United Arab Shipping v Galleon Industrial Ltd [2000] Int.Com.L.R. 12/18

JUDGMENT : The Hon. Mr. Justice Moore-Bick Commercial Court. 18th December 2000

Background

1. On 5th November 1997 five containers of toys were shipped by the defendants, Galleon Industrial Limited, on board the vessel *Hanjin Yokohama* at Hong Kong for carriage to Beirut. The containers were carried under two bills of lading issued by United Agencies Shipping Co (Hong Kong) Ltd as agents for the first claimants, United Arab Shipping Company S.A.G. ("UASC"), as carrier. The vessel was owned by the third claimants, Hanjin Shipping Company Limited, by whom it had been chartered to UASC. The containers were transhipped at Genoa under a liberty contained in the bills of lading and were carried from Genoa to Beirut in the *Al-Walid*, a vessel owned by the fourth claimants.

2. The goods arrived in Beirut on 29th November 1997 and were discharged into the custody of the second claimants, Akak Marine Co. S.A.L., the local agents of UASC. It appears that Galleon had sold them to a local merchant, a Mr. Munif Kozah, who on 9th December 1997 applied for delivery. He was unable at that time to produce the bills of lading, but the goods were nonetheless delivered to him against his personal undertaking to deliver them by 11th February 1998. The reason why Mr. Kozah was unable to produce the bills of lading on 9th December is now clear: he had not paid for the goods and was not entitled to receive them. In these circumstances Galleon looked to UASC as the ocean carrier and all those who had played any part in the carriage and delivery of the goods to make good its loss.

3. Both bills of lading were issued on UASC's printed form and contained the following term in a box on the front:

   "*JURISDICTION: All disputes relating to goods carried under this bill are to be dealt with in accordance with the jurisdiction clause, clause 24 and/or clause 25 on the reverse side of this bill.*"

   The clauses printed on the reverse of each of the bills included the following:

   "*1. DEFINITIONS*

   "Carrier" means [UASC] ; if, however, for any reason the owner of the vessel, charterer by way of demise or otherwise, or other operator or agent . . . . . be found to be liable as carrier, then such person shall be entitled to the benefit of every defence, exception, limitation, condition and liberty applicable to the Carrier under this bill (including clauses 24 and 25).

   . . . . . .

   4. SUBCONTRACTING AND LIABILITY OF SERVANTS AND SUBCONTRACTORS

   4.1 The Carrier is entitled to sub-contract on any terms the whole or any part of the carriage (including loading and discharge of the goods) without notice to the Merchant.

   4.2 Notwithstanding any sub-contracting the Merchant agrees that the Carrier is responsible solely under the terms of the contract evidenced by this bill for the carriage and the Merchant undertakes that no person other than the Carrier (which expression shall include any servant or agent of the Carrier or any independent contractor engaged by the Carrier to carry out any of its obligations) shall in any circumstances be liable to the Merchant for any loss damage or delay of whatsoever kind howsoever caused and the Merchant further undertakes that no claim will be made other than against the Carrier under the terms of this bill and if any such claim is made agrees to indemnify the carrier against any consequences thereof.

   4.3 Without prejudice to the foregoing, any sub-contractor, agent, employee, independent contractor or other (including but not limited to stevedores or terminal operators) who becomes the subject of proceedings by the Merchant shall be entitled to the benefit of every defence, exception, limitation, condition and liberty applicable to the Carrier under this bill (including clauses 24 and 25) and for the purposes of the foregoing the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of such persons as if such provisions were expressly for their benefit.

   24. LAW AND JURISDICTION

   Unless otherwise agreed by the Carrier and subject to clause 25 any claim or dispute arising under this bill shall be determined in England or Kuwait at the option of the Carrier. In both cases according to the laws of England, to the exclusion of the jurisdiction of the Courts of any other country."

4. Initially Galleon took the matter up with UASC's agents in Hong Kong, United Agencies Shipping Co. There was an exchange of correspondence during 1998 which led to a letter being written by Holman Fenwick & Willan to Galleon's lawyers, Vincent T.K. Cheung, Yap & Co. on 9th December 1998 in which they stated that they had asked their clients to confirm that they had instructions to accept service on their behalf. That was confirmed in a letter dated 19th January 1999, but in the event Galleon did not commence proceedings, either in Hong Kong or anywhere else, until 26th November 1999 when they issued a writ in Beirut against Akak Marine, both in its personal capacity and as representative of UASC, the owners of the *Hanjin Yokohama* and the owners of the *Al-Walid*. It is clear enough from the way the claim is set out in the writ that it is made against all four of the claimants in the present proceedings.

5. The explanation for this course of action had already been provided in a letter written by Ashby Recoveries Ltd (who by then were handling the matter on behalf of Galleon) to Holman Fenwick & Willan dated 12th November 1999 in which they stated that the claim had become time-barred in Hong Kong and would therefore not be pursued there. However, since they understood that the Lebanese courts would apply the Hamburg Rules, they said that they proposed to start proceedings in Lebanon. On 7th December 1999 Holman Fenwick and Willan responded pointing out that clause 24 gave UASC the right to have any dispute determined in England or Kuwait

and exercising its option in favour of England. On 29th March 2000 the proceedings in Beirut were adjourned to October to enable arrangements for representation to made, but in the meantime the claimants commenced proceedings in this country seeking, among other things, a declaration that they have been discharged from any liability by virtue of Article III, r. 6 of the Hague-Visby Rules and relief by way of anti-suit injunction. On 30th July this year Timothy Walker J. gave the claimants permission to serve the proceedings on Galleon in Hong Kong.

6. This matter now comes before me on the hearing of three applications: (i) Galleon's application to set aside the order of Timothy Walker J. giving permission to serve the proceedings out of the jurisdiction; (ii) the claimants' application for summary judgment on their claim for declaratory relief and for a permanent anti-suit injunction; and (iii) the claimants' alternative application for an interim anti-suit injunction pending trial of the action.

A. Service out of the jurisdiction

7. It was common ground that before granting permission to serve proceedings out of the jurisdiction the court must be satisfied (a) that there is a good arguable case that the claim falls within one of the grounds of jurisdiction set out in Rule 6.20; (b) that the claim gives rise to a serious issue to be tried; and (c) that it is one in respect of which it is appropriate as a matter of discretion to give such permission: see ***Seaconsar Far East Limited v Bank Markazi Johmhouri Islam Iran*** [1994] 1 A.C. 43.

8. The claimants all sought and obtained permission to serve Galleon out of the jurisdiction under CPR Rule 6.20(5) (c) and (d) on the grounds that their claims were made in respect of contracts which are governed by English law and which provide that the English courts shall have jurisdiction to determine claims arising under them. As far as UASC is concerned, this simply raises a question of the construction of clause 24 of the bills of lading. As far as the other claimants are concerned, however, it also raises a question as to the construction and effect of clause 4 and to that extent their position calls for separate consideration. It is convenient therefore to consider the position of UASC first.

(i) The position of UASC

(a) Jurisdiction

9. Mr. Morris on behalf of the claimants submitted that, despite its imperfections, clause 24 contains a clear agreement that the contract contained in or evidenced by the bill of lading is to be governed by English law. If the clause had been a little more carefully drafted as a single sentence, with commas separating the words "in both cases according to the laws of England", rather than as two sentences with a full stop after the word "Carrier" and a new sentence beginning with the words "In both cases", there would have been no room for argument to the contrary. Mr. Ghaffar submitted, however, that having regard to the way in which the clause is in fact structured the words "In both cases according to the laws of England" are to be read as applying only to the construction of clause 24 which is itself limited in its substantive effect to the choice of jurisdiction. He submitted that in the absence of any express or implied choice of law all the circumstances of the case pointed to the law of Hong Kong as being the proper law of the contract.

10. This is a short question of construction on which I consider Mr. Ghaffar's argument to be quite untenable. Apart from anything else, it leads to the surprising conclusion that the parties chose one system of law to govern this limited aspect of their relationship while completely ignoring the question of which system of law should govern its primary commercial aspects. It would, if Mr. Ghaffar were right, also lead to the conclusion that the different parts of the contract are governed by different systems of law. In my judgment this is a good example of the dangers inherent in applying what Lord Diplock in ***Antaios Compania Naviera S.A. v Salen Rederierna A.B.*** [1985] A.C. 191, 201 referred to as "*detailed syntactical and linguistic analysis*" to commercial documents. The drafting of clause 24 is certainly unsatisfactory in some respects: it is not framed as a single sentence and the part which appears as a second sentence is grammatically flawed, containing no verb. Yet the second part of the clause clearly refers back to the earlier part and is intended to be read with it. Article 3(1) of the Rome Convention requires that any choice of proper law be demonstrated with reasonable certainty and when I look at clause 24 as a whole I am left in no doubt as to its meaning. It is clear to me that it was intended to be read as a whole, indeed as a single sentence, and that the parties were intending to provide that in whichever of the two named jurisdictions disputes were determined, they were to be determined in accordance with English law.

11. The question whether there was at the time of the application an effective agreement that any action should be pursued in England depends on the exchanges between the parties which took place during the latter part of 1998 and the early part of 1999. Mr. Ghaffar accepted that clause 24 contains an exclusive jurisdiction clause in favour of England or Kuwait at UASC's option, but he drew attention to the words "*Unless otherwise agreed by the Carrier . . . . . .*" and submitted that in this case UASC had "*agreed otherwise*", thereby entitling Galleon to commence proceedings in any other jurisdiction of its choice.

12. Again, I find it impossible to accept this argument. In the first place, it depends on the proposition that if the Carrier agrees to proceedings being brought in any jurisdiction other than the two specified in the clause, he automatically opens the door to proceedings against him anywhere in the world. However, I am unable to accept that clause 24 has that effect. The clause undoubtedly contemplates that the Carrier may waive his right to insist on proceedings being brought in one of the two agreed jurisdictions, but I do not think that it can properly be construed to mean that if he agrees to proceedings being brought against him in one particular jurisdiction he automatically loses any right to object to proceedings being brought in others. That would make little commercial sense and would require much clearer language. The language of the clause makes it clear that the Carrier has

the right to decide in which of the agreed jurisdictions proceedings shall be brought and it is consistent with that that it also has the right to decide whether and to what extent it will consent to any relaxation of those restrictions. The precise extent of the waiver will depend on the facts of the case. Even if UASC had agreed to proceedings being brought against it in Hong Kong, therefore, I do not think that it would thereby have lost the right to object to proceedings being brought against it in Lebanon.

13. However, there is another obstacle in the way of Mr. Ghaffar's argument because I am unable to accept that in this case UASC did agree irrevocably to proceedings being brought against it in Hong Kong or to depart from the provisions of clause 24. The exclusive jurisdiction agreement forms part of the contractual terms agreed between the parties and the rights which it gives can only be lost in accordance with the terms of the clause or general principles of law. The terms of clause 24 itself do not suggest that the Carrier loses his rights merely by saying that he is willing for proceedings to be brought elsewhere if such a statement would not otherwise be binding on him. It is necessary, therefore, to consider whether in this case UASC did irrevocably agree to proceedings being brought against it in Hong Kong.

14. It is quite true, as I have already said, that in the course of the correspondence to which I have referred Holman Fenwick & Willan offered to accept service of proceedings in Hong Kong. Mr. Ghaffar submitted that they did so on behalf of all the present claimants. In some cases it is apparent that agents for a shipping line, as well as the lawyers handling the matter on their behalf, are dealing with a claim on behalf of the shipowner or the person who acted as carrier under the bill of lading. Whether that is the case or not will depend on the facts of the case. At the outset Holman Fenwick & Willan informed Vincent T.K. Cheung, Yap & Co. that they acted for United Agencies Shipping Co., but thereafter the correspondence proceeded on the basis that they were dealing with the substance of the claim in a manner which might have provided some basis for thinking that they were acting on behalf of other interested parties as well. However, in their letter of 9th January 1999 Holman Fenwick & Willan stated in terms that they were authorised to accept service of any proceedings against United Agencies Shipping Co. and at that point I do not think that Vincent T.K. Cheung, Yap & Co. can properly have been under any illusions. In these circumstances it is very difficult for Galleon to say that Holman Fenwick & Willan were purporting to act on behalf of UASC or that UASC was agreeing to proceedings being brought against it in Hong Kong; and it is even more difficult for it to say that Holman Fenwick & Willan were speaking on behalf of any of the other claimants.

15. However, the matter does not end there because Galleon did not in fact issue proceedings in Hong Kong. There is no evidence that it took any steps whatsoever in response to Holman Fenwick & Willan's letter and in those circumstances I can see no basis for saying that UASC or any of the claimants irrevocably gave up their right to insist that proceedings be brought in England or Kuwait in accordance with clause 24. If proceedings had been issued in Hong Kong, and a fortiori if they had been served, it might (subject to the point mentioned earlier) have been possible to argue that in accordance with the ordinary principles of promissory estoppel UASC had waived its right to object to proceedings being brought in Hong Kong, but in the absence of any action of that kind I can see no grounds on which such an argument could succeed. It follows that I do not think that UASC agreed to proceedings being brought against it in Hong Kong in such a way as to preclude it from relying on clause 24 or from exercising its option in favour of England as Holman Fenwick & Willan purported to do on its behalf in their letter of 7th December 1999.

16. For these reasons I am satisfied that the contracts in this case are both governed by English law and that each of them contains an exclusive jurisdiction clause in favour of the English courts. The claims being made by UASC in the present action are claims in respect of contracts which are governed by English law and which provide that the English courts shall have jurisdiction to determine claims arising under them. The court therefore had jurisdiction to give permission to serve the proceedings on Galleon in Hong Kong.

(b) Serious issue to be tried

17. UASC is making three distinct claims in these proceedings. The first relates to its liability under the bills of lading. As to this, the claim is for a declaration that any liability for misdelivery of the goods has been discharged by operation of Article III, rule 6 of the Hague-Visby Rules. The second relates to the exclusive jurisdiction agreement contained in clause 24. As to this, the claim is for relief by way of anti-suit injunction to prevent the continuation of the proceedings in Lebanon and for damages for breach of the agreement. The third relates to the undertaking in clause 4.2 not to pursue claims against agents and sub-contractors. Again, the claim is for relief by way of injunction. In each case there is in my view a serious issue to be tried.

18. As far as the first claim is concerned, Mr. Ghaffar submitted that the claim being pursued in Lebanon is not a claim under the bills of lading as such; it is a simple claim for misdelivery of goods by a bailee. That may be true in one sense, although the evidence indicates that Akak Marine Co. were holding the goods as agents of UASC as ocean carriers under the bill of lading. If that were not the case, it is difficult to see on what basis Galleon is seeking to hold UASC liable. The important point for these purposes, however, is not whether Galleon can pursue a claim without relying on the bills of lading, but whether the contracts contained in the bills of lading contain an effective limitation clause which relieves UASC from any liability for what happened in this case. That is the issue on which its claim for a declaration depends since it is common ground that proceedings were not commenced in any jurisdiction within 12 months of the date when the goods should have been delivered. Whether UASC is right or wrong on the point, the issue is undoubtedly a serious one to be decided as between itself and Galleon.

19. The same goes for the claim based on clause 24. As I have held, that clause does contain an effective exclusive jurisdiction in favour of the courts of this country and there is therefore a serious issue to be tried in relation to the commencement of proceedings against UASC by Galleon in Lebanon and the consequences of that action.

20. As far as the claim based on clause 4.2 is concerned, the clause contains a personal undertaking by the merchant in favour of the carrier not to pursue a claim otherwise than against the carrier. The commercial purpose of this is obvious: it is intended to prevent claims which could not be pursued successfully by the cargo owner against the carrier under the bill of lading from being pursued against it through the medium of those who, if they were to be held liable to the cargo owner, might seek to recover an indemnity from him free of the constraints which the bill of lading would otherwise impose. In the present case UASC seeks to enforce that undertaking directly against Galleon for its own benefit and this in my judgment clearly does raise a serious issue.

(c) Discretion

21. In cases where the only ground for giving permission to serve out of the jurisdiction is that the contract is governed by English law the exercise of the court's discretion, especially in relation to the question of forum conveniens, assumes particular importance. Where, however, the parties have agreed that the English court should have jurisdiction the question of forum conveniens is of less significance because the court is entitled to assume that the parties have satisfied themselves that England is the most suitable forum in which to have their disputes determined, added to which there is the desirability of holding the parties to their agreement. Where there is an exclusive jurisdiction clause these considerations are usually overwhelming. In the present case there is nothing which would suggest that Lebanon is the appropriate forum for the determination of disputes under the bills of lading. Galleon has already made it clear that proceedings have been brought in that country only because it has been advised that the Lebanese courts will apply the more favourable Hamburg Rules instead of the Hague-Visby Rules which would apply both under the proper law of the contract and as a mandatory requirement under the Carriage of Goods by Sea Act 1971 if the proceedings took place in this country. I agree with Mr. Morris that this is a matter which weighs in favour of giving permission to serve out rather than against it.

22. In these circumstances I am satisfied that this is a proper case for UASC to be given permission to serve Galleon out of the jurisdiction and the application to set aside the order of Timothy Walker J. in favour of UASC must be dismissed.

(ii) The position of the second, third and fourth claimants

23. The second, third and fourth claimants seek to take advantage of clause 24 of the bill of lading through the operation of clauses 1 and 4.3. It is not clear whether, and if so on what basis, Galleon seeks to hold any of them liable as Carrier; on the contrary, the nature of Mr. Ghaffar's submission suggests that it does not. Mr. Morris therefore based his submission on the operation of clause 4.3 which he said was framed in terms which are wide enough to confer on all those to whom it applies the benefit of the choice of proper law and jurisdiction contained in clause 24.

24. Clauses of the kind represented by clause 4.3, commonly known as "Himalaya clauses", have been in existence in various forms for a long time. They are usually couched in general terms and this has given rise to a debate about whether they are capable of conferring on parties such as agents and stevedores the benefit of certain kinds of provisions. The most recent consideration of this question is to be found in the ***Mahkutai*** [1996] A.C. 650 (P.C.). In that case a cargo of plywood was carried from Jakarta to Shantou under a bill of lading issued on behalf of the charterers which contained a Himalaya clause in the following terms:

    "*Without prejudice to the foregoing, every such servant, agent and subcontractor shall have the benefit of all exceptions, limitations, provision, conditions and liberties herein benefiting the carrier as if such provisions were expressly made for their benefit, and, in entering into this contract, the carrier, to the extent of these provisions, does so not only on as [sic] own behalf, but also as agent and trustee for such servants, agents and subcontractors.*"

    The bill of lading also contained a jurisdiction clause which provided that the contract should be governed by the law of Indonesia and that the Indonesian courts should have exclusive jurisdiction to determine any disputes arising under it.

25. The cargo owners arrested the vessel when she called at Hong Kong to discharge other cargo, alleging that the plywood had been damaged in the course of the voyage. The shipowners applied to stay those proceedings on the grounds that, although they were not primary parties to the bill of lading contract, they were entitled to the benefit of the exclusive jurisdiction clause, either by virtue of the Himalaya clause, or by virtue of the fact that they had become bailees of the goods on its terms.

26. Having traced the history of the development of the court's approach to these questions from ***Elder, Dempster & Co. Ltd v Paterson, Zochonis & Co. Ltd*** [1924] A.C. 522 to ***Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd*** [1981] 1 W.L.R. 138, Lord Goff, delivering the opinion of the Board, approached the matter on the basis that the principle established in ***The Eurymedon*** [1975] A.C. 154 applied, namely that the Himalaya clause gave rise to a bilateral contract between the shipowners and the cargo owners made through the agency of the charterer as carrier. (Their Lordships were prepared to assume for this purpose that the shipowners were "*subcontractors*" within the meaning of the clause.) The choice of law provision which, as in the present case, formed part of the jurisdiction clause, does not appear to have given their Lordships any concern, primarily, it seems because it was recognised that any contract which came into existence between the cargo owners and parties other than the carrier through the operation of the Himalaya clause would naturally be governed by the

same system of law. What clearly did trouble their Lordships was whether an exclusive jurisdiction clause which creates mutual rights and obligations could properly be regarded as an "*exception, limitation, provision, condition or liberty benefiting the carrier*" within the meaning of the clause. They held that it could not.

27. I think it is clear from the passage at page 666B-667F of the report that their Lordships approached the question as essentially one of construction of the terms of the clause in question, informed by an understanding derived from the decided cases of the intended function of clauses of this kind. It follows, therefore, that a differently worded clause might have a different effect, although it will still be necessary to take account of the nature and intended function of this kind of clause before reaching that conclusion. It is important, of course, in the interests of commercial certainty that the court should avoid drawing fine distinctions between clauses with similar wording. However, it is equally if not more important in my view to give effect so far as possible to the intentions of the parties when these are clearly ascertainable. Mr. Morris drew my attention to the decision of the Court of Appeal in ***Bouygues Offshore S.A. v Caspian Shipping Co*** [1997] I.L.Pr. 472 refusing an application for leave to appeal in which Hobhouse L.J. recognised that it might be possible to draft a Himalaya clause which was wide enough to encompass an exclusive jurisdiction clause. To that limited extent the case supports his argument.

28. Clause 4.3 in the present case differs from the Himalaya clauses considered in previous cases in containing an express reference to clauses 24 and 25 of the bill. Clause 24 is the jurisdiction clause which I have already cited. Clause 25 is a United States Clause Paramount which incorporates the United States Carriage of Goods by Sea Act 1936 in relation to the carriage of goods to, from or through a port in the United States and requires claims in such cases to be referred to the District Court for the Southern District of New York in accordance with the laws of the United States. As a matter of construction, although it would not normally fall within the words "defence, exception, limitation, condition and liberty" in clause 4.3, the specific reference to clause 24 makes it quite clear in my view that the parties intended its provisions to apply to any relationship between the merchant and a party other than the carrier brought into existence under that clause. Some, though not all, of the factors to which Lord Goff referred in ***The Mahkutai*** as supporting the Board's conclusion in that case still apply: the most obvious is the fact that the choice of forum is that of the carrier and is unlikely to reflect the preferences of the agent or sub-contractor in question. On the other hand, the carrier itself may have an interest in ensuring that any proceedings against its employees, agents or sub-contractors are brought in the jurisdiction of its own choice. However, I do not think that considerations of this kind can displace the parties' agreement where that is expressed in sufficiently clear terms. In my judgment the parties in this case have succeeded in doing so.

29. In *The Mahkutai* the Privy Council found it unnecessary to decide whether the shipowners were sub-contractors for the purposes of the clause in question and so the point was left open. In the present case Mr. Ghaffar did not argue very strongly that the owners of the *Hanjin Yokohama* were unable to bring themselves within the scope of clause 4.3 and for my own part I agree with the observations of Colman J. in ***Homburg Houtimport B.V. v Agrosin Private Ltd (The "Starsin")*** [2000] Lloyd's Rep. 85, 99 that in a case where cargo is carried in a chartered ship under bills of lading issued by the charterer on his own behalf the shipowner is to be regarded as an independent contractor within the meaning of a clause of this kind. I am satisfied, therefore, that the shipowners are entitled to take the benefit of clause 24 in this case. Akak Marine are the agents of UASC at Beirut and took possession of the goods following their discharge from the vessel. They therefore fall squarely within the terms of clause 4.3. As owners of the "feeder vessel" by which the carriage to Lebanon was completed the fourth claimants can in my view properly be regarded as sub-contractors and Mr. Ghaffar did not suggest otherwise. Each of these claimants is therefore entitled to invoke the provisions of clause 24 and by issuing these proceedings, if not before, each of them has clearly assented to the choice of English jurisdiction. In each case, therefore, the claim is one which falls within the provisions of Rule 6.20(5)(c) and (d), and for the reasons I have already given I am satisfied both that there is a serious issue to be tried and that this is a proper case in which to give leave to serve out of the jurisdiction. The application to set aside the order of Timothy Walker J. in favour of the second, third and fourth claimants must therefore also be dismissed.

B. Summary Judgment

30. If, as I have held, the action is to proceed in this country, the claimants are entitled to seek summary judgment under Part 24 of the Civil Procedure Rules. It is common ground that in order to succeed in an application of that kind they must show that the defendant has no real prospect of successfully defending the relevant claim.

(a) Declaration that the claimants are discharged from liability

31. It is convenient to consider first the claim for a declaration that the claimants have been discharged from liability. Once it is accepted that the action should proceed in this country certain consequences follow, one of which is that since the goods were shipped in a contracting state the court must apply the Hague-Visby Rules as enacted in the Carriage of Goods by Sea Act 1971. It is common ground that Galleon did not begin proceedings in any jurisdiction within the 12 month time limit; indeed, it refrained from commencing proceedings in Hong Kong in 1999 precisely because it recognised that the time allowed under the Hague-Visby Rules had by then already expired. Mr. Ghaffar submitted that the precise nature of the claim being pursued against the claimants in Lebanon is uncertain and that on further investigation it may become clear that it is not one which falls within the ambit of the Hague-Visby Rules at all. There are two answers to this point, however. The first is that once the claimant has complied with the requirement in paragraph 2(3)(b) of the practice direction to Part 24 to state his belief that the defendant has no real prospect of success, it is for the defendant to adduce sufficient evidence to satisfy the court that the matter ought to go to trial. He cannot simply submit that if the case is allowed to proceed something may turn up. In the present case Galleon has not sought to adduce evidence to suggest that the

Lebanese proceedings involve anything other than a claim for misdelivery of the goods on the part of the carrier and those acting on his behalf. The second answer is that this is really just another way of putting the argument that Galleon does not need to rely on the bill of lading to support its claim. However, as I have already pointed out, that does not take the matter any further. Mr. Ghaffar did not seek to argue that Article III, rule 6 is ineffective to discharge liability for misdelivery of the goods and in the light of the decision of the Court of Appeal in ***Compania Portorafti Commerciale S.A. v Ultramar Panama Inc. (The "Captain Gregos")*** [1990] 1 Lloyd's Rep. 310 he was in my view right not to do so. In these circumstances it follows that the claimants are entitled to the declaration which they seek in this respect. It is unnecessary in these circumstances to decide whether UASC is also entitled to a declaration that the second, third and fourth claimants are under no liability to Galleon by virtue of clause 4.2.

(b) Declaration that the Lebanese proceedings constitute a breach of contract

32. Each of the claimants alleges that the commencement by Galleon of proceedings against it in Lebanon involved a breach of contract and it follows from what I have already said that that is so. In the case of UASC the proceedings involve both a breach of the exclusive jurisdiction agreement in clause 24 and a breach of the undertaking in clause 4.2 not to make a claim against anyone other than UASC. An undertaking of this kind is enforceable at the suit of the person to whom it is given and in an appropriate case will be enforced by stay of proceedings or other appropriate order: *see* ***Nippon Yusen Kaisha v International Import and Export Co. Ltd*** [1978] 1 Lloyd's Rep. 206. As far as the other claimants are concerned the commencement and prosecution of proceedings in Lebanon is a breach of the exclusive jurisdiction agreement which, as I have held, applies as between each of them and Galleon by virtue of clause 4.3. For these reasons I am satisfied that they are entitled to a declaration in the terms sought. They are also entitled to judgment for damages to be assessed in respect of that breach.

(c) Anti-suit injunction

33. In these circumstances it becomes very difficult for Galleon to resist the claimants' application for a permanent injunction restraining it from pursuing the proceedings in Lebanon. Each of the claimants has established the existence of an exclusive jurisdiction agreement between itself and Galleon in favour of the courts of this country and in those circumstances it would be necessary for Galleon to show strong reasons why that agreement should not be enforced: see ***Aggeliki Charis Compania Maritima S.A. v Pagnan S.p.A. (The "Angelic Grace")*** [1995] 1 Lloyd's Rep. 87 and ***Donohue v Armco Inc*** [2000] 1 Lloyd's Rep. 579. In fact, as all concerned in this matter are well aware, Galleon is seeking to pursue a claim in Lebanon only in order to circumvent the operation of Article III, rule 6 of the Hague-Visby Rules, contrary to the wishes of the parties who clearly intended that so far as possible their relationship should be governed by English law and by the Hague or Hague-Visby Rules. It is quite true that these proceedings were not themselves begun as promptly as might have been the case following the issue of the writ in Lebanon, but that action has made very little progress as yet and I cannot accept that such delay as has occurred provides sufficient grounds for refusing the only form of relief that will provide an effective remedy for this breach of contract. I am satisfied, therefore, that the appropriate course is to grant the injunction which the claimants seek.

Mr. Stephen Morris instructed by Holman Fenwick & Willan appeared for the claimants.
Mr. Arshad Ghaffar instructed by John Weston & Co appeared for the defendant.