Lib No: 980632

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CORAM	**:**	MASTER BREDMEYER
HEARD	**:**	24 JUNE 1998 & 7 OCTOBER 1998
DELIVERED	**:**	6 NOVEMBER 1998
FILE NO/S	**:**	ARB 12 of 1998
BETWEEN	**:**	ANTCLIZO SHIPPING CORPORATION Plaintiff AND THE FOOD CORPORATION OF INDIA Defendant

Catchwords:

Arbitration - Enforcement of foreign award - Application to enforce not time barred - *Limitation Act 1935* s38(1)(c)(i) and s44(3) - Limitation period of 6 years runs from when the claimant became entitled to enforce the award - Period extended in this case by part payments

Representation:

Counsel:

Plaintiff	:	Ms P A Saraceni
Defendant	:	Mr S Singh

Solicitors:

Plaintiff	:	Cocks Macnish & Co
Defendant	:	Friedman Lurie Singh

Case(s) referred to in judgment(s):

Agromet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd [1985] 2 All ER 436
IBSSL v Minerals Trading Corp [1996] 1 All ER 1017

Case(s) also cited:

Continental Grain Co v Bremer Handelsgesellschaft mbH (No 2) [1984] 2 Lloyd's Rep 121
Erven Warnink BV v Townend & Sons Ltd [1982] 3 All ER 312
Fordham v Wallis (1853) 10 Hare 216
Hunt v R M Douglas (Roofing) Ltd [1990] 1 AC 398
London & Overseas Freighters Ltd v Timber Shipping Co SA [1972] AC 1
Metropolitan District Railway Co v Sharpe (1880) 5 App Cas 425
Morgan v Rolands (1872) LR 7 QBE 493
Re Clagett, Ex parte Lewis (1886) 36 WR 653
Royal Trust Co v Attorney General (Alberta) [1930] AC 144
Spencer v Hermmerde [1922] 2 AC 507
Tanner v Smart (1827) 6 B and C 603

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MASTER BREDMEYER:

This is an application by the plaintiff for leave to enforce a foreign arbitration award in this State under the provisions of s8 of the *International Arbitration Act 1974 (Cth)* and s33 of the *Commercial Arbitration Act 1985 (WA)*. The dispute arose out of a charter party between the plaintiff, which was the owner of a vessel and the defendant who were the charterers and a voyage which took place between November 1973 and February 1974. The arbitration was conducted by Mr A D Colman QC in London and he published his award and reasons on 17 October 1990. He ordered the defendant to pay various sums to the plaintiff, including pre-award interest and costs. The defendant then appealed the arbitration award to the High Court in London. The appeal was heard by Hirst J and was dismissed on 2 May 1991. The defendant then appealed from the decision of Hirst J to the Court of Appeal. The appeal was dismissed on 18 February 1992. The Arbitrator's award is as follows:

> "(1) It is declared that there is due from the Respondents to the Claimants in respect of unpaid charter freight the sum of [Pounds]34,911.96 and that such amount shall become payable on the publication of this award.
>
> (2) The Respondents shall pay to the Claimants in respect of demurrage at Bombay less despatch at Houston the sum of US Dollars 123,736.11.
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> (3) The Respondents shall pay to the Claimants interest on the sum of US 123,736.11 for the period from 1st December 1974 until 30th April 1975 and from 21st April 1983 to the date of this Award, namely 17 October 1990, at the rate of 9½ per cent per annum simple, which is a total amount of interest of US $92,913.44.
>
> (4) The Respondents are not entitled to recover the cost of any of the lightening performed at Bombay.

(5) The Respondents shall pay their own and the Claimants' costs of the reference to be taxed if not agreed, including the costs of the Respondents' application for an adjournment on 9th March 1990.

(6) The Respondents shall pay my fees and the costs of this my Award which I hereby tax and settle in the sum of [Pounds]27,500.00.

(7) The Respondents shall pay the fees of Mr Khandwala which are hereby taxed and settled in the sum of [Pounds]950.00.

(8) If the Claimants shall first have settled any part of such fees and costs as are referred to paragraphs (6) and (7) the Respondents shall forthwith reimburse the Claimants in respect of the amount thus paid.

(9) Should neither party set down this Special Case for hearing by the Court by the expiration of six weeks from the date hereof this Award shall stand as my Final Award."

Paragraph 5 of the Award required the respondents (which is the defendant) to pay the claimant's (plaintiff's) costs of the reference to be taxed, if not agreed. Those costs were agreed and correspondence has been produced to me between the plaintiff and the defendant's London solicitors on that. The correspondence is dated November 1992 to January 1993.

I note that para 9 of the award that the award was to stand as the final award from a date six weeks hence if neither party set down "this Special Case for hearing by the Court". This probably means that if one of the parties set down the Special Case for hearing by the Court then the award would not take effect until the determination of that special case which might in turn involve a reference back to the Arbitrator to decide certain questions of fact following the Court's determination of the law. I do not have any papers relating to the "appeal" before Hirst J but I do have the order made by

the Court of Appeal. It refers to the case before Hirst J as "the trial of the special case stated by the Umpire in the reference on the 2nd day of May 1991 ... ". It also refers to the "second question of law asked by the Umpire in the special case". So there was a special case referred to the High Court. It was heard by Hirst J in May 1991. I do not know if it was set down for hearing within 6 weeks of the Arbitrator's award.

Substantial payments have been paid by the defendant. US$79,309.05 was paid on 28 March 1994 and US$217,502.43 was paid on 24 March 1994. The first sum was applied by the plaintiff towards payment of the Arbitrator's award for freight (para 1 of the award) plus interest thereon and the second sum was applied towards the Arbitrator's award of demurrage (para 2 of the award) plus interest thereon. Other sums have been paid by the defendant at other times. 150,000 pounds Sterling was paid on 1 December 1992. 26,107.54 pounds was paid on 11 January 1993. This was a payment out of 24,000 pounds paid by the defendant as security for costs plus interest thereon. A further 51,000 pounds was paid on 24 March 1993.

The defendant's first objection to the enforcement of this arbitration award is on the basis that the application to enforce it is time barred. The argument is that the parties agreed in the charter party to arbitrate their dispute and impliedly agreed to be bound by the Arbitrator's award. The plaintiff's present application to enforce the award is a form of action based on breach of contract and the limitation period for that under s38(1)(c)(i) of the *Limitation Act 1935 (WA)*, for a contract not under seal, is six years. The charter party was a simple contract. It was not under seal. The submission is supported by ***Agromet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd*** [1985] 2 All ER 436, a decision of Otton J and also by ***IBSSL v Minerals Trading Corp*** [1996] 1 All ER 1017. The latter case, a decision of the Court

of Appeal, affirmed the decision of Otton J in ***Agromet***. Section 38 of the *Limitation Act* refers to when the cause of action arose. Those cases decide that when a claimant is seeking to enforce an arbitration award the cause of action arises when he becomes entitled to enforce the award. At 1021 of ***IBSSL*** Evans LJ (with whom the other two Judges agreed) said:

> "... [C]onceptually the claim arises under a contractual undertaking to honour the award. This may mean that the party against whom the award is made becomes under an immediate obligation to pay the amount of the award, which strictly should be construed as a liquidated debt obligation. Alternatively, if the claim is for damages for breach of the implied promise to pay, then a reasonable period should be allowed for the necessary payment to be made. This period would be co-extensive with whatever is allowed by 'forthwith'. If regard is had to the time need for the payment process, then this period might be, say, 28 days. It could hardly be longer than, say, three months."

I agree with that and propose to follow that view. The cause of action arose when the plaintiff became entitled to enforce the award. Three months would be a reasonable period in this case. To pay in English pounds or US dollars the defendant needed first to get approval from the Reserve Bank of India. Reference to that is made in the papers. That being so, and allowing six weeks for the setting down of the case stated (as per para 9 of the award) and three months for payment, the present application is time barred. If, however, the award, properly construed, contemplated that, if there was a special case, then the award took effect on the determination of the special case (in May 1991 by Hirst J) and allowing three months for payment, then the present application is also time barred. If, however, the award properly construed was only to come into force on the determination of the special case to the court - including any appeal therefrom - then the appeal was determined on 18 February 1992. Allowing three months for

payment after that, then the plaintiff's present application made on 5 May 1998 is not time barred.

I need not express any final view on this because, in any event, I am firmly of the view that the plaintiff has a let out from the limitation argument. Section 44(3) of the *Limitation Act* provides that an acknowledgment of the debt or a promise to pay in writing or a part payment can halt time running temporarily. I am satisfied that the payments mentioned in 1992, 1993 and 1994, particularly the last ones in March 1994, are part payments which have the effect of defeating the limitation argument. The six year period will expire in the year 2000. The plaintiff's application is not time barred.

The defendant has raised a further argument based on s44(2) of the *Limitation Act* that to get the benefit of a part payment which extends the limitation period the plaintiff has to produce evidence that (1) the part payment was made, and (2) that it was not made by way of a "bill of exchange, cheque or promissory note". I do not agree with that argument. The plaintiff does not have to prove that the money was not paid by a cheque etc. The plaintiff is relying on the last proviso of s44(3) not on s44(2). It is not disputed that the substantial sums mentioned were paid. These payments are deposed to in the affidavits filed on both sides.

Post-award interest

The arbitration was conducted under an arbitration clause in the charter party which is included in the annexures to the award. The two arbitrators had to be members of the Baltic and engaged in the shipping and/or grain trades, one to be appointed by each of the parties, with the power given to such arbitrators to appoint an umpire. The arbitrators were appointed and they appointed Mr Colman QC of the London Bar as the umpire. The choice of English arbitration implies, I think, that the award

once given will be governed by English law. Under that law post-award interest at a statutory rate is payable on the award and on costs. The following summary of the law on this topic is taken from the 1997 *Supreme Court Practice*:

> "1. Section 20 of the United Kingdom Arbitration Act, 1950 provides that:
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> > 'A sum directed to be paid by an Award shall, unless the Award otherwise directs, carry interest as and from the date of the Award and at the same rate as a judgment debt.' (White Book vol 2 p 1912)
>
> 2. The intention of Section 20 is that an award is treated as if it were a judgment, carrying interest from the date of the award at the rate of a judgment debt set out in the Order in Council under Section 44. The Court has no power under the *Administration of Justice Act 1970* s44or under its inherent jurisdiction to vary the rate of interest prevailing at the date of entry up of the judgment during the currency of that judgment, whether the rate during that period is increased or decreased under a fresh Statutory Instrument made under s44. See *Rocco Giuseppe & Figli v Tradax Export SA* [1983] 3 All ER 598 and volume 1 of the White Book [1997] p 715 and vol 2 p 1913.
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> 3. (a) Every judgment debt carries interest at the statutory rate from pronouncement of the judgment;
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> (b) the statutory rate of interest as at 17th October, 1990 (being the date of the award) was 15% per annum (see Judgment Debts (Rate of Interest) Order, 1985 and the White Book vol 1 p 715.
>
> 4. The entitlement to statutory interest applies to money payable under an arbitration award from the date of the award by virtue of Section 20 of the Arbitration Act, 1950. See *London & Overseas Freighters Ltd v Timber Shipping Co SA* [1972] AC 1 at 21 to 23.

5. Statutory interest accrues from the date of pronouncement of the judgment in court. See Section 17 of the Judgments Act, *Erven Warnink BV v Townend & Sons Ltd* [1982] 3 All ER 312 and the White Book vol 1 p 716.

6. Statutory interest on an order for costs runs from the date of the order and not from the certificate of taxation quantifying the same. See *Hunt v R M Douglas (Roofing) Ltd* [1990] 1 AC 398, the White Book vol 1 p 716, and *Metropolitan District Railway Co v Sharpe* (1880) 5 App Cas 425 and Jacobs (infra) at page 7836 paragraph 31.110.

7. The statutory interest is payable as part of the judgment debt. See *Re Clagett, Ex parte Lewis* (1886) 36 WR 653 and the White Book vol 1 p 716. It therefore constitutes part of the award in respect of which enforcement is sought. See also Jacobs on *Commercial Arbitration Law and Practice* (Law Book Company) page 7835 at paragraph 31.100. Accordingly interest accrues on 'so much of the money as is from time to time unpaid'. (See Jacobs (supra))."

I do not consider that the defendant has raised any arguments against those principles. Defence counsel has argued that the costs awarded are subsequent to the award and, as a matter of common sense, cannot form part of the award. He said the plaintiff will need to take separate enforcement proceedings in relation to these costs orders. Let me examine that argument. The Arbitrator's costs of 27,500 pounds were part of the award. See para 6 of the award quoted above. The party/party costs are referred to in para 5 of the award quoted above. As mentioned previously in my judgment, these were agreed between November 1992 and January 1993. Once agreed, interest on those costs dates back to the date of award under point 5 of the legal principles taken from the *White Book*, quoted above.

As further support of those views I quote from Mustill and Boyd, *Commercial Arbitration* (2nd ed) (1989) at 420. The learned authors are there dealing with the practice relevant to enforcing an arbitration award under s26 of the *Arbitration Act 1950 (UK)*:

> "An order or judgment enforcing an award may include the costs awarded by the arbitrator and the arbitrator's fees even though they have not been taxed or agreed[20]. A sum directed to be paid by an award carries interest as from the date of the award and at the same rate as a judgment debt[1]. The arbitrator has power to direct that the award shall not carry interest, but not to alter the rate[2].
>
> Section 26 requires judgment to be entered 'in terms of the award'. This makes it impossible to include the costs of the application in the judgment: but the order giving leave to enter judgment will normally make provision for the costs of the application as well as for the costs of signing judgment, and this order can itself be enforced as if it were a judgment. Interest on the award, under section 20 is not usually expressly provided for in the award but, even if it is not, judgment 'in terms of the award' may include interest on the award, because section 20 is in effect a term of the award implied by statute[3].

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20 *Holdsworth v Wilson* (1863) 32 LJQB 289; *Lewis v Rossiter* (1875) 44 LJ Ex 136; *Metropolitan District Rly Co v Sharpe* (1880) 5 App Cas 425.

1 Arbitration Act 1950, s20. The rate is laid down from time to time by Statutory Instruments made under s44 of the Administration of Justice Act 1970 and is generally below commercial rates.

2 *London and Overseas Freighters v Timber Shipping Co SA* [1971] 1 Lloyd's Rep 523, [1972] AC 1.

3 *Continental Grain Co v Bremer Handelsgesellschaft mbH (No 2)* [1984] 2 Lloyd's Rep 121."

I should add that s26 of the *Arbitration Act 1950 (UK)* is headed "Enforcement of Award". Subsection (1) reads:

> "(1) An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award."

The provision is reproduced in s33 of the *Commercial Arbitration Act (WA)* save that "the Court" is substituted for "the High Court or a judge thereof".

I propose to give leave to the plaintiff to enforce the award and to enter judgment in terms of the award.