BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 601 of 2008

BETWEEN:

FURNITURE LIMITED **PLAINTIFF**

AND

ROBULK AGENCIES INC. **FIRST DEFENDANT**

SCOTT VEIRA **SECOND DEFENDANT**

Before The Honourable Mr. Justice Olson DeC. Alleyne, Judge of the High Court (Acting). (In Chambers).

2008: April 23 and 24,

June 16.

Mr. Stan Smith for the Plaintiff

Mr. Patterson Cheltenham Q.C. with Ms Liesel Weekes and Ms. Jewel Garner for the Defendants

DECISION

Introduction

[1] By their Summons filed on 22 April 2008, the First and Second Defendants seek the following relief:

"1. That the First and Second Defendants be removed as Defendants from this action pursuant to Order 15 rule 6 (2) (a) of the Rules of the Supreme Court.

2. Further or in the alternative that the issue of jurisdiction be tried as a preliminary issue herein.

3. In the event that the issue is so tried and the local courts are found to be the forum non conveniens for the trial of the substantive matter herein, that the matter be struck out pursuant to Order 33 rule 7 of the Rules of the Supreme Court.

4. That costs of and occasioned by this application be reserved to the Defendants in any event.

5. An Abridgment of time within which this Summons may be heard.

6. Such further or other orders as this Honourable court deems fit."

[2] The Summons came on for hearing, in Chambers, on 23 April 2008. There was no objection by Counsel for the Plaintiff to the orders sought at paragraphs 5 or 2 of the Summons. Consequently, an Order was granted in terms of paragraph 5 and arguments heard on 23 and 24 April 2008.

[3] It is not surprising that Counsel for the Plaintiff ("Furniture Ltd."), Mr. Stan Smith, did not object to the prompt hearing of the Defendants' Summons for, on 22 April 2008, his client had approached this Court by way of Summons, filed on 17 April 2008, for urgent interlocutory relief. The relief sought was in identical terms to that claimed on the Writ of Summons filed on 10 April 2008 and was as follows:

> "(i) The release at Bridgetown Port of the goods contained in container reference No.ZCSU8684810 under bill of lading No. ZIMUNVT197, and damages; or
>
> (ii) Damages inclusive of loss of sales, business and reputation; and
>
> (iii) Payment of all port charges up to the determination of this Action or sooner release and/or settlement by the Defendants;
>
> (iv) Interest pursuant to the Supreme Court of Judicature Act, Cap 117A;
>
> (v) Further or other relief as this Honourable Court thinks fit;
>
> (vi) Costs."

[4] I ordered that Furniture Ltd.'s Summons be served on the Defendants and adjourned the hearing of the matter. The Defendants' Summons was filed subsequently and, given the nature of the relief sought by them, prudence dictated that it be heard first so that the preliminary issues raised therein could be determined.

[5] At the close of the hearing on 24 April 2008, I invited Counsel on both sides to provide written submissions on the factors which I should consider in deciding whether to grant a stay in these proceedings. On 25 April 2008, the Defendants' Counsel filed written submissions headed "REVIEW OF CASE LAW" in which they reviewed the cases on which they had relied in their oral arguments.

[6] No written submissions of the nature requested by me were received from Furniture Ltd. Rather, two documents dated 25 and 30 April 2008 were filed on that company's behalf. The former document is headed, "PLAINTIFF'S SUBMISSIONS FURTHER TO ORAL SUBMISSIONS IN CHAMBERS" and the latter, "PLAINTIFF'S WRITTEN SUBMISSIONS". Since those documents appear to fall outside the scope of my request, I do not consider them part of the arguments in this case. No opportunity would have been afforded the other side to comment on any of their content which raise issues other than those ventilated at the oral hearings. In any event, my decision does not turn on any matter contained in them.

Background

[7] The Defendants' application was supported by the affidavit of the Second Defendant ("Mr. Veira") which was filed on 22 April 2008. No affidavit evidence was adduced by or on behalf of Furniture Ltd. Consequently, I turn to Mr. Veira's affidavit for a summary of the relevant facts.

[8] The First Defendant ("Robulk") carries on business as a shipping agency. In the course of its business, it receives shipments of goods from its overseas principal for onward delivery to the person in Barbados by whom the goods were purchased and for whom they were shipped.

[9] Robulk has such an agency relationship with Zim Integretated Shipping Services ("Zim"), a foreign shipping

company with its head office in Haifa, Israel.

[10] On or about 25 March 2008, Robulk was made aware that a shipment of goods was en route to Barbados for delivery to Furniture Ltd. By letter dated 25 March 2008, Robulk informed Furniture Ltd. that the goods were scheduled to arrive in Barbados on 26 March 2008. A copy of that letter was exhibited with the affidavit. It also referred to an attached bill of lading covering a container bearing number ZCSU8684810 and requested Furniture Ltd. to make arrangements to facilitate the clearance of the cargo from the Bridgetown Port within eight working days.

[11] A copy of the bill of lading referred to in that letter was exhibited with Mr. Veira's affidavit. It discloses that it was issued in Brazil on 26 February 2008 by "SEVEN STARS as agent for" Zim. The bill of lading lists the particulars of the shipment under the caption "DESCRIPTION OF GOODS", as "1.120 PIECES BEING: 400 BI-FOLD DOORS, 360 CLEAR PINE PANEL DOORS AND 360 CEDRORANA PANEL DOORS". These goods were further described as having been “SHIPPED ON BOARD" with freight prepaid at Norfolk in the United States of America. The Shipper is named as IBI International AB, the company from which Furniture Ltd. purchased the goods. That company is also named as the consignee of the goods.

[12] Mr. Veira's further evidence is to the effect that a certain practice had developed with respect to the shipment of goods to Furniture Ltd. by Zim. In accordance with that practice, once a shipment arrives in Barbados, the bill of lading is amended to include the name of Furniture Ltd as consignee. This is done to facilitate delivery of the goods to Furniture Limited. Mr. Veira exhibits a copy of the bill of lading as so amended. That practice existed since the time of the first shipment by Zim to Furniture Ltd. However, there is no evidence as to the date of that shipment.

[13] It is clear, though, that there had been some prior dealings between Furniture Ltd. and Zim, for Mr. Veira attests that, prior to the shipment under consideration, Furniture Ltd. had incurred demurrage charges with Zim totaling $91,237.42 and that those charges remain unpaid. He exhibited with his affidavit a number of invoices setting out various demurrage charges. Those invoices are all dated 4 January 2008 and relate to shipments which are stated on the invoices to have arrived in Barbados, on various dates, between 24 July 2007 and 11 September 2007. The bills of lading relating to those shipments were not exhibited.

[14] Sometime after he had notified Furniture Ltd. of the pending arrival of the goods, Mr. Veira was instructed by Zim to withhold delivery until such time as the outstanding demurrage charges were settled in full. His evidence is that he received those instructions in his capacity as Robulk's employee.

[15] The Defendants claim to be exercising, on behalf of their principal Zim, a lien expressed in clause 20 of the bill of lading. Their contention is that this clause gives Zim and its servants or agents a lien and a right to sell the goods for the demurrage charges which they allege to be outstanding. The clause provides as follows:

> “LIEN: The carrier, his servants or agents, shall have a lien on the goods or any part thereof and a right to sell such goods whether privately or by public auction for all freight (including additional freight payable as is herein stipulated) primage, deadfreight, demurrage, detention, container demurrage, charges, salvage, average of any kind whatsoever, stamps, duties, fines or penalties, C. O. D. charges to be collected as per Merchant's request prior to delivery of the goods, and for all other charges and expenses whatsoever which are for the account of the goods, or of the Merchant, and for the costs and expenses of exercising such lien, and of such sale and also for all previously unsatisfied debts whatsoever due to the Carrier, his servants or agents, by the Merchant. The lien hereby accorded may be exercised by the Carrier, his servants or agents notwithstanding that he or they may have parted with possession of the goods; and the Carrier, his servants or agents, shall at all times stand authorized by the Merchant to give all such notices to any person or persons for the time being in possession of the goods as may be required for the purpose of giving effect to the

provisions of this Clause. Nothing in this Clause shall prevent the Carrier from recovering from the Merchant the difference between the amount due from them or any of them to him and the amount realized by the exercise of the rights given to the Carrier under this Clause."

[16] I also reproduce clause 24 of the bill of lading. It is upon this provision that the Defendants pivot their arguments for a stay of these proceedings. The clause provides as follows:

"LAW AND JURISDICTION:

All and any claims and/or disputes arising under this Bill of Lading or in connection therewith shall be brought before and determined by the courts and in accordance with the law at:

(a) the place where the Carrier has its Head Office, namely Haifa, Israel

OR

(b) if the cargo originates in or is destined for the U.S.A., by the United States District Court for the Southern District of New York, N Y., U.S.A.

Each of the above courts, respectively, shall have exclusive jurisdiction and, therefore, no proceedings shall be brought before any other court."

[17] The face of the bill of lading discloses that the goods were loaded at Navegantes, Brazil for delivery to Bridgetown, Barbados. Therefore, by virtue of this clause, the courts of Haifa, Israel would be the exclusive forum for related disputes.

Questions for determination

[18] It is against this background that the two broad issues that arise on the Defendants' Summons fall to be determined. These are: (1) whether this Court should decline jurisdiction in this matter and (2) whether the Defendants are proper parties to these proceedings. Logically, I should address the issues in the order just set out.

Stay of proceedings

[19] In their Summons, the Defendants ask that these proceedings be struck out, in the event that I decline jurisdiction in this case on the ground of *forum non conveniens*. However, in the course of his oral submissions, Counsel for the Defendants, Mr. Patterson Cheltenham Q. C., asked that the proceedings be stayed. That this would be the more appropriate remedy if the Defendants' arguments were to succeed, was emphasised by the Court of Justice of the European Communities in **Owusu v Jackson et al (Case C-281/02) [2005] QB 801 at page 804, para. 9** where it was stated:

"An English court which decides to decline jurisdiction under the doctrine of forum non conveniens stays proceedings so that the proceedings which are thus provisionally suspended can be resumed

should it be prove, in particular, that the foreign forum has no jurisdiction to hear the case or that the claimant has no access to effective justice in that forum."

(i) *The submissions*

[20] Mr. Cheltenham submitted that clause 20 of the bill of lading constitutes an exclusive jurisdiction clause; that the clause is binding on Furniture Ltd. as the ultimate consignee of the goods and that the court should give effect to this provision, in the absence of strong grounds shown by the Plaintiff as to why the court should not stay these proceedings. He cited the cases of **The "Star of Luxor" [1981] 1 Lloyd's Rep. 139** and **The Eleftheria [1969] 1 Lloyd's Rep. 237** in support of his contention and urged that I should exercise my discretion in favour of granting a stay. Ms. Weekes, who provided a lucid outline of the facts as derived from Mr. Veira's affidavit, submitted that clause 20 of the bill of lading was sufficiently wide to cover the demurrage charges.

[21] Mr. Smith gave no direct response to the Defendants' submissions as they related to the factors applicable to the exercise of any discretion with respect to staying these proceedings. Rather, he contended that the exclusive jurisdiction clause was not incorporated into any contract to which Furniture Ltd. is a party and, for the other reasons advanced by him, is not binding on Furniture Ltd. He also made submissions on the interpretation of clause 20 of the bill of lading. However, his main contention was that the terms of the bill of lading were limited to disputes arising before the arrival of the goods at Bridgetown, the port of final destination. According to him, the dispute in this case arose in this jurisdiction and was a matter to be determined solely by reference to the contractual or other arrangements between his client and the Defendants.

[22] I will refrain from dealing with the submissions relating to the interpretation of clause 20 of the Bill of Lading or the other submissions made by Mr. Smith as I do not consider it necessary to determine any of those issues to arrive at a decision in this matter. However, I will state that I found no merit in Mr. Smith's submissions as to the limited sphere of application of the bill of lading.

(ii) *Assessment of the Defendants' case*

[23] Mr. Cheltenham's arguments were premised on the assumption that the exclusive jurisdiction provision, in this case, is effective. For reasons that will appear later, I do not accept this premise. However, had I done so, I would not have been inclined to exercise my discretion in the manner requested by Mr. Cheltenham. The general rule applicable in such a circumstance is as stated by Mr. Justice Sheen in **The "Star of Luxor"** at page 140:

"….[W]hen parties have agreed that any dispute between them shall be decided in a particular country this Court will give effect to that agreement unless the plaintiff shows strong grounds why the Court should not do so."

[24] The principles on which a determination should be made as to whether or not to grant a stay were set out by Brandon J in **The Eleftheria** at page 242 as follows:

"(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative

convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so. whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

These principles were approved by the House of Lords in **Donohue v Armco Inc. et. al. [2002] 1 Lloyd's Rep. 425**. In that case, Lord Bingham, with whom the other Law Lords agreed, noted, at page 433, para. 24, that Mr. Justice Brandon did not intend his list to be exhaustive. Indeed, a court must consider all the circumstances of the case.

[25] Assuming the exclusive jurisdiction clause to be valid and binding on Furniture Ltd., there would be a *prima facie* desirability of holding Furniture Ltd. to it and I give full weight to this.

[26] However, many of the facts in this case speak for themselves and tend to rebut the prima facie case for a stay. It is clear from Mr. Veira's affidavit that Robulk is a company which was incorporated, and has its principal place of business, in this country. Mr. Veira states his address as Fitts Village, St James. There is no evidence that either Defendant is ordinarily resident in or has any connection with any other country. Exhibits "RAL1", the letter of 25 March 2008, and Exhibit "RAL3", the amended Bill of Lading and the invoices exhibited as RAL 5-11 show Furniture Ltd.'s place of business to be in St Michael, Barbados. There is no evidence of any connection on the part of that company with any other country.

[27] Further, it is clear from Mr. Veira's affidavit that the goods which are the subject matter of this suit are in Barbados and that the demurrage charges on which the claimed exercise of the lien are based were all allegedly incurred in this country. The invoices with respect to those charges were all generated here by Robulk.

[28] Simply put, the parties to this action all reside and have their place of business in Barbados, the relevant evidence is in Barbados and the witnesses who can properly put that evidence before a Court are all in Barbados. It does not appear as though any great number of witnesses would be required to travel to Israel in the event of a trial in that forum. I agree with Mr. Cheltenham's observation to this effect. However, the above factors suggest that it would be more convenient and less expensive to have a trial in these courts as compared to a court in Israel.

[29] One factor holds the potential to reinforce the *prima facie* position in favour of a stay. Clause 24 of the bill of lading states the law of Haifa, Israel to be the proper law applicable to disputes arising under or in connection with the bill of lading. The issue may well arise as to whether this clause is effective so that Israeli law governs the interpretation, scope or application of the terms of the bill of lading.

[30] In any event, the fact that the proper law of a contract is of a foreign jurisdiction does not, without more, mean that my discretion must be exercised in favour of a grant of a stay. The relevant principles were set out in **Crédit Chemique v James Scott Engineering Group Ltd (1982) S.L.T. 131,** by Lord Jauncey who, after examining various judicial views on the subject, concluded, thus, at page 135:

"…I consider that there can be no hard and fast rule as to the effect of the necessity for the application of foreign law on a plea of forum non conveniens but that each case must depend on its own circumstances. In some cases the questions may be relatively simple and the application of that law by a Scottish court may not present undue difficulties. In such cases the necessity to apply foreign law would not suffice to found the plea. In other cases the questions of foreign law likely to be involved

may be numerous and complex and in such cases the necessity to apply the law might properly be a factor which the court would take into account in deciding whether or not to exercise its discretion to sustain the plea."

[31] No evidence has been put before me as to the likely number of issues, or their degree of complexity, with respect to which foreign law might have to be applied or whether or not there would be any difficulty in having such issues resolved in this jurisdiction. Moreover, there is no evidence before me to suggest that the law of Israel differs in any material respects from that of the law of this country. In the absence of such evidence, there is a presumption that Israeli law is the same as the law of this country.

[32] Taking account of the *prima facie* desirability of giving effect to the exclusive jurisdiction agreement; the fact that the burden of proof lies on the Plaintiff and my assessment of the relevant factors that have arisen on what has been presented before me, I would have been inclined to exercise my discretion against the grant of a stay.

(iii) *The effect of the jurisidiction clause*

[33] However, in my view, Mr. Cheltenham's argument is misconceived. As is illustrated by **The Hollandia [1983] 1 A.C. 565**, the validity or effectiveness of an exclusive jurisdiction provision may be rendered void or of restrictive effect by the provisions of a local statute.

[34] The effectiveness of the jurisdiction clause in this case must be assessed in light of the provisions of the *Carriage of Goods by Sea Act* Cap. 307 of the Laws of Barbados. This Act was cited in argument by Counsel for Furniture Ltd. but, regrettably, its likely effect on clause 24 of the bill of lading was not explored by either side. The Act came into force on 1 January 1981, its stated purpose being “to provide for the implementation in Barbados of the United Nations Convention on the Carriage of Goods by Sea, 1978" ("the 1978 Convention"). The 1978 Convention is contained in the Schedule to the Act, section 3 of which provides that, subject to the *Shipping Act,* it has the force of law in Barbados. Hence, its provisions must be treated as if they were directly enacted rules of statute law in this country.

(iv) *Application of the 1978 Convention*

[35] The scope of the application of the 1978 Convention is set out in Article 2(1) which provides as follows:

“The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:

(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or

(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or

(c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or

(d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a

Contracting State, or

(e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract."

[36] Paragraph 2 stipulates that the provisions of the 1978 Convention are applicable "without regard to the nationality of the ship, the carrier, the shipper, the consignee or any other interested person". "Contract of carriage by sea" is defined in the 1978 Convention to mean "any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another..."

[37] Two basic conditions must be met to trigger the application of the 1978 Convention: (1) there must be a contract of carriage by sea, and (2) the movement of the shipment must be between two different States. However, there is no requirement that all the States involved must be Contracting States. The involvement of one such State suffices.

[38] A summary of some decisions on the 1978 Convention is to be found in the electronic database of the United Nation Commission on International Trade Law ("UNCITRAL"): http://www.uncitral.org/uncitral/en/case_law.html. One of the purposes of this database is to promote uniformity in decision making on the 1978 Convention. A search there reveals that in **Compagnie Sénégalaise d'assurances et de réassurances CSAR and 27 Other Companies v Rosoe Shipping Co, the Captain of the Ship 'World Appolo' and the Steaming Mutual Underwriting Association (1996) (Case no: 159),** the Commercial Court of Marseilles applied the 1978 Convention to cargo which had been transported from Thailand, a non-Contracting State to Senegal, a Contracting State.

[39] A decision of a French Court is not binding in this jurisdiction but it is comforting to note that this Court's interpretation of article 2 of the 1978 Convention is consistent with that adopted in the above decision.

[40] Article 2(1)(b) is of direct relevance to this case. The port of discharge as provided for in the contract of carriage by sea was Barbados. Barbados is a Contracting State. Hence, the legislation is applicable to the contract of carriage contained in or evidenced by the bill of lading.

(v) *Jurisdiction*

[41] Article 21 is captioned "Jurisdiction". It is necessary to reproduce this article in its entirety given its centrality to the reasoning which informs my decision. It provides as follows:

"1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) the port of loading or the port of discharge; or

(d) any additional place designated for that purpose in the contract of carriage by sea."

2. (a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim…

(b) …

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

4. (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgment has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgment of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted;

(b) for the purpose of this article the institution of measures with a view to obtaining the enforcement of a judgment is not to be considered as the starting of a new action;

(c) for the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2(a) of this article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action is effective."

[42] Article 22 provides for arbitration in the same jurisdictions as those prescribed in the provisions of Article 21(1). Article 23 of the Convention precludes derogation from the terms of the Convention. It reads:

"Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms part…."

[43] Article 21(1) provides a plaintiff in any proceedings relating to carriage of goods with the option of initiating suit in any of the jurisdictions in which one of the following places is located: (1) the principal place of residence of the defendant; (2) in the absence of (1), the habitual residence of the defendant; (3) the place where the contract was made provided that the defendant has a place of business, branch or agency through which the contract was made in that country; (4) the port of loading; (5) the port of discharge; (6) any place designated as a contractual forum by the parties to the contract of carriage by sea, or (7) the courts of any Contracting State in which the carrying vessel or other vessel of same ownership has been arrested in accordance with the law of that State and international law. Article 23 disables a party to the contract of carriage from contracting out of the provisions of the Convention.

[44] The effect of these provisions is to render null, void or ineffective any exclusive jurisdiction provision to the extent that it makes a claim to exclusivity but the contractual forum qualifies as one of the jurisdictional options available to a plaintiff under article 21(1). It is so with the exclusive jurisdiction provision contained in clause 24 of the bill of lading. Article 21(1) gives Furniture Ltd. the option of initiating action in Barbados, in accordance with sub-paragraphs (a) and (c), Brazil, in accordance with sub-paragraph (c) or Israel, in accordance with sub-paragraph (d).

[45] Consequently, to the extent that it has chosen the Courts of Barbados, Furniture Ltd. has acted within its legal rights.

(vi) *Is there a power to stay?*

[46] While the clear effect of Article 21 is to render null and ineffective the exclusive jurisdiction provision, the question remains as to whether the provision interferes with the general discretion of this Court to stay proceedings on the grounds of *forum non conveniens*. I am mindful that I have not had the benefit of arguments from Counsel on such an important point but, nonetheless, I will proceed to consider it.

[47] In the Canadian case of **Magic Sportswear Corp. v. Mathilde Maersk (The) (F.C.A.) 2006 FC A 284; [2007] 2 F.C.R. 733,** the contract of carriage had provided that English law would be the proper law of the contract and any claim would be determined by the High Court in London. Section 46 of the Marine Liability Act gave the Canadian Federal Court jurisdiction to hear a case of the type involved, if any of the conditions mentioned in 46(1)(a), (b) or (c) was met. This provision operated notwithstanding the contractual selection of a forum. The Court held that while the provision determined that the Canadian Court was a competent forum to hear the matter, it did not deprive the Court of its power to determine whether to grant a stay on the basis that the Canadian Court was not the most convenient forum for the trial.

[48] The Federal Court of Appeal, at paras. 25 to 28. gave three reasons in support of its decision: (1) that the legislation does not state that the court must exercise its jurisdiction; it merely provides that a Claimant may institute proceedings in the Canadian Court, (2) the provision does not expressly remove the court's broad discretion to stay proceedings; more specific language would be required "to remove from the courts a power fundamental to their ability to control their own process" (para. 27) and (3) to interpret the provision as implicitly removing the Court's jurisdiction to stay on the ground of *forum non conveniens* would produce anomalous results.

[49] One distinction between the Canadian case and the case before me is that section 46 of the Canadian Act does not give effect to any obligations undertaken by an international convention. In addition, there are material differences between the Canadian provisions and Article 21 of the 1978 Convention. Among them are the facts that the Canadian legislation (1) contains no provision which bars a plaintiff from initiating suit elsewhere, once an

action has been initiated in Canada; (2) does not require a plaintiff to institute proceedings in Canada; and (3) contains no provision which renders exclusive jurisdiction clauses null and void. For these reasons, I do not find this case to be a very persuasive analogy.

[50] My research has not unearthed any decisions in which this point has been considered with respect to the 1978 Convention. However, I have derived much support from a number of decisions relating to legislation enacting provisions containing jurisdictional rules in the Warsaw Convention, the Convention on the Carriage of Goods by Road (the CMR) and the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as amended) (the Brussels Convention). However, I refer to these with due caution since one has to be wary of drawing analogies to other instruments, the objects and terms of which may differ from those of the Convention under consideration.

[51] The first case to which I turn is that of **Milor Sri et. al. v British Airways plc [1996] 3 All ER 537**. The plaintiffs were the shippers, consignees and forwarding agents respectively of a consignment of gold which had been consigned from Italy to Philadelphia, Pennsylvania under a contract of international carriage with the defendant airline. They commenced proceedings in the United Kingdom after the goods were stolen from within the precincts of the airport. Their choice of jurisdiction was informed by the fact that the defendants were ordinarily resident and had their principal place of business in the selected jurisdiction and that the selection was within the options afforded them by article 28 of the Warsaw Convention. This Convention was incorporated into English law by the Carriage by Air Acts (Application of Provisions) Order 1967, SI 1967/480.

[52] Article 28 of the Warsaw Convention provides as follows:

> "(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction in the place of destination.
>
> (2) Questions of procedure shall be governed by the law of the Court seised of the case.

[53] The Court of Appeal considered it inappropriate to apply the *forum non conveniens* doctrine. It held that article 28 gave the plaintiff the right not only to select the forum in which to commence his claim but also to have it tried and that the power to stay proceedings on such grounds was incompatible with that right and could not stand with it. Additionally, it considered that since the doctrine of *forum non conveniens* was not of universal application, its application in some jurisdictions and not in others would be incongruous with the object of the Convention which was to harmonise various national views on jurisdiction. In some countries, a plaintiff would be denied the opportunity to have his case heard in the jurisdiction of his choice and in others he would not be.

[54] Phillips LJ took the view that the natural meaning of the word 'brought" depended on its context, and that in the context of article 28, it embraced "both the initiation and the pursuit of the action". He stated as follows at page 540:

> "I accept that, in the appropriate context, the expression 'to bring an action' can naturally mean 'to commence an action.'… The natural meaning of 'brought' will, however, depend upon its context. If a litigant says 'I brought a successful action', the natural meaning of 'brought' embraces both the initiation and the pursuit of the action. In my judgment, the context of art 28 is one in which 'brought' naturally has the latter meaning, rather than meaning no more than 'instituted'."

[55] I do not understand Phillips LJ as laying down any general rule that the word "institute" which appears in article 21 of the 1978 Convention, means no more than "commence", whatever be its context. Indeed, it seems to me that a litigant could equally say "I instituted a successful action". When the word "brought", "initiated", "instituted" or "commenced" is used in such a context, the statement can mean no more than that I started an action which turned out to be successful. The real point made by Phillips LJ is that the meaning of such words must be had from the context in which they occur.

[56] Indeed, this point is illustrated by Saville J in **Hambros Leasing Limited v Gota Bank UK Queen's Bench Division (Commercial Court) 7 December 1993 Official Transcripts (1990-1997).** This case related to the interpretation of a covenant in an underlease in which the tenant had covenanted to "institute the preparation of plans and specifications and the obtaining of all necessary consents and approvals to rebuild or repair [certain premises] and to commence the rebuilding or repairing as soon as is reasonably practicable after all necessary consents and agreements have been obtained". In response to a submission that the words "institute" and "commence" only required the tenant to make a genuine start, Saville J had this to say at page 2:

> "….[I]t seems to me that the words "**institute**" and "**commence**" are, at least in the present context, perfectly capable of meaning "get on with," as opposed merely just to "begin", thus imposing a continuing obligation in relation to the preparation of plans, the obtaining of consents and the work of actual rebuilding or repairing, lasting until all the necessary plans and consents had been obtained and the rebuilding or repairing completed, or at least until the underlessees had used all their best endeavours to this end. In ordinary parlance the words are often used with this meaning. If I have a leaking tap and the plumber agrees to commence the repair at once, I would hardly be satisfied if he brought along the necessary washer and then went away; any more than I would be satisfied if my Bank agreed to institute inquires into a failure to collect a cheque but then merely wrote an initial letter."

[57] Hence, the meaning of the word "institute" in Article 21(1) of the 1978 Convention must be gleaned from its wider context and, having considered that context, I see no reason to give it a restricted meaning. The more general point made in **Milor** was expressed as follows by Phillips LJ at page 540:

> "To give a plaintiff the option to chose in which of a number of competent jurisdictions to commence his suit is to give him nothing. It is axiomatic that, if there are a number of competent jurisdictions, the plaintiff will be able to choose in which one to commence proceedings. If the option granted by art 28 is to have value, it must be an option to the plaintiff to decide in which forum his claim is to be resolved. That, in my judgment, is the natural meaning of the option afforded by that article."

[58] In my view, this point applies with equal force to Article 21 of the Convention. The reasoning of Phillips JA in **Milor** was adopted by Aikens J in **Royal & Sun Alliance Insurance PLC Exel Logistique S.A. v. MK Digital FZE (Cyprus) Ltd et. al. [2005] 2 Lloyds Rep. 679**. In that case, the Court of Appeal was concerned, *inter alia*,

with the provisions of the CMR. The related issue was framed thus at para. 30:

> "On the assumption that the English proceedings arise out of carriage under the CMR and article 31 governs jurisdictional issues, apart from those covered by the Judgments Regulation, does the English court have jurisdiction to stay the English proceedings on the ground of *forum non conveniens?"*

[59] Article 31 of the CMR bears some similarity to Article 21 of the 1978 Convention. It gives a plaintiff the option to "bring" an action in a forum in a country within which any of a number of qualifying bases are satisfied and goes on to restrict the available venues to those specified. Paragraph 2 contains a term in *pari materia* with Article 21(4)(a) of the 1978 Convention save that while the latter speaks in its opening words of an action that "has been instituted", the CMR refers to an action that is "pending" and, while the 1978 Convention speaks of "the court before which the first action was instituted", the CMR uses the word "brought" rather than "instituted".

[60] Aikens J, adopting the reasoning of Phillips LJ in **Milor** concluded, at para. 72, in this way:

> "In my view exactly the same reasoning and conclusions apply to the CMR. Article 31(1) is an exclusive code as to where proceedings "arising out of carriage under this Convention" may be brought. The final words of that paragraph are "and in no other courts or tribunals". As with the Warsaw convention, in my view, article 31(1) leaves no scope for a challenge to the jurisdiction on the grounds of *forum non conveniens."*

[61] The decision of Aikens J in **Royal & Sun Alliance Insurance PLC** was reversed by the Court of Appeal on other grounds but the aspect of the case discussed above was not subject to appellate review: [2006] ALL ER (D) 246.

[62] In **GKN Westland Helicopters Limited et al v Korean Air [2003] 2 Lloyds Rep. 629. at para. 18,** Morison J stated the general principle to be extracted from **Milor** in this way*:*

> "A state's procedural rules must not be applied so as to produce a result which is contrary to the express provisions of the Convention. Thus, art 28(1) specifies the jurisdictions in which claims under the Convention may be brought. If the English Court is one of those jurisdictions, then our procedural rules which permit an action to be stayed in favour of another jurisdiction on grounds of convenience should not be applied in favour of another competent jurisdiction:…"

[63] Finally, I come to **Owusu v Jackson [2005] QB 801.** This case related to the Brussels Convention, Article 2 of which mandated that persons domiciled in a contracting State should be sued in the courts of that state. The Court of Justice of the European Communities was called upon to determine whether a national court could decline jurisdiction, where a case before it had connecting factors with a non-contracting state but none with any other contracting state. The Court ruled that it was not open to a court of a contracting state to decline jurisdiction on the ground that the court of a non-contracting state would be a more appropriate forum.

[64] In the earlier decision of **Re Harrods (Buenos Aires) Ltd [1972] Ch 72**, the English Court of Appeal had restricted the non-applicability of the *forum non conveniens* doctrine to cases where the alternative forum was in a contracting state. That case had effectively overruled **S & W Berisford plc v New Hampshire Insurance Co [1990] 2 QB 631 and Arkwright Mutual Insurance Co v Bryanston Insurance Co Ltd [1990] 2 QB 649.**

[65**]** I am mindful that the decision in **Owusu** has met with some criticism and that, of the Conventions referred to above, it is the least analogous to the 1978 Convention. However, it is open to this court to draw on some of the

reasons relied on in that case where those reasons appear apt and apply with equal force to the convention before me. The more relevant of those as set out at paras. 37 to 46 of the judgment were: (1) the mandatory nature of Article 2 and the fact there can be no derogation from the principle it lays down except as provided for in the Brussels Convention; (2) the fact that no provision was made for the application of the *forum non conveniens* doctrine in the Convention; (3) the principles of certainty and predictability which are objectives of the Convention, would be undermined; (4) the uniform application of the rules of jurisdiction would be undermined since the doctrine is recognised only in a limited number of Contracting states; this conflicts with the objective of the Brussels Convention which is to lay down common rules from which national states cannot deviate.

(vii) *Background to The 1978 Convention*

[66] I have drawn heavily on Professor Yancey's, *The Carriage of Goods: Hague, Cogsa, Visby, and Hamburg* [1983] 57 Tulane Law Review 1238; Professsor Tetley's, *Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by sea, (*found at page 183 in *Jurisdiction and Forum Selection in International Maritime Law* edited by Martin Davies); and Indira Carr's, *Principles of International Trade Law* 2nd ed. for the background information on the 1978 Convention.

[67] The 1978 Convention came into force on 1 November 1992. That convention is commonly referred to as the Hamburg Rules. It was preceded by the Hague Rules and the Brussel's Protocol (The Hague-Visby Rules) The latter instrument was intended to address some of the failings of the Hague Rules and was largely the result of dissatisfaction expressed by the traditional maritime states with that convention. The Hague Rules and the Hague-Visby Rules were perceived to be too carrier-friendly and representatives from developing countries felt that they had failed in their objectives of protecting cargo-owners from the consequences of inequality in bargaining power. This was part of a broader position articulated by the newly independent states of Asia and Africa which was to the effect that traditional maritime law and other aspects of international trade law worked to the disadvantage of the economic development of those countries. In summary, Carr notes at page 189:

> "Broadly speaking, the regime of carrier liability under the Hamburg Rules is far more stringent than that of the Hague Rules, or the Hague-Visby Rules, and appears to be tipped in favour of the cargo-owners. Further, the Rules are more of a self-contained code than the other two Conventions since, among others, they include specific provisions on jurisdiction, arbitration and the carrier's right to freight and demurrage,"

(viii) *Compatibiltiy of forum conveniens doctrine with the 1978*

Convention

[68] Article 21 of the 1978 Convention sets out an exclusive code regulating where proceedings 'relating to the Carriage of Goods under the Convention" may be instituted. No proceedings may be instituted in a place other than those specified in Article 21(1) and (2). The effect of Article 21(4)(a) is that, except in the limited circumstance set out in that provision, proceedings, once instituted, cannot be started in another country. There can be no contractual derogation from these provisions (Article 23).

[69] Article 3 of the 1978 Convention provides that regard should be had to the instrument's international character and to the need to promote uniformity in interpreting and applying its provisions. Allowing the application of the *forum non conveniens* doctrine in this context could affect the uniform application of the rules of jurisdiction since the doctrine is not recognised by all the Contracting parties to the 1978 Convention. In addition,

an application of the doctrine holds the potential to undermine the objectives of predictability and certainty which underlie the basis of the 1978 Convention since a Court applying this doctrine has a wide discretion with respect to the determination of which forum is more appropriate for the trial of a matter.

[70] There is no provision in the *Carriage of Goods by Sea Act* stating whether or not a court is precluded from declining jurisdiction on the basis of *forum non conveniens.* However, the exercise of any such discretion on that ground would be wholly impracticable. The effect of Article 21(4)(a) would be that a plaintiff against whom the discretion was exercised would have no access to justice in any other forum unless he violated the laws of this land, something which a local Court could not condone. Consequently, he would be left to resume proceedings in these Courts.

[71] In light of the foregoing and guided by the principles stated by Phillips JA and reproduced at para. 60 above and that of Morison J reproduced at para. 62, it is my opinion that the nature of the 1978 Convention is such that it precludes this Court from declining jurisdiction conferred on it by Article 21(1) on the ground that any other state would be a more convenient forum. It matters not whether the alternative forum is a party to the 1978 Convention or otherwise.

(ix) *The Spiliada principles*

[72] In any event, if I am wrong in so holding, the effect of Article 21(4)(a) is a strong factor which militates against the grant of a stay on grounds of *forum non conveniens,* when due consideration is given to the principles which inform the exercise of my discretion in circumstances such as these.

[73] The principles governing the exercise of a discretion in cases where there are no effective exclusive jurisdiction or arbitration clauses are those set out by Lord Goff in **Spiliada Maritime Corporation v Cansulex Ltd. [1987] 1 AC 460,** affirmed in **Connelly v R.T.Z. Corpn. Plc. [1998] AC 854** and exhaustively reviewed by Rawlins J, as he then was, in **Bitech Downstream Limited v Rimex Captial Inc.** and **Woodbridge Trading Limited (British Virgin Islands) High Court Claims Nos. CV2002/0233 and CV2003/0008 and Astian Group Limited et al v TNK Industrial Holdings Limited et. al. (British Virgin Islands**) **High Court Claim No. CV2003/0072**. I have taken account of the recent decision of Sir David Simmons CJ in **Downer v Downer (Suit No. 663 of 2007,** Decision given 23 May 2008) in which he examined the principles in **Spiliada** and approved their application in this jurisdiction in preference to those developed in Australia and applied in **Oceanic Sun Line Special Shipping Co. Inc. v Fay(1988) 165 CLR 197**; **Voth v Manildra Flour Mills Pty Ltd 97 ALR 124 and Henry v Henry 20 Fam LR 171.**

[74] The relevant principles are set out in **Spiliada** in the judgment of Lord Goff at page 476, thus:

> "(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> (b) …[I]n general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay … It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rests on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f)

below).

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established … It is significant that, in all the leading English cases where a stay has been granted, there has been a clearly more appropriate forum … In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right … and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described in *MacShannon's case* [1978] A.C. 795, 812**,** as indicating that justice can be done in the other forum at "substantially less inconvenience or expense". Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz* case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable … to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin Daver* [1984]A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting the convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction … and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum, which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay… It is difficult to imagine circumstances where, in such a case, a stay may be granted.

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see *The Abidin Daver* [1984] A.C. 398, 411 per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage."

[75] Accordingly, I can grant a stay only if I am satisfied that there is an available forum, of competent jurisdiction which is the appropriate forum for the trial of this action. I use the word "appropriate" in the sense identified above

by Lord Goff, that is, a forum "in which the case may be tried more suitably for the interests of all the parties and the ends of justice."

[76] In general, the legal burden of proof is on the Defendants to persuade the Court to exercise its discretion to grant a stay. However, a party seeking to rely on matters which will assist him in persuading the Court to exercise its discretion in his favour bears an evidential burden with respect to those matters.

[77] The inquiry comprises two stages. At the first stage, I must be satisfied that there is an "available" foreign forum and that that forum is *prima facie* more appropriate for the trial of this action. At this stage, I am required to consider the factors which connect this case to the courts of competent jurisdiction to determine with which one the case has its most real and substantial connection. If the Defendants satisfy me that there is an available forum which is *prima facie* the appropriate one for this trial, the onus then shifts to the Plaintiff to show that there are special circumstances consequent upon which justice requires that the trial should take place in this country. At this further stage, all of the circumstances of the case must be considered including factors which go beyond those considered at the first stage.

[78] The first question that arises is whether, given the provisions of Article 21(4)(a) of the 1978 Convention, it could be said that there is an "available" foreign forum.

[79] In **Mohammed v Bank of Kuwait and the Middle East KSC [1996] 1 WLR 1483**, Evans LJ held that the trial judge was right in holding that "available" meant "available in practice to this plaintiff to have this dispute resolved" (p. 1490, para. F). In that case, a number of practical difficulties combined to deny the plaintiff access to the courts of Kuwait. The Court was of the view that it should take account of considerations of practical and substantive justice in deciding whether the defendant had satisfied it that the courts in Kuwait were "available" as an alternative forum to the plaintiff.

[80] Though accepting that the decision in **Mohammed v Bank of Kuwait and the Middle East KSC** could be explained on its own facts, the English Court of Appeal (UK) in **Askin et. al. v. ABSA Bank Limited et. al. [2000] The Times, 23rd February 2000); [1999] IL Pr. 471** accepted the force of the academic criticism that had been mounted against Evan LJ's definition of "available". The gravamen of that criticism was that the definition resulted in an elision of the two stages of the test set out by Lord Goff in **Spiliada**. That Court opined that "appropriate" could only refer to some other competent forum since, at the first stage of the test, the court is concerned only with an evaluation of the connecting factors.

[81] This Court has a discretionary power to grant injunctive relief against the commencement or continuation of judicial proceedings in a foreign court. However, it cannot directly prevent such a court from trying an action. Consequently, an argument could be advanced that Israel is an "available" foreign forum, if one accepts the criticism in **Askin** and restricts the meaning of "available" to mean an alternative court of competent jurisdiction.

[82] However, such a result would be anomalous. In neither **Mohammed** nor **Askin** did the Court have to consider the question which arises in this case. Dicey, Morris & Collins in *The Conflict of Laws* 14th ed. Vol. 1 at para. 12-028 note that there are three aspects of availability to consider. They state the first of these aspects, thus:

> "First, a foreign court will be considered to be "available" to a claimant if by the time of the application for a stay, it would be open to him to institute proceedings against the defendant before that court."

Support for this proposition can be found in **Hindocha and Others v. Gheewala and Others [2004] 2 LRC 732 (PC).** In that case, Lord Walker, at p. 742 para. 22, accepted it as a general principle which had been upheld by the House of Lords in **Lubbe v Cape plc [2000] 5 LRC 605.**

[83] Given the bar imposed by Article 21(4)(a) of the 1978 Convention, this Court cannot conclude that it is open to Furniture Ltd. to institute proceedings before the Courts of Israel or those of any other country. Hence, I would be inclined to hold that there is no other "available" forum.

[84] In any event, even if this is not so, the fact that the laws of this country bar a party from initiating suit in any other jurisdiction must be a strong factor of which account must be taken and which would militate against the exercise of my discretion to grant a stay.

[85] Furthermore, even in the absence of this factor, when account is taken of my assessment of the connecting factors at paras. 26 to 31 above and the fact that the burden of proof falls on the Defendants with respect to the first stage of the **Spiliada** test, I would not have been persuaded that the Courts of Haifa, Israel constitute a more appropriate forum.

The status of the Defendants

(i) *Introduction*

[86] I now turn to the issue of whether the Defendants are proper parties to these proceedings. To the extent that this is a procedural matter it must be determined in accordance with the law of the *lex fori*, that is, the law of the country to which the court that is hearing the matter belongs. It may well be that if, as happens later, consideration is given to what causes of action arise on the pleadings, the matter becomes one of substance to be determined in accordance with the *lex causae*, that is, the law applicable to the dispute. I have made no determination as to whether the law of Israel will be the governing law for this transaction but, even if it is, there is no evidence before me to indicate that such law differs in any material respects from the laws of this country. Therefore, I proceed to determine this issue by reference to the laws of Barbados. Indeed, that is the basis on which it was argued.

[87] Order 15 rule 6(2)(a) of the Rules of the Supreme Court (RSC) empowers this Court, either of its own motion or on application, to order any person who has been improperly or unnecessarily made a party to proceedings to cease to be a party. Therefore, I have to determine whether either Robulk or Mr. Veira has been improperly or unnecessarily made a party to this action.

(ii) *The submissions*

[88] On this aspect of the Summons, both sides assumed the existence of a cause of action in contract but their respective references were not to the same contract.

[89] Mr. Cheltenham submitted on behalf of the Defendants that the bill of lading represents a contract between Zim and Furniture Ltd. Assuming this to be the contract the breach of which Furniture Ltd. complains in its pleadings, he submitted that the Defendants are not proper parties to the proceedings. He urged that the Defendants had not negotiated the terms of the bill of lading on behalf of the principal Zim and that, even if they had done so, they would have contracted on behalf of a disclosed principal. He argued further that, given the nature of the contract; its terms and the course of dealings between Furniture Ltd, Robulk and Zim, the parties could not have intended that Robulk would be liable on what was, in essence, a contract of carriage. He relied on the following statement of Brandon J in **Bridges v. Swan [1968] 1 Lloyd's Rep. 5, 12** in support of his submission:

"Where A contracts with B on behalf of a disclosed principal C, the question whether both A and C are

liable on the contract or only C depends on the intention of the parties. That intention is gathered from (1) the nature of the contract, (2) its terms and (3) the surrounding circumstances."

[90] As expected, Mr. Smith submitted on behalf of Furniture Ltd. that the Defendants are proper parties to the action. He argued that two distinct contracts exist, the one to which Mr. Cheltenham referred and a second one which arose after the goods arrived in Barbados. Mr. Smith submitted that this second contract was made between Robulk and Furniture Ltd. and was for the delivery and acquisition of the goods. He contended that it is this contract that Furniture Ltd. alleges, in its pleadings, has been breached by the Defendants.

[91] In rebuttal, Mr. Cheltenham submitted that the pleadings do not disclose this second contract. However, in response to the Court, he conceded that they appear to disclose a cause of action in tort against the Defendants. He contended, though, that Robulk was a separate legal entity and that there was no basis for suing Mr. Veira who is its director and principal officer. He also contended that the alleged tort is inextricably linked to the bill of lading and, since Robulk was acting within the scope of its agency relationship with Zim, it could not be sued in tort in this Court.

(iii) *The pleadings*

[92] If Furniture Ltd.'s pleadings disclose a cause of action in tort, this seems to be determinative of the issue as to whether the Defendants are proper parties since there is no merit in the submissions made by Mr. Cheltenham in relation to the question of tortious liability. Therefore, a review of the pleadings is required.

[93] Furniture Ltd.'s original Statement of Claim was endorsed on the Writ of Summons which was filed on 10 April 2008. On 22 April 2008 an amended Statement of Claim was filed pursuant to Order 20 rule 3 of the RSC.

[94] The Amended Statement of Claim is not a model of clarity. I will refer to it in some detail and reproduce, in full, those paragraphs that are germane to a determination of what causes of action, if any, are disclosed. Paragraphs 1, 2 and 4 seek to identify and describe the parties to the action. Paragraph 3 provides as follows:

"3. Further, the First Defendant was and is at all material times the legally qualified agent of Zim Integrated Shipping Services Ltd, the party by whom the Plaintiff was and is the receiver of goods pursuant to the original contract of affreightment by bill of lading no. ZIMUNVT197 in accordance with the Bills of Lading Act., Cap. 305."

[95] Paragraph 5 alleges that Furniture Ltd. was "indorsee of the bill of lading ...to whom property in the goods passed upon or by reason of such indorsement." The nature and price of the goods and their date of purchase are pleaded at paragraph 6. Paragraph 7 asserts that the goods were arranged for shipping to Barbados by IBI International; that freight was prepaid and that the bill of lading was indorsed by IBI International to Furniture Ltd. Paragraph 8 asserts that “the Defendant” notified Furniture Ltd. of the pending arrival in Barbados of the container.

[96] Clauses 9 through 16 provide as follows:

"9. By contract contained in or evidenced by the bill of lading the Plaintiff agreed to pay and did pay port-applicable charges to the First Defendant on Tuesday 1st April 2008 together with presentation of the original bill of lading.

10. The Plaintiff issued to the First Defendant Bank of Nova Scotia, Broad Street, Bridgetown, Cheque

No. 32335 of same date in the sum of $222.13. Such charges were referred to in the First Defendant's invoice of 25th March 2008 to the Plaintiff for delivery into Bridgetown Port of said goods.

11. On or about Tuesday 1st April 2008 the First Defendant refused the aforementioned payment by said cheque and refused to release the consignment to the Plaintiff at Bridgetown Port in this Island and at all other material times the Defendants wrongfully detained and withheld from the Plaintiff the consignment of goods indorsed to the Plaintiff and contained in the said container.

12. The First and Second Defendants have breached the contract evidenced by bill of lading ref no. ZIMUNVT197.

13. The Defendants by refusal to release the consignment to the Plaintiff have caused the consignment in its status as indorsed to the Plaintiff to incur charges at the Bridgetown Port that have accrued and continue to accrue.

14 On or about Tuesday 1st April 2008 Mrs. Ram Mirchandani, Director of the Plaintiff and its servant and agent, orally demanded from the Second Defendant the release of container reference No. ZCSU8684810 indorsed to the Plaintiff under the aforementioned bill of lading, or alternatively to release the indorsed goods for off-loading from the container at the Bridgetown Port as freight was so prepaid.

15. The Second Defendant on his own accord and cognizant of, and in breach of the said contract, refused and still refuses to release the consignment of goods indorsed to the Plaintiff and still the Defendants wrongfully detain same.

16 The Plaintiff has suffered and continues to suffer loss and damage as a result of the Defendants' breach of contract and concomitant trespass to and/or deprivation of said goods indorsed to the Plaintiff."

[97] In the prayer of the Amended Statement of Claim, Furniture Ltd. claims the same relief as that claimed on the original Statement of Claim and reproduced at paragraph 3 of this decision.

[98] It is unclear whether the reference at paragraph 9 of the Amended Statement of Claim to a "contract contained in or evidenced by the bill of lading" is a reference to the “original contract of affreightment” mentioned in paragraph 3 or whether it is intended to refer to the second contract; that of which Mr. Smith spoke in his oral submissions. While paragraph 9 refers to a “contract” pursuant to which it is claimed that Furniture Ltd. paid certain charges to Robulk, there is no indication as to who are the parties to that contract or the date on which it was made.

(iv) *Analysis*

[99] In light of Mr. Smith's submissions, it must be taken that the references to contractual breach at paragraphs 12, 15 and 16 of the Amended Statement of Claim were intended to relate to the second contract alleged by him in

his oral submissions.

[100] If I had to decide the point, I might have been inclined to agree with Mr. Cheltenham that the pleadings do not disclose a cause of action, with respect to a second contract. However, whatever my views might be, I need not decide it, for, as Mr. Cheltenham concedes, a careful reading of paragraphs 5, 11, 14, 15 and 16 of the Amended Statement of Claim shows that the pleadings disclose a cause of action in tort.

[101] In those paragraphs, there is an assertion that the property in the goods, the subject matter of the shipment has passed to Furniture Ltd; that "the Defendants" wrongfully detained and withheld those goods; that Furniture Ltd. demanded the release of those goods from Mr. Veira; that Mr. Veira refused and still refuses to release the goods; that the "Defendants" still wrongfully detain the goods and that they have committed a trespass to and/or deprivation of said goods.

[102] Consequently, the pleadings disclose a cause of action in the tort of detinue against both Defendants. I did not understand Mr. Cheltenham as suggesting that since Robulk was acting within the scope of its agency relationship it could not be liable in tort. Indeed, any such submission would run counter to the basic rule of law that renders liable any agent who commits a tortious act in the course of his employment, even if that act was expressly authorised by the principal. Rather, it seems to me that his point was linked to the jurisdictional issue and, therefore, given that this Court has asserted its jurisdiction in this matter, it must fail.

[103] As to Mr. Cheltenham's submission with respect to Mr. Veira's liability in tort, the concept of separate legal personality does not preclude a plaintiff from suing a director or company officer where that individual commits a tortious wrong. Furthermore, in his affidavit, Mr. Veira describes himself as Robulk's employee and states that it was in that capacity that he received and followed Zim's instructions to withhold delivery of the goods. As such, he can be liable for any tort he is found to have committed and Robulk can be vicariously liable.

[104] The proper defendant in a claim of tort is the tortfeasor or anyone who is liable for his or her acts. Where, as in this case, the act is committed on the instructions of a principal, the principal is liable jointly and severally with the agent. It is open to a plaintiff to sue any one or more of the persons considered so liable. Hence, both Defendants must be proper and necessary parties to this action.

[105] Statements as to the law and supporting authorities in support of the basic principles set out in the three preceding paragraphs may be found at Vol. 2(1) *Halsbury's Laws of England*, 4th ed. (reissue) paras. 177 and 191 and Vol. 37 *Halsbury's Laws of England*, 4th ed. para. 253.

[106] I am mindful of the provisions of clause 4(1V) of the bill of lading which provides, in part, that:

> "…no servant or agent of the Carrier (including any stevedore, terminal operator, sub-carrier or independent contractor employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment."

However, no submissions were made before me by either party as to the meaning, effect, validity or applicability of this provision and the parties remain at liberty, if so advised, to address this in the further course of this action.

Disposal

[107] For the reasons set out above, I hold that the Defendants' application fails on both issues which fall to be

determined. I hold that these proceedings should not be stayed and that the Defendants are proper parties to this action.

[108] In the circumstances, the Defendants' application is refused. The costs of and occasioned by the application will be the Plaintiff's in any event, such costs to be agreed or taxed.

Olson DeC. Alleyne

Judge of the High Court (Ag)