Nima SARL v The Deves Insurance Public Company Ltd [2002] Int.Com.L.R. 07/30

CA on appeal from Commercial Courtt (Mr Justice Andrew Smith) before Potter LJ; Keene LJ; Mr Justice Sumner. 30th July 2002
Lord Justice Potter:

INTRODUCTION

1. This is an appeal by the defendant insurance company (a company incorporated and resident in Thailand) from the order and judgment of Mr Justice Andrew Smith dated 29 November 2001 by which he dismissed the defendants' application for an order setting aside the earlier order of Mr Justice Toulson dated 18 January 2000 granting permission to the claimants pursuant to RSC Order 11 rule 1(1)(d)(iii) to serve the Claim Form on the defendants out of the jurisdiction. The ground relied on for the grant of such permission was that the contract sued upon, a marine insurance policy, is governed by English law. Andrew Smith J refused permission to appeal. However, permission was subsequently granted by Clarke LJ on 27 December 2001.

2. The claimants (a company incorporated and resident in Mali) were purchasers from Central Rice Co Ltd of Thailand ("Central") under a CIF contract of a cargo of some 5,500 tonnes of rice valued at about €1.5 million shipped on a vessel bearing the name "PRESTRIOKA" ("the vessel") at Kohsichang in Thailand in March 1999 for carriage to Dakar in Senegal. The cargo was insured under an all risks Marine Cargo Policy issued in Bangkok ("the Policy") as follows:

   "*NAME OF ASSURED: Central Rice Co. Limited. VESSEL: PERESTRIOKA. VOYAGE: At and from Kohsichang ... TO: Dakar Port in Transit ... Insurance Certificate for 110% of CAF Free Out Dakar Value Covering All Risks. As per Institute Cargo Clauses (A)....*".

   By an endorsement dated 10 March 1999 the definition of the voyage the subject of cover under the policy was amended to read:

   "*From Kohsichang, Thailand to Dakar port, Senegal.*"

   The cargo never arrived at its destination and has been totally lost in mysterious circumstances. The claimants claim for loss of the cargo on the basis that it resulted from a peril insured against under the terms of the policy and in particular under Clause 1 of the Institute Cargo Clauses (A) ("ICC") which provides inter alia that:

   "*1. This insurance covers all risks of loss of or damage to the subject-matter insured except as provided in Clauses 4, 5, 6, and 7 below.*" *(None of those numbered clauses is relevant for the purposes of this appeal) ...*

   5.2 The Underwriters waive any breach of the implied warranty of seaworthiness of the ship and fitness of the ship to carry the Subject-matter Insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness."

   It was an express term of the policy that:

   "*Notwithstanding anything contained herein or attached hereto to the contrary, it is understood and agreed that this insurance is subject to English law and practice only as to all questions of liability for and settlement of any and all claims arising under this Policy.*"

   I shall refer below to certain further clauses of the ICC which are relevant to the argument on this appeal.

THE BACKGROUND

3. The following are the material facts so far as known when the matter was before the judge, as summarised by him.

4. The vessel was chartered by the sellers of the cargo on an amended Gencon voyage charter dated 24 February 1999. SGS inspected the vessel and cargo at loading, and shipment on board of the cargo was acknowledged by 2 Congen bills of lading dated Thailand 5 March 1999, naming the claimants as the notified party and Dakar as the discharge port. The vessel did not in fact sail until 28 March 1999 because she was undergoing engine repairs.

5. The normal passage time to Dakar is 32-35 days. Thus, the vessel should have arrived in the ordinary course at the beginning of May 1999. Faxed communications concerning the progress of the vessel were received by the agents on paper bearing the letterhead of '*Prestrioka Maritime Limited (Penang Representative Office)*' and signed by '*Eddy*' of that office who stated that the owners were in touch with the vessel on a daily basis. On 22 April 1999, they advised she had been delayed owing to her speed and on 24 April 1999 gave an ETA at Dakar of 20/21 May 1999. On 13 May, the owners advised that the vessel would be in Dakar within 15/16 days, her main engine problem resulting in an unfavourable speed. On 20 May 1999 the owners advised that the vessel had not been heard from for 7 days. The last message from the owners was received on 24 May 1999 reporting the vessel's position as at 22 May and stating that the vessel's main engines had failed. It continued:

   "*Vessel were drifting southward about forty-four miles a day due to strong wind rough to very rough sea she also rolling/pitching heavily sometime. Ship's engineers are trying to have damaged parts repairs and estimated another four-five days more. Radio equipment have also problem and very difficult to send/receive messages.*

   We will regularly keep you informed and we regret for this unexpected circumstance."

6. The vessel never arrived in Dakar and no trace of her or her cargo has been found. All that is known with certainty is that the cargo was loaded on the vessel at the load port but did not arrive at the discharge port. On the face of it, therefore, the cargo was totally lost in circumstances prima facie covered by the All Risks policy.

7. The claimants claimed for its loss under the policy on 19 May 1999. After investigation, the defendants declined liability on 17 August 1999 on the sole ground that the vessel was unseaworthy. The defendants initially indicated in correspondence that they would appoint solicitors to accept service within the jurisdiction. However, the defendants then equivocated. On 18 January 2000 Mr Justice Toulson granted the claimants permission to issue

and serve the Claim Form on the defendants out of the jurisdiction in Thailand where service was belatedly effected after the documents had been transmitted through diplomatic channels on 16 July 2001.

8. On 17 August 2001 the defendants applied to set aside the order of Toulson J on the grounds that (a) there was no serious issue to be tried between the parties and (b) Thailand was the more appropriate *forum* for trying the claim.

9. The principle point taken under ground (a) was one which was largely taken upon the basis of the claimants' own evidence in support of the application to serve out. In the witness statement of Mr Blows, the claimants' solicitor, dated 5 January 2001 under the heading 'The Circumstances of Loss', having set out the history of the loading aboard, and the voyage of, the vessel, he stated as follows:

"22. In July 1999 my firm's Paris office was instructed by the claimants in relation to this matter. I am informed by Ms Borssan of that office and believe that she sought to make enquiries in relation to the cargo, in particular, the m.v. "PRESTRIOKA". Those enquiries have yielded the following information. From documents supplied to the claimants by ICL Trading Co Ltd on 2 April 1999, it appeared that the vessel was registered in Honduras [p.87]. Ms Borssan tells me, and I believe her, that she has endeavoured to make enquiries of the Honduras Registry in relation to the vessel but they have repeatedly failed to respond, the company which purports to own the vessel, Prestrioka Maritime Co Ltd, appears from the charterparty [p.68] to be Malaysian company. However, I am informed by Ms Borssan and believe that she asked my firm's Singapore office to make enquiries in relation to the company; their response, having instructed local lawyers, was that no record of it could be found at the Malaysian Companies Registries [p.88]. Ms Borssan thus informs me, and I believe, that it has proved impossible to find any record of the vessel or her owners. I also attach a copy of a fax from the same local employers, confirming that the vessel is not registered in Malaysia [p.89].

23. In the light of the above, I consider it likely that the Claimants has been the victim of a fraud by the shipowners, or by persons purporting to be the shipowners. It may be that the vessel on which the cargo was loaded was not the mv "PRESTRIOKA" at all, but some vessel purporting to be that vessel. But it appears whatever be the detailed circumstances of loss, that the cargo has been stolen. I attach a fax from the ICC-International Maritime Bureau confirming that the person involved in the "PRESTRIOKA" has disappeared [p.90]"

10. The letter exhibited stated: "*We came across [Prestrioka Maritime Ltd] whilst investigating an unconnected matter.*

Mr Eddy Ng or a person with this false identity was involved in a case where the vessel has gone missing with the cargo. At that time the address used by Eddy Ng was – Room 1, 2nd Floor, Wisma Boon San Tong, 49B, Wield Quay, Penang, 10300. Our investigator visited this address in May 1999. Mr Eddy Ng had rented this room for a short period and had moved on. Our investigator found some faxes relating to MV PRESTRIOKA at that address.

MV PRESTRIOKA has all the hallmarks of a phantom vessel. She is not actually registered in Honduras. We have been unable to locate Eddy Ng."

It appears that a '*phantom*' ship or vessel is a term used within the International Maritime Bureau to describe a vessel which has no valid classification, is not registered with any recognised ship registry and is usually operated by criminals. It is employed as a vehicle for fraud on cargo owners, the modus operandi being that, as part of a pre-arranged scheme to which the owners and/or Master are party, shortly after leaving the port of shipment ostensibly bound for the port to which the vessel's cargo is contracted to be delivered, delays en route are reported during which the phantom vessel in fact proceeds to a new location to discharge her cargo and achieve her disappearance, usually by assuming a new identity. Phantom ship frauds are a phenomenon well known in Far East shipping circles: see for instance ***Everbright Commercial Enterprises v Axa Insurance Singapore*** [2001] 2 SLR 316 and ***Nam Kwong Medicines & Health Products Co Ltd v China Insurance Company Limited***, High Court of Hong Kong. The latter case is reported at [1999] 1216 HKCU 1 in relation to an interlocutory application. A transcript of the substantive decision of Stone J at first instance on 28 June 2002 has also been provided to us.

11. The case advanced by the claimants was summarised in this way: *"First, and as set out above, I believe it likely that the cargo had simply been stolen by persons purporting to be the owners of the mv "PRESTRIOKA". If that be right, any loss was not caused by the unseaworthiness of the mv "PRESTRIOKA" (or of the vessel which purported to be that vessel). Secondly, even if the loss was caused by the unseaworthiness of the vessel, there is no reason to suppose that the Claimant or, for that matter, Central, was privy to such unseaworthiness."*

In those circumstances, while maintaining their defence that the vessel was unseaworthy at the time of sailing, the defendants contended that it was plain from the evidence before the court that the risk under the policy never attached by virtue of s.44 of the *Marine Insurance Act 1906* which provides:

"*Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.*"

12. The defendants relied before the judge upon a number of matters made clear by the evidence before him as establishing that the claimants had indeed been the victims of a '*phantom ship*' fraud. They were as follows. Despite investigation by Associated Marine Surveyors (Thailand) Limited ("AMS") and lawyers for the defendants and by English and Far East lawyers for the claimants, no record of a vessel called PRESTRIOKA nor any record of a company called "Prestrioka Maritime Limited" has been found in any register or other official source. The single document available in the name of the 'PRESTRIOKA' which the owners provided to the agents for the vessel was in the form of a provisional registry certificate of Honduras in which the place of issue and the address of the owner had not been stated. However, the vessel is not in fact registered in Honduras and the form used was out of date. Prestrioka Maritime Limited gave an address in Malaysia on the charterparty but the company was not registered in

Malaysia and the address given was simply a room rented by Mr Eddy Ng for a short period in which was discovered, after he had vacated, some faxes relating to the 'PRESTRIOKA'. The ICC had reported that Mr Ng was involved in another case in which the vessel had disappeared with its cargo, also being investigated by the ICC. Prestrioka Maritime Limited had given intermittent reports of the progress of the vessel until 20 May 1999. Thereafter all messages had ceased and no report was made to cargo interests as to what had happened to the vessel. The vessel had since disappeared without any record of a casualty being reported or found. The claimants had themselves reached the conclusion that the cargo was stolen by the owners of the vessel. The defendants argued that since the claimants had never suggested that they considered any other explanation for the loss to be plausible, or that it intended to carry out further investigations, there was no real prospect that the trial judge could reach any other conclusion than that suggested by the International Maritime Bureau i.e. that the vessel was a 'phantom ship' which was never intended by its owners and/or Master to be sailed to Dakar, but rather to 'disappear' at sea. There was therefore no good arguable case or real issue to be tried.

13. In response, the claimants did not advance any positive case beyond that deposed to by Mr Blows. Their position was as set out in the second witness statement of Miss Taylor, Mr Blows' assistant, who stated:

"*16. The claimant does not and does not need to advance a positive case that the cargo was stolen by the vessel owners. Still less does the claimant need to advance a case that such a theft took place pursuant to a plot decided upon as the vessel left the load port. The claimant's case is as appears in the Particulars of Claim, namely that the loss was by insured perils ...*

17. Mr Melbourne asserts that it is "plain" that the vessel never intended to sail for the contractual discharge port ... On the basis of the present factual information and the uncertainty as to the actual cause of the loss, this is not a conclusion which can be reached with any confidence. These matters are properly investigated at trial.

18. The ship left the load port ostensibly for Dakar and did not arrive. It is, therefore, and must be for the Defendant to show that, at the time of sailing, the shipowners did not intend to go to Dakar if the s.44 point is to be relied on. Further, the Defendant needs to discharge that burden to the high standards required in the context of an allegation of criminal activity in a civil case. The Court is invited to find that the Defendant has not done so."

14. So far as ground (b), the issue of '*forum conveniens*', was concerned, the defendants relied upon the fact that, despite its subsequent assignment to the claimants (who are a company registered in Mali), the contract on which the action was based was made in Thailand between two Thai entities for the insurance of a cargo which was lying in a Thai port. It was contended that despite the fact that the policy provided that it should be subject to English law and practice only, the contracting parties would naturally have contemplated Thai jurisdiction in the event of a dispute. It was asserted that all the factual issues in the case concerning the loading and inspection of the cargo, the sailing of the vessel, its state of repair and the circumstances surrounding its utilisation, sailing and disappearance would be more conveniently tried in Thailand than in England and reliance was placed upon the concession of Mr Blows in his affidavit that '*the bulk of evidence may have to be obtained from Thailand*'.

15. For the claimants, it was argued that the provisions and effect of s.44 were avoided or displaced by reason of the incorporation of the ICC and, in particular, Clause 8 which, in the section headed '*Duration*', and accompanied by a side-note 'Transit Clause' provides:

"*8.1 This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either*

8.1.1 On delivery to the Consignees or other final warehouse or place of storage at the destination named herein,

8.1.2 On delivery or any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either

8.2.1 For storage other than in the ordinary course of transit or

8.1.3 For allocation or distribution, or

8.1.4 On the expiry of 60 days after completion of discharge ...

whichever shall first occur ..."

It is not necessary to quote the remainder of Clause 8, nor Clause 9. However, Clause 10, described by a side heading as a 'Change of Voyage Clause'; provided as follows:

"*10. Where, after attachment of this insurance, the destination is changed by the Assured, held covered at a premium and on conditions to be arranged subject to prompt notice being given to the Underwriters.*"

16. The claimants' argument before the judge, put shortly, was that, Clause 8 was a '*warehouse to warehouse*' clause which clearly provided for commencement of the risk at a time earlier and/or different from that contemplated by s.44 (i.e. the commencement of the voyage). Thus, Clause 8 takes precedence over and/or avoids the application of s.44 so that the '*All Risks*' cover, having attached at the point when the goods left the warehouse for the commencement of the transit, it could not become 'unattached' upon the vessel sailing for another destination. Second, the claimants submitted that, they having established the loss of the cargo insured under an All Risks policy, the burden lay upon the defendants to show loss by a cause for which they were not liable, and the reliance upon Mr Blow's recognition of the likelihood of a fraud by the shipowners (see paragraph 9 above) was not sufficient for the purpose. Even if the defendants were correct in their assertion that, despite the warehouse to warehouse Clause, s.44 was potentially applicable by way of defence, the burden remained upon the defendants to demonstrate that the shipowners and/or Master had intended that the vessel should sail for a

different destination *prior to* the start of the voyage; otherwise the requirements of s.44 would not be made out. Thus, so far as the defendants' reliance on s.44 was concerned, the claimants contended that there were plainly issues of fact and law to be tried which could not be resolved by the judge.

17. In relation to *forum conveniens*, the claimants contended that England was the most appropriate forum in that the English court was obviously a preferable forum to decide the various issues of marine insurance law which arose in the proceedings, not least because the points taken on the proper construction of the *Marine Insurance Act* and the ICC were not yet authoritatively determined. In any event, it was uncertain how far the Thai courts would respect and apply the parties' choice of English law. Further, as was not in dispute, the claim in Thailand would be time-barred under a two-year time limit commencing with the date of loss. The claimants also pointed out that, while a number of potential witnesses were located in Thailand, others were not and, in any event, overseas witnesses could give evidence by video link where their oral evidence was required. Further, so far as the documents relevant to the case were concerned, the vast majority were in English (a few in French) and would need to be translated if the case were tried in Thailand. There would also be considerable work involved in translation of the expert reports and cases relied on in relation to English law as well as the need for interpretation of English lawyers' evidence. So far as relevant surveyors' reports were concerned they were in English rather than in Thai.

THE JUDGMENT OF ANDREW SMITH J

18. Andrew Smith J stated that he found both the question whether the claimants had shown a sufficiently strong case to justify service of proceedings in Thailand and whether they had shown that England was the appropriate forum '*finely balanced*'. He referred to ***Seaconsar v Bank Markazi*** [1994] 1 AC 438 and in particular the observation of Lord Goff of Chieveley that in relation to the merits of an application to serve outside the jurisdiction, the claimants must show '*a serious issue to be tried*' in respect of each cause of action for which he seeks permission. He proceeded for the purposes of his decision upon the acceptance of the parties of the correctness of the statement of Colman J in ***Molestina & Ors v Ponton & Ors*** 16 May 2001 (New Law Online) to the effect that:

"Application of the overriding objective may, in this field, as in the application of CPR 3.4.2 and 24.2, involve a slight qualification to Lord Goff's test of a serious issue to be tried: that is to say, if the law is in issue, and there is no serious issue to be tried in relation to any conceivably relevant fact, there may, in some cases, be good reason to determine the question of law at the application stage and decline permission to serve out, rather than imposing upon a foreign defendants the inconvenience and expense of applying to strike out the claim under CPR 3.4.2 or 24.2."

19. The judge referred to the defendants' '*strong argument*' that the loss resulted from theft of the cargo pursuant to a scheme to steal formed by the time that the ship sailed. He then turned to the merits of the legal argument as to the potential application of s.44 in the light of Clause 8 of the ICC which I have summarised above.

20. So far as the effect of s.44 in isolation was concerned, the judge relied on the *obiter dicta* of Lord Denning MR in ***Shell International Petroleum Co Limited v Gibbs ("The Salem")*** [1982] 1 QB 946 at 985, a case in which a cargo of oil loaded in Kuwait and ostensibly bound for Italy was diverted to South Africa in breach of an embargo on oils supplies to that country pursuant to a fraudulent plan hatched before the vessel sailed from Kuwait. The principal issue related to whether the cargo was the subject of a '*taking at sea*' and s.44 of the *Marine Insurance Act 1906* was not relied on. However, in the course of his judgment, Lord Denning said as follows:

"In this case "the destination specified in the policy" was North Europe. That was the destination specified as the place to which the cargo was to be carried.

On the facts as I see them, instead of "sailing for" that destination, the ship "sailed for" Durban. As soon as she moved off from Mina al Ahmadi (Kuwait) her Master intended to take her to Durban and discharge the oil there. Durban was the place to which the shipowners and the Master intended to carry the oil and deliver it there.

... Shell never relied on the "held covered" clause and never gave notice of it to the underwriters. They did this for tactical reasons – because they did not want to concede that the vessel ever sailed for Durban. Their case was that she sailed for North Europe and afterwards changed course for Durban. If they had conceded that she had sailed for Durban, they would have been defeated by section 44."

21. In considering the effect of the '*warehouse to warehouse*' provision in ICC Clause 8 the judge observed that, while it was not necessary for him finally to determine the point, he found it '*very difficult*' to interpret Clause 8 read with Clauses 9 and 10 as displacing the provision of s.44. In this respect he referred to a passage in *Arnould's Law of Marine Insurance and Average* (16th ed) vol. III at para 253 in relation to Clause 8.1 to the effect that:

"The risk will not attach, even if the goods leave the warehouse for the intended destination, if they do not proceed on 'the transit' contemplated by the policy. If the insured venture is for carriage in a named vessel, and the goods are never appropriated by a contract of carriage to the insured voyage but are shipped by some other vessel, the policy will not attach; neither the opening paragraph of the Transit Clause nor Clause 8.3 can avail the assured in such circumstances (no question of transhipment or deviation or of the exercise of any liberty granted to the shipowner can arise)."

22. In relation to that proposition a footnote in *Arnould* cites the decisions in ***Simon Israel & Co v Sedgewick*** [1893] 1 QB 303 and ***Kallis (Manufacturers) Limited v Success Insurance Limited*** [1985] 2 Lloyd's Rep 8. Having referred to those authorities, the judge apparently accepted their cogency, because he observed:

"Miss Blanchard has not persuaded me that there is anything in the submission that s.44 is displaced which should lead me to the view that her clients have a real prospect of success on the claim.

I must therefore turn to the question whether on the evidence before me I can be sufficiently confident as to how the loss came about to decide that there is no real prospect of succeeding... if I conclude that it is fanciful to suppose that

the loss occurred any way other than that which the defendant suggests, the claimants would not satisfy me that they have a sufficient case."

23. Having reviewed the evidence upon that question and the many suspicious and unexplained circumstances surrounding the origins, registration, ownership and operation of the vessel, the judge stated his conclusion as follows:

"Of course, the difficulty of tracing the vessel and the owner company is suspicious. It may well be that the trial judge here or in Thailand will have more information than I have. It may be that, when the matter comes to trial, there will be evidence from or about the company shown on the Memorandum of Agreement of the sale of the vessel as the seller to PML. It may be that enquiries about the crew list, which is in evidence before me, will provide more information to support, or go towards answering the defendants' contentions. But I have reached the conclusion that it would be wrong to allow the suspicions which inevitably are raised by the material put before me by the defendants to drive me to the conclusion that this a 'phantom vessel' case, and any other contention stands no reasonable prospect of success, or real prospect of success, or that there is no serious issue to be tried.

I add that, even if the absence of registration and the difficulty in tracing the vessel and the company cast doubt (as it appears to do so) on the bona fide of those operating the vessel in some general way, Miss Blanchard [for the claimants] rightly points out that it does not necessarily follow that they were not intending to deliver the cargo or to sail for Dakar when the vessel left port."

24. Certain subsidiary issues were raised before the judge, none of which affected the main question of whether, in the light of the 'phantom vessel' defence raised, the claimants had failed to show an arguable case. First, the defendants argued that if the vessel was not a phantom ship as they contended, then her loss was probably for reasons of unseaworthiness resulting from the difficulties experienced with her main engine before sailing, which delayed her departure. Counsel for the defendants submitted that, since both the original assured and the claimants knew of those difficulties it was probable that they had been privy to such unseaworthiness on sailing. The judge rightly rejected the leap of reasoning involved in that proposition and therefore concluded that, so far as the defendants' submission of 'no arguable case' was concerned, all turned upon the s.44 point. Second, the claimants themselves raised a question whether or not the policy contained an endorsement incorporating an 'Institutes Classification Clause' the terms of which might give rise to a defence on the part of the insurers and themselves provided evidence to show that it was not in fact incorporated. Third, the judge mentioned the possibility (barely raised or discussed) of an issue of whether s.45 of the *Marine Insurance Act 1906* applied or whether it was disapplied by Clause 10 of the ICC. However, we have been informed on this appeal that neither party now considers that such an issue arises on the facts of the case. Finally, there was a likely issue as to the right of the claimants to recover as damages certain financing charges as well as their claim for ordinary interest.

25. Following his decision on '*arguable case*' as quoted in paragraph 22 above, the judge turned to the question of *forum*. He started by considering the significance of the fact that the claim was governed by English law, observing that that matter was not necessarily determinative of the appropriate *forum*: see ***Amin Rasheed Shipping Corporation v Kuwait Insurance Co*** [1984] A.C. 50. In particular, he observed that there was no agreement as to jurisdiction. Having reviewed the evidence as to the law and practice of Thailand so far as a claim of this kind was concerned he found that the claimants had not shown, that there was any real likelihood that a Thai court would not apply English law if the case were tried in Thailand other than in respect of limitation. He turned to consider the question of English law and construction which arose for consideration observing that this was an issue of central importance because, given that in any case

"it is an inconvenience and expense for parties to have to adduce English law through expert evidence in a foreign court, the number and complexity of the questions determines the weight to be given to this consideration."

26. Turning to the questions (i) whether the effect of s.44 is displaced by the Clause 8 ICC and (ii) whether the effect of s.44 applies to a 'phantom vessel' case, he said:

"With regard to the first, this is ultimately a question of the interpretation of specific contractual provisions rather than an intricate question of English law. However, it is an obvious advantage that an English court should interpret a document written in English and governed by the law of England. Although I have already stated a view on this point and in doing so indicated that it does not seem to me a particularly difficult question, nevertheless it is a live question of central importance to the dispute.

With regard to the second question – whether s.44 applies in such circumstances – it does not seem to me that there is any cogent basis for disputing what was said by Lord Denning [in The Salem at 985S-986A] and Miss Blanchard has advanced no argument which I regard as casting any doubt upon the correctness of his observation."

27. The judge then adverted to the subsidiary issues which I have mentioned at paragraph 23 above. He said:

"... Mr Salzedo leaves open the question as to whether Central's knowledge or privity to unseaworthiness is relevant ... there is possibly a question as to whether s.45 of the Marine Insurance Act applies in this case and whether it has been disclosed by Clause 10 ... there is a possible question as to the incorporation of the classification clause ... Moreover, Miss Blanchard ... observed that the claim is not confined to the value of the lost cargo and suggests that might raise an issue between the parties. Mr Salzedo has not suggested otherwise. It remains to be seen whether or not that is an issue.

I emphasise that I recognise at least four questions, or some of them, might well not be live issues. But Miss Blanchard's submissions on this point satisfy me that there is a realistic prospect of questions about English law, such as these four, arising at trial, which have not been the subject of submissions on the questions considered ...

I conclude, on this part of my consideration of the case, that, although the various questions of English law to which I have referred are not particularly obscure, undeniably this case is liable to raise questions of English law and interpretation of an English document, and there is obvious advantage in an English court dealing with such questions."

28. Having considered and rejected two further arguments raised by the claimants, the judge concluded:

"Thirdly, [Miss Blanchard] refers to the documents, observing that both of them are in English, a few in French, and none (so far as the evidence before me goes) is in Thai. It is likely, Mr Salzedo accepts, that some will need to be translated if the case is heard in Thailand. This is a consideration of some importance, in my mind. If documents are to be translated, not only is there an obvious question of expense and inconvenience, but also, inherently, a risk of misunderstanding or lack of clarity in translation."

29. The judge then considered and accepted the argument of the defendants that the factual enquiry would be about Thailand, and that the evidence would have to be obtained in Thailand, to which Thai witnesses would speak. He also accepted that the insurers, sellers, shippers, shippers' agents, and the repairers and surveyors, who repaired and inspected the vessel before loading, were all Thai Corporations and that the shipowners (who would clearly not be available to the parties) were represented by Thai agents. He observed:

"These are, I acknowledge, powerful points. But, the witnesses who have thus far been identified, it is fair to say that there is no indication than any does not speak English. Nor is there any suggestion that any of the witnesses would be unwilling to give evidence by way of a statement, or unwilling to come to England, if necessary. Moreover, the problems of transport and witnesses having to come to England are the less in view of the increasing custom of this court to receive evidence by video link. The nature of the evidence likely to be given in this case is not such .... that it would be unsuitable or inappropriate to receive the evidence by video link.

There is a further point which seems to me of some significance. As I have observed. The surveyors wrote their report in English, and so did Captain Duarte. Insofar as their evidence is in dispute (and the significance of the need for them to attend at trial supposes that it will be) it is realistic to suppose that a significant pat of their cross-examination will be by reference to their reports. There are difficulties in a witnesses being cross-examined in one language about the consistency of his evidence with a report written in another language.

It seems to me, therefore, that, while I accept that a number of witnesses are in Thailand and would have to give evidence at an English trial either by travelling to this country or, more realistically, by video link, the difficulties do not seem to me as great as Mr Salzedo submitted. I have not overlooked the inherent connection of this policy with Thailand, but Miss Blanchard rightly observes that it is in the nature of the policy of this kind that it has something of an international flavour, and that it is to be expected that such polices will be assigned. Indeed, claims are payable under this policy not in Thailand, but in Senegal.

I have already stated that I consider this a finely balanced question, but, in the end, I have concluded that the claimants have shown that England is the appropriate forum, and done so with the necessary clarity in accordance with the guidance given by Lord Goff."

30. Finally, the judge indicated that he considered it unnecessary to determine a further question argued between the parties, namely whether, if he had acceded to the defendants' applications, he should only have done so on the basis of a requirement that they undertake not to rely upon the limitation period in Thailand. The defendants although willing if necessary to offer such undertaking, submitted that they should not be required to do so because the claimants had acted unreasonably in not bringing protective proceedings in Thailand (see the guidance provided in ***The Spiliada*** at [1987] AC 483E-484E). In this connection the judge stated:

"it was apparent before the expiry of the Thai time limit of two years that there was a real possibility of a jurisdiction point arising, and the defendants had made it clear in correspondence that they might well be taking a point that matter should be tried in Thailand and not in this country.

For my part, I need say [no] more than that I have not been convinced that it was a reasonable course not to issue protective proceedings in these circumstances. Certainly, I do not consider that solicitors can be confident that, if protective proceedings are not brought in comparable circumstances, the court would necessarily require an undertaking from the defendants that it would not take a time limit point in a foreign court if a similar case were to come before this court."

The judge left the matter there.

THE DEFENDANTS' GROUNDS OF APPEAL

31. The defendants' grounds of appeal may be shortly stated. (i) It is said that the judge was right when he held that, if the cause of the loss was that the owners of the vessel operated a '*phantom vessel*' fraud at the expense of the claimants and never intended to deliver the cargo to Dakar before she sailed, then by reason of s.44 the risks never attached and the claim must fail. However, it is complained that he was wrong to hold that he could not be satisfied to the requisite standard (i.e. '*no real prospect*' of a contrary finding at trial) that the cause of the loss was a '*phantom vessel*' fraud, the evidence of such fraud being overwhelming. Reliance is placed upon the fact that evidence of such fraud was originally put forward by the claimants, presumably before they appreciated the s.44 point, and that the claimants never suggested that any further or contrary evidence was being sought or likely to emerge at trial. (ii) As to *forum conveniens*, it is said that the judge erred in giving weight to the potential issues of law which he identified as requiring resolution; he should have given effect to his view that none of them had any serious likelihood of causing difficulties for any court trying the action and, in particular, that what he identified as 'the essential question' in the action (i.e. the s.44/Clause 8 issue) was an issue of law on which he had rightly indicated that the claimants had no real prospect of success. Since that was so, and since the judge had

rightly found that the factual and evidential centre of gravity of the dispute was overwhelmingly located in Thailand, he should have found that Thailand was the appropriate forum for the trial.

THE CLAIMANTS' CONTENTIONS

32. In supporting the judgment of Andrew Smith J, the claimants do not accept that the judge formally decided the s.44/Clause 8 argument against them, so that his decision as to 'arguable case' rested solely upon his doubt as to whether, on the facts, a s.44 defence existed. Mr Dunning points out that, despite the judge's expression of view favourable to the defendants (see paragraphs 20-21 above), when dealing with *forum conveniens* he treated it as 'a live question of central importance to the dispute' (see paragraph 24 above). Should the court take a contrary view, Mr Dunning sought permission to appeal against the judge's decision on that point. We indicated that he was at liberty to argue it in any event.

33. Mr Dunning's argument may also be shortly stated. It is that Clause 8 of the ICC provides that the risk attaches when the cargo leaves the warehouse. That being so, it does not cease to attach when the vessel sails. The risks encountered once the cargo leaves the warehouse include theft by the owners in whatever manner. Mr Dunning poses the question "*What if the cargo had been stolen by a third party en route for the warehouse?*" He answers it by saying that the loss would plainly be covered. He submits that the position can be no different if the shipowner is the thief. As to the issue whether the defendants have sufficiently established that the cause of the loss was a '*phantom vessel*' fraud, he emphasises, as is not disputed, that the claimants having established the loss as a fortuity prima facie within the All Risks policy, the burden of proof lies upon the defendants and that the judge cannot be faulted for treating the matter as one of strong suspicion only, falling short of the necessary level of proof (see paragraph 23 above).

34. So far as the question of *forum* is concerned, the claimants support the reasoning of the judge and assert that the factors which he took into account and the balancing exercise which he conducted were a proper exercise of his discretion. Mr Dunning reminds the court of the observations of Lord Templeman in ***The Spiliada*** at [1987] 1 AC 465F that: *"... the resolution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge. Commercial Court judges are very experienced in these matters. In nearly every case evidence is on affidavit by witnesses of acknowledged probity. I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of my noble and learned friend Lord Goff in this in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere*."

35. In addition, Mr Dunning advances the following reasons, not expressly relied upon by the judge, as to why the judgment should be upheld. Again, we permitted him to advance these reasons without the need for a respondent's notice.

    (1) The case involves points arising under the *Marine Insurance Act 1906* to which the English court can be relied on to apply its own law more reliably than a foreign court as '*a matter of common sense*': see ***The Eleftheria*** [1970] 94 at 104.

    (2) The Policy provides that it shall be subject to English law and practice *only*, thus expressly excluding reference to any other law or practice [e.g. as to claim settlement]. Consequently England is the natural forum in which to hear a dispute under the contract. In this connection it is to be noted that the policy is not exclusively connected with Thailand in that it expressly makes claims payable in Dakar and provides that notice of claim must be given to, and a summary report provided by, a firm of surveyors in Dakar.

    (3) It was common ground between the experts that the Thai court will not apply English law if to do so would be contrary to public order and good morals. It is not known what issues may develop in relation to which this rule might be applicable. However, there is no dispute between the experts that the Thai court would apply its own time bar to the claim.

    (4) Not all of the witnesses likely to be involved appear to be resident in Thailand. For instance the claimants' general manager, Mr Ba who witnessed the vessel for part of the loading operation is resident in Mali. If further witnesses from the crew available by the time of trial, they are unlikely to be Thai: see the statement of Mr Aung referred to at paragraph 39 below.

    (5) It is not clear where the true centre of gravity of the case is to be found. In serving their costs schedule below, the defendants included a claim for time spent attending on English reinsurers who may well be the persons effectively pulling the strings in the litigation.

    (6) Mr Dunning submits that the effect of the Thai law evidence below was, contrary to the finding of the judge, that the Thai court could not be relied on to apply English law. The claimant applies for permission to cross-appeal the judge's finding in this regard on the basis that, so far as *forum* is concerned, the claimant ought not to be forced to litigate in a jurisdiction where there is doubt as to whether it will apply the parties' contractual choice of law.

FRESH EVIDENCE

36. In finding as he did upon the '*phantom vessel*' issue, the judge commented upon the help which he might have derived from evidence which in fact he lacked in relation to (a) the sea and weather conditions affecting the voyage of the vessel when last heard of in mid-May 1999 (b) evidence from or about Min Yang Shipping, the company which appeared to have sold the vessel (then named the "Nikoula") to Prestrioka Maritime Limited and (c) evidence derived from the crew list placed before the court. The defendants accordingly went off to seek such

evidence and they apply to adduce the evidence they have obtained on this appeal. As to (a) they seek to adduce a report from Professor Roger Motte, a meteorological expert (exhibited to the third witness statement of Mr Melbourne) which it is submitted shows that the purported information from the vessel was not a true description of the weather and sea conditions at the time, which were in fact good. As to (b) they seek to adduce hearsay evidence of a conversation between Sarawak correspondents of the defendants' solicitor's Singapore office and Mr Ting (a director of Min Yang) and Mr Lau (its former auditor). It is said of Mr Ting that he was '*unhelpful and evasive*' and of Mr Lau that he could find no documents relevant to the sale of the vessel in December 1998 and said that he could not further assist.

37. As to (c), the position is as follows. By his first statement of 5 March 2002 Mr Melbourne stated that, so far as he was aware, no crew list for the vessel on the relevant voyage (as opposed to its previous voyage) was available to the parties in the case. However, by a fourth statement of 20 March 2002, Mr Melbourne exhibited two e-mails dated 8 and 19 March 2002 respectively from the defendants' Thai lawyers, sent without prior warning, which set out the substance of information just received from Captain Duarte, with whom those lawyers were in contact in relation to his part in supervising repairs to the vessel before she sailed. Captain Duarte stated that evidence was available from Mr Aung, a former member of the crew of the vessel whose name appeared in the crew list which had been in evidence before the judge. He had been recruited to the crew by Captain Duarte at the request of the ship's agents at Kohsichang and was in a position to give evidence as to the events of the voyage.

38. The status of the e-mails as evidence was no more than a compilation of hearsay upon hearsay which failed properly to distinguish between such evidence as Mr Aung could give, Captain Duarte's interpretation of it, and hearsay evidence and/or speculation available from Captain Duarte himself. However, in the course of the appeal before us, a statement signed by Mr Aung has been placed before us which it was agreed constitutes the content of his evidence to which we should have regard, should we decide to admit it.

39. The statement of Mr Aung, who is himself Burmese, is to the effect that, having been recruited to the crew by Captain Duarte when the vessel was under repair, he remained aboard as one of a crew of 17 when she sailed on 28 March under an Indian captain called Ray. The crew was made up of three nationalities, Indian, Burmese and Indonesian. Mr Aung learned from Indian crew members (who were mostly officers) that the vessel was to go to India to unload. A need for further repairs developed and the vessel berthed at Port Keng near the Malacca Strait. During repairs, another vessel, the M.V. Mariner berthed alongside. Mr Aung learned that it was headed for Burma to unload its cargo. After further breakdown and repairs in its onward journey, the vessel reached India and berthed about 50 miles from Bombay Port, where the Captain was replaced and the vessel subsequently sailed to Dubai. At that time, Mr Aung learned from Indian crew members that there was no consignee for the goods in India and thus the vessel must travel somewhere else. The engine again failed and the vessel was towed to Dubai, arriving in July 1999 where it unloaded alongside the M.V. Mariner which had already berthed there. Mr Aung also stated that the 'PRESTRIOKA' changed its name en route in the Indian Ocean and that he was informed by the Captain that the vessel was to be destroyed following unloading. He said that the voyage conditions were reasonably good throughout and there had been no storms.

40. The defendants, in making their application to adduce further evidence, and the claimants in resisting it, have recognised the authority of the observation of Lord Phillips MR in ***Hamilton v Al Fayed*** (C.A.) 21 December 2000 to the effect that, when considering whether special grounds have been demonstrated for the admission of further evidence, the court is no longer in the strait-jacket of previous authority, although the old cases remain powerful persuasive authority as illustrating the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right results, such task being in accordance with the overriding objective: see the guidance to be found in the judgment of Hale LJ in ***Hertfordshire Investments v Bubb*** [2000] 1 WLR 2318 at 2325E-H. Having referred to the familiar three-fold test for introducing fresh evidence on appeal as propounded in ***Ladd v Marshall*** [1954] 1 WLR 1489 at 1491 by Denning LJ, the Master of the Rolls stated:

> "*13. These principles have been followed by the Court of Appeal for nearly half a century and are in no way in conflict with the overriding objective. In particular it will not normally be in the interests of justice to re-open a concluded trial in order to introduce fresh evidence unless that evidence will probably influence the result. ...*
>
> *40. The principles established by pre-CPR authorities, which we have considered above do not have to be slavishly followed. They are to be applied insofar as they advance the overriding objective of the CPR. The critical question is what is required to deal justly with the case.*"

41. Mr Dunning QC for the defendants acknowledges that we are not here dealing with the case of a concluded trial. However, he objects to the admission of the evidence on the general ground that the defendants could, and ought reasonably to, have obtained the evidence if they wished to rely upon it for the purposes of the jurisdiction application. He submits that the true position is that, having had ample opportunity to present such evidence as they saw fit before the judge and having lost on the basis that such evidence was inadequate, the defendants are now seeking to have an impermissible second bite at the cherry. He complains that the analysis of weather conditions compiled by Professor Motte, though prepared in February 2002 was not produced to the claimants until 7 March 2002 and points out that various voyage calculations in it were based on an erroneous assumption that the vessel's voyage commenced on 4 March and not 28 March 1999 as was the case. Mr Dunning also complains that the report did not comply with the requirements of the Practice Direction in relation to expert evidence; it contains no statement of the Professor's material instructions, or that he had understood his duty to the court.

42. In relation to the evidence of Mr Aung, Mr Dunning objects that his statement is untested and raises more questions than it answers (see further at paragraph 61 below).

43. For the claimants, Mr Malins QC accepted that before the judge the defendants had proceeded on the basis that the evidence which I have recounted at paragraph 12 above would be sufficient to give rise to the conclusion rather than the suspicion that the vessel was a phantom vessel used as an instrument of fraud. Having obtained leave to appeal the judge's contrary decision, the defendants thought it appropriate to seek to obtain evidence in those areas which the judge indicated might have enabled him to come to a positive conclusion. Mr Malins accepted that evidence along the lines of the report of Professor Motte could have been obtained earlier. Similarly, the previous owners of the '*Nikoula*'/'*PRESTRIOKA*' could have been approached if it had been considered they might give evidence of assistance. However, in relation to the evidence of Mr Aung, Mr Malins submitted that (as made clear in the witness statement of Mr Melbourne) such evidence could not reasonably have been obtained earlier. Neither the addresses of, nor any information relating to, the members of the crew were known to the defendants; it was only upon Captain Duarte having recently seen Mr Aung and informed the defendants' lawyers of his availability, that his evidence became known to the defendants. Indeed, Mr Aung had been at sea until 14 April 2002.

44. In my opinion the further evidence should be admitted upon the hearing of this appeal. So far as the first condition laid down in ***Ladd v Marshall*** is concerned, it seems clear to me that the most significant evidence, that of Mr Aung, could not have been obtained with reasonable diligence for use before the judge, for the reasons explained by the defendants. The same cannot be said of the report of Professor Motte or the conversations with the director and auditor of Min Yang. Nonetheless, they have now been obtained as part of a corpus of evidence which the judge said he would have valued when considering what conclusion to reach. In the case of the Min Yang evidence, it furnishes no information of substance. However, its value lies in demonstrating that no evidence helpful to either side is likely to be available at trial from that quarter.

45. As to the second condition in ***Ladd v Marshall,*** I am satisfied that, if taken into account, the evidence would have had an important influence on the result of the case before the judge, because he indicated the nicely balanced state of his mind in relation to the 'phantom ship' evidence, and his desire in this connection for evidence of the kind now made available. As I read his judgment and, in particular, the passage quoted at paragraph 23 above, and on my own view of the overall effect of the evidence as now augmented, the judge would have been satisfied that the claimants had indeed been the victims of a '*phantom ship*' fraud (see further below). As to the third condition in ***Ladd v Marshall,*** the evidence of Professor Motte and Mr Aung seems to me apparently credible in relation to the matters for which it is relied on, when considered with various matters already in evidence before the judge (see paragraph 12 above and paragraphs 60-62 below). I acknowledge the force of Mr Dunning's 'second bite of the cherry' argument in a case of this kind. In the context of an appeal on jurisdiction, the refusal to admit further evidence is not ordinarily apt to do lasting or final injustice to a defendant whose application is refused, because he is not thereby deprived of an opportunity to rely on the new evidence at a later stage in the proceedings. However, if the admission of the new evidence is sufficient to make clear that, in truth, the claimants have no good arguable case against the defendants, then it is wrong that foreign defendants should be brought to this jurisdiction against their will, simply as parties to a contract which (albeit governed by English law) contains no jurisdiction clause. This seems to me to be all the more the case if the evidence is such that, if required to contest the action here, the defendants would immediately be in a position to seek summary relief under CPR 24.2(a)(i); c.f. the observation of Colman J quoted at paragraph 18 above, with which I agree. I consider that to be the case here, and that to admit the evidence upon this appeal is consistent with the overriding objective.

S.44 AND ICC CLAUSE 8

46. I consider the judge was right in the view he expressed on what he described as the central issue of importance before him.

47. It is common ground that the Policy in this case is a '*voyage policy*' as defined in s.25 of the 1906 Act, the contract being one "*to insure the subject matter [the cargo] .... from one place [Kohsichang] to another [Dakar]*". Nor is it in dispute that by Rule 2 of the 'Rules for the Construction of Policy' in the First Schedule to the 1906 Act, save where the context otherwise requires:

"*Where the subject matter is insured 'from' a particular place, the risk does not attach until the ship starts on the voyage assured.*"

48. That said, however, it seems to me plain that since the policy incorporates a warehouse to warehouse clause, in this case ICC Clause 8, which provides that: "*The insurance attaches from the time the goods leave the warehouse or place of storage*" the context does otherwise require in any case where the voyage assured takes place. However, the provision as to the attachment of risk does not divest the policy of its character or classification as a Marine Insurance policy on the one hand or, more particularly, a Voyage Policy on the other. As to the first classification, s.2(1) of the 1906 Act makes clear that: "*A contract of marine insurance may, by its express terms ... be extended so as to protect the assured against losses on .... any land risk which may be incidental to any sea voyage.*"

The modern warehouse to warehouse '*Transit*' clause exemplified by Clause 8 in the various forms of Institute Cargo Clauses (A)(B) and (C) affords the leading example of such extension. However, it does not alter the fundamental nature of the marine insurance policy as being a policy covering the interests of the assured in a marine adventure which is defined in the case of a voyage policy (as opposed to a time policy) by its two marine

termini: see *Arnould* vol 1 para 461. This transit clause is headed '*Duration*'. It operates on the assumption that the insured adventure takes place and on that basis addresses the question of the commencement and termination of the risk. As to the second classification, it has long been accepted that, in the case of a voyage policy (i.e *"a policy to insure the subject matter "at and from" or from one place to another"*: s.25):

"If the substance of the policy is the maritime risk, ... the character of the preliminary conveyance before the ship is reached must be determined by that of the voyage on which the goods were actually shipped, and that the goods must, until shipment, be taken to have started for the voyage for which they were afterwards in fact shipped ..." (my italics)

per Wright J in the ***Simon Israel*** case at first instance (1892) 62 LTMS 352 at 353-4.

49. That case involved a voyage policy '*at or from the Mersey or London to any port in Portugal or Spain .... including all risks whatever from the time of leaving the warehouse in the United Kingdom, and all risks of every kind until safely delivered at the warehouse of the consignee*'. The consignors United Kingdom warehouse was in Bradford. At the time of the consignor's declaration of goods to be shipped for Seville and their dispatch from Bradford to Liverpool for that purpose, he believed and intended that the goods would go by ship to Seville and that belief continued until after the vessel on which the goods were shipped had sailed. Following loss of the vessel with the goods aboard it was discovered that her voyage was not to Seville or any port within the range permitted under the insurance. Wright J stated:

"...., I think that in substance this is a marine insurance from the Thames or Mersey to a port on the west coast of Spain. Terminal risks, including risks of land transit in Spain, are included, but the substance of the risk undertaken appears to me to be the voyage as above described, and the other risks are undertaken only as supplementary to that .... The ship so far as these goods are concerned, sailed on a different voyage, and one for which the assured had no right under the policy to "declare" them."

50. That decision was upheld without qualification or criticism in the Court of Appeal.

Bowen LJ stated:

"We all know by this time the general history of the extension of the protection which the policy provides for the goods by the enumeration of risks slightly outside the transit. It has been by slow growth that risks outside the sea journey have been swept, so to speak, within the shelter of the policy. But in construing the whole of the obligations and protections which the policy creates, you must first get distinctly in your mind the definition of the voyage, and then apply the definition of the voyage to the enumeration of the risks. In the present case the goods started from Bradford, and it has been contended that the moment they started from Bradford they were upon the insured voyage. If the goods had started for the insured voyage it seems to me that the risk during the time that they were between Bradford and Liverpool would have been covered as incidental to and supplementary to the insured voyage. But we have here a conclusive fact that the goods never started upon the insured voyage. Accordingly the risk between Bradford and Liverpool never could be incidental or supplementary to it. It is not necessary to decide what would have been the case supposing the goods, after having been specifically appropriated by a contract of carriage to the insured voyage, had been injured or lost during the transit between Bradford and Liverpool. It is not necessary to decide that case. In this case the facts here show conclusively that the goods were never specifically appropriated to the insured voyage, because the person who had the control of the goods – the person who had the power of fixing the voyage on which the goods the goods were ultimately to go – fixed the voyage outside the policy; and if that is so, the policy never attached..."

A L Smith LJ said:

"The defence is, that the goods never were upon the voyage insured, and so were never covered by the policy – in other words that the policy never attached ... as I read this policy, when you once get the goods upon the voyage in question, then the risk which the underwriter undertakes is the risk from the warehouse to the ship in this country, during the voyage, and from the ship to the warehouse in the other country. But unless you get the goods started upon or allocated by contract, as Bowen LJ said – and I adopt that phrase – to the insured voyage, in my judgment this policy does not attach. It is said that this policy attached no matter on what voyage the goods ultimately might go, immediately they started from Bradford. I do not read the policy in that way at all. Until you get the goods upon the contemplated voyage, in my judgment this policy does not attach, and it is a mistake to say that this policy is at and from Bradford to the west coast of Spain. It is at and from the Mersey to the west coast of Spain; and when you get the goods upon that voyage, then it is that the risk attaches to the goods between Bradford and the Mersey."

51. In ***Kallis Manufacturers v Success Insurance*** [1985] 2 Lloyd's Rep 8, the Judicial Committee of the Privy Council, observing that the decision in ***the Simon Israel*** case was the foundation of s.44 of the 1906 Act (see also *Chalmers; The Marine Insurance Act 1906* (1st ed) 1907 pp 61-62), applied and approved its reasoning in a case where, although onboard bills of lading (the only contract of affreightment to which the buyers were parties) stated that the goods were on board the *Ta Shun* for carriage to Limassol, they were in fact shipped on a different vessel and were lost en route. Having quoted with approval from the words of Bowen LJ which I have set out at paragraph 48 above, Lord Diplock stated:

*"Here the goods were never "**appropriated by a contract of carriage for the insured voyage**", to use Lord Justice Bowen's words, since the insured voyage was, as already stated, from Hong Kong to Limassol under a shipped onboard bill of lading on Ta Shun. The opening paragraph of the warehouse to warehouse clause does not therefore help the appellants."*

52. Mr Dunning has sought to argue that those decisions are in fact of assistance to him. He places reliance upon the observations of Bowen LJ that, on the facts of the ***Simon Israel*** case '*the goods were never specifically appropriated to the insured voyage*' (c.p. A L Smith LJ '*allocated by contract ... to the insured voyage*'). He points out that these were the words emphasised by Lord Diplock in **the *George Kallis*** case. He argues that the question of whether the insured voyage has commenced must be considered at the point when the goods leave the warehouse and not at the later stage of sailing. Provided that the goods are appropriated or allocated by the consignor to the insured voyage when they leave the warehouse and/or there is no intention at that stage on the part of the consignor for the goods to go anywhere other than on the insured voyage, the risk attaches. Mr Dunning encapsulated this submission by saying: the question is: were the right arrangements made, not whether the cargo in fact went on the right voyage. In this case, he submits, all the evidence is to the effect that the goods did leave the warehouse to go on the insured voyage and that they were appropriated to the insured voyage when they left the warehouse and/or at latest when they were loaded on board the vessel identified in the policy. When that occurred, the "*all risks*" policy incepted.

53. I do not accept that argument. I consider that it is the plain import of the judgment in **the *Simon Israel*** case that, despite the effective extension of the voyage insured '*from*' the moment of sailing back to the moment of leaving the warehouse for the purposes of the attachment of risk, the overall voyage or adventure assured is still properly characterised as a voyage from A to B and, if that adventure is never *in fact* embarked upon, the insurer will not be liable. I do not accept Mr Dunning's argument that, if the goods have been appropriated by the hand and act of an innocent seller or shipper to carriage in the vessel named in the policy which he believes and intends will occur, that is sufficient to avoid the effect of s.44 if the vessel in fact sails on a different voyage. I consider that it is clear from the authorities that where an insurer invokes s.44, the court will conduct an *ex post facto* exercise to determine not simply the contractual, but the *actual,* destination of the ship at the time of sailing, which exercise depends upon the acts and intentions of the owners and/or Master at the time of its departure.

54. If the court determines that, at the time of sailing, vessel and cargo were in truth bound for a *terminus ad quem* other than that identified in the policy as definitive of the voyage insured, then s.44 will apply and the risk which prima facie attached when the goods left the warehouse will in the event be held not to have attached. The position is to be contrasted with that where the prior intention is merely to deviate. In that event, provided the *terminus ad quem* remains unaltered, the policy will attach; however, at the point when deviation occurs (without lawful excuse) the insurer will be discharged from liability: see ***Hewitt –v- London General Insurance Co Limited*** (1925) 23 Lloyd's Rep 243 and s.46 of the 1906 Act.

55. Academic texts dealing with the effects of a '*warehouse to warehouse*' clause appear to bear this out, albeit they do not consider the point in any detail: see the passage in *Arnould* referred to by the judge and quoted at paragraph 20 above. Although that passage deals with a voyage *on a vessel* other than that named in the policy, the named *port of destination* is equally an essential ingredient of the definition of the voyage contemplated by the policy. See also *Ivamy: Marine Insurance* (4th ed) p.117 where it is stated without qualification that:

"*As in the case of policies on ship, the risk will not attach if the vessel on which the goods are loaded sails from a port not specified in the policy or sails for a different destination.*"

See also: *Thomas: The Modern Law of Marine Insurance, 1996*:

"*A modern cargo policy, incorporating the Transit clause (Clause 8) in which the two specified termini happen to be ports will most probably ... fall within section 43 and 44.*"

56. The question posed by Mr Dunning as to the position in respect of goods lost or stolen en route between the warehouse and the ship's rail, raises an interesting problem mentioned by Bowen LJ but left unresolved in the *Simon Israel* case. It may be that the short answer in such a case is that, since the vessel has not in fact sailed for another destination at the time of the loss or theft, s.44 has no application and the risk which *prima facie* attaches to the goods on leaving the warehouse should not be subject to *ex post facto* invalidation as a result of an event (i.e. the commencement of the voyage) which has not occurred at the time of the loss. However, it is not necessary to answer the problem posed for the purposes of a decision in this case and I say no more upon that topic. I would uphold the views expressed by Andrew Smith J upon the s.44/Clause 8 issue and proceed on the basis that it should not be regarded as a live legal issue in any future proceedings, whether here or in Thailand.

57. Thus, the question becomes whether the judge's view that there was nonetheless a serious issue to be tried is sustainable on the facts, taking into account the further evidence now available, bearing in mind that it has not been the subject of cross-examination and, given that, in the light of its late production, the claimants have had no chance themselves to produce evidence to answer it.

'A PHANTOM SHIP'?

58. The judge rightly took the view that mere suspicion, or even strong suspicion, that the vessel was a '*phantom ship*' was insufficient to demonstrate that there was no triable issue. The burden of proof at trial lay upon the defendants under the policy and, in deciding whether the claimants had established a serious issue to be tried, the judge was faced with deciding whether, at the preliminary stage of an application to set aside, the evidence before him was so cogent as to satisfy him that the defendants were bound to succeed on the basis of a conclusion to be drawn by way of inference from limited facts. In such cases, it is both unusual and impracticable for the court to seek to form a view on the merits. In the ordinary way, it should refrain from doing so. This is because, if the jurisdiction of the court is established and it is clearly the appropriate forum for the dispute, the resolution of the merits of the dispute is a matter for the trial process at a later stage. Nonetheless, in the course of applying to

serve out of the jurisdiction, a claimant is ordinarily obliged, at least in outline, to apprise the court of the relevant background of matters of which he is aware which go to the general merits of the action, to say briefly how the case is put, and to make reference to the nature of any defence likely to be advanced. If in the course of doing so he or (upon application to set aside) the defendant, demonstrates the virtual certainty of defeat for the claimant by reason of the facts and circumstances which the court is satisfied will be established at trial, then it is open to the court to hold that the claimant has failed to demonstrate a serious issue to be tried for the purpose of the exercise of the court's discretion.

59. In this respect, the judge was content to proceed on the basis that he must be sufficiently confident as to how the loss came about to decide there was '*no real prospect of succeeding*'. He equated this with concluding that '*it is fanciful to suppose that the loss occurred in any way other*' than a pre-conceived plan to proceed to a port other than Dakar in order to discharge the cargo (c.f. ***Swain v Hillman*** [2001] 1 All ER 91 at 92 per Lord Woolf MR, considering CPR 24.2). I am content to proceed on the basis that the '*fanciful*' test was appropriate to the facts of this case, because neither party has submitted the contrary. Mr Malins has submitted that, whether or not the judge was correct in his view on the evidence before him, the additional evidence now available would have been sufficient to tip the scales in the defendants' favour and that this court is now in a position to take the view that it would be fanciful to suppose that the loss occurred in any other way. I consider that Mr Malins is correct. On the basis of the position as summarised by the defendants before the judge (see paragraph 12 above), I consider the case was one, not merely of suspicion, but of very strong suspicion and Mr Dunning has not sought to argue otherwise. In my view, faced at trial with the evidence now available, the court would be able to reach only one conclusion as to the cause of loss, namely a fraud by the shipowners or by persons purporting to be the shipowners (see paragraph 23 of Mr Blows' affidavit quoted at paragraph 9 above), the 'PRESTRIOKA' bearing the hallmarks of a '*phantom vessel*' destined before departure for disappearance and/or destruction having carried its cargo to a port far from that anticipated by the cargo owners. It is plain that what inhibited the judge from a decision to that effect was the paucity of '*hard*' evidence at what was a preliminary stage of proceedings before him, in particular the lack of evidence on the three aspects which he mentioned might become available to the judge at trial. Such evidence, assuming its reliability, is now available.

60. Taken at face value at least, the evidence of Professor Motte confirmed the likely bogus nature of the final message received from the vessel with its report of strong winds and rough to very rough seas. The evidence as to the lack of co-operation and available information from the previous owners of the 'PRESTRIOKA' indicates that no further useful information will be available, or at least forthcoming, from them at trial. Above all, however, the evidence of Mr Aung appears clearly to indicate that the vessel in fact set out in order to discharge its cargo in India rather than Dakar and that, having failed to do so, sailed for Dubai after a further name change, discharging its cargo there. Mr Aung's evidence is of particular importance because (if correct) it demonstrates not only what happened to the vessel, being the account of a crew member now returned from the voyage in question, but that the messages reported to have been sent by the vessel and relayed on by Mr Eddy Ng on behalf of the owners were also bogus. The fact that Mr Aung was informed that the vessel was proceeding to India to discharge finally removes any suggestion (in my view far-fetched from the outset) that the theft might have been the product of a spontaneous plan to steal, conceived only after the vessel had sailed, rather than being the execution of a pre-conceived plan by owners of an unregistered vessel operating from a bogus address via an individual known to the International Marine Bureau to have been involved in another 'phantom vessel' case. The question therefore arises whether it is safe or proper to rely on the further statement of Mr Aung, untested by cross-examination, to resolve the doubts felt by the judge as a result of the gaps in the earlier evidence. It seems to me that it is.

61. Having failed as a result of their own investigation to come to any conclusion other than that expressed by Mr Blows, the position of the claimants has from the outset been, and continued before us to be, that set out in the second witness statement of Miss Taylor quoted at paragraph 13 above. Mr Dunning has, in my view, been unable to assert any persuasive grounds on which the matters spoken to by Mr Aung should be disbelieved. His approach has simply been to say that the statement raises more questions than it answers. First, he points out that it appears from Mr Aung's passport that, during the relevant period, he was only admitted to Thailand on 14 March 1999, whereas he speaks of being introduced to Captain Duarte as a prospective member of the vessel's crew in January 1999 and that he assisted in repairs prior to leaving in March 1999. Nor does he speak to having been one of the crew on the inward journey as suggested by the crew list before the judge. As to the first point, the passport pages exhibited to Mr Aung's statement are incomplete (they are pages 10,16 and 17 only). As to the second, the defendants believed before the judge that the crew list which they exhibited was indeed for the previous voyage. It is now far from clear that that is so. However, the important point as to Mr Aung's involvement, as it seems to me, is that Mr Aung's passport clearly bears a 'Departed' stamp, endorsed 'MV Prestrioka' and dated 28 March 1999, which is agreed to be the date on which the vessel departed from Kohsichang.

62. Mr Dunning also raises a number of questions directed to a more detailed elucidation of the movements of the vessel and of the MV Mariner than appears in Mr Aung's statement. However, these questions seem to me largely beside the point; they do nothing to answer the essential question whether the theft, which it is common ground occurred if and when the cargo was diverted and/or discharged elsewhere than Dakar, was committed pursuant to a preconceived plan or as a result of a spontaneous decision taken after the vessel sailed. As to that, the question is simply whether or not there is reason to disbelieve or suspect Mr Aung's assertion that he was told the

vessel was to sail to India, whither it then sailed, only to move on after it was found that there was no consignee for the goods in India. As to that assertion, and the circumstantial account which Mr Aung gives of the voyage of the vessel which is consistent with it, Mr Dunning has advanced no good reason to regard it is other than genuine or why Mr Aung should misstate the position. Further, Mr Aung's account that he returned to Thailand from Dubai on 5 August 1999 is supported by an entry stamp on his passport.

63. Mr Dunning makes two further general points. He suggests that the evidence of Mr Aung lacks the ring of truth because it is inherently unlikely that owners would purchase a vessel for US$ 350,000, repair her, provide a crew, and supply and repair her for 4/5 months at sea all for a cargo worth €1.5 million. Second, he says that now Mr Aung has been traced, the claimants should be afforded the opportunity to trace the twelve crew members who Mr Aung says accompanied him back from Dubai in August 1999 in order to see whether their evidence accords with that of Mr Aung.

64. The first point seems to me devoid of substance. In fact, there is no evidence as to whether the vessel was ever fully paid for (the Memorandum of Sale makes clear that the seller was to deliver the vessel against a deposit of $50,000, the remainder of the purchase price being entirely unsecured and not payable until fourteen days after delivery); nor is it evident that the repairs were paid for. It appears to be a complaint of Captain Duarte that he was not paid. There is certainly no reason to suppose that it was anticipated that the repairs which were carried out were not adequate to get the vessel to India without incident. Equally, no doubt, it was not anticipated that no consignees for the cargo would be found in India, so that the vessel had to continue its voyage and eventually had to be towed to Dubai. Although the account of Mr Aung suggests that the planned venture went wrong, the circumstances do not in my view suggest that the diversion of the cargo was not intended at the time of departure; indeed, on the evidence as a whole I consider it fanciful so to suggest. As to Mr Dunning's assertion that the claimants should be given the opportunity to trace Mr Aung's fellow crew members, we received no clear indication that it was in fact the claimants' intention to do so; nor could Mr Dunning give us any reason to suppose why, if traced, their evidence would be likely to differ from that of Mr Aung.

65. I regard the evidence from Professor Motte and the previous owners as subsidiary to that of Mr Aung, but supportive of my overall conclusion. The error of Professor Motte as to the starting date of the voyage is irrelevant to the purpose for which his evidence is relied upon, namely the question of what was the true state of the weather between 12 and 22 May 1999 in the area where the vessel was reported by the owners to be. On that point Professor Motte exhibits publicly available charts and meteorological data and makes clear what they show. Since receiving his report the claimants have had time to obtain contrary expert evidence if they wished, but have not sought to do so. Professor Motte's evidence as to the weather off South Africa during the relevant period is to the effect that the vessel would have been in the middle of an area of high pressure with light southerly winds and slight seas, the winds being of a direction appropriate to cause her to drift north, rather than south as stated in the owners' final telex. Those are not points which Mr Dunning has been able to gainsay or has sought to contradict.

66. Finally, the minimal information supplied and the attitude exhibited by the previous owners and their auditor, indicate that no further information is likely to be forthcoming concerning the original acquisition of the ship, or indeed the question of whether it was paid for.

67. Returning to Mr Dunning's assertion that the claimants should be afforded the opportunity to seek evidence from other crew members than Mr Aung, approached realistically it seems to me that, rather than indicating a serious issue to be tried, the request is for the court to permit the matter to proceed in this jurisdiction in the hope that something may turn up in a situation where no positive case or reason has been put forward to suggest why it should. The claimants' case remains that, while they accept that they have been the victim of a deliberate fraud by the owners, they wish to put the insurers to proof in a situation where there is now before the court evidence from a crew member which, considered with the rest of the evidence, permits of no other inference than that the fraud was one dependent upon prior planning, without any intention that the vessel should ever sale for Dakar. Mr Dunning has referred to the high standard of proof required in a case alleging a criminal offence. Here, however, there is no real controversy that a criminal offence has been committed. The issue is whether the court is satisfied that the criminal intent to divert the cargo was formed from the outset (as the overall evidence clearly indicates), or only subsequently in the course of the voyage, which is inherently improbable and contrary to the statement of Mr Aung.

68. I bear in mind the now well known observations of Lord Hope on the criteria to be applied under CPR 3.2 and 24.2 in the case of ***Three Rivers District Council v Bank of England (No 3)*** [2001] UKHL/60 at paras 90-95 as affording an analogous approach in a case of this kind to the question whether a claimant has demonstrated a serious issue to be tried. In particular I bear in mind that, in commenting on the scope of the inquiry, Lord Hope said: "*... more complex cases are unlikely to be capable of being resolved ... without conducting a mini-trial on the documents without discovery and without oral evidence.*"

However, in the sense referred to, it does not seem to me that the relevant issue here is a complex one. The theft is not realistically in dispute; the issue is whether or not it took place in pursuance of a plan on the part of the owners which existed from the outset of the voyage. All the probabilities are that it did. The statement of Mr Aung puts flesh and substance upon the previous outline of deception and disappearance. This is not a case where there is any substantive reason to suppose that there may become available, at trial, evidence to assist the claimant. Nor is the issue in question one where the normal processes of discovery and interrogation as between the parties

(who are both at one remove from the event under investigation) will shed any further light on the matter. In these very unusual circumstances and, having received evidence which was not available to the judge, I would hold that, so far as the defendants' liability under the policy is concerned, there is no serious issue to be tried, in the sense that I am satisfied there is no real prospect of a finding for the claimants at trial.

69. Having come to that conclusion, it is strictly unnecessary for me to deal with the aspect of *forum conveniens*. However, I propose to do so briefly in the light of the arguments addressed.

FORUM CONVENIENS

70. Mr Malins has argued that, even upon the approach which the judge took to the proceedings, namely that the s.44/Clause 8 construction issue remained live for determination at trial, his decision that this country was the appropriate forum for the litigation was in error for the reasons I have shortly summarised at paragraphs 14 and 31(ii) above. Mr Malins submits that the defendants' arguments below acquire added force if this court decides (as I would decide) in his favour upon the issue of construction, thus removing any room for expert disagreement on the matter at trial. He points out that the judge regarded the question of *forum* as turning largely upon the number and complexity of the issues of English law to be determined, given the obvious advantages of having an English court determining them (including avoidance of the need for interpreters at trial and the necessary translation of a large number of documents in connection therewith). He invites us to hold that, with the s.44/Clause 8 plank of the claimants' legal argument removed, (a) the residual issue is a factual one only, namely whether the vessel was in fact a phantom ship and/or whether a fraudulent intention existed prior to the sailing of the vessel. It is not in dispute that that issue is more closely connected with and convenient for determination in Thailand than England; (b) the remaining issues of law adverted to by the judge are unlikely to be productive of substantial expert disagreement as to the law to be applied, and thus are well susceptible of determination by a Thai court on the basis of such evidence.

71. Those remaining issues were as follows. First, the still live question of whether Central were 'privy' to the unseaworthiness of the vessel. As to this, the meaning of that phrase has been authoritatively and uncontroversially defined in ***The Eurysthenes*** [1977] QB, 49 in particular by Roskill LJ at 76D-G, in terms which there is no reason to suppose that a Thai court could not understand and readily apply, whilst enjoying the added advantage of familiarity with local conditions and practices. Second, an argument as to the applicability of s.45/ICC Clause 10; this is no longer relied on. Third, the further question of the incorporation of the Classification Clause; this appears in substance to be an issue of fact as to whether or not the relevant endorsement had been sent, or its contents otherwise communicated, to the claimants. Fourth, the issue whether, in addition to the value of the cargo lost, the claimants are entitled to claim for the '*extraordinary*' costs of their financing arrangements in addition to a claim for 'ordinary' interest over the period concerned. There might be some room for disagreement between expert witnesses upon this question; however, the concepts and issues involved should be explicable to and able to be resolved by a Thai court.

72. Finally, it is right to note that, whereas in his judgment the judge observed that counsel for the claimants had persuaded him that there was a realistic prospect of additional questions of English law arising at trial, such questions have not been the subject of any attempted identification by Mr Dunning who has been content simply to endorse the judge's view that, *if* such issues did arise, '*there is obvious advantage in an English court dealing with such questions*'.

73. Upon Mr Malins' above analysis of the legal issues, which I accept, I would have come to a different conclusion from that of the judge on the question of *forum*, given what I regard as the overwhelmingly Thai connections of the defendants, the various agencies involved, almost all the potential witnesses and the relevant events and factual issues; these connections were indeed recognised by the judge. However, in the light of the broad discretion available to the judge in assessing the matter of overall convenience, and of the strictures of Lord Templeman in ***The Spiliada*** at 465G to the effect that an appellate court should be slow to interfere, that alone is insufficient reason to reverse the judge's decision. Nonetheless, upon this appeal, as it seems to me, the situation has resolved to an extent which might well have altered the judge's own view in the light of the fact that it was his assessment of the number and complexity of the questions of law which determined the weight to be given to the need to call expert evidence of English law if the case were tried in Thailand (see paragraph 25 above). In this connection, he highlighted the questions of contractual construction, and in particular, the relationship and interlocking effect of s.44 and s.45 of the 1906 Act on the one hand and ICC Clauses 8 and 10 respectively on the other. Both those aspects are now gone (one decided and the other abandoned). The court is left with the issues I have enumerated in paragraph 71 above which present little difficulty and, on analysis, essentially involve application of uncontroversial legal principles to the facts as found at trial.

74. The judge was expressly satisfied that the Thai courts would apply English law and, in my view, he was correct to be so satisfied on the evidence before him. The contrary suggestion was more in the way of a query than an assertion (see the second witness statement of Sarah Taylor, para 38) appropriately answered in the second witness statement of Mr Melbourne (paras 8-12), with an unconvincing rebuttal in the second witness statement of Mr Blows. The only concrete example produced of a likely application of Thai law at the expense of English law was the application of the limitation period of two years under s.5 of the Thai Act on Conflict of Law (see paragraphs 32-33 of Miss Taylor's second witness statement). However, it was also the evidence of Mr Blows (see paragraph 10 of his second witness statement) that the waiver of a time limit after its expiry would be valid under Thai law. In this respect, the defendants formally offered to waive the Thai time bar (see para 7 of Mr

Melbourne's second witness statement) if the court saw fit to require it to do so, and that offer has been repeated in this court.

75. Mr Malins has relied heavily upon the considerable similarities between the position in this case and that in the ***Amin Rashid*** case in which, despite deciding that the adapted form of Lloyds policy in that case was governed by English law, the House of Lords upheld the view of Bingham J at first instance that Kuwait was the appropriate *forum* on the basis that the central issue in the litigation was one of fact, the principal witnesses were Saudi Arabian, Indian and Bangladeshi and the factual issues could be as well, and probably better, determined in Kuwait by a Kuwaiti judge:

"*... [who] would be likely to have greater familiarity even than the Commercial Court in England with the sort of thing that goes on in purely local trading in the Arabian Gulf ...*" (per Lord Diplock at 67B)

Every case is of course different upon its facts and in relation to the details which arise for consideration when *forum conveniens* is in issue. However, that observation seems to me of universal validity and considerable weight in this case.

76. Times have of course moved on since the ***Amin Rashid*** decision. In particular, the judge gave weight to the consideration that, now that the video link is available as a means of securing 'live' evidence from a far off place, the potency of the consideration of the residence of individual witnesses and the inconvenience involved in travel is reduced. Nonetheless, while the existence of such a facility may be relied on to overcome difficulties in relation to a particular witness or witnesses in a case of need, the broad proposition that evidence may now be given by video link seems to me to be a relatively minor factor in the overall task of the court to:

"*take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and extent.*" (per Lord Wilberforce *ibid* at 72C)

77. In my view, the most significant potential objection to the case proceeding in Thailand which I regard as *prima facie* its natural home, is the availability in Thailand of a plea of limitation. In this respect it cannot be said that the claimants acted unreasonably by promptly commencing their action in England, bearing in mind the jurisdiction available to them under Order 11 rule 1(1)(d)(iii). The question before the judge was whether they acted unreasonably in failing to commence protective proceedings in Thailand before the expiry of the limitation period there. Upon the evidence, they did not do so as a matter of deliberate tactics, but rather because of their failure to appreciate the existence of the time limit of two years. In the light of the judge's decision upon *forum*, he did not have to determine the question whether it was appropriate to require an undertaking from the defendants to waive reliance upon limitation in Thailand (which they offered, if necessary, to do): c.f the observations of Lord Goff in ***The Spiliada*** at 487B-488A.

78. It seems clear from the last paragraph of his judgment that the judge was not persuaded by the claimants that it was reasonable for them not to issue protective proceedings in the light of the warning which they had received some five months after the loss of their cargo in a letter dated 21 October 1999 from the defendants' Thai solicitors. Having stated that they had contacted Clyde & Co and were waiting for confirmation from the defendants as to whether to instruct them the solicitors said:

"*At this moment we are reserve (sic) our client's right on the issue of English Court jurisdiction over the case. We are now accepting that only Thai courts can apply the jurisdiction over the case.*"

79. Thereafter, in the absence of confirmation as promised, the claimants made their application to the English court and, in the course of a very extended process of service abroad, permitted the passing of a two-year time bar in Thailand, of which they were unaware.

80. It is clear that, in ***The Spiliada***, Lord Goff treated the question of the reasonableness of a claimant's conduct in permitting a foreign time bar to pass as highly relevant to the question whether the court should, as a condition of the grant of a stay, require an undertaking from the defendant not to rely upon such time bar. He did not, as I read the relevant passage of his speech, treat that question as necessarily determinative of the court's decision. It seems to me that when, in the course of considering the various factors going to the exercise of his discretion, a judge finds himself inclined to grant a stay but for the existence of a foreign time bar, and the defendant seeking that stay offers if necessary to waive reliance upon it, it will only exceptionally be appropriate for the court to grant a stay without requiring such an undertaking. If the failure of the claimant to bring protective proceedings amounts in all the circumstances to a glaring error or want of care, as plainly would be the case if the limitation point had been specifically drawn to his or his solicitors' attention by the other side, that is one thing. But if the case is less than clear, then it seems to me that it will usually be unnecessary in the interests of justice for the court to conduct a *post mortem* upon the reasonableness or otherwise of the actions of the claimant or his solicitors in all the circumstances of the case.

81. Were it not for my conclusion that the defendants' appeal should be allowed on the grounds already stated, I would regard it as appropriate to order that, upon the defendants' undertaking to waive reliance upon the defence of limitation in Thailand, there should be a stay of these proceedings.

CONCLUSION

82. I would allow the appeal and order that the order of Mr Justice Toulson dated 18th January 2000 permitting the claimants to serve the claim form on the defendants out of the jurisdiction be set aside and that the proceedings be dismissed. Whilst I agree in principle with the point taken in Ground 4 of the respondents' cross-appeal

relating to waiver of the time bar in Thailand, in the light of my decision that the appeal should be allowed I would also dismiss the cross-appeal.

Lord Justice Keene:

83. I agree

Mr Justice Sumner:

84. I also agree

Order:

1. Judgment is handed down today.
2. No other orders are made today
3. All application in this matter, including in relation to costs and permission to appeal, are adjourned to a date to be fixed.
4. For the avoidance of doubt, time for applying for permission to appeal and for lodging any appeal will be extended to run from the date of the restored hearing.

(Order does not form part of the approved judgment)

Graham Dunning QC and Ms Claire Blanchard (instructed by Holman Fenwick & Willan, London) for the claimants/respondent
Julian Malins QC and Simon Salzedo Esquire (instructed by Clyde & Co, Surrey) for the defendants/appellant