Case No: A3/2003/0242

Neutral Citation No: [2003] EWCA Civ 1668
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGHT COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
(MR MICHAEL CRANE QC)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Monday 24th November 2003

Before :

LORD JUSTICE MANTELL
LORD JUSTICE CLARKE
and
MR JUSTICE RIMER

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Between :

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|---|---|
| GOOD CHALLENGER NAVEGANTE S.A. | Respondent |
| - and - | |
| METALEXPORTIMPORT S.A. | Appellant |

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(Transcript of the Handed Down Judgment of
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Mr Duncan Matthews QC and Mr Michael Ashcroft (instructed by Holman, Fenwick & Willan) for the Respondent
Mr James Turner (instructed by Lane & Partners) for the Appellant

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# Judgment

Lord Justice Clarke :

Introduction

1. This is in some ways a remarkable case. It involves the continued attempts of the respondent to enforce an award made by London arbitrators against the appellant as long ago as 15 June 1983.

2. The award arose out of a claim by the respondent as owner of the vessel GOOD CHALLENGER for demurrage and damages for detention against the appellant as charterer under a voyage charterparty dated 1 April 1981. I shall call the appellant 'the charterers' and the respondent 'the owners'. The arbitrators, Mr Michael Mabbs and Mr John Potter, awarded a total of US$1,663,865.63 plus interest at 12.5 per cent per annum from 1 March 1982 to the date of the award and costs (including the arbitrators' costs of £880).

3. I will return below, so far as necessary, to the events between the making of the award on 15 June 1983 and 25 January 1993 when, on an *ex parte* application made by the respondent under section 26 of the Arbitration Act 1950 ("the 1950 Act"), Saville J made an order granting leave to enforce the award in the same manner as a judgment or order, subject to the proviso that the appellant should have 22 days from the service of the order in which to apply to set the order aside. He also ordered that, subject to further order, the order should not be enforced until after the expiry of that period of 22 days. In the event, for reasons set out below, the order was not served before the Civil Procedure Rules came into force and the proceedings were automatically stayed.

4. On 16 February 2001 Moore-Bick J lifted the stay and allowed the owners to serve the order of Saville J but directed that no steps be taken to enforce it without the permission of the court. The order of Moore-Bick J was served on 15 August 2001. The charterers did not apply to set aside the order of Moore-Bick J but applied for an order setting aside either the order or service of the order of Saville J or alternatively for an order staying the proceedings for enforcement of the award. For their part, the owners resisted those applications and applied for permission to enforce the order of Saville J pursuant to the order of Moore-Bick J and to enter judgment pursuant to the order of Saville J. Those applications came before Mr Michael Crane QC, sitting as a Deputy High Court Judge in the Commercial Court. On 10 January 2003 he refused the charterers' applications and granted the owners' application for permission to enforce Saville J's order. He also gave them permission to enter judgment in the total sum of US$4,561,990.08 inclusive of interest. The charterers now appeal against those orders pursuant to permission granted by the judge.

Issues before the Judge

5. The grounds upon which the charterers made their applications before the judge were these:

   i) that proceedings to enforce the award had become time barred before the owners made their *ex parte* application to Saville J or the owners were estopped by a subsequent decision of the Supreme Court of Romania on the same issue; and

ii) that, having made no attempt to serve the order of Saville J until 2001, the attempt to rely upon it was an abuse of the process of the court.

6. If the charterers were to succeed on either of those grounds, the owners' application for permission to enforce the award would fail but, if both the charterers' applications were to fail, it was common ground that the remaining issue for the judge to decide would be whether the owners should be permitted to enforce the award. I will call those three issues the time bar issue, the abuse of process issue and the enforcement issue.

Time Bar

7. The time bar issue itself involved two separate questions and some sub-questions. The first question was whether the owners were estopped by a decision of the Supreme Court of Romania from arguing that proceedings in England to enforce the award were time barred when action was brought in England in January 1993. The judge resolved this issue in favour of the owners and the charterers challenge that decision in this appeal. It raises questions of issue estoppel.

8. The second question was whether the claim was time barred in England at that time as a matter of English law under section 7 of the Limitation Act 1980 ("the 1980 Act"), which provides:

> "An action to enforce an award, where the submission is not under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued."

It was (and remains) common ground that, when an *ex parte* application for leave to enforce an award was made under section 26 of the 1950 Act, an action was brought for the purposes of section 7 of the 1980 Act. That is because such an application was an alternative to proceeding by way of writ or originating summons.

9. It was also (and also remains) common ground that time runs, not from the date upon which the award is made or published, but from the date when the paying party is in breach of its implied obligation to pay the award: see e.g. *Agromet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd* [1985] 2 All ER 436. On the facts here that would have occurred, as the judge put it, fairly shortly after the award was published. The period of six years had thus long expired before the proceedings under section 26 of the 1950 Act were commenced in 1993. However, the owners relied upon what they said were part payments and acknowledgments, which they said meant that the claim was not time barred by January 1993 by reason of sections 29(5) and 30 of the Limitation Act 1980. Before the judge there were a number of sub-issues under this head. However, the only one which survives for the purposes of this appeal is whether a telex relied upon by the charterers is an acknowledgment "in writing and signed by the person making it" within the meaning of section 30(1) of the 1980 Act.

10. Logic might suggest that the question of issue estoppel should be considered before that of time bar because, if the charterers succeed on issue estoppel, the appeal succeeds and the

question of time bar does not arise. There is, however, some overlap between the two questions because the alleged issue estoppel arises out of what is said to be the decision of the Supreme Court of Romania that the claim was time barred under English law by 27 May 1992, when the proceedings in Romania were commenced. It seems to me that, in order to understand the decision of the Supreme Court on that question and in order to determine whether it gives rise to an issue estoppel, it is or may be important to focus on the questions which are relevant to the issue of time bar. I shall therefore consider first the question whether the owners' claim was indeed time barred under English law by January 1993.

*Time Bar under English Law*

11. It is first necessary to set out the relevant terms of the 1980 Act and to give a short account of the material events between 1983 and 1993. Sections 29(5) and 30 of the 1980 Act provide, so far as relevant, as follows:

> "29(5) Subject to subsection (6) below, where any right of action has accrued to recover –
>
> (a) any debt or other liquidated pecuniary claim; …
>
> and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of acknowledgment or payment.
>
> …
>
> 30(1) To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.
>
> (2) For the purposes of section 29, any acknowledgment or payment –
>
> (a) may be made by the agent of the person by whom it is required to be made under that section; and
>
> (b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made."

12. Before the judge the owners relied upon two part payments and four acknowledgments. In order to put them in context I should refer briefly to the events after the award was published. At the time of the award the charterers were a Romanian state entity. No attempt was made to challenge the validity of the award but no payment was immediately made under it and in December 1985 the owners arrested a vessel in France. Although that vessel was owned, not by the charterers, but by Navrom, which was another Romanian state entity, the arrest led to a payment of US$851,000 on about 7 January 1986.

13. As the judge explained, that payment was made by an entity called Navlomar to the credit of an account designated by Nicholas G Moundreas Shipping SA ("NGM"). It has been

common ground throughout that for present purposes, including section 30(2) of the 1980 Act, NGM was the duly authorised agent of the owners and Navlomar was the duly authorised agent of the charterers. That was the first of the two part payments relied upon by the owners.

14. The second part payment was a further payment of US$78,172.47 (plus £880), which was made on a date which the judge put between March and August 1986 by a Mr Loukedes on behalf of Navlomar to NGM. That sum was the amount calculated by NGM as being the outstanding balance of the award on the footing that the remainder was to be secured by a guarantee in the sum of US$1,949,000, which Navlomar claimed had been approved by the charterers. In the event the guarantee did not materialise. The owners relied upon that second payment as a further part payment and upon a telex of 10 January 1986 as an acknowledgment.

15. In April 1987 the owners' then solicitors, Messrs Hughes Hooker & Co, wrote to President Ceaucescu and other ministers in the Romanian government to enlist their support. There followed correspondence between Navlomar and NGM but all these efforts were without success. The owners relied upon two telexes, dated 17 February 1988 and 7 March 1989 respectively, each from Navlomar to NGM, as acknowledgments of the obligation to pay the amount of the award.

16. During 1990 the owners wrote to various Romanian government ministries, a meeting took place in November 1990 and the owners themselves wrote to various ministries on 23 August 1991, all without success. The third telex acknowledgment relied upon was a telex from the charterers to NGM dated 31 August 1991. No further payment was made and none has been made since then. The charterers were a state entity called Metalimportexport but they are now a private entity called Metalexportimport SA. It is common ground that they are the same legal entity.

17. There was an issue as to whether the first payment was a part payment within the meaning of sections 29 and 30 of the 1980 Act but the judge held that it was and the charterers do not say that he was wrong in this appeal. The effect of that part payment (or indeed the telex of 10 January 1986) was not sufficient for the owners' purposes because it only extended the six year period for six years from the date of the payment. That period thus expired in January 1992 at the latest, which was before the enforcement proceedings were brought in England. In order to extend the period beyond January 1993 it was necessary for the owners to show that the charterers acknowledged the owners' claim after December 1986.

18. The owners sought to do so by relying upon one or more of the telexes sent to NGM, namely those sent on 17 February 1988 and 7 March 1989 by Navlomar and that sent on 31 August 1991 by the charterers. As the judge observed, on the timing it was sufficient for the owners if any of those telexes was held to be an acknowledgment. The judge also correctly observed that, even if the first payment was not a part payment, the owners would succeed if the telex of 17 February 1988 was an acknowledgment because the primary period of six years had not expired by that date. As a result, the judge focused principally on the telex of 17 February 1988. The charterers submitted that the statements in the telex were not sufficiently clear to amount to an acknowledgment. The judge rejected that submission and the charterers do not challenge that conclusion in this appeal. It is therefore unnecessary to consider it.

19. I should note in passing that the judge did not give detailed consideration to the second alleged part payment because, even if it was made at the latest date, in August 1986, the period of six years would have expired before proceedings were commenced in England in January 1993. It could not therefore be relevant as a matter of English law and the judge was not concerned to consider the true position under Romanian law. It follows that it was not relevant then or now.

20. The second point taken by the charterers, which they repeat before us, is that, for the purposes of section 30(1) of the 1980 Act, an acknowledgment is not "in writing and signed by the person making it" unless the maker of the document inscribes his name or characteristic mark on it in his own hand. The charterers say that that is the ordinary meaning of the word "signed", that there is no reason to give it any other meaning in section 30 and that it follows that the section is not satisfied by a telex containing a typed signature. There is no authority on this question in the particular context of section 30 of the Act.

21. The judge rejected the charterers' submissions. He observed that if their submissions were correct, no telex communication could ever constitute an acknowledgment for limitation purposes because it can never be signed by the sender. Mr Turner accepts that that is so but submits that it is the result of the language used in the statute.

22. The words of section 30 should be construed in their context having regard to the purpose of the provision. The judge expressed his view thus in paragraph 61 of his judgment:

> "As a matter of general principle, in my view a document is signed by the maker of it when his name or mark is attached to it in a manner which indicates, objectively, his approval of the contents. How this is done will depend upon the nature and format of the document. Thus in the case of a formal contract which prints the names of the parties and leaves a space under each name for the parties to write their names, the document will not have been signed by a party until he writes his name in the space provided. Conversely, with a telex, where there is no such facility, the typed name of the sender at the end of the telex not only identifies the maker but leads to the inference that he has approved the contents: the typed name, therefore constitutes his signature. Thus in my judgment each of the telexes relied on by the Claimant was signed by the sender typing in its name, or his name, at the foot of the document."

I entirely agree.

23. The judge found support for his conclusion in cases decided under section 4 of the Statute of Frauds 1677. He identified in particular two statements of principle: *Schneider v Norris* (1814) 2 M&S 286, per Lord Ellenborough CJ and *Decouvreur v Jordan*, the Times 25 May 1987, per Nourse LJ at paragraph 20. I agree with the judge that those statements support the conclusion that the essential attributes of a signature are recognition and approval of the contents of the document.

24. I also agree that decisions on the Statute of Frauds are of particular assistance, given that the origin of section 30 of the 1980 Act was the Statute of Frauds (Amendment) Act 1828,

which clarified the meaning of "Acknowledgments and Promises offered in Evidence for the Purpose of taking Cases out of the Operation" of earlier statutes of limitation. It provided that they would not have that effect "unless such Acknowledgment or Promise shall be made or contained by or in some Writing to be signed by the Party chargeable thereby". It can immediately be seen that those words are very similar both to the words used in section 30(1) of the 1980 Act and to the words used in section 4 of the Statute of Frauds.

25. The judge referred to the decision of Staughton J in *The Anemone* [1987] 1 Lloyd's Rep 546, which (like the judge) I have found of particular assistance because it is a decision in which it was held that the typing of an alleged guarantor's signature on a telex was "in writing and signed by the parties to be charged" for the purposes of section 4 of the Statute of Frauds. Staughton J would have gone further. He said (at p 554):

> "I reached a provisional view in the course of the argument that the answerback of the sender of a telex would constitute a signature, whilst that of the receiver would not since it only authenticates the document and does not convey approval of the contents. But in the event the point does not arise."

26. The only reason that the point did not arise was that Staughton J held that the typed signature satisfied the test that the document must be "in writing and signed by the parties to be charged". I can see no distinction between this case and that because here the telex of 17 February 1988 was signed by Navlomar in the sense that its name was typed on the telex and there is no suggestion that the signature was a forgery or put on without the authority of Navlomar. Moreover, it is common ground that Navlomar was the charterers' agent in this regard. It is not therefore necessary to decide whether the fact that Navlomar's answerback appeared on the telex would be sufficient in itself. It seems to me that an answerback might well be sufficient on its own, although it would be necessary to construe the whole of the particular telex set in its context.

27. The crucial point here is that Navlomar's typed signature appeared on the telex in circumstances in which it is evident that it was put on with Navlomar's authority so that it can be seen that Navlomar (and thus the charterers) were acknowledging the debt. The purpose of the statute is to be sure that the person said to be acknowledging the debt has in truth done so. That purpose is to my mind achieved by the conclusion reached by the judge and would be thwarted were we to accede to the charterers' submissions. We were referred to a number of other authorities but, in my judgment, none of them is directly in point or affects the conclusion of the judge. I would only add that I am pleased to be able to reach this conclusion because, although telexes are not so common now, there was a time when they were the usual form of communication between chartering brokers and their principals and any other conclusion would not be commercially sensible.

28. It follows that I would hold that the owners' claim under the award was not time barred under English law in January 1993 when the application was made under section 26 of the 1950 Act, or indeed when the proceedings were begun in Romania in May 1992. This discussion is I think of some assistance in connection with the question of issue estoppel but it is also relevant both to the issue of abuse of process and to the question whether the owners should be permitted to enforce the order of Saville J now. It follows from the conclusion I have expressed that, if the owners had served the order of Saville J in early

1993, or indeed at any time thereafter, an application to set aside the order on the ground that the owners' claim was time barred would have failed. It also follows that I would dismiss the appeal in so far as it is said that the claim was time barred in 1993 under section 7 of the 1980 Act.

*Issue Estoppel - the Romanian Proceedings*

29. The charterers' case is that the conclusion expressed above that the owners' claim was not time barred in England by January 1993 is irrelevant because the Supreme Court of Romania decided the contrary on 10 March 1998. Before considering that decision, it is appropriate to describe briefly the events which led up to it. I am not quite sure when the charterers were privatised but no formal steps to enforce the judgment in Romania were taken until 27 May 1992, when NGM, acting on behalf of the owners under a power of attorney, began proceedings in the Municipal Court of Bucharest seeking recognition and enforcement of the award. Romania has been a party to the New York Convention on enforcement of arbitral awards since 1961. On 12 May 1993 the Municipal Court gave judgment in the owners' favour.

30. I note in passing (as the judge did in paragraph 11 of his judgment) that the Municipal Court also granted recognition and enforcement of a default judgment obtained in the High Court on 18 February 1983 for damages to be assessed in relation to the same liability as subsequently gave rise to the award. It is common ground that that judgment is irrelevant. The owners expressly disavowed any reliance upon it during the appeal from the decision of the Municipal Court and have not relied upon it since.

31. The charterers appealed from the decision of the Municipal Court and on 1 April 1994 the Court of Appeal in Bucharest allowed their appeal against the order for enforcement but upheld the decision on recognition. The appeal was allowed on procedural grounds and no reliance was placed upon the decision by the charterers, either before the judge or before us. The charterers appealed to the Supreme Court of Romania against the Court of Appeal's decision on recognition but on 16 November 1994 the appeal was dismissed on the ground that it was filed late.

32. Although the charterers made no further attempts to persuade the Romanian courts that the award should not be recognised, the owners did make further attempts to enforce the award in Romania. They did so in the Municipal Court in Bucharest but on 16 October 1995 the court gave judgment in favour of the charterers. The owners appealed to the Court of Appeal but their appeal failed on 6 December 1996. Nothing daunted, the owners appealed to the Supreme Court but that appeal also failed, on 10 March 1998. It is that decision which the charterers say gives rise to an issue estoppel.

33. Although none of the earlier decisions is relied upon as giving rise to an issue estoppel, it is I think helpful to see how the issues before the Romanian courts developed, in so far as they are relevant to the issues which arise in this appeal. It is not therefore necessary to consider the Romanian law of recognition. I therefore focus only on the Romanian law of enforcement. The key provision of Romanian law is Article 174 of Law No 105/1992, which provides, according to the translation used before the judge:

> "Art 174. – The execution of the foreign decision is consented in keeping with the conditions stipulated under article 167 and the following:
>
> (a) the decision is executory according to the law of the instance which pronounced it;
>
> (b) the right to request an unwilling execution is not prescribed according to the Romanian law.
>
> The provisions under Articles 168 and 169 are correspondingly applicable to the request of consent of the execution as well."

Articles 167, 168 and 169 are briefly discussed by the judge in paragraphs 13 and 14 of his judgment but are not relevant for the purposes of determining the issues raised by this appeal.

34. It can be seen from Article 174 that paragraph (a) involves a consideration of the "law of the instance which pronounced" the decision, which was of course English law, whereas paragraph (b) involves showing that "the right to request an unwilling execution is not prescribed according to the Romanian law". All three courts in Romania considered the issues which arose under Romanian law and they all decided that the owners' claim was time barred under Romanian law so that Article 174(b) was not satisfied and the award was not enforceable in Romania. Only the Supreme Court expressed a firm opinion on English law under Article 174(a) but, since there is some factual overlap between the issues which arose under Romanian and English law, it is convenient briefly to consider the issues of Romanian law.

35. The judge summarised the relevant Romanian rules of prescription in some detail. I can do so more briefly, making full use of his account, which is not in dispute. The relevant rules are contained in Decree No 167/1958, which provides by Article 6 that the right to claim execution of the judgment of a tribunal becomes time barred after three years. Article 7 states that the prescription period commences when the right to seek execution arises but Article 16 provides for limitation periods to accrue afresh in cases of part payments and acknowledgments. The judge observed that there were in this regard some similarities with English law but said that it was not clear whether the attributes of an acknowledgment or part payment necessary in order for it to be effective to restart a period of prescription under Decree No 167/1958 were the same as those necessary for the purpose of restarting a limitation period under Sections 29(5) and 30 of the Limitation Act 1980.

36. The Municipal Court held that the award was capable of being executed as soon as it was published and that the right to execute it had become barred by prescription under Decree No 167/1958 on 15 June 1986, that is to say, 3 years after the award's publication to the parties. As to Article 16, the court held that it had no application to rights of enforcement, as distinct from claims to establish a liability, and accordingly no question of interruption of the prescription period arose.

37. As the judge put it, although there was some discussion of the position under Article 174(a), the decision of the Court of Appeal was based squarely on non-compliance with Article

174(b). The basis of the decision was stated in the final paragraph of the judgment as follows:

> "The conclusion we must come to is that the legal requirements are not fulfilled for approving the execution sought since the prescription period for exercising the right to obtain execution had lapsed according to Romanian law the judicial judgment not having been executed within the prescription period allowed and the right of execution thus having been forfeited."

Again as the judge put it, in contrast to the Municipal Court, the Court of Appeal appears to have treated Article 16 as potentially applicable to claims for enforcement but as not applicable on the particular facts of this case. The Romanian law experts agreed that this judgment contained no decision regarding expiry of the limitation period for enforcement of the award under English law.

38. In the judgment of the Supreme Court the court referred to the history of the matter and observed that the requirements of Article 174(a) and (b) must be satisfied and continued (in the translation most used before the judge):

> "However, based on the above considerations, it is obvious that the right to request forced execution was terminated due to prescription, as the action was filed 9 years (June 15, 1983, date when the foreign decision was pronounced – May 27, 1992, date when the request was filed) after the date when the foreign decision became executory (at the date when it was pronounced), and therefore the courts were justifiably rejected the claimant's request for approval of forced execution of the arbitral award of June 15, 1983.
>
> Moreover, the courts justifiably rejected the appellant's allegations that, in reality, through partial payments or recognitions of debt in specific documents, effected by the defendant, prescription would have been interrupted in the current case, because at the dates of such payments (which were not even proved to be related to the amounts to which the defendant was obliged by the foreign decision), the right to request forced execution was already prescribed, as well as at the date when it is alleged that the defendant recognized its debt, and, given this situation, one may no longer raise the issue of prescription interruption regarding a right that had already been prescribed.
>
> On the other hand, according to the evidence submitted in the file, the general prescription term under British law is 6 years, and consequently, as the claimant exercised its right to request forced execution at a date exceeding this term (which expired on June 15, 1989), it means that the foreign decision lost its executory title, which makes relevant for our case the provisions of art. 174, letter "a", of Law no. 105/1992, which entitle courts to refuse the approval of forced execution of such decision which is no longer executory according to the law of the court that pronounced it.

> Consequently, we acknowledge that the solution of rejection of the approval of forced execution of the foreign decision is the result of a good judgment of legal provisions applicable to the case and to the evidence of the file, and for this reason the appeal filed in this case shall be rejected as unsubstantiated."

The judge observed that in the other translation used at the trial the word "Moreover" was used instead of "On the other hand" in the penultimate paragraph.

39. As I see it, the court again held that Article 174(b) was not satisfied because more than three years had expired before the proceedings were brought in Romania on 27 May 1992. The court rejected the owners' reliance on part payments and acknowledgments because "the right to request forced execution was already prescribed when it is alleged that the defendant recognized its debt". In the case of the alleged part payments, it said (in the passage in brackets) that the "payments were not even proved to be related to the amounts" which the charterers were obliged to pay under the award.

40. The question is what part the court's view of Article 174(a) played in the court's decision. This involves some consideration of the English law issues raised by the parties. As developed by the time the case reached the Court of Appeal, the charterers' case was that, since more than six years had expired before proceedings were brought in Romania on 27 May 1992, the owners had failed to establish that the award remained "executory" in England and that they had thus failed to satisfy the condition for enforcement stipulated by Article 174(a). The charterers filed a copy of part of the 1980 Act along with a Romanian translation.

41. In response the owners deposited an opinion of Hughes Hooker & Co, dated 21 June 1996, and an opinion of Holman Fenwick & Willan, their current solicitors, dated 15 July 1996. Both opinions argued that the award had remained enforceable in England when the proceedings to have the award recognised with a view to enforcement in Romania were commenced in May 1992. As the judge observed, the two opinions reached the same conclusion by somewhat different routes. Hughes Hooker argued, somewhat unpromisingly, that the primary limitation period had not then expired because, until shortly before the time at which they commenced the proceedings for recognition and enforcement, the owners had continued to believe that the charterers would in due course perform their implied promise to discharge the award and had continued to hold them to that promise. That was said to have postponed the accrual of the cause of action to enforce the award. Holman Fenwick argued, in more orthodox terms, that the two part payments, which they put at 1 January and 1 March 1986, caused the limitation period to begin again under section 29(5) of the 1980 Act. However, they went on to suggest that the limitation period restarted, not at the date of the part payments, but upon the expiry of a reasonable time thereafter. They also pointed to the telex communications between the parties or their respective agents during 1988 and 1989 and stated the opinion that these too would have been effective to restart the limitation period under English law.

42. It should be noted, again as the judge pointed out, those were secondary submissions because the owners' primary argument was that English limitation rules were irrelevant. The submission was that Article 174(a) simply meant that the award must be final and valid in substance and thus capable of being enforced and in that sense executory. Article 174(a)

was contrasted with Article 174(b) and it was submitted that only the Romanian laws of prescription were relevant. As already indicated, although the Court of Appeal touched on the position under Article 174(a), it was common ground at the trial that no decision was made as to the position under English law.

43. Some additional evidence was put before the Supreme Court, albeit at a late stage. A short time before the hearing of the appeal on 10 March 1998, which proved to be the date on which the decision was made, the owners put before the court copies of part of the 1980 Act and of two decisions of this court. As to the former, we were told that the copy of the 1980 Act included section 29 but possibly not section 30 and, as to the latter, neither of the two decisions seems to me to have been of particular assistance. However that may be, the owners said that they confirmed that the six year period under English law was susceptible of being prolonged or interrupted in the case of part payments or acknowledgments. They also reiterated their point that only the Romanian, and not the English, law of limitation was relevant.

44. It may be noted that neither in the Court of Appeal nor in the Supreme Court did the charterers advance any argument as to whether or not the alleged part payments and acknowledgments were effective under section 30 of the Limitation Act 1980. Their position was that the legal opinions filed by the owners' solicitors were inadmissible for a variety of reasons, one of which was that Romanian law does not recognise legal opinions which are not based upon legal texts (or statutory codes) as a source of law. The result, according to the charterers, was that the owners had failed to discharge the burden of proving that at the date enforcement proceedings commenced in Romania the award remained capable of enforcement in its country of origin.

45. In summary the charterers' case was that Article 174(a) required the owners to show that the claim was not time barred, that they had failed to do so and that the claim was time barred because the relevant period of six years had expired. The owners' case was that time bar was irrelevant or, if it was relevant, that time was still running because of part payments and acknowledgments. The charterers' response was that the evidence relied upon by the owners was irrelevant. They did not address the issues of part payment and acknowledgment.

46. As I read the judgment of the Supreme Court, only one paragraph focuses on the English law issues. It is the third of the paragraphs quoted above as follows:

> On the other hand, according to the evidence submitted in the file, the general prescription term under British law is 6 years, and consequently, as the claimant exercised its right to request forced execution at a date exceeding this term (which expired on June 15, 1989), it means that the foreign decision lost its executory title, which makes relevant for our case the provisions of art. 174, letter "a", of Law no. 105/1992, which entitle courts to refuse the approval of forced execution of such decision which is no longer executory according to the law of the court that pronounced it.

47. I recognise, as is common ground, that in that paragraph the court expressed a conclusion on the English law point. However, it can immediately be seen that, on its face, the judgment

appears only to state that the reason why Article 174(a) was not satisfied was the expiry of six years on June 15 1989. There is no express consideration of the owners' case that the time had been extended by part payments and acknowledgments. I should perhaps add that the reasons given by the court for rejecting the alleged acknowledgments in the paragraph dealing with Romanian law under Article 174(b), namely that the claim was already time barred when they were made, could not apply to the telex of 17 February 1988 in the context of English law because six years had not then expired since the award. I will return to this reasoning below.

48. It was, I think, submitted in the course of the argument that the fourth of the paragraphs quoted above was expressing the conclusion of the Supreme Court in terms of both Article 174(a) and 174(b). It is in these terms:

> "Consequently, we acknowledge that the solution of rejection of the approval of forced execution of the foreign decision is the result of a good judgment of legal provisions applicable to the case and to the evidence of the file, and for this reason the appeal filed in this case shall be rejected as unsubstantiated."

For my part, I would not accept that submission. While the use of the word or expression 'consequently' may appear to provide some support for it, I prefer the view that all that the Supreme Court was doing in that paragraph was summarising in general terms its conclusion on the appeal which was before it. It was not there identifying, at any rate expressly or clearly, that it was basing its decision on both Articles 174(a) and (b).

*Issue Estoppel – the Legal Principles*

49. Before the judge it was submitted by Mr Turner on behalf of the charterers that the decision of the Supreme Court gives rise either to a cause of action estoppel or to an issue estoppel. The judge rejected both submissions and it is not now suggested, to my mind correctly, that the decision gives rise to any cause of action estoppel. The issue in the appeal is whether it gives rise to an issue estoppel, sometimes called an issue estoppel *per rem judicatam*.

50. The authorities show that in order to establish an issue estoppel four conditions must be satisfied, namely (1) that the judgment must be given by a foreign court of competent jurisdiction; (2) that the judgment must be final and conclusive and on the merits; (3) that there must be identity of parties; and (4) that there must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the English proceedings: see, in particular *Carl Zeiss Stiftung v Rayner C Keeler Ltd (No 2)* [1967] 1 AC 853 ("the *Carl Zeiss"* case), *The Sennar (No 2)* [1985] 1 WLR 490, especially per Lord Brandon at p 499, and *Desert Sun Loan Corporation v Hill* [1996] 2 All ER 847.

51. There was and is no dispute that conditions (1) and (3) were satisfied. The principal debate relates to conditions (2) and (4). As to issue (4), the judge held that the Supreme Court decided, after a full contestation, that the award ceased to be enforceable in England six years after its publication and was accordingly time barred under English law by 27 May 1992: see paragraph 44. He further held that, since the issue in England is whether an action to enforce an award had become time barred by January 1993, the issue determined by the

court was in effect the same issue as the issue which arises in England: see paragraphs 44 and 50. If it is necessary to do so, Mr Matthews challenges that conclusion in this appeal.

52. Condition (2) breaks down into three conditions or sub-conditions. The judgment on the issue must be final, conclusive and on the merits. The judge held that it was a judgment on the merits: see paragraphs 36 and 37 of his judgment. Again Mr Matthews submits (if necessary) that he was wrong so to hold.

53. As to the other two conditions or sub-conditions, the judge held that the Supreme Court's determination of the issue was not conclusive in the sense of being fundamental or essential to its judgment. Mr Turner submits that the judge was wrong so to hold and it is convenient to consider this question first because, if the submission fails, the appeal on issue estoppel must fail and the other questions will not arise. As to the question whether the determination on the issue was final, I am not quite sure whether the judge decided this question separately. It may be that he did not, on the basis that there is some overlap between the questions whether the decision was final and whether it was conclusive.

54. The authorities establish that there must be "a full contestation and a clear decision" on the issue in question. That is made clear in the speech of Lord Wilberforce in the *Carl Zeiss* case and (as the judge observed in paragraph 36) was echoed by Lord Brandon in *The Sennar (No 2)*. The cases also underline four further important features of the approach of the courts to issue estoppel, which I will consider in turn. They are as follows:

i) It is irrelevant that the English court may form the view that the decision of the foreign court was wrong either on the facts or as a matter of English law.

ii) The courts must be cautious before concluding that the foreign court made a clear decision on the relevant issue because the procedures of the court may be different and it may not be easy to determine the precise identity of the issues being determined.

iii) The decision of the court must be necessary for its decision.

iv) The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice.

*i) Correctness of decision irrelevant*

55. Subject to the operation of the fourth feature identified above, as exemplified perhaps in the decision of the House of Lords in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, it is well settled that the correctness or otherwise of the decision of the foreign court (or indeed of a decision of an English court relied upon as an issue estoppel) is irrelevant to the question whether it gives rise to an issue estoppel.

56. As the judge observed in paragraph 38, it has been established since *Godard v Gray* (1870) LR 6 QB 139 that a judgment in personam of a foreign court of competent jurisdiction cannot be questioned by the parties on the merits when recognition or enforcement of the judgment is sought in England, notwithstanding that it may have been wrong either in fact or law. This principle applies even where there is an error of English law apparent on the face of the judgment. Thus I entirely agree with the judge that if it is clear on the evidence that the Supreme Court of Romania, after a full contestation, decided the issue which the Claimants now seek to litigate in this court, it is immaterial that the Supreme Court might have decided that issue in error on the basis of a mistaken appreciation either of English law or other aspects of the evidence.

57. That principle has been restated many times since 1870: see e.g. per Lord Reid in the *Carl Zeiss* case at p 917. It follows that my conclusion that the owners' claim was not time barred in English Law is irrelevant to the question whether the decision of the Romanian Supreme Court gives rise to an issue estoppel.

*ii) Caution and the General Principle and iii) Necessity.*

58. It is convenient to consider these two features together. The correct approach can I think be clearly seen from a passage from the speech of Lord Wilberforce in the *Carl Zeiss* case at p 967, which was quoted by the judge in paragraph 35 of his judgment, in support of the proposition that the principle of *res judicata* is founded upon the twin principles that there should be an end to litigation and that justice demands that the same party shall not be harassed twice in the same cause. I entirely agree that those are indeed the underlying principles.

59. Lord Wilberforce said at p 967:

> "As a matter of principle (and we are really thrown back upon principle), whether the recognition of judgments is based upon a recognition of vested rights, or upon considerations of public interest in limiting relitigation, there seems to be no acceptable reason why the recognition of foreign judgments should not extend to the recognition of issue decisions. From the nature of things (and here it is right to recall Lord Brougham's warning) this, in the case of foreign judgments, may involve difficulties and necessitate caution. The right to ascertain the precise issue decided, by examination of the court's judgment, of the pleadings and possibly of the evidence, may well, in the case of courts whose procedure, decision-making technique, and substantive law is not the same as our own, make it difficult or even impossible to establish the identity of the issue there decided with that attempted here to be raised, or the necessity for the foreign decision. And I think that it would be right for a court in this country, when faced with a claim of issue estoppel arising out of foreign proceedings, to receive the claim with caution in circumstances where the party against whom the estoppel is raised might not have had occasion to raise the particular issue. The fact that the court can (as I have stated) examine the pleadings, evidence and other material, seems fully consistent with its right to take a broad

> view of the result of the foreign decision. But with these reservations, where after careful examination there appears to have been a full contestation and a clear decision on an issue, it would in my opinion be unfortunate to exclude estoppel by issue decision from the sphere of recognition."

60. To similar effect Lord Reid said this in the *Carl Zeiss* case at p 918:

> "I can see no reason in principle why we should deny the possibility of issue estoppel based on a foreign judgment, but there appear to me to be at least three reasons for being cautious in any particular case. In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter. Secondly, I have already alluded to the practical difficulties of a defendant in deciding whether, even in this country, he should incur the trouble and expense of deploying his case because it was impracticable for him to do so in an earlier case of a trivial character abroad, with the result that the decision in the case went against him."

See also to much the same effect per Lord Brandon in *The Sennar (No 2)* at p 499 and the decision of this court in *Desert Sun Loan Corporation v Hill*, where it stressed the importance of the court being satisfied that the relevant issue was clearly decided.

61. In the context of the present case, the important question is to my mind whether we can be confident that the decision of the Supreme Court on the English time bar point, which potentially arose under Article 174(a), was, as Lord Reid put it in the passage just quoted, a basis of the foreign judgment and not merely collateral or obiter.

62. It is in this connection that I should notice the third feature identified above, namely that the determination of the issue said to give rise to the issue estoppel was necessary for the decision. All or almost all the formulations of the principles in the cases include the requirement of necessity. So, for example, in the passage quoted above Lord Wilberforce speaks of the "necessity for the foreign decision" and in *Desert Sun Loan Corporation v Hill* Evans LJ described the principle thus (at p 854):

> "The principle is that an issue of fact or law which *necessarily* was concluded in favour of one party in the foreign proceedings cannot be reopened in foreign proceedings between the same parties here." (My emphasis)

63. That principle can be traced back to *Reg v Inhabitants of the Township of Hartington Middle Quarter* (1855) 4 ECB 780, which Lord Lowry described as one of his starting points on issue estoppel in *Arnold v National Westminster Bank* at p 111. In that case, in a passage quoted by Lord Reid in the *Carl Zeiss* case, Coleridge J said at pp 794-5:

> "The question then is, whether the former judgment concludes, not merely as to the point actually decided, but as to a matter which it was

> necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue. And we think it does conclude to that extent. … Now, it cannot be said that the facts we are considering were merely collateral to the decision in the former case. The question then was where two unemancipated children were settled: and it was answered by showing that they were the legitimate issue of William and Esther, that is that these two were lawfully married, and the children born after, and that William was settled with the now appellants. Strike either of these facts out, and there is no ground for the decision: these facts therefore were necessarily and directly matter of enquiry. The question now is, where is Esther settled: and this is answered by showing the same two facts, the marriage of Esther and William, and the settlement of William, the two facts already decided. The judgments in the two cases therefore rest on the same foundation; which, having been settled in the first cannot be, as between the same parties, unsettled in the latter."

64. To my mind that puts the principle very clearly, although it also underlines the different situations to which the principles may apply. For example, this case is somewhat different from that described by Coleridge J because, in order to conclude that the award was not enforceable in Romania, the Supreme Court did not have to decide both the issue of Romanian law under Article 174(b) and the issue of English law under Article 174(a). A decision on either limb would have sufficed. It would only have had to decide both points in order to hold that the award was enforceable in Romania. That can be seen by the decisions of the Municipal Court and of the Court of Appeal, each of which decided only the Romanian law point under Article 174(b).

65. There was some discussion during the course of the argument as to the correct approach to a case in which the first court decides the case on two grounds, each of which forms the basis of the decision so that (in the old parlance) there are two *rationes decidendi*, even though the court could have decided the case on one or other basis. Mr Matthews submits that neither basis can give rise to an issue estoppel, whereas Mr Turner submits that each gives rise to an issue estoppel.

66. Mr Matthews relies upon this statement of principle at paragraphs 210-211 of the second edition (1969) of *Spencer Bower & Turner on Res Judicata* at paragraphs 210-211:

> "Even when in one way or another it can be demonstrated that the court has *expressly* determined, in the earlier proceeding, the same issue as is now in dispute, an issue estoppel will not by any means always be the result. Only determinations which are necessary to the decision – which are fundamental to it and without which it cannot stand – will found an issue estoppel. Other determinations, without which it would still be possible for the decision to stand, however definite be the language in which they are expressed, cannot support an issue estoppel between the parties between whom they were pronounced."

67. Mr Matthews observes that in a case of two *rationes decidendi* neither can be said to be necessary to the decision in the sense of being fundamental to it and without which it cannot stand. He further relies upon the fact that the passage just quoted was approved by this court in *Re State of Norway's Application (No 2)* [1988] 3 WLR 603: see per May LJ at p 624 and Balcombe LJ at p 631. Thus, May LJ described the basic requirement as being that "the earlier determination relied on as raising an issue estoppel shall have been fundamental to the decision first arrived at" and added that the matter was fully dealt with in the passage from *Spencer Bower* just quoted.

68. By contrast Mr Turner submits that those cases were not considering the twin *ratio* case and that such an approach is inconsistent with the principles identified by Diplock LJ in this well known passage from *Thoday v Thoday* [1964] P 181 at p 198:

> "The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

69. Those principles have been accepted as correct in a number of cases since *Thoday v Thoday*, notably by the House of Lords in *Arnold v National Westminster Bank* and indeed by May LJ in the *State of Norway* case notwithstanding his acceptance of the passage quoted from *Spencer Bower*. Mr Turner submits that the principle stated by Diplock LJ covers this case because here the Supreme Court of Romania held (he says) as part of its decision that the owners had failed to bring the case within Article 174(a) because the claim was time barred under English law by May 1992.

70. The judge was attracted by Mr Turner's submission. He said in paragraph 48 that it is hard to see why a determination which forms the primary basis of a foreign judgment should not give rise to an estoppel on the issue in question, notwithstanding that the judgment was also reached on an alternative basis. On the other hand there seems to me to be much to be said for Mr Matthews' submission that the cases support the proposition that the particular determination must be necessary for the decision in the sense of being fundamental to it and that in a two *ratio* case, nether *ratio* can satisfy that test.

71. However that may be, the judge held that he did not have to determine the question because he held that the decision of the Supreme Court under Article 174(a) was not the (or I think

he also meant a) primary basis for the decision. For the reasons given below, I have reached the conclusion that the judge was correct and that it is not necessary for us to determine the correct approach in a twin *ratio* case. In these circumstances I do not think that I should express a view on the point. There is a good deal to be said on both sides of the question and it seems to me to be preferable to do so only in a case where it arises for decision on the facts.

72. As I see it, assuming that it is possible for each *ratio* in a two *ratio* case to give rise to an issue estoppel, the determination of the particular issue relied upon must have been treated by the first court as necessary for its decision in the sense that it was part of the decision which it in fact reached and not collateral to it or *obiter*.

73. Finally I should note that one of the factors which the courts have taken into account in deciding whether the determination was part of the decision on the one hand or collateral or *obiter* on the other is whether it can be appealed. Thus in the *State of Norway* case May LJ quoted this passage from the judgment of Lord Denning MR in *Penn-Texas Corporation v Murat Anstalt (No 2)* [1964] 2 QB 647 at pp 660-661:

> In my opinion a previous judgment between the same parties is only conclusive on matters which are conclusive and necessary to the decision. It is not conclusive on other matters which came incidentally into consideration in the course of the reasoning: see the *Duchess of Kingston's Case* (1776) 20 ST 336 and *Reg v Hutchings* (1881) 6 QBD 300. One of the tests in seeing whether a matter was necessary to the decision, or only incidental to it, is to ask: Could the party have appealed from it? If he could have appealed and did not, he is bound by it, see *Bader Bee v Habib Merican Noordin* [1909] AC 615, 623 by Lord Macnaghten. If he could not have appealed from it (because it did not affect the order made), then it is only an incidental matter, not essential to the decision, and he is not bound".

74. In the *State of Norway* case this court, having considered the decision of the Privy Council in *Duedu v Yiboe* [1961] 1 WLR 1040, did not accept that an issue estoppel is impossible if the first decision cannot be appealed. However, it held that it is a good test. It seems to me that the correct approach to the question of appealability is to treat it as one factor in deciding whether the determination is necessary to the decision or only collateral to it.

*iv) Justice*

75. In the *Carl Zeiss* case Lord Upjohn said this (at p 947) in a sentence which has been much quoted since:

> "All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

76. That approach was applied in *Arnold v National Westminster Bank*, where a landlord relied upon an earlier decision of Walton J as to the construction of a lease in the course of a rent review between the same parties in 1983. His decision was made on appeal from an arbitration award and he refused a certificate that the question was one which ought to be considered by this court, with the result that there could be no appeal from it. Subsequent decisions, including two decisions of this court, indicated that Walton J's decision on the construction point was wrong. Before the second rent review in 1988 the tenant brought proceedings for a declaration as to the construction of the lease. The landlord relied upon the decision of Walton J as giving rise to an issue estoppel.

77. But for the principle identified by Lord Upjohn in the *Carl Zeiss* case and quoted above, the elements of issue estoppel would have been established because the decision of Walton J was a final decision on the same issue between the same parties. The principal speech was given by Lord Keith, with whom Lord Griffiths, Lord Oliver and Lord Jauncey agreed. The facts of that case were very different from this but the fact that Lord Keith treated that case as an application of the principle stated by Lord Upjohn can be seen both from his citation from Lord Upjohn's speech and from his agreement (at pp 110-111) "on the whole matter" with this passage in the judgment of Sir Nicholas Browne-Wilkinson V-C at first instance:

> "In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess. I can therefore see no reason for holding that a subsequent change in the law can *never* be sufficient to bring the case within the exception.
>
> Whether or not such a change does or does not bring the case within the exception must depend upon the exact circumstances of each case."

78. Browne-Wilkinson V-C was of course there referring to the facts of the case but he underlined the fact that whether what he called the exception applies depends upon all the circumstances of the particular case. Lord Keith expressed the principle in this way at p 109 (in a passage quoted by Lord Bingham in *Johnson v Gore Wood &* Co [2002] 2 AC 1 at 25), after referring to the particular problem in that case:

> "One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage I have quoted …"

79. As I see it, the correct approach is to apply the principles set out above unless there are special circumstances such that it would be unjust to do so. Whether there are such special circumstances or not will of course depend upon the facts of the particular case.

80. As already indicated, the judge held that the determination of English law under Article 174(a) was not necessary for the decision and not conclusive and that it did not therefore satisfy condition (2). It follows that he held that it did not give rise to an issue estoppel.

81. The judge observed in paragraph 41 that the Supreme Court did not mention the question whether the six year limitation period under English law had been interrupted. He observed in paragraph 42 that the Supreme Court may well have accepted the charterers' submission that the evidence of the owners' solicitors was inadmissible. As he put it, after all the opinions were not fully consistent with each other and, taken together, could hardly be said to have presented a clear picture. In these circumstances the judge thought that the court probably did not ask itself whether the alleged part payments and acknowledgments were effective to restart the limitation period under section 30 of the 1980 Act.

82. The reasoning which led the judge to his key conclusion can be seen from paragraphs 48, 49 and 50 of his judgment as follows:

> "48. … In the present case the Supreme Court's finding, that the right to claim execution in Romania was barred by prescription under the laws of Romania, upheld the decision of the Bucharest Court of Appeal under Article 174(b) of Law No 105/1992 and was enough to dispose of the Claimants' appeal. This was the "fundamental" or "essential" determination on which the judgment refusing execution of the award in Romania was based. The finding in relation to Article 174(b) of Law 105/1992 was the primary basis for the decision and involved most of the legal reasoning. The additional finding, that the Claimants had also failed to make out a case under Article 174 (a), was unnecessary and was not essential to this conclusion. It may have been for this reason that the Supreme Court felt able to deal with the question of English law limitation in a single short paragraph.
>
> 49. Paragraph 205 of the Third Edition of *Spencer Bower, Turner & Handley* contains the following statement of principle:
>
> > "A decision of fact or law against the party who succeeded will not found an estoppel because it cannot be fundamental to the decision. It would be unjust to make such a decision the foundation of an estoppel, for no appeal is available to the person against whom it was given. A similar argument applies where several factual grounds are advanced as alternative bases for a cause of action and the court finds more than one in favour of the party who succeeds. No estoppel can be founded on any of the separate findings, for the party failing on such issues cannot appeal any of them separately. To succeed on appeal he must succeed on all the issues, and if the finding on one is good, this

> will be fatal. There will be a cause of action estoppel, but the separate issues will not ground issue estoppels because none was fundamental to the decision.
>
> This paragraph is particularly relevant to the instant case. Article 322 point 2 of the Romanian Code of Civil Procedure enabled the Claimants to seek a revision of the Supreme Court's judgment within one month failing which it became final, subject to the exceptional power to revise under Article 322 point 5 to which I have referred earlier. The Defendants argue that the Claimants' failure to avail themselves of this procedure in relation to the Supreme Court's finding under Article 174(a) while, at the same time, attempting to dispute that decision in this court, is an abuse of process. The position was, however, that it would not have availed the Claimants to seek revision of the Supreme Court's ruling in relation to the English limitation ruling (Article 174(a)) unless they also succeeded in achieving a revision of its primary ruling on prescription under Romanian law (Article 174(b)). This is a strong indication that the Supreme Court's decision on English law limitation was not conclusive in the sense of being fundamental or essential to its judgment. It also suggests to me that it would be unjust to shut out the Claimants from arguing the limitation question in proceedings in England.
>
> 50. In the result, therefore, although the Supreme Court of Romania reached a decision on the merits on the issue which is now in dispute, it was not conclusive in the sense of being fundamental or essential to its judgment. Given the Supreme Court's primary finding on Article 174 (b), it was certainly not a necessary determination. The Claimants are not, therefore, estopped from reopening that question now."

83. Mr Turner submits that those conclusions are wrong and that on a fair reading of the judgment of the Supreme Court, it decided the appeal on the basis of both Article 174(b) and 174(a) and that each was necessary for the decision as that expression is used in the authorities. In short he submits that this was a two *ratio* decision. However, for my part I would not accept those submissions, essentially for the reasons given by the judge.

84. It seems to me that on a fair reading of the judgment of the Supreme Court the primary basis for its decision was the view which it formed under Article 174(b) that the claim was time barred under Romanian law. That was sufficient to decide the case in favour of the charterers and, in particular, to dismiss the appeal from the decision of the Court of Appeal, which had decided the matter solely on the Romanian law point.

85. By contrast, the judgment contains no reasons why the court rejected the owners' submission that the six year period had been extended by the part payments and the acknowledgments. It is of course possible that the court rejected the evidence relied upon by the owners as inadmissible but, if it did, it did not say so. It might be said that the court rejected the part payments on the basis that the dates of the payments "were not even proved

to be related to the amounts" of the award, but no such submission could be made with regard to the alleged acknowledgment in the telex of 17 March 1988, which, as stated in paragraph 18 above, would have been sufficient to extend the period to a date after 27 May 1992. The reader of the judgment is left to speculate as to the reasons which led the court to reach the conclusion it did.

86. I agree with the judge that that is a pointer to the conclusion that this was a secondary or collateral or *obiter* reason for the decision. In any event, it is far from clear whether the court was treating the Article 174(a) point as an equal ground for its decision to dismiss the appeal and, given the caution which the cases show should be used in deciding questions of this kind, for my part I would not hold that the charterers have shown that the determination of the Article 174(a) point was central to the decision and not collateral to it.

87. It is I think also relevant, as the authorities show, to take account of the difficulties in reviewing the determination of that point. As the judge observed in paragraph 49 quoted above, it would not have availed the owners to take advantage of the procedure which was available to seek a revision of the judgment within a month unless they also sought to do so and succeeded in relation to the Article 174(b) point because, in order to succeed on appeal from the decision of the Court of Appeal it was of course necessary for the owners to succeed under both Article 174(a) and under Article 174(b). I regard that consideration as a relevant pointer but not as conclusive in support of the judge's reasoning.

88. I should add that for my part I would not accept Mr Turner's submission that the judge's reasoning was somehow contrary to the opinions of the experts on Romanian law who gave evidence before him. It is true that Professor Florescu said that Romanian law does not recognise a distinction between *ratio* and *obiter* but I do not think that the evidence of the experts, which the judge heard and considered, leads to any other conclusion than that reached by the judge. I would accept Mr Matthews' submission that the fact that such a distinction is not recognised does not lead to the conclusion that all statements of opinion in the course of a judgment are part of the *ratio*. It was essentially a matter for the judge to decide whether the determination of the Article 174(a) point was necessary for the decision or whether it was collateral to it. In reaching that conclusion he had to have regard to the expert evidence, which he did, but I see no flaw in either his approach or his conclusions in this regard.

89. In these circumstances, it is not necessary to consider whether, if the other ingredients of issue estoppel were present it would be appropriate to hold that there are here special circumstances which would make it unjust to hold the owners to be issue estopped from arguing that the claim was not time barred in January 1993. It appears to me that the lack of clarity as to the role played by the Article 174(a) point in the reasoning and decision of the Supreme Court leads to the conclusion that it would be unjust to the owners to hold that its decision gives rise to an issue estoppel. It does not, however, do so by the application of what might be called the special circumstances exception but as a result of the conclusion that the charterers have not demonstrated that the determination of the Article 174(a) point was necessary to the decision as opposed to collateral to it.

90. It is also unnecessary further to prolong this judgment by considering Mr Matthews' submissions that the judge was wrong to hold that the decision of the Supreme Court was a decision on the merits and of the same issue as arises here. I shall not therefore do so.

*Conclusions on Time Bar*

91. For the reasons I have given I would dismiss the appeal under this head and hold that the claim was not time barred when the proceedings were begun in England in January 1993 and that the owners are not issue estopped by the decision of the Supreme Court in Romania from submitting to the English court that the proceedings were brought in time.

Abuse of Process

92. It appears from the judgment that before the judge the charterers submitted that, having failed to serve the order of Saville J until 2001 it was an abuse of process to rely upon it in order to enforce the award. The judge rejected that submission and the charterers say that he was wrong to do so. Mr Turner calls that procedural abuse. However, Mr Turner also advances a somewhat different abuse of process argument in this appeal, which he calls relitigation abuse, which I will consider first.

*Relitigation Abuse*

93. It is common ground that there are circumstances in which it is an abuse of process to seek to relitigate issues which have been determined or which could have been raised in previous proceedings. The rule in *Henderson v Henderson* (1843) Hare 100 is an example of such abuse. See also *Johnson v Gore Wood*, where the principles were discussed in considerable detail by the House of Lords. It has a close relationship with issue estoppel, although there are of course cases in which an allegation of abuse of process has succeeded where an allegation of issue estoppel has failed.

94. The judge simply said that no question of abuse of process of this kind could occur here because the owners raised the same issues of part payment and acknowledgment in Romania as they have raised here. Mr Turner submits that, even though he had held that there was no issue estoppel and that the rule in *Henderson v Henderson* did not assist the charterers, he should have held that the owners' attempt to relitigate the issue of time bar under English law in England was an abuse of process.

95. In *Johnson v Gore Wood* Lord Bingham identified the correct approach as follows on p 31:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceeding may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary,

> before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. … While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

96. Mr Turner submits that, taken as a whole and in particular in seeking to relitigate a point which it could have had decided in England a decade ago and to make at best irregular use of the processes of the court in order to circumvent what would otherwise be what Mr Turner called the insurmountable hurdle of limitation, the owners' conduct amounted to the kind of abuse of process which Lord Diplock described in *Hunter v Chief Constable of the West Midlands* [1982] AC 529 at p 536. It was:

> "misuse of [the court's] procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people".

97. Mr Turner submits that the irregular use of the processes of the court was this. Having obtained the order from Saville J in January 1993, the owners chose not to serve it. Mr Turner does not say that in doing so they were in breach of any provision of the Rules of the Supreme Court. However, he submits that the owners were acting contrary to what the judge called the ordinary assumption on which an *ex parte* order is made, namely that it will be brought to the respondent's attention and served as soon as reasonably practicable.

98. Mr Turner recognises that there was nothing in the old RSC Order 73 rule 10 (as it applied to applications under section 26 of the 1950 Act) to require the owners to serve an order of the kind obtained *ex parte* from Saville J. However he observes that, if an action had been commenced to enforce the award, as it could have been, it would have had to have been

served on the charterers at the time, as would an originating summons, which the court could have directed the owners to issue under RSC Order 73 rule 10(5).

99. That is, of course, true. The charterers could then have defended the proceedings on the ground that they were time barred, just as they could have applied to set aside the order of Saville J if it had been served upon them. However, the irony of the position, as it seems to me, is that any such defence or challenge on the ground of time bar would have failed for the reasons which I gave earlier, namely that the action was not time barred in England in January 1993.

100. The judge considered these submissions, albeit in the context of the argument that it was an abuse of process to permit the order to be enforced so long after it was made. He said this:

> "68. These are formidable arguments. Had the evidence suggested that the Defendants had had no intention of serving the order when they obtained it but had nevertheless omitted to disclose either the existence of the Romanian proceedings or their intention not to disclose the order while those proceedings were pending, I might have taken a different view of the matter. However, that was not, I think, the case. Having been advised by their Romanian lawyer that to serve the order might prejudice their position in the Romanian proceedings, they held back from serving it. It was not until 12th May 1993 that the Municipal Court of Bucharest gave judgment in the Claimants' favour allowing both recognition and enforcement of the award; but that judgment proved to be merely the first of six rounds in a process which lasted far longer than could reasonably have been expected at the time and which ended in the Claimants failing on the enforcement issue. In the light of those developments, which must have indicated that the order would not be served within the near future, the correct procedure, I think, would have been for the Claimants to return to court with an explanatory affidavit. The court might then have accepted the delay in service or it might have directed service of the order or the issue of an originating summons. I also accept that the ordinary assumption on which an *ex parte* order is made is that it will be brought to the respondent's attention and served as soon as reasonably practicable.
>
> 69. Against this, the terms of the order ensured that there could be no enforcement while the order was not served on the Defendants and the procedure which the Claimants had adopted was the one prescribed by the rules. In the event the Defendants do not in my judgment make out a case of abuse of process. Accordingly I decline to set aside the order made by Mr. Justice Saville on 25th January 1993."

101. I see no reason to disagree with those conclusions. I detect no error of principle and, in my opinion, the judge was entitled to reach the conclusions he did. In short, the owners always

intended to enforce the award. They made the *ex parte* application with a view to obtaining and enforcing the award as an order of the court. The only reason they did not do so was because of advice received from their Romanian lawyers. The Romanian proceedings lasted much longer than they could have expected. If they had served the order, the charterers would not have succeeded in setting it aside and, for the reasons I gave earlier, I do not think that anything that happened in Romania made it manifestly unfair or an abuse of the process to relitigate the English time bar issue in England. Applying the broad merits based approach referred to by Lord Bingham, I would hold that the charterers have not established what Mr Turner calls relitigation abuse.

*Procedural Abuse*

102. There is a considerable overlap between this and relitigation abuse. Indeed, to my mind, they are aspects of the same thing. In so far as reliance is placed upon the failure to take steps between 1993 and the end of the Romanian proceedings in 1998, the judge considered them in the passages quoted above and, in my opinion, was entitled to reach the conclusion he did. However, under this head, in addition to the considerations already identified, Mr Turner relies upon the long delay between 1998 and, say, 15 February 2001 when Moore-Bick J lifted the stay and allowed the owners to serve the order of Saville J.

103. The considerations under this head seem to me to be closely related to the question whether the owners should have been permitted to enforce the award as a judgment. I will therefore consider them together.

Enforcement

104. This application was made on 7 December 2001 and was made because the order of Moore-Bick J lifted the automatic stay but directed that no steps be taken to enforce the award without leave of the court and/or because more than six years had passed since the *ex parte* order was made.

105. As the judge explained in paragraph 71, the relevance of the period of six years is that by CPR Part 50 and RSC Order 46 rule 2(1) a writ of execution to enforce a judgment or order may not issue without the leave of the court where six or more years have elapsed since the date of the judgment or order. It is common ground that Order 46 rule 2(1) had no direct relevance because the owners did not apply to the court for leave to issue a writ of execution to enforce a judgment in terms of the award but the position under that rule was treated before the judge and before us as having a bearing on the application to enter judgment. The judge said in this regard that, having been in a position equivalent to that of a judgment creditor since January 1993, there was no reason why the Claimants should avoid either the time constraints on execution imposed by Order 46 rule 2 (1) or, indeed, the law on limitation regarding interest on judgment debts. I entirely agree.

106. The judge directed himself in accordance with the principles adopted under RSC Order 46 rule 2(1) by Evans-Lombe J in *Duer v Frazer* [2001] 1 All ER 249 and by this court in *Patel v Singh* [2002] EWCA 1938, although *Patel v Singh* had only recently been decided and I think I am right in saying that the judge did not hear argument based on it and did not have a

full report of it. The judge quoted this passage from paragraph 25 of the judgment of Evans-Lombe J in *Duer v Frazer*, where Evans-Lombe J was stating his view of the principles to be derived from the judgment of Dillon LJ in *BP Properties Ltd v Buckler* [1987] EGLR 168 and from the judgment of Slade LJ in *Westminster Bank plc v Powney* [1991] Ch 339:

> "… the court would not, in general, extend time beyond the six years save where it is demonstrably just to do so. The burden of demonstrating this should, in my judgment, rest on the judgment creditor. Each case must turn on its own facts but, in the absence of very special circumstances such as were present in the *National Westminster Bank* case, the court will have regard to such matters as the explanation given by the judgment creditor for not issuing execution during the initial six-year period, or for any delay thereafter in applying to extend that period, and any prejudice which the judgment debtor may have been subject to as a result of such delay including, in particular, any change of position by him as a result which has occurred. The longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice to the judgment debtor."

107. The judge said this in paragraph 73 with regard to *Patel v Singh*:

> "Since the conclusion of the argument in this case the Court of Appeal has also considered the principles for exercise of this discretion in *Patel v Singh* Court of Appeal (Civil Division) 13.12.2002 – Peter Gibson LJ, Sir Anthony Evans. The Court of Appeal in that case cited *Duer v Frazer* and confirmed that the loss of the right to execute after six years called for an explanation for the delay from the judgment creditor before permission to execute could be given. This requirement contrasted with the absence of any requirement on the debtor to show prejudice resulting from the delay. Given that the general rule is that execution will not be allowed after six years, the creditor is required to show circumstances which take the case out of the ordinary. Unfortunately a copy of the full transcript of the judgment in *Patel v Singh* is not yet available."

108. Although the judge did not have a full copy of the judgment in that case, in my opinion he described the principles contained in it correctly. As I read the judgment of Peter Gibson LJ, with whom Sir Anthony Evans agreed, he adopted the approach of Evans-Lombe J as correct, while observing that he was suspicious of glosses to the wording of the rules. The appropriate course was to consider whether there was something in the circumstances to take the case out of the general rule that execution will not be allowed after six years. As I read his judgment, the judge did precisely that.

109. He noted that in *Patel v Singh* the judgment creditor had taken no steps to enforce the debt and had failed to instruct lawyers to enforce the debt in Germany where the judgment debtor had moved to shortly after the judgment. He also noted that in *Duer v Frazer* there had been no attempt at enforcement proceedings and there was positive evidence that the judgment debtor had suffered prejudice as a result of the delay in that his financial circumstances had changed.

110. The judge contrasted the facts of those cases with the facts of this. He expressed his conclusions thus in paragraph 75:

> "In contrast, in the present case the judgment creditor has given an explanation of the delay which takes the case out of the ordinary. From January 1993, when the Claimants acquired the status of judgment creditors, until about May or June 1998 when, as I understand it, the Claimants were notified of the decision against them by the Supreme Court of Romania, the Claimants were continuously involved in enforcement proceedings in the country in which the Defendants principally carry on business. This is not, therefore, a case where the creditor has sat back or where the debtor could have been led to believe that the debt would not be enforced. Admittedly, there was considerable delay after the conclusion of the Romanian proceedings. This period of delay exceeded that which was reasonable for recuperation and reconsideration after the long and no doubt costly failure in those proceedings. But I do not believe that that, in itself, should lead to the Claimants being refused permission to enforce. In my judgment the interests of justice point to permission being given to enforce in this unusual case."

111. The judge accordingly gave the owners permission to enforce the award but he also held that they should be in no better position in terms of interest than they would have been if they had in fact entered judgment in the terms of the award under the 1993 order. It was for that reason that the figure for which he gave the owners permission to enter judgment, namely US$4,561,990.08 included interest for six years from 25 January 1993 to 25 January 1999 and no more.

112. Again I can detect no error of principle in the approach adopted by the judge in the passage quoted above. He had a discretion whether to grant permission. He was in my judgment entitled to hold that this was an unusual case in which the circumstances were such as to take it out of the general rule. I would accept Mr Matthews' submission that the judge did not exceed the generous ambit within which reasonable disagreement is possible. It follows that I can see no basis upon which this court could properly interfere with the exercise of the discretion on the part of the judge.

113. For much the same reasons I would not hold that the judge should have held that the owners abused the process of the court in any of the ways suggested on behalf of the charterers. I do not think that it has been demonstrated that there was procedural abuse, any more than relitigation abuse, on the particular facts of this case.

CONCLUSIONS

114. For the reasons I have given I would dismiss the appeal. The judge was correct to hold that the owners are not estopped from asserting in England that their claim was not time barred under the 1980 Act when they commenced proceedings in England in January 1993. He was also correct to hold that the claim was not time barred because the six year time limit had been extended by an acknowledgment in a telex dated 17 January 1988, which extended the time to a date later than January 1993. The judge was also entitled to hold that there was

no abuse of process and to give the owners permission to enforce the award as a judgment on the terms in which he did.

115. I would add by way of postscript that it is common ground that the same problem could not arise under the CPR. CPR 62.18 is very similar to the old RSC Order 73 rule 10 but it provides that the application may be made without notice in an arbitration claim form. Under CPR 62.4 the general rule is that any arbitration claim form must be served on a defendant within one month of the date of issue unless the court orders otherwise. Although under CPR 7.6 an applicant can apply for an extension of time for serving any claim form, it seems that the rules now provide for service of the claim form even though the application may be made without notice.

116. Finally I would like to pay tribute to the judgment of the judge and to the arguments of counsel on both sides in this unusual case.

Mr Justice Rimer:

117. I agree.

Lord Justice Mantell:

118. I also agree.

Order: Appeal dismissed with costs to be assessed on the standard basis; permission to appal to the House of Lords refused.

(Order does not form part of the approved judgment)