CA on appeal from Truro C.Ct. (HHJ Anthony Thompson QC) before Mantell LJ; Robert Walker LJ. 4th December 1998.

LORD JUSTICE ROBERT WALKER:

1. The practice direction very recently promulgated by the Master of the Rolls has confirmed, as Mr Mortimore in his submissions reminded us, that the general test for granting leave to appeal in this court is that leave will be given unless an appeal would have no realistic prospect of success. That is the paramount test although other factors, such as the importance of the point either to the parties or generally, may also be given some weight.

2. In this case the issue in the appeal, a stay of proceedings in the Truro County Court for the purpose of arbitration pursuant to section 9 of Arbitration Act 1996, is apparently short and technical but it is plainly of considerable practical importance to the parties and it does on analysis raise legal issues of some difficulty and importance. The background is complicated and fortunately it is not necessary to go into it in great detail. Indeed it would be something of a distraction to do so. It is necessary to focus on the position as it now is.

3. The force behind the proposed appeal is Mr Terence Lewis, the third defendant in the proceedings. He has in the past had various interests in the first defendant, M C Fabrications Limited (which I will call *"the company"*). That is a shipbuilding company based in Falmouth, which is now in liquidation. Mr Lewis's present relevant interest in the company are as follows.

4. First, he is assignee (by virtue of an assignment and transfer dated 8 January 1998) from Barclays Bank of a debenture created on 13 October 1997, and he is assignee of the sum *(then £293,000 odd)* secured by the debenture.

5. Secondly, Mr Lewis has or claims to have by virtue of a deed dated 2 February 1998 the benefit of a contract by the company (acting through receivers who had by then been appointed), for a consideration moving towards the company of £1 and a 50 per cent share in any eventual net recoveries, by which the company agreed to assign to Mr Lewis the company's right title and interest in liens over three specified ships, in rights under three specified contracts relating to the ships, and in all causes of action between the company and the other parties to the three contracts.

6. Thirdly, Mr Lewis has or claims to have the benefit of an agreement dated 9 March 1998 between the company, the receivers and himself which recited doubts as to the effect of the deed dated 2 February 1998 and then (without prejudice to that deed) contained an agreement by the company acting through its receivers which was expressed to give irrevocable authority for Mr Lewis to undertake either proceedings or arbitration against Bawejem Limited and/or the Royal Bank of Scotland (whom together I will call "the purchasers") in connection with a shipbuilding contract dated 15 February 1996, which was one of the three specified contracts and the only contract relevant today.

7. That then is the position of Mr Lewis. I must relate that to the proceedings in which the appeal is sought to be brought. They are proceedings in the Truro County Court. The plaintiffs are the purchasers, as I have defined them. The defendants are the company, Mr Malcolm Crouse and Mr Lewis. I should add that a winding-up petition against the company was presented on 27 February 1998. I am told it was presented by a relatively small creditor. That petition was presented therefore before the agreement of 9 March and a winding-up order was made on the petition on 13 May 1998.

8. Application was made to the county court to stay the proceedings pending arbitration under section 9 of the Arbitration Act 1996. His Honour Judge Anthony Thompson QC, sitting at Truro County Court on 14 October 1998, refused the application for a stay and it is against that that the company and/or (by a proposed amended notice of appeal) Mr Lewis, seek to appeal. Mr Simon Mortimore QC and Mr Timothy Hill for Mr Lewis urge on us that the crucial question is whether Mr Lewis can apply either in the name of the company or, as under the draft amended notice of appeal, on his own for a stay of the proceedings by virtue of his rights as assignee debentureholder and under the agreements of 2 February and 13 March last, which I have mentioned, and moreover can do so notwithstanding the fact that the company is now in compulsory liquidation and that the liquidator appeared in the Truro County Court and said that he did not consent to the stay.

9. The judge dealt with the point as a preliminary issue. He focused on the crucial point, as counsel have before us today, that the shipbuilding contract had an arbitration clause which would normally, as the judge noted, have resulted in an automatic stay, but it also contained an absolute prohibition on assignment contained in article 16 of the contract and expressed in simple but wide terms, that *is "the contract is not transferable or assignable by either party without the written consent of the other party".*

10. The judge then referred to the transfer of the debenture and to various provisions in it which were relied on by the would-be appellants, including in particular various provisions of clause 6(d) relating to the powers exercisable by receivers appointed under the debenture. As to that the judge commented: *"The difficulty which I see in all of this is that the subsequent attempt by the receiver whereby he purported to assign the right of action and a lien which the company contended that it had to Mr Lewis was a nullity on account of the total prohibition which was contained in the original contract."*

11. The judge then referred to the decision of the House of Lords in the well-known case of ***Linden Gardens Trust v. Lenesta Sludge Disposals Ltd.*** [1994] 1 A.C. 84 and to the winding-up order and to the decision of Lord Justice Walton in ***Fargro Ltd. v. Godfroy*** [1986] 1 W.L.R. 1134, 1136. ***Fargro v. Godfroy*** is a rather special case because it was concerned with a minority shareholders' derivative action followed by a company going into liquidation.

That case does not therefore afford me any particular help and it appears to me that the significance of the liquidation was not gone into very deeply before the judge. In particular there was no mention in the judgment of the effect of section 130(2) of the Insolvency Act 1986 which provides that, on the making of a compulsory winding-up order, no further proceedings to which a company is a party are to be commenced nor are any existing proceedings to be continued without the sanction of the court.

12. When Mr Mortimore was preparing his skeleton argument he and those instructing him were under the impression that leave for continuation of the Truro proceedings had already been given under section 130(2). However, it now appears that that is not correct. The question has been ventilated before the Companies Court sitting in Bristol but the Companies Court judge in the person I think of H.H. Judge Weeks QC has taken the view that no sanction for the continuation of proceedings will be given under section 130(2) until all parties, including Mr Lewis, have been heard on the question. The judge concluded that in the absence of support for the application, or at any rate concurrence in the application by the liquidator, he should dismiss the application and he did so and refused leave to appeal.

13. I should perhaps add that the main issues in the Truro proceedings as between the purchasers and the company are whether the purchasers validly cancelled the contract under a power contained in article 11 by a notice which they gave on 2 December 1997, or whether the purchasers are in repudiatory breach as a result of giving that notice. That issue and issues connected with it are what would go to arbitration, if anything goes to arbitration. There are in the proceedings also claims by the purchasers against Mr Crouse and Mr Lewis but it is common ground that they would not go to arbitration in any event.

14. I should also mention that the position is further complicated because on 15 December 1997 the company began Admiralty proceedings in rem against, among other vessels, the vessel with which the Truro proceedings are concerned in order to secure its lien. This court has been told that a further hearing in those proceedings is likely in the fairly near future.

15. The excellence of the written submissions addressed to us have been matched only by the excellence of the oral submissions which we have heard. It appears to me - and neither counsel dissented from this - that there are essentially three hurdles in the case which Mr Lewis would have to overcome in order to establish that he could, either in his own right or through and in the name of the company, make a successful claim to have the proceedings stayed for the purpose of going to arbitration.

16. The first hurdle, and that on which Mr Davies for the purchasers has concentrated, arises from the absolute prohibition on assignment contained in article 16 of the relevant contract. It is common ground that the effect of that article is that the benefit of the contract could not be assigned at law without consent. That does not necessarily mean that every prohibition on assignment at law also has the effect of prohibiting any type of subsidiary disposition operating in equity. There is for instance, as noted in many cases, an obvious distinction between an assignment of the right for a party to insist on future performance of a contract which has not yet been fully performed, and an assignment of fruits, especially fruits in liquidated monetary form, which are in the course of arising or may at some future time arise under the contract.

17. The extent of any prohibition depends on the correct construction of the relevant contract in the light of established doctrine. That point appears very clearly from the speech of Lord Browne-Wilkinson in the ***Linden Gardens case*** in which he said at page 105: *"The question is to what extent does clause 17 [I interpose that that was the prohibition on assignment relevant in that case] on its true construction restrict rights of assignment which would otherwise exist? In the context of a complicated building contract, I find it impossible to construe clause 17 as prohibiting only the assignment of rights to future performance, leaving each party free to assign the fruits of the contract. The reason for including the contractual prohibition viewed from the contractor's point of view must be that the contractor wishes to ensure that he deals, and deals only, with the particular employer with whom he has chosen to enter into a contract. Building contracts are pregnant with disputes: some employers are much more reasonable than others in dealing with such disputes."*

18. Mr Davies referred us to that passage and indeed read a good deal more in which Lord Browne-Wilkinson elaborates the point. But that is sufficient for present purposes.

19. The same point was made with particular reference to a right to insist on arbitration in the case of ***Yeandle v. Wynn Realisations*** (1995) 47 Con LR 1; see in particular the observations of Lord Justice Hobhouse at pages 8 to 11 and those of Sir Thomas Bingham MR at page 13. I will come back to that first hurdle on which Mr Davies has, as I say, concentrated his submissions.

20. The second hurdle which Mr Lewis would have to overcome is as to his practical rights by the joint effect of the original debenture and the three documents which I have already identified, dated 8 January, 2 February and 9 March last. That of 9 March was after the presentation of the winding-up petition but Mr Mortimore submits that that creates no problem under section 127 of the Insolvency Act since it was concerned only with the giving of consent and did not constitute a disposition of property.

21. So far as Mr Lewis would seek to enforce those rights, not on his own account but through what would amount to powers to control the conduct of the company, he would be relying on the position of the company as remaining the legal owner of those rights. Alternatively, by his suggested amendment Mr Mortimore seeks to contend that the legal owner can be treated as transparent and that Mr Lewis could assert his own rights or those of the receivers directly. This point, which is of some technicality, was very clearly explained by Lord Justice Peter

Gibson in an interlocutory appeal in ***Three Rivers District Council v. Bank of England*** [1996] Q.B. 292, 307-308 in a passage which Mr Mortimore has referred to in his skeleton argument.

22. The third hurdle is as to the effect of the supervening winding- up order. My present view is that of the three hurdles the third is in principle the least formidable, although the presence and attitude of the liquidator, as evinced so far, certainly increases Mr Lewis's practical difficulties. Mr Mortimore's best authority on this point is the very clear explanation of principle in the judgment of Mr Justice Goulding in ***Sowman v. David Samuel Trust*** [1978] 1 W.L.R. 22.

23. I must however go back to what I have called the first hurdle. Mr Davies referred us not only to ***Linden Gardens*** and ***Yeandle*** but also to two recent decisions of this court, that is ***Flood v Shand Construction*** (1996) 81 B.L.R. 31, especially the observations of Lord Justice Evans at page 41, and the decision in ***R. v. Chester and North Wales Legal Aid Area Office (No.12) Ex parte Floods of Queensferry Ltd.*** [1998] 1 W.L.R. 1496, especially the observations of Lord Justice Millett at pages 1501, 1502 and 1503. Those passages do seem to me to create very real difficulties in the way of Mr Mortimore on the first point.

24. I should perhaps mention that the ***Ex parte Floods of Queensferry*** case was in effect a further episode involving the same parties as that which had been before this court in ***Flood v. Shand Construction .*** What had happened by the time it got to ***Ex parte Floods of Queensferry*** was that the managing director of a company had taken an assignment of its cause of action under a contract which was, like the contract in this case, declared not to be assignable. The company had then applied for legal aid in respect of its bare legal ownership of the benefit of the contract and contended that it would therefore be a plaintiff in a *"representative, fiduciary or official capacity"*. Lord Justice Millett said at page 1501: *"It was submitted before us that the assignment was effective in equity to transfer the beneficial interest in the company's cause of action, so that it was effective as an equitable but not a legal assignment. I do not accept this. The subcontract expressly prohibits any assignment of the claim, not merely any legal assignment, and in my opinion an equitable assignment is as much within the prohibition as a legal assignment. It is not necessary to consider whether the company could have declared itself a trustee of its claim, for it has not done so. But it could not have assigned the benefit interest to Mr Flood by contracting to do so, since equity will not enforce the performance of an obligation which constitutes a breach of a prior contract with a third party."*

25. Then at page 1502 Lord Justice Millett tested the position by considering the consequences of an offer to compromise the action which commended itself to a liquidator who would have the carriage of the action, but which did not commend itself to Mr Flood, the ex-managing director. At page 1503 Lord Justice Millett said: *"The assignment is wholly ineffective to vest any interest now in existence in Mr Flood. Accordingly, the company remains an ordinary plaintiff suing on its own behalf."*

26. Mr Mortimore in reply met these powerful authorities by contending that there is a major difference between the situation in those cases and the situation in the present case because in all of them, he said, it was another person who was trying to enforce the right - whether that right was to go to arbitration or whatever it was - whereas in this case, he said, it would be the company itself, albeit at Mr Lewis's instigation, which would be enforcing the right.

27. However, I have in the end come to the clear conclusion that Mr Mortimore and those whom he represent are in effect faced with this dilemma. If and so far as the real issue is *"Who is to speak for the company?"*, the most appropriate tribunal, and indeed in my view the only appropriate tribunal, to decide that question is not the Truro County Court but the Companies Court sitting in Bristol. That is where the question of *"Who is entitled to give directions as to how the company should conduct itself in the litigation in Truro?"* can most appropriately be dealt with by judicial resources expert in company law and in questions involving receivers and so on.

28. If on the other hand Mr Lewis wishes, as he wishes by the draft amended notice of appeal, to be recognised as himself having rights which are directly enforceable under the contract (by virtue of the complicated derivative title which he seeks to trace), it seems to me that that contention is simply not arguable as a result of the decision of the House of Lords in ***Linden Gardens*** and the other decisions of this court to which Mr Davies has referred us, including in particular ***Ex parte Floods of Queensferry .***

29. Mr Mortimore has urged on us that further litigation in the Companies Court in Bristol would be expensive and no doubt that is so. The whole of this litigation has, I have no doubt, incurred expense of an amount which is most regrettable. But it seems to me that, rather than those questions being litigated (with, as I see it, only one possible outcome in the Court of Appeal), the more appropriate recourse, if Mr Lewis wishes to take this matter further, would be in the Companies Court in Bristol.

30. There is at present, as I have noted, a stay of the Truro proceedings as a result of the statutory provisions in the Insolvency Act. The next time that any application is made in Bristol to get the Truro claim back on the road, whether by a continuation of those proceedings or by arbitration, that would be the appropriate occasion for these matters to be determined.

31. For those reasons, which I am afraid I have set out at excessive length (but that is a tribute to the advocacy that we have heard), I would refuse this application for leave.

LORD JUSTICE MANTELL: So would I.

Order: Application refused with costs on standard basis.

MR SIMON MORTIMORE QC and MR TIMOTHY HILL (instructed by Messrs Foot & Bowden, Plymouth, Devon) appeared on behalf of the Applicant (Third Defendant). MR STEPHEN DAVIES (instructed by Messrs Peterkins, Aberdeen) appeared on behalf of the Respondents (Plaintiffs).