CA on appeal from QBD (Mr Justice Langley) before Hirst LJ; Waite LJ; Peter Gibson LJ. 19th December, 1996

LORD JUSTICE WAITE:

1. In January 1997 - about six weeks from now - an arbitration is due to take place with an estimated hearing length of three weeks. The reference derives from the arbitration clause in a shipbuilding contract between Buyers in this country and Builders in Croatia. The subject-matter is a claim by the Buyers to repayment of advance payments made on account of the purchase price. The arbitration was started some years ago, when it first became apparent that the anticipated progress in the vessel's construction would not be achieved. The claim was formulated under a Rejection and Rescission clause in the contract. It was the only clause then available to be relied on. That was because the Cancellation for Delay Clause (which entitled the Buyers to a refund of the advance payments if delivery of the completed vessel was delayed beyond a specified delivery date) had not yet become operative - the contractual delivery date being still (at that time) in the future. After service in the arbitration of the Buyers' Points of Claim, a long hiatus was introduced as a result of efforts by the parties to settle the dispute. When those had still come to nothing some two years later, the arbitration process was renewed with vigour by both sides. By then the contractual delivery date had well passed, and the Cancellation for Delay clause was therefore potentially in play. But the Buyers (as they have since frankly conceded) overlooked it. In consequence, only the old cudgels (under the Rejection and Rescission clause) were taken up. The issues raised in the original Points of Claim stood unamended, were responded to in Points of Defence, and were answered in Points of Reply. Discovery and inspection were concluded.

2. Preparations for next January's arbitration hearing had reached an advanced stage, when someone on the Buyers' side re-discovered the Cancellation for Delay clause. It seemed to the Buyers to provide them with a clear road to an easy and assured victory. Such a triumph deserved, so they thought, to be enacted in an arena of its own. So they started court proceedings with a view to enforcing their repayment claim under the Cancellation for Delay clause by summary process under Order 14. The Buyers being out of the jurisdiction, leave to serve the proceedings on them was required by Order 11. When that leave was obtained on an ex parte application, the Builders applied to discharge it at an inter partes hearing before Langley J on 22 November 1996. The application was dismissed, and an expedited hearing of the Builders' appeal from that dismissal took place in this court on 29 November, when we allowed the appeal, reserving our statement of grounds to a later date. I now give my reasons for supporting that decision.

THE PROCEDURAL HISTORY

3. The Contract was dated 29 April 1988 and was for the construction of a tanker at a price of 20.6 million US dollars. The contractual date of delivery was 31 May 1992. The Contract contained provision for advance payments totalling 15.4 million US dollars to be paid by instalments at the start of the contract and by various stages thereafter as the work progressed.

4. The following clauses of the Contract need to be quoted in full:

Clause X1B : REJECTION AND RESCISSION

The payments made by the Buyer prior to the delivery of the Vessel shall be in the nature of advances to the Builder. In the event that the Buyer shall become entitled (i) to reject the Vessel pursuant to Clause IX and/or (ii) to exercise its right of rescission of this Contract under Clauses XI,XII or XIV hereof and shall choose to exercise either or both of such rights, then the Buyer shall promptly so notify the Builder in writing or by telex or telefacsimile confirmed in writing. Such notice of rejection or rescission shall be effective as of the date of such telex or telefacsimile and the Builder shall immediately thereupon (A) refund to the Buyer the full amount of all sums paid by the Buyer to the Builder on account of the Vessel and (B) irrevocably instruct Jugobanka-New York Agency to return to the Buyer the amount of the fourth instalment (if previously deposited in accordance with the provisions of sub-paragraph 3(d) of Clause V hereof) with accrued interest thereon. The Builder shall also pay the Buyer (I) a sum equivalent to the market value at the time and place of purchase of the Buyer's supplies purchased at the date of rescission and (II) interest at the rate of ten per cent (10 per cent) per annum on all amounts required herein to be refunded to the Buyer, computed from the date or dates on which such sums were paid by the Buyer to the date of remittance of such refund to the buyer by the Builder. Upon such refundment by the Builder to the Buyer, all obligation, duties and liabilities of each of the parties to the other under this contract shall be forthwith completely discharged. To secure the performance of its obligations hereunder the Builder shall, as a condition of the Buyer's obligation to pay the First Instalment of the Contract Price, provide to the Buyer in the manner described in Clause V hereof a transferable, irrevocable, on-demand letter of guarantee issued by the Bank in the form of Appendix A hereto, covering the full amount of the First Second and Third Instalments of the Contract Price.

CLAUSE X11.4 : Cancellation of contract due to excessive delay

Notwithstanding anything to the contrary contained in this Contract, if delivery of the Vessel is delayed for any reason whatsoever (including permissible delays referred to in paragraph XII.1 hereof but excluding delays which are the result of the Buyer's default as referred to in Sub-paragraph (i) of the paragraph 1) for a period of more than twelve months beyond 31st May 1992 (or, in the event that the Builder should exercise its option pursuant to the provisions of Clause X.6, for a period of more than twelve months beyond the Contractual Delivery Date so chosen by the Builder when exercising such option), then, in such event, the Buyer may, at his option, rescind this Contract by serving upon the Builder a notice of rescission by telex or telefax. Such rescission shall be effective as of the date of such telex or telefax and shall have the consequences set out in Clause XIB hereof.

Clause XV1 : DEFAULTS BY THE BUILDER

The Buyer shall be entitled, but not bound, to declare the Builder in default in any of the following circumstances:-

(a) If Builder is declared either by effective resolution or by order of any court insolvent or bankrupt; or

(b) If Builder without justification stops or delays the progress of construction of the Vessel to such extent as will prevent the Builder from delivering the Vessel within the time-limits as provided in this Contract or if the Builder (without the written consent of the Buyers) assigns, sub-lets or sub-contracts performance of its obligations (except as provided for in this Contract) and such default continues for a period of thirty (30) days from notice of the same having been given by the Builder to the Buyer.

If the Builder shall be declared in default as above provided the provisions of Clause XIB shall apply.

The contract also contained a 'force majeure' clause, and a common form arbitration clause under which disputes were to be referred to an arbitrator in London applying English law.

5. On 28 September 1992 the Buyers served notice purporting to rescind the contract under Clause XV1. In January 1993 the Buyers began the arbitration proceedings. Mr Harris was appointed as sole arbitrator. Points of Claim were served in that same month. Reliance was placed by the Buyers at that stage exclusively on Clause XV1, as it had to be, because the period of non-delivery under Clause X11.4 had not yet expired.

6. There followed a period of negotiation, whose end was foreshadowed in the following exchange of letters. On 3 June 1994 the Builders' solicitors wrote to the Buyers' agents as follows: *"In the meantime, we wish to make it clear without any admission of the validity of your claims that by commencing arbitration for return of the pre-delivery instalments of the contract price and interest and by commencing proceedings against Jugobanka for payment by them under the Refund Guarantee you have effectively terminated the contract which is therefore at an end and will therefore remain at an end unless we can reach agreement to the contrary. You appreciate that you cannot claim the refund of the monies unless you contend that the contract is terminated. Any negotiations between us in order to try to reach an amicable settlement have been and will be made on that basis."*

7. To which the Buyers' agents replied on 23 June 1994 in these terms:

"We refer to the above, which rests with your fax of 3.6.94. Please accept our apologies for not responding sooner...

For sake of good order, we confirm that the proposals put forward by you are not acceptable...Accordingly, there is no option but to continue with the arbitration proceedings and if no agreement can be reached for Points of Defence to be served within a short time (we have in mind 14 days) we shall have no alternative but to apply to the sole arbitrator for a suitable order.

As you have correctly stated, the effect of the commencement of arbitration proceedings, and of the above, is that both parties agree the shipbuilding contract to be at an end".

8. Negotiations finally broke down at the end of that year, and on 6 February 1995 the Buyers served notice of intention to proceed in the arbitration. No amendment was made to the existing Points of Claim to make a fresh or alternative case under Clause X11.4, notwithstanding that by then the twelve months from 15 May 1992 referred to in that clause had passed. Points of Defence were served by the Builders in April 1995, in which they denied that the delay in delivery was "without justification" - making a positive averment that the delay was refused justified firstly by the failure of the Buyers to pay certain sums due under the contract (as allegedly varied) and secondly by the severe disruption to the building process suffered as a result of the war in the former Yugoslavia. It was further contended that the contract had been frustrated from August 1990 as a result of such hostilities, which were also relied on as constituting force majeure.

9. Arrangements went ahead for the arbitration. The Builders obtained security for the costs of the arbitration in the sum of £125,000. Substantial discovery and inspection took place. By June 1996 the arbitration was ready for hearing and the date for January 1997 was obtained.

10. Meanwhile in the spring of this year an appreciation had begun to dawn on the Buyers of the possible relevance of Clause X11.4. Their solicitors wrote on 3 April 1996 to the Builders, giving notice that this clause would be relied on as an alternative basis for the claimed repayment, in addition (and without prejudice) to the existing basis of claim for a refund and/or for rescission. Nothing was said at that stage, however, about court proceedings. Those first entered the scene on 26 September 1996, when the Buyers procured the issue of a concurrent specially indorsed Writ in the High Court claiming the same repayment as that claimed in the arbitration proceedings. The primary case pleaded in the writ was an entitlement to rescind under Clause XV1, but the Buyers claimed "further or alternatively" to be entitled to do so, under Clause X11. Leave to serve out of the jurisdiction was granted that same day by Colman J.

11. Following the issue by the Builders of a summons to set aside that leave, the Buyers served Points of Reply in the arbitration on 11 November 1996 relying on Clause X11.4 as an additional basis for entitlement to rescind, and on 20 November served draft amended Points of Claim in the High Court proceedings in which they abandoned for the purposes of the proposed action any reliance on a right to rescind under Clause XV1 and relied solely upon the right to rescind under Clause X11.4.

12. Langley J heard the discharge application on 22 November 1996 inter partes, and dismissed it. On 27 November 1996 the Builders dealt with the Points of Reply in the arbitration by serving Points of Rejoinder pleading the exchange of correspondence in June 1994 which has already been quoted.

THE JUDGE'S GROUNDS FOR CONFIRMING LEAVE TO SERVE THE WRIT

13. Langley J (who used the terms "first notice claim" and "second notice claim" to describe respectively the claims derived from Clause XV1 and Clause X11) refused to set aside leave on the ground that:

(1) the Buyers had a more than reasonable prospect of success (if the action continued) in claiming summary judgment under Order 14 in respect of the second notice claim; and

(2) although the plaintiffs' delay in bringing forward the second notice claim was blameworthy, no appreciable unfairness or injustice had been suffered by the defendants as a result, since the same material that had already been prepared for the arbitration would be of equal relevance and availability in the action if it proceeded.

THE ARGUMENT ON APPEAL

14. Mr Sumption QC for the Builders accepts that the issue was one for the judge's discretion, but submits that his reasoning was flawed in respect of both the grounds on which he relied. It is at least arguable that the opening words of Clause X11.4 do not preclude the refund for which that clause provides (after the lapse of 12 months from the delivery date) from being qualified or vitiated by the defences of default by the Buyers and frustration or force majeure already deployed in answer to the Clause X1 claim. He points, moreover, to the quoted exchange of letters in June 1994 as indicating that the contract ended in that month - if not earlier. The arbitrator is equipped, he finally points out, with powers which would enable him in his discretion to deal with the Clause X11.4 point as a preliminary issue in the arbitration, if it should become clear that costs and time could be saved by following that course.

15. Mr Hamilton QC argues, for the Buyers, that there is a substantive, and not just a procedural, difference between a case like the present where the issue of "*action versus arbitration*" is being dealt with at one remove under an application to serve process outside the jurisdiction, and the conventional case where an application to stay proceedings under S 1 (1) of the Arbitration Act 1975 is met with an objection that there is no "dispute" to go to arbitration at all because the would-be plaintiff has a cast-iron case under Order 14. When a summons is before the court under Order 14, he points out, the defendant is required to demonstrate that he has a case for resisting the claim by sworn evidence. It is a misuse, he submits, of applications under O 12 R 8 to allow them to be used as a means of absolving a defendant from being put to his oath as to the merits of his claim. Alternatively he contends that if (contrary to that submission) there was sufficient material for the judge to decide whether or not there was a dispute fit to go to arbitration, he was fully entitled to conclude in the exercise of his discretion that there was no serious arguable issue to be tried in opposition to the entitlement of the Buyers to a refund under Clause X11.4, and therefore no dispute.

CONCLUSION

16. Mr Sumption's argument is in my view to be preferred. If a party elects for the procedural remedy of arbitration, the longer he persists in that election the greater the risk he runs of being found to have gone "too far along the road to arbitration now to be allowed to turn back" - see Mustill J in ***A and B v C and D*** [1982] 1 LLR 166 at page 173.

17. The same authority supplies the answer to Mr Hamilton's procedural objection. When it comes to deciding whether an alleged case is strong enough to give rise to a genuine *"dispute"* within the terms of S 1 (1) of the Arbitration Act 1975, there is no reason of principle preventing an application under Order 11 (or an application under O 12 R 8) from providing as good a forum for such an assessment as would be provided by an application for summary judgment under Order 14 - provided, of course, that the parties state their claim (or defence) with sufficient particularity to enable the strength of the claim or prospective defence to be judged. That is implicit in Mustill J's observations at page 171, with which I would respectfully agree. In the present case there was ample evidence in the documents and correspondence already before the court to enable the existence of a dispute to be established or negatived. The judge's decision cannot therefore be supported on the suggested alternative ground that he was justified in leaving the issue of arguability to be resolved in proceedings under Order 14.

18. The judge was accordingly entitled, and right, to make his own determination of the merits of the Builders' prospective defence to a claim based on clause X11.4. He was wrong, however, in my judgment, to regard the evidence as indicating that no arguable defence had been shown. The issues sought to be raised by the Builders as to frustration, alleged default in payment by the Buyers, and the uncertainty as to when (and with what effect upon the specific provisions of the contract) rescission was effected may not be impressive, but they are clearly arguable - whichever clause is relied upon. The judge was also in error in supposing that no appreciable risk of injustice to the Builders would be involved in allowing the action to proceed. The Buyers took the arbitration down to the point at which the Builders' overseas witnesses were finalising the statements which the arbitrator had directed to be supplied, and had already made their arrangements to be present in London for the arbitration hearing. The potential for injustice in forcing a different forum upon them at this stage is self-evident.

19. The strongest point of all, however, is to my mind the availability to the arbitrator of the power to direct determination of a preliminary issue within the arbitration. If he considered, on application being made to him either at the opening of the arbitration hearing or at any suitable point thereafter, that time or costs could be saved by directing a preliminary hearing to resolve the Clause X11.4 issue, there is every reason to assume that he would do so. Nothing would be gained, and time and money might potentially be wasted, through raising the same preliminary issue in separate proceedings.

20. For all those reasons I have supported the decision to allow the appeal and substitute for the order of Langley J an order under Order 12 Rule 8 (1) (c) discharging the order giving leave to serve the writ on the Builders outside the jurisdiction.

LORD JUSTICE PETER GIBSON:

21. I agree that this appeal must be allowed, but as we are differing from the judge, who had exercised his discretion to refuse to set aside the writ and its service out of the jurisdiction, and in deference to the admirable arguments of Mr. Sumption Q.C. for the Appellant Builder and of Mr. Hamilton Q.C. for the Respondent Buyer, I shall express my reasons in my own words.

22. The key features of the facts set out by Waite L.J. in his judgment are in my view as follows.
    1. The shipbuilding contract was subject to English law and contained a London arbitration clause.
    2. The contract provided that if the Buyer lawfully rescinded the contract under provisions for rescission in the contract, it would be entitled to a refund of sums paid on account before rescission.
    3. The Buyer claims to be entitled to a refund because it has lawfully rescinded the contract (a) on 28 September 1992 under cl.XVI on the ground that the builder without justification stopped or delayed the progress of construction of the vessel to such an extent as prevented the Builder from delivering the vessel within the contractual time limits, or (b) on 3 April 1996 under cl.XII.4 on the ground that the delivery of the vessel was delayed by more than 12 months after the contract delivery date of 31 May 1992.
    4. In January 1992 the Buyer commenced arbitration proceedings in respect of its claim to a refund under cl.XVI, the Builder's main defences to this claim being (a) that the delay in delivery was not without justification because of the failure by the Buyer to make certain payments and because of the disruption caused by the war in Croatia and (b) frustration and force majeure.
    5. On 11 November 1996 the Buyer served Points of Reply in which the purported rescission under XII.4 was relied on. But in Points of Rejoinder served on 27 November 1996 the Builder pleaded that that rescission was ineffective because (a) the purported rescission on 28 September 1992 by the Buyer had been accepted by the Builder on 3 June 1994 as a repudiation, (b) because it was agreed in the correspondence between the parties in June 1994, which Waite L.J. has set out, that the contract had come to an end, (c) because the contract was frustrated and (d) because of the Buyer's failure to make certain payments.
    6. By agreement the 3 weeks hearing of the arbitration was fixed in June 1996 to commence in January 1997; discovery has occurred and other steps pursuant to interlocutory directions (such as substantial security for costs) have been taken.
    7. On 20 September 1996 leave was obtained for the Buyer to issue and serve the specially indorsed writ in the High Court, claiming the same refund as in the arbitration on the basis of entitlement to rescind under cl.XVI (a claim now intended to be abandoned), alternatively under cl.XII.4.
    8. On 22 November 1996 the judge dismissed the Builder's application under O.12.r.8.

23. The prima facie right of a party to an arbitration agreement to a stay is displaced if the court is satisfied that there is not in fact any dispute between the parties in the sense explained in ***Hayter v Nelson*** [1990] 2 Lloyd's L.R. 265. The primary ground on which the judge dismissed the application was that there was in effect no such dispute and that the Buyer would have a reasonable prospect of success on an O.14 application in the writ proceedings. The judge of course did not have the Points of Rejoinder, drawing specific attention to the correspondence between the parties in June 1994 and the claimed legal consequences thereof. As I understand him, Mr. Hamilton sought to resile from the letter of 23 June 1994, written as it was by the agent of the Buyer, or at any rate to suggest that it should not be taken at its face value, submitting that it had to be looked at in all the circumstances. No doubt it does, but on the material before us the arguments based on that letter and the letter of the 3 June 1994 seem to me to provide at least arguable defences to the claim founded on the purported rescission of 3 April 1996. Nor would I rule out at this stage the arguability of the other two defences to which I have referred in para. 5 above, although I can see that they may well face greater difficulty.

24. The judge was also dismissive of the Builder's argument that because the parties had agreed to arbitrate their dispute and were a considerable way down the road to doing so, it was unjust that the Buyer should be permitted belatedly to commence a writ action to obtain a decision in the High Court on one issue in the arbitration. In support of the judge's approach Mr. Hamilton relied on a passage in Mustill and Boyd : Commercial Arbitration 2nd ed. (1984) at p.493 to the effect that the court can give judgment on claims in respect of which liability is clear and let other claims be determined by arbitration. But that passage was not dealing with a situation where the parties had already submitted to arbitration, still less one where the parties are so far down the arbitration road. Here the effectiveness of the rescission in April 1996 is an issue in the arbitration, as the pleadings demonstrate. The arbitrator could deal with it as a preliminary issue, if any advantage in time and costs were perceived in so doing. In my judgment the court should be slow to allow an issue in the arbitration to be determined in the High Court in the face of the opposition of one of the parties (contrast s.2(1) Arbitration Act 1979), the more so when the arbitration hearing is so close at hand and when disruption to the preparation for the arbitration is bound to ensue. I cannot think it right that the Buyer should now be permitted to adopt a course so inconsistent with that previously followed by him.

25. In response to Mr. Sumption's reliance on ***A and B v C and D*** [1982] 1 Lloyd's L.R. 166 for the procedure adopted by the Builder, Mr. Hamilton took a technical point on evidence. He referred us to Mustill and Boyd op. cit. p.462, where reference is made to that case, and in particular to n.5. There it is said that that was a case where the

defendant's claim for a stay would have been irresistible. The note continued: "In a less clear case, or where the stay would have been granted, if at all, under s.4 which gives the court a discretion, the court would be likely to insist on the application for a stay being brought on formally and supported by affidavit evidence." So, Mr. Hamilton says, the Builder's case should be supported by affidavit evidence. For my part I can see nothing wrong with the way the matter has been put to the court by the Builder. There are 3 Affidavits by its solicitor, Mr. Phillips, in which he deposes fully to the reasons why the Builder sought to obtain an order under O.12.r.8 and states his view that "genuine disputes do exist between the parties which should be arbitrated" and in particular to the fact that the Builder disputed the validity of the rescission under cl.XII.4. In my judgment no more was required.

26. For these reasons I too would allow the appeal.

LORD JUSTICE HIRST:

27. I agree that this appeal must be allowed, and I do not propose to give a separate judgment, since my reasons are identical to those given by Peter Gibson L.J.

ORDER: Appeal allowed. Leave to serve out of jurisdiction set aside. All costs of the action to include costs here and below.

MR J SUMPTION QC and MR G DUNNING (Instructed by Stephenson Harwood EC4M 85H) appeared on behalf of the Appellant
MR A HAMILTON QC and MR PA McGRATH (Instructed by Ince & Co EC3R 5EN) appeared on behalf of the Respondent