided:-

"In consideration of the delivery to us or to our order, on payment of the freight due, of the goods noted above, we agree to pay the proper proportion of any salvage and/or general average and/or special charges which may hereinafter be ascertained to be due from the goods or the shippers or owners thereof under an adjustment prepared in accordance with the provisions of the contract of a freightment (sic) governing the carriage of the goods or, failing any such provision, in accordance with the law and practice of the place where the common maritime adventure ended, and which is payable in respect of the goods by the shipper or owners thereof.

We also agree to:

(i) furnish particulars of the value of the goods, supported by a copy of the commercial invoice rendered to us or, if there is no such invoice, details of the shipped value and

(ii) make a payment of such sum as is duly certified by the average adjusters to be due from the goods and which is payable in respect of the goods by the shippers or owners thereof."

10. The Average Guarantee was given on 16th July 2004 in the form approved by the Association of Average Adjusters and the Institute of London Underwriters. The Average Adjusters are Harvey Ashby Ltd of Colchester, Essex. The adjustment has yet to be completed. It is thought that, since the values of the ship and the cargo are fairly evenly balanced, the actual monetary claim brought by Galaxy against Prima would not, when the adjustment is finalised, turn out to be particularly large.

11. By a fax of 23rd July 2004 addressed to Springfield Shipping Co Panama SA as managers, Prima gave notice that they would seek to recover all their losses as a result of the breach of authority in the making of the LOF with the salvors and in respect of losses arising from the consequences of the grounding itself. This notification led ultimately to the giving of a letter of undertaking ("LOU") of 2nd August 2004, from West of England, Galaxy's P&I Club, to:- *"The Owners and/or those entitled to sue and/or underwriters (collectively "Cargo Interests") of the cargo of approximately 61,000 m/t of wheat laden on board the Olympic Galaxy."*

12. The LOU was in relevant parts as follows:-

"Claim for an indemnity for Cargo's liability to Salvors, including liability for interest and Salvors' costs and/or indemnity for any amounts payable by cargo interests in General Average and/or Cargo shortage/damage/loss in value and/or additional freight charges and/or for a declaration that Cargo are not liable to contribute in General Average.

IN CONSIDERATION of and upon condition that you refrain from arresting or otherwise detaining the above vessel or any other vessel or property in the same or associated Ownership, Management, possession or control of the owners of the OLYMPIC GALAXY to secure the above claim and/or to establish jurisdiction and that you refrain from commencing and/or prosecuting legal or arbitration proceedings (otherwise than before the court and/or tribunal referred to below) against the Owners of the above vessel, their servants or agents WE HEREBY unconditionally and irrevocably undertake to pay to you or to Dolphin Maritime &Aviation Services Limited or to any Solicitor you may appoint any sum nor (sic) exceeding US$2,000,000 plus interest and costs and interest on costs which may be either agreed between the parties to be due to you in respect of the above claim(s) or which may be adjudged to be due to you in respect of the above claim(s) from the Owners of the above vessel by a final and unappealable judgment of a court or tribunal of competent jurisdiction or both.

Furthermore:

. . . . . .

2. We undertake that we will, within 7 days of a request from you to do so, instruct solicitors in England (and to advise you of their identity) on behalf of the above named ship and/or her owners to accept service of court proceedings or notice of appointment of an arbitrator.

3. In the event that the claim is brought in London, we mutually agree that the claim will be arbitrated in London as per clause 33b of the charterparty between Noble Chartering and AWB dated 14th April 2004.

4. In the event that the Courts of Sri Lanka issue service of proceedings in Sri Lanka, we will instruct Messer's Murugesu & Neelakzandan, Attorneys-at law & Notaries Public, P.O. Box 749, M&N Building (Level 5), No. 2, Deal Place, Colombo – 00300. Sri Lanka to accept such service of proceedings from the Sri Lanka Courts, without prejudice to any rights which the owners of the OLYMPIC GALAXY have to contest and dispute jurisdiction of the courts of Sri Lanka, to hear and determine this matter.

5. It is expressly agreed that in the event that additional salvage security is required from cargo interests, or cargo loss or damage is suffered, or losses of any nature are suffered by cargo interests, cargo interests retain the right

to arrest for additional security. Cargo interests agree to accept the additional security by way of West of England Letter of Undertaking.

6. We agree that this undertaking shall be governed by and construed in accordance with English law and we agree to submit to the English High Court of Justice for any disputes or any enforcement proceedings in respect of this undertaking. We confirm that our address for service is Tower Bridge Court, 224-226 Tower Bridge Road, London, SE1 2UP.

This letter of undertaking is given without prejudice to all rights and defences which may be available to owners and/or any rights of limitation of liability according to international conventions or applicable laws. Furthermore, nothing herein is to be construed as an admission of liability."

13. It will be noted that the "court and/or tribunal referred to below" before which the operative part of the LOU proceedings are allowed to be brought is either the arbitration tribunal in clause 3 or the courts in Sri Lanka in clause 4. The reference to "court proceedings" in clause 2 does not, in my view, contemplate substantive court proceedings in London but only court proceedings ancillary to the arbitration contemplated in clause 3.

14. Subsequently, on 14th October 2004, Galaxy sought to invoke the provisions of the arbitration clause (33(b)) of the Charter Party by making a reference to arbitration in London and appointing Mr Bruce Harris as their arbitrator. Prima, without prejudice to their position, nominated Mr William Packard as their arbitrator, but it was then thought that, by virtue of the change of ownership of the vessel, there was no contractual nexus which entitled the parties to proceed under the arbitration agreement. Accordingly, nothing further happened and the arbitration was described to the deputy judge as moribund.

15. On 16th February 2005, following a hearing in London under the LOF salvage agreement, the Arbitrator Mr John Reeder QC awarded and adjudged that Galaxy should pay to Tsavliris Russ US$2,787,675 plus interest for the salvage services, an amount which was reduced by Mr Nigel Teare QC on appeal to US$2,423,040. Cargo-owners' proportion of that award was determined to be US$1,252,560 plus interest and costs.

16. Given the transfer of ownership of the vessel on 7th July 2004, three days before the grounding, it is common ground that the LAB is the only contract between the parties; the claimants submit that the LAB is subject to English law since English law is the law governing the contemplated adjustment. Mr Persey QC for Prima conceded that on the authority of the House of Lords in Union of India v EB Aaby's Rederi [1975] AC 797, the law of the adjustment is English law. However, he did not accept that the law of the adjustment necessarily governed what he termed "the underlying legal relationship" between the parties; and the Petition in the Sri Lankan proceedings is made on the basis that Sri Lankan law applies to that relationship.

17. As to the LOU, it is said by Prima that the LOU is a strong indication that Sri Lanka is (and England is not) the natural forum for the resolution of all the disputes contemplated by it as to the consequences of the grounding, once it is accepted that no arbitration agreement exists between the parties.

18. The judgment

The judge held that Galaxy were making their claim under or pursuant to the LAB and that the LAB was governed by English law. Jurisdiction pursuant to CPR Part 20(5)(c) was, therefore, established and he went on to decide whether, as a matter of his discretion, the proceedings should be set aside. He directed himself in accordance with familiar authority such as ***Spiliada Maritime Corporation v Cansulex Ltd*** [1987] AC 460 and ***Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*** [1994] 1 AC 438 in appreciating that it was for the claimant to establish that England was the forum in which the case could most suitably be tried for the interests of the parties and for the ends of justice. He decided that Galaxy had discharged that burden primarily because he agreed with Mr Flaux QC for Galaxy that the dispute between the parties would have to be determined under English law since English law was the proper law of the LAB, the only contract between the parties, see the end of paragraph 32 and the beginning of paragraph 33. He added, at the end of paragraph 33:-

"I also consider that there is a clear juridical advantage to having this case disposed of by this court, namely the certainty of having these disputes decided by the application of English law as envisaged by the parties in their contract (the LAB)"

19. The submissions

Prima accepted that Galaxy were entitled to bring a claim under the LAB and that there was a good arguable case that the LAB was governed by English law. That sufficed to establish jurisdiction but they attacked the exercise of discretion and submitted:-

(1) the judge was wrong to have accepted Galaxy's argument that the parties' relationship as a whole was governed by English law merely because the LAB was itself (arguably) governed by English law;

(2) the LAB would normally have the same law as the contract of affreightment pursuant to which it was issued and it was the law of that contract of affreightment which governed the parties' relationship; in the present case there was no contract of affreightment between cargo-interests and the new owners of the vessel because the ownership had changed during the voyage after the issue of the bills of lading by or on behalf of the previous owners;

(3) the relationship between the cargo interests and the new owners was therefore not governed by the law of any contract of affreightment and could not be governed by the law of a subsequently agreed LAB; in

particular, since there was no contract between the parties there was no room for any incorporation of the Hague Rules; cargo-owners were, therefore, entitled, as a matter of the general law of general average, to rely on the shipowners' default in relation to the grounding and Galaxy could not respond by relying on Article IV 2(a) of the Hague Rules;

(4) once it was appreciated that the rights and wrongs of the general average claim were not going to be determined by English law, there was no advantage in those rights being determined by the English courts;

(5) even if it was arguable that English law did govern the parties' relationship, the Sri Lankan courts were able to apply English law as well as the English courts;

(6) English law could not, therefore, be a decisive factor and should be regarded as a neutral factor. All other factors pointed to Sri Lanka and away from England. Those factors included:-
(a) the existence of the Sri Lanka proceedings and the consequent risk of conflicting judgments;
(b) the absence of either party having any connection with England;
(c) the convenience of witnesses;
(d) the absence of any security in respect of English proceedings in the letter of undertaking;

(7) The judge's discretion was vitiated by:-
(a) his acceptance of the argument that the whole of the parties' relationship was governed by English law;
(b) his apparent failure to consider that the Sri Lankan proceedings would have to continue in any event;

(8) This court should, therefore, exercise its discretion anew and, relying on the factors in (6) above should allow the appeal and set aside the proceedings in England, for which Colman J initially gave leave.

20. Galaxy supported the judge submitting:-

(1) the LAB itself provided that the parties' rights and obligations were to be ascertained in accordance with the provisions of the contract of affreightment which was itself governed by English law;

(2) it was, in any event, strongly arguable that English law governed the parties' relationship, even if there was no contract of affreightment between them;

(3) even if there was no contract of affreightment, Galaxy were bailees or sub-bailees of the cargo; the bailment would be a bailment governed by English law and would be on Hague Rules' terms; an important feature of English law was England's accession to the International Salvage Convention of 1989 and section 224 of the Merchant Shipping Act whereby the shipowner was deemed to have the actual authority of the cargo-owners to enter into salvage agreements on their behalf;

(4) the judge was therefore right to say that the parties envisaged English law applying to their relationship and that it was therefore better that the English courts rather than the Sri Lankan courts determine their rights and obligations;

(5) it was impossible to imagine that the judge was ignorant of the fact that the Sri Lankan proceedings were going to continue in any event;

(6) his exercise of discretion was not vitiated by any error and should be maintained.

21. The Average Bond and the general average claims

It is clear to me that the judge did accept Galaxy's argument that the LAB was governed by English law and that the disputes relating to the grounding and the declaration of general average would, therefore, have to be determined by English law. That was Mr Flaux' argument and he accepted it. He, therefore, never appreciated the contrary argument. That argument is a formidable one. It is that, in the absence of any contract of affreightment, there was no agreement between the parties into which it would be possible to incorporate the Hague Rules. It is by no means self-evident that there was a bailment or sub-bailment on terms which would incorporate the Hague Rules and, if there was not, Galaxy could not rely on the Article IV 2 (a) exception for acts and neglects of master pilot and crew to excuse what might otherwise be such default as would preclude Galaxy from claiming general average. In any event owners' personal default is placed in issue in the Sri Lankan proceedings. Mr Flaux seeks to rely on the terms of the LAB (which undoubtedly does constitute the only contract between the parties) to say that general average is to be ascertained by an adjustment *"prepared in accordance with the provisions of the contract of affreightment governing the carriage of the goods"*

But this must also be doubtful, since the bond goes on *"or failing any such provision in accordance with the law and practice of the place where the common maritime adventure ended."*

22. These are all matters of some difficulty and it would be inappropriate for this court, on this interlocutory application, to express any (even preliminary) view about them. The point for present purposes is that there is a substantial argument that, even if the LAB is itself governed by English law, the rights and wrongs of the claims and cross-claims for general average contribution and indemnity for being exposed to general average or salvage claims will fall to be determined in accordance with Sri Lankan law where the adventure ended and/or without the incorporation of the Hague Rules. The deputy judge appears not to have fully appreciated that there was this substantial argument but rather to have been beguiled by Mr Flaux into agreeing with the proposition that all matters in dispute between the parties would necessarily be determined by English law. He was, in my view, wrong to be so beguiled and the main plank for the exercise of his discretion whereby he decided that it was right for the proceedings to continue in England thus disappears.

23. I would add that, even if it were right that English law undoubtedly applied to the general average claims, it should not necessarily follow that the disputes should be determined in England. The Sri Lankan courts are well used to applying English law, on which their own law in mercantile matters is modelled and Galaxy made no suggestion that the courts of Sri Lanka either would not or would not be capable of applying English law. In such circumstances the English law factor will be one factor among many to be considered and, seldom, the decisive factor.

24. The Sri Lankan proceedings

It is not apparent that the judge, in coming to his discretionary decision, has given appropriate weight to the fact that, subject to any application made by Galaxy to stay Prima's action, the Sri Lankan proceedings will continue in any event. They were the proceedings first instituted and they are necessary proceedings because (in the inevitable absence of arbitration proceedings) they are the proceedings to which the Club's LOU will respond in the event of Prima being successful. If the English proceedings continue, there is a risk that different decisions may be made on the factual issues that are going to arise. That is not a satisfactory situation; sometimes it is an unavoidable situation. Here it is not.

25. I would accept Mr Flaux' submission that the deputy judge was fully aware of the existence of the Sri Lankan proceedings; indeed the passage already cited in para. 18 above has a conscious echo of the important words of Lord Diplock in ***The Abidin Daver*** [1984] AC 398 at 411-412 (itself a case where proceedings had been instituted first in the foreign jurisdiction):- *"Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it."*

For the deputy judge there was cogent evidence of a juridical advantage available only in the English action in the form of *"the certainty of having these disputes decided by the application of English law as envisaged by the parties in their contract (the LAB)."*

The LAB, however, as I have sought to explain did not, necessarily, envisage that its law would apply to determine the underlying dispute about liability to general average and, even if it did, the advantage of having the dispute determined by reference to English law is not only available in the English action.

26. Relying on Dicey and Morris, Conflict of Laws 13th ed para 12-030, Mr Flaux argued that the effect of Lord Diplock's speech in ***Abidin Daver*** had been subsequently diluted by Spiliada. But as I read that passage any such dilution is confined to cases where foreign proceedings have not passed beyond the stage of being initiated and have been started merely for the sake of demonstrating that a competing jurisdiction exists. That is not the position here and while the existence of prior foreign proceedings is not, by itself, decisive, it deserves weight especially in a case such as the present where Prima's claim is considerably larger than Galaxy's appears to be. I am reluctantly driven to conclude that the deputy judge has not accorded the Sri Lankan proceedings their proper weight and that his exercise of discretion is flawed on this ground also. That being so, it is necessary for the court to exercise its discretion afresh.

27. Discretion

If my brethren agree with me thus far, it falls to the court to exercise its own discretion. In this connection the following factors are important:-

(1) the facts of the dispute have little to do with England and everything to do with the grounding off Trincomalee in Sri Lanka and the signing of the salvage agreement in Sri Lanka;
(2) proceedings are continuing in Sri Lanka and, in the absence of a successful application for the proceedings to be stayed, are likely to continue to do so;
(3) a potentially important witness viz the pilot is in Sri Lanka; other witnesses of fact are not in England;
(4) the parties are not connected with England; Prima is Sri Lankan.

28. Conversely, there are some factors favouring English jurisdiction in that:-

(1) English law is likely to have some influence on the outcome of the disputes particularly since Sri Lankan law and English law are likely to be the same, save in relation to the incorporation of the International Salvage convention 1989;
(2) Galaxy's P&I Club has strong connections with England; although the average guarantee has been put up by or on behalf of Singapore insurers they are likely to have connections with the English market;
(3) expert witnesses on navigation and management of the vessel are likely to be readily available in England, but are, of course, available elsewhere.

29. Bearing in mind (1) that the onus is on Galaxy to show that the English proceedings should continue and (2) that the speech of Lord Diplock in ***Abidin Daver*** still represents the law, I have little doubt that the balance comes down substantially in favour of setting aside the English proceedings and their service, thus enabling the Sri Lankan proceedings to determine the rights and liabilities of the parties.

30. Naturally enough Mr Flaux relied on the dicta of Lord Templeman in ***Spiliada*** at page 465G that an appeal about the relative merits of trial in England and trial abroad should be rare and the appellate court should be slow to interfere. I respectfully agree and members of this court are rightly slow to grant permission to appeal in such cases. Once permission is granted, however, any resulting appeal must be decided in accordance with the law. If it can (in a rare case) be shown that the court's discretion has been exercised on wrong principles, this court has to exercise its own discretion. It naturally pays great deference to the way the commercial judge has exercised his discretion but it will occasionally disagree and be bound then to interfere. Even the greatest commercial judges have been held to have been wrong on this very question and have been reversed, see ***Compania Naviera Micro SA v Shipley International Inc*** [1982] 2 Lloyds Rep 351.

31. Conclusion

I would, therefore, allow this appeal and set aside the without notice order of Colman J whereby he gave permission to issue and serve these proceedings on Prima.

Lord Justice Buxton:

32. I agree.

Lord Justice Mummery:

33. I also agree.

LIONEL PERSEY Esq QC and EMMET COLDRICK Esq (instructed by Howard Kennedy) for the Appellant
JULIAN FLAUX Esq QC and DAVID LEWIS Esq (instructed by Ince & Co) for the Respondent