JUDGMENT No. 306 / 91

C A T C H W O R D S

SHIPPING AND NAVIGATION - negotiations for sale of tanker conducted by brokers in London and Tokyo - whether contract formed - whether then varied - effect of "recaps" and "subjects".

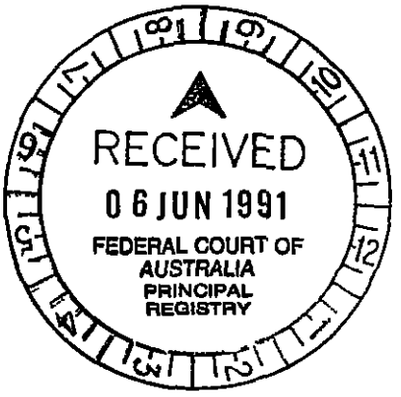
INTERNATIONAL ARBITRATION - whether arbitration agreement rendered inoperative by subsequent agreement and by giving and acceptance of undertakings to the Court - whether stay of proceedings should not be ordered.

International Arbitration Act 1974

Tanning Research Laboratories Inc. v O'Brien (1990) 169 CLR 332
De Bussche v Alt (1878) 8 Ch D 286
Reardon Smith Line v Hansen-Tangen [1976] 3 All ER 570
Codelfa Construction Pty Ltd v State Rail Authority of N.S.W. (1982) 149 CLR 337
The "Blankenstein" [1985] 1 Lloyd's Rep. 93
Godecke v Kirwan (1973) 129 CLR 629
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537
Tallerman & Co. Pty Limited v Nathan's Merchandise (Victoria) Pty Limited (1957) 98 CLR 93
Dan v Barclays Australia Limited (1983) 57 ALJR 442
Buhrer v Tweedie [1973] 1 NZLR 517
Paczy v Haendler and Natermann GmbH [1981] 1 Lloyd's Rep. 302
Kruidenier (London) Ltd v The Egyptian Navigation Co. [1980] 2 Lloyd's Rep. 166

BAKRI NAVIGATION COMPANY LIMITED v
SHIP "GOLDEN GLORY"
GLORIOUS SHIPPING S.A. (OWNERS OF)
No. G199 of 1991

CORAM: **GUMMOW J.**
PLACE: **SYDNEY.**
DATE: **5 *JUNE* 1991.**



IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)
GENERAL DIVISION) No. G199 of 1991
IN ADMIRALTY)

BETWEEN: BAKRI NAVIGATION COMPANY LIMITED
Plaintiff

AND: SHIP "GOLDEN GLORY"
GLORIOUS SHIPPING S.A.
(OWNERS OF)
Defendant

CORAM: GUMMOW J.
PLACE: SYDNEY.
DATE: 5 JUNE 1991.

MINUTE OF ORDER

THE COURT orders that the questions for separate decision be answered as follows:

(1) Is there a concluded agreement between Bakri Navigation Co. Limited and Glorious Shipping S.A. for the sale of the ship 'Golden Glory' upon the terms alleged by Bakri Navigation Co. Limited?

ANSWER: Yes.

(2) If "yes" to (1), does this proceeding involve the determination of a matter which, in pursuance of that agreement, is capable of settlement by arbitration, within the meaning of s. 7 of the International Arbitration Act 1974 ("the Act")?

ANSWER: Yes.

(3) Should the proceeding, as to whole or part, and, if so, as to which part, be stayed by order under sub-s. 7 (2) of the Act, and the parties referred to arbitration?

ANSWER: No.

(4) Is the Court required by sub-s. 7 (5) not to make an order it otherwise would make under sub-s. 7 (2) of the Act?

ANSWER: Yes.

Note: Settlement and entry of Orders is dealt with by Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)
NEW SOUTH WALES DISTRICT REGISTRY)
GENERAL DIVISION) No. G199 of 1991
IN ADMIRALTY)

BETWEEN: BAKRI NAVIGATION COMPANY LIMITED
Plaintiff

AND: SHIP "GOLDEN GLORY"
GLORIOUS SHIPPING S.A.
(OWNERS OF)
Defendant

CORAM: GUMMOW J.
PLACE: SYDNEY.
DATE: 5 JUNE 1991.

REASONS FOR JUDGMENT

Introduction

This proceeding was commenced on 27 April 1991. The plaintiff seeks a declaration that it has a binding contract for the sale to it of the ship "Golden Glory" and an order for the specific performance of that contract. The ship was arrested on 28 April 1991 in Port Botany. The defendant, the owners of the ship, applied for release of the ship from the arrest, and that application was heard by me on 1 and 2 May 1991. On 2 May 1991, after delivering oral reasons for judgment, I ordered that the application for release stand over to the next day for the giving of undertakings and the making of orders in accordance with those reasons.

In the events that have since happened, the terms of the orders made 3 May 1991 have assumed a particular importance. I therefore set them out in full:

> "UPON the Defendant by its counsel undertaking to the Court:
>
> (a) That the Defendant will take all steps on its part as are properly necessary to prepare these proceedings for trial on 15, 16 and 17 May 1991;
>
> (b) That the Defendant will not, without the prior written consent of the Plaintiff, sell, transfer title to, mortgage or otherwise encumber in any manner whatsoever the ship or any interest in the ship 'Golden Glory' pending the determination of these proceedings (including any appeals to the Federal Court of Australia or otherwise, and including any applications for special leave to appeal that might be taken therefrom to the High Court of Australia);
>
> (c) That it will comply (subject to its rights to seek variation or discharge thereof, and to appeal therefrom) with any Orders made against it in these proceedings;
>
> AND NOTING that the Defendant has procured the delivery to the Sydney solicitors for the Plaintiff of a Deed in the form of Exhibit D on the application filed in these proceedings on 1 May 1991, and that arrangements satisfactory to the Marshal and as set out in Exhibit E on that application have been made for the payment of the fees and expenses of the Marshal in connection with the custody of the said ship while it was under arrest,
>
> THE COURT ORDERS that the ship 'Golden Glory' be released from arrest."

It will be necessary later in these reasons to refer in more detail to Exhibit D ("the Deed of Undertaking") but it should now be noted that it contains a covenant by the defendant to the plaintiff to comply with the above undertakings given to this Court.

Directions also were given to have the matter ready for hearing on 15 May 1991. At the hearing, I heard some of the evidence going to the availability of specific performance. But it became apparent that if the Court found for the plaintiff as to the existence of a contract in the terms propounded by it, the defendant would contend first, that the contract contained an arbitration agreement within the meaning of sub-s. 3 (1) of the International Arbitration Act 1974 ("the Arbitration Act") and secondly, that the procedure for arbitration under that agreement was governed by English law, which would answer the description in para. 7 (1) (a) in the statute of "the law of a Convention country". Upon that footing, the defendant would apply for a stay of the balance of the proceeding. Subject to the imposition of such conditions, if any, as it thought fit, the Court would be obliged by sub-s. 7 (2) to impose such a stay.

To this the plaintiff responded by contending that no such stay should be ordered because (i) there was no "arbitration agreement" of the relevant description and, (ii) even if there were, sub-s. 7 (5) of the Arbitration Act applied. This states:

> "7 (5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed."

In particular, the plaintiff wished to submit that the terms of the undertakings given to the Court on 3 May 1991 as a step

to procure the release of the ship from arrest, and the terms of the deed, Exhibit D, were inconsistent with the continued existence of the arbitration agreement alleged by the defendant. This was said to be because their clear import was an acceptance by the defendant of a situation whereby the proceeding between it and the plaintiff would be disposed of in its entirety in this Court. (However, the plaintiff expressly disavowed any further argument which would assert that the claim to specific performance was not a matter the determination of which was "capable of settlement by arbitration" within the meaning of sub-s. 7 (2) of the Act because such a claim was susceptible of determination exclusively by the exercise of judicial power; cf. Tanning Research Laboratories Inc. v O'Brien (1990) 169 CLR 332 at 351-352, per Deane, Gaudron JJ.).

In these circumstances, the Court made orders for the decision of the following questions separately and in advance of any other questions in the proceeding:

"(1) Is there a concluded agreement between Bakri Navigation Co. Limited and Glorious Shipping S.A. for the sale of the ship 'Golden Glory' upon the terms alleged by Bakri Navigation Co. Limited?

(2) If 'yes' to (1), does this proceeding involve the determination of a matter which, in pursuance of that agreement, is capable of settlement by arbitration, within the meaning of s. 7 of the International Arbitration Act 1974 ('the Act')?

(3) Should the proceeding, as to whole or part, and, if so, as to which part, be stayed by order under sub-s. 7 (2) of the Act, and the parties referred to arbitration?

(4) Is the Court required by sub-s. 7 (5) not to make an order it otherwise would make under sub-s. 7 (2) of the Act?"

What follows are the reasons for judgment on those separate questions. It will be apparent that questions (2), (3) and (4) are closely interrelated, and that the threshold issue is that presented by question (1), namely the existence, or otherwise, of a concluded agreement for the sale of the ship. The applicable law in answering question (1) has been treated as the common law as in force in the State of New South Wales.

The Parties and the Brokers

The plaintiff, Bakri Navigation Co. Limited ("Bakri") is a corporation formed under the laws of the Kingdom of Saudi Arabia. The defendant, Glorious Shipping S.A. ("Glorious") is a corporation formed under the laws of the Republic of Panama. The beneficial owners of the shares in the defendant are Mr Hideshi Doi and his sons Mr Hidekazu Doi and Mr Kazunobu Doi, each of whom is a citizen and resident of Japan. Mr Hideshi Doi has been President since 1961 of a Japanese corporation, Sanko Unyu KK ("Sanko"). Mr Hidekazu Doi, who gave evidence in the present proceeding, is President of the defendant and since 1986 has also been Managing Director of Sanko. He agreed in cross-examination that Glorious was set up as a "one ship company" so as to acquire the use of the Panamanian flag of convenience.

The ship "Golden Glory" was built in Japan and launched in November 1981. Its port of registry is Panama in the Republic of Panama. The ship was acquired by the defendant in about February 1988. It has stainless steel tanks suitable for the carriage of oil, molasses and chemicals. On 28 June 1988, Glorious entered into a time charter party of the ship for 7 years to a Japanese corporation Eiyu Kaiun Co. Ltd ("Eiyu Kaiun"). Eiyu Kaiun time chartered the ship to another Japanese corporation, which in turn chartered it to Dorval Tankships Pty Ltd.

The evidence includes details of negotiations for the sale of the ship conducted from late January 1991 until mid-April 1991. The position of Glorious is that negotiations for the sale by it of the vessel were then broken off, whilst Bakri contends that by that stage there was already in existence a concluded agreement which Bakri remains, on its part, ready and willing to perform.

No less than four ship broking firms participated in the negotiations. They were Far East Shipping & Trading Co. Limited ("FEST"), Seascope Shipping Limited ("Seascope"), Cairnhope Shipping Co. Limited ("Cairnhope") and Portshire Limited ("Portshire"). Seascope, Cairnhope and Portshire are based in London and FEST in Tokyo. Those with principal carriage of the matter for the respective brokers were Mr Noda and Mr Obata (FEST), Mr Staffan Bulow and Mr Julian Kinross (Seascope), Mr Paul Messenger (Cairnhope), and Mr Jeremy

Liddell (Portshire). At the trial, Mr Messenger and Mr Liddell gave evidence. No evidence was given by any representative of FEST or Seascope. Portshire acted in the negotiations on behalf of Bakri, the proposed buyer of the ship. FEST acted for Glorious, the proposed seller of the ship. At the trial, there was initially a denial by Glorious as to the nature and scope of the authority of FEST. But, in address, counsel for Glorious took the position that whilst it did not concede the point, it did not seek to refute the propositions, which I accept, put by counsel for Bakri in support of the existence of FEST's authority to bind Glorious in all relevant respects.

Mr Liddell gave evidence that it is well known in the European ship broking market that Seascope is a broker which does all, or at least the vast majority, of the business which FEST does in Europe. The evidence also indicates that it is not unusual in a transaction such as the present for there to be a string of brokers interposed between the two principals. Whilst FEST acted with the authority of the defendant and Portshire with the authority of the plaintiff, in their submissions counsel for both parties accepted that neither Seascope nor Cairnhope was directly in a comparable position. Counsel for the defendant described the role of these two brokers as "middle men" with no additional authority from either principal to bind it in respect of any material that was passed backwards and forwards along the chain of communication; cf. De Bussche v Alt (1878) 8 Ch D 286. I

accept that submission. The evidence also indicates that in such situations brokers, including intermediaries and middlemen, receive commission for their part in, as Mr Messenger put it, "developing and negotiating the transaction".

The Trade

In dealing with a commercial contract, the court should know the commercial purpose of the alleged contract, something which presupposes knowledge, inter alia, of the market in which the parties are operating; see Reardon Smith Line v Hansen-Tangen [1976] 3 All ER 570 at 574 per Lord Wilberforce; Codelfa Construction Pty Ltd v State Rail Authority of N.S.W. (1982) 149 CLR 337 at 350 per Mason J. Counsel for the plaintiff submitted that the evidence of industry practice might be taken into account, in particular, in assessing the submission that the circumstance that the parties contemplated that an agreement reached by them would be followed by the execution of a memorandum of agreement, did not prevent the immediate creation of a concluded contract. I accept that the intention of the parties should be ascertained from the terms of the relevant documents in the objective framework of facts within which the alleged contract came into existence, including the practices in the trade.

Further, a significant element in the negotiations which the plaintiff contends gave rise to a concluded contract, was provided by faxes and telexes relayed along the chain of communication between Portshire at one end and FEST at the

other. Various abbreviations and terms are used in that material which have a meaning that is not immediately apparent, but which is well understood between ship brokers. I have received evidence from Mr Messenger and Mr Liddell with respect to those usages and related practices in the trade. It is best to turn to this before coming to the terms of the negotiations in question.

A "recap" telex is one which sets out the terms which have been agreed between the parties. The "recap" may either be "clean" or it may be expressed to be subject to certain conditions or events (described as "subjects"). A "clean recap" means that the parties are in agreement, and the recap telex then summarises the terms agreed as a result of previous communications. If the parties have not reached that stage, and they are not yet ready to consider themselves bound, the "recap" will contain "subjects". This may be for various reasons. For example, the seller may need to have the agreement approved by a third party such as a bank holding a mortgage on the ship, or the buyer may not yet have inspected the ship to ensure that it is in good condition. Further "recaps" may contain a "subject" providing for approval to be given by a company board within a certain period, thereby giving that party time to reflect before formally committing itself.

The brokers act on the footing that where the terms summarised in a "recap" include "subjects", the terms of the

recap will not reflect a binding agreement unless and until each party lifts all of that party's outstanding "subjects". Of course, the effect in law of a "recap" before it is lifted is for the Court to decide. The understanding in the trade is that in a case where a "recap" contains, for example, two subjects, one on the buyer's side and one on the seller's side, the seller has the right to withdraw until such time as it declares that its subject is lifted, and the buyer has the right to withdraw at any time until it declares that its subject has been lifted; as soon as each party declares its outstanding subject lifted, that party is regarded as committed to the sale or purchase of the ship.

When a clean recap has been achieved, the brokers then set out the principal terms in a Memorandum of Agreement ("MOA") which adapts as appropriate the provisions of a set of standard terms, for example that known as the "Norwegian Saleform". It would be impractical for the brokers continually to send draft versions of the MOA up and down the chain of brokers; accordingly, the terms are agreed between the parties (and recapped as I have described), then a memorandum of agreement is drawn up reflecting the terms agreed and incorporating the standard terms. It is rare for the MOA to be drawn up before all subjects have been lifted. In most instances, the MOA will be drawn up subsequently and will reflect the consensus reached pursuant to the earlier exchange of telexes.

The circumstances that the clean recap precedes, and contemplates, the completion of the MOA is not inconsistent with the proposition that at this earlier stage the parties have entered into contractual arrangements. The English Court of Appeal so held upon the particular facts before it in The "Blankenstein" [1985] 1 Lloyd's Rep. 93 at 97-98, 104-105. In a given case, the execution of a formal contract may be, not a condition of the existence of a binding agreement, but a condition of the performance of an agreement by which the parties are immediately bound: Godecke v Kirwan (1973) 129 CLR 629 at 639-640 per Walsh J. Further, the law implies a duty requiring each party to co-operate in the doing of acts which are necessary to the performance by that party, or by the parties, of fundamental obligations under their contract: Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596 at 607, per Mason J.

The understanding in the trade is that when there is a "clean recap", either initially, or because all subjects have been lifted, it is thereafter not open to a party to fail to proceed. Mr Messenger said he had no experience of a party seeking to "get out of" such an engagement. Mr Liddell gave evidence to the same effect. Nevertheless, litigation does from time to time arise. A recent example is The "Blankenstein" (supra) where the English Court of Appeal held that a concluded agreement had been reached by exchange of telexes between the brokers, with a "clean recap", in advance of the execution of a formal memorandum of agreement in the

Norwegian Saleform. The Court (supra at 98, 104-105) had regard to evidence that the shipping market would regard the "clean recap" as giving rise to a "binding" contract of sale.

What is the legal character to be given to "subjects" at a stage where as yet there is no clean recap? No doubt there can be no universal proposition applicable to all cases. In Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537 at 551, Mason J. said:

> "There is an obvious difference between the condition which is precedent to the formation or existence of a contract and the condition which is precedent to the obligation of a party to perform his part of the contract and is subsequent in the sense that it entitles the party to terminate the contract on non-fulfilment. In the first category the transaction creates no rights enforceable by the parties unless and until the condition is fulfilled. In the second category there is a binding contract which creates rights capable of enforcement, though the obligation of a party, or perhaps of both parties, to perform depends on fulfilment of the condition and non-fulfilment entitles him to terminate."

Further, as Mason J. also pointed out, supra at 552, the law tends to favour a construction which leads to the result that a stipulation of such a character is a condition precedent to performance rather than a condition precedent to the formation or existence of a contract, that is to say, that there is a binding contract which makes the stipulated circumstance a condition precedent to the duty to perform; further, the party for whose protection such a condition is inserted may waive

it. It will be necessary further to consider these principles as they apply to the present facts, after I have dealt with those facts.

The Recap

The story begins on 25 January 1991 when Mr Noda, of FEST, informed Seascope that whilst the "Golden Glory" was not yet officially for sale, FEST had been requested by the owner "to check market price privately". Mr Bulow of Seascope approached Mr Messenger of Cairnhope. Cairnhope had on previous occasions acted in relation to purchases by Portshire for Bakri, and Mr Messenger told Mr Liddell of Portshire that he had been approached on behalf of the owners of the "Golden Glory", a ship which might interest Portshire's client Bakri. He said that the ship was a 12,000 deadweight ton chemical, oil and molasses carrier with stainless steel tanks. Mr Liddell then came back to Mr Messenger with a request for further information, and on 28 January 1991 this was sought by Cairnhope from Seascope by the first of a series of telexes and faxes passing between the brokers. It is unnecessary to describe the terms of those communications.

Eventually, on 19 February 1991, FEST sent to Seascope a telex (document 190212 in the Agreed Bundle). In reading that telex, it should be borne in mind that the practice in the trade is that a broker will describe commission payable to the buyer and other brokers between him and the buyer as commission payable "your end"; with offers passing in the

other direction, that is to say from the buyer to the seller, a broker on passing the offer on to the next broker will in that offer describe commission as being payable "our end". This includes the commission sought for the buyer and all brokers up to and including the buyer.

The text of the telex of 19 February 1991 from FEST to Seascope, so far as is material, was as follows:

"RECAP AS FOL:

M/T 'GOLDEN GLORY' - A/C BAKRI NAVIGATION CO, LTD.

1. PRICE USD13.10 MIL CASH LESS 4 PCT AT YOUR END.

   10 PCT DEPOSIT TO BE LODGED IN JOINT A/C OF BUYERS AND SELLERS WITHIN THREE WORKING DAYS OF SIGNING MOA AND ALL SUBJECTS LIFTED, AT THE JAPAN CREDIT BANK, HEAD OFFICE.

   THE REMAINING 90 PCT UPON DELIVERY AGAINST DELIVERY DOCUMENTS MUTUALLY AGREED.

   CLOSING IN TOKYO.

2. THE VESSEL TO BE DELIVERED CHARTER FREE AT SAFE PORT, SAFELY BERTHED ALONGSIDE, OR AT A SAFE ANCHORAGE, ALWAYS SAFELY AFLOAT IN JAPAN/SINGAPORE RANGE IN SELLERS OPTION, LAYCAN 26 MAY/25 JUNE 1991, TO BE NARROWED, WITH 25 JUNE 1991 CANCELLING DATE IN BUYERS OPTION.

3. VESSEL TO BE DELIVERED PRESENT CLASS MAINTAINED FREE OF RECOMMENDATIONS AND FREE OF AVERAGE DAMAGE AFFECTING CLASS. VESSEL TO BE DELIVERED WITH ALL NATIONAL/INTERNATIONAL TRADING AND SAFETY CERTIFICATES TO BE CLEAN, VALID AND UNEXTENDED FOR A MINIMUM PERIOD OF THREE MONTHS FROM TIME OF DELIVERY. CONTINUOUS SURVEY CYCLES ON HULL AND MACHINERY TO BE FULLY UP TO DATE AT TIME OF DELIVERY. VSL TO BE DELIVERED IN SUBSTANTIALLY THE SAME CONDITION AS WHEN INSPECTED, FAIR WEAR AND TEAR EXCEPTED. DELIVERY WITH ALL TANKS CLEAN AND GASFREE.

4. USUAL DRYDOCKING CLAUSE ACCORDING TO CLAUSE SIX OF NORWEGIAN SALE FORM 1987 WITH BUYERS RIGHT TO ATTEND

AND ARRANGE PAINTING OF VESSELS UNDERWATER PARTS IN DRYDOCK AND TO UNDERTAKE OTHER MINOR WORKS AT BUYERS EXPENSE INCLUDING OVERHAULING SEA VALVES AND LOWER ANCHOR/CHAINS (LABOUR, PAINT AND ANY EXTRA TIME REQUIRED FOR THIS PURPOSE TO BE FOR BUYERS ACCOUNT).

5. VESSEL TO BE DELIVERED WITH EVERYTHING BELONGING TO HER ON BOARD, ASHORE AND ON ORDER INCLUDED IN THE SALE INCLUDING NAVAIDS AND WIRELESS EQUIPMENT AND SPARE PARTS TO MINIMUM CLASS REQUIREMENTS SUBJECT TO PROVISIONS OF CLAUSE SEVEN OF MOA.

BUYERS SHALL TAKE OVER REMAINING BUNKERS AND UNBROACHED LUBEOILS AND PAY NET CONTRACT PRICE AT PORT AND DATE OF DELIVERY.

EXCLUDED FROM SALE:-

A/ HIRE EQUIPMENT I.E. 5 BUTTERWORTH MACHINES

B/ MASTERS/OFFICERS PERSONAL EFFECTS

C/ SLOP CHEST

D/ CHARTERERS PROPERTY I.E. TANK CLEANING DETERGENTS

6. OTHERWISE TERMS TO BE MUTUALLY AGREED BASED ON NORWEGIAN SALE FORM 1987.

ARBITRATION IN LONDON.

7. SUBJECT INSPECTION OF VESSEL AND VESSELS RECORDS, DECLARABLE 7 DAYS AFTER COMPLETING INSPECTION/S. BUYERS UNDERTAKE TO INSPECT VSL AT EARLIEST OPPORTUNITY.

8. THIS TRANSACTION TO BE KEPT STRICTLY PRIVATE AND CONFIDENTIAL. OWNERS WARRANT THAT VESSEL IS NOT BOYCOTTED/BLACKLISTED BY ARAB LEAGUE.

AFTER MOA SIGNED AND 10 PCT DEPOSIT LODGED BUYERS RIGHT TO PLACE UP TO 2 REPS ONBOARD VESSEL UNTIL TIME OF DELIVERY FOR FAMILIARISATION PURPOSES.

10. SUBJECT TO BUYERS BOARD APPROVAL DECLARABLE 10 RUNNING DAYS AFTER RECAP OF MAIN TERMS.

11. SUBJECT TO SELLERS BOARD APPROVAL DECLARABLE WITHIN 20 RUNNING DAYS AFTER RECAP OF MAIN TERMS.

12. SUBJECT TO CHARTERERS APPROVAL DECLARABLE WITHIN 20 RUNNING DAYS AFTER RECAP OF MAIN TERMS.

END OF RECAP"

The name of the seller's bank in clause 1 of the FEST telex, it was later clarified, should have read "NIPPON CREDIT BANK LIMITED", rather than "JAPAN CREDIT BANK". FEST went on in the telex to comment that Seascope should obtain the buyer's acceptance to the recap while FEST would obtain the seller's reconfirmation the next day, the hope of FEST being that the "countdown" would start from 20 February. Seascope passed the text of the telex on to Cairnhope (by telex from it to Cairnhope) and Cairnhope in turn did so by telex to Portshire. The immediate response by telex from the buyer's side on the same day, 19 February, was that there had been insufficient time to study the recap in detail and to provide "FORMAL CONFIRMATION" but that "BUYERS OPINION OF RECAP IS JUST THAT - I.E. TERMS HAVE BEEN AGREED AND RECAP IS MERELY A SUMMARY".

On the next day, 20 February 1991, Seascope sent a telex to FEST (document 200201) stating:

> "SELLERS RECONFIRM RECAP PER OTLX YDAY MTIME WAITING BUYERS RECONFIRMATION. COUNT STARTING FROM THE DATE WHEN RECAP RECONFIRMED . . ."

Then, later on the same day, London time, Cairnhope sent a telex to Seascope (document 200217):

> "BUYERS CONFIRM RECAP IN ORDER - THOUGH PLEASE CLARIFY SELLERS BANK AS ONE GIVEN IN RECAP IS DIFFERENT TO THAT PREVIOUSLY MENTIONED AND BUYERS HAVE TO CHECK STATUS OF CORRESPONDABILITY (??) WITH THEIR BANK."

In my view, there was thereby concluded a contract between Glorious and Bakri for the sale and purchase of the ship. It included a term that arbitration be in London in accordance with the provisions of the Norwegian Saleform. This is so, even though the MOA, which was to be based on the Norwegian Saleform 1987, had yet to be drawn up. I have referred to the applicable principles when discussing The "Blankenstein", supra, and Godecke v Kirwan, supra. But the recap was not a clean recap, having four subjects, two on each party's side. The subjects are to be regarded as conditions precedent, in the sense discussed by Mason J. in Perri's Case, supra, to the obligation to perform and complete the transaction of sale and purchase. Consistently with the practice in the industry, a party would be bound to proceed to completion only when that party had declared its outstanding subjects to be lifted, or had otherwise waived or treated them as satisfied.

Further, the contract which came into existence in the manner I have described, was, like any other contract, susceptible to subsequent variation by further agreement between the parties, in the sense described by Taylor J. in Tallerman & Co. Pty Limited v Nathan's Merchandise (Victoria) Pty Limited (1957) 98 CLR 93 at 144. His Honour then approved the following passages from Salmond and Williams on "Contracts", 2nd ed., 1945, p. 489, as to the manner in which an agreement by way of variation operates:

> "Partial rescission is not the extinction of the contract but the variation of it.
> . . .
>
> A contract may be varied (1) by way of partial rescission without the substitution of new terms in place of those rescinded, or (2) by way of partial rescission with the substitution of new terms for those rescinded, or (3) by the addition of new terms without any partial rescission at all."

See also Dan v Barclays Australia Limited (1983) 57 ALJR 442 at 448-449.

This is what happened in the present case. In at least two instances there was an agreed mutual abandonment of existing rights with replacement or conferment of new rights. First, on 14 March 1991, the provision in clause 1 for the price was varied so as to be US$12.98m; thus, there was an agreed partial rescission with substitution of a new term. Agreement also was reached in March to maintain the current time charter to permit one Australian round voyage. It was agreed that this was to be provided for in a "side agreement" to the MOA whereby, upon delivery to Bakri, the ship would be entered into a charter from Bakri to Glorious for one Australian round voyage for a duration of approximately 60 days, to which the provisions of the time charter dated 28 June 1988 would apply with some modifications.

Consistently with the principles set out above, Bakri and Glorious might also effect a variation of the contract as regards the terms of a "subject" which at the time of the

variation had yet to be lifted by the party for whom it had been included; the newly agreed subject would then stand until lifted. This is what befell clause 7 of the recap.

The "Subjects" in the "Recap"

As I have said, the recap telex was not "clean". It contained four "subjects", two on the buyer's side (clauses 7 and 10) and two on the seller's side (clauses 11 and 12). Clause 12 referred to the charterer's approval; I have earlier referred to the time charter to Eiyu Kaiun. Clause 10 was lifted by Bakri on 3 March 1991. Clauses 11 and 12 were lifted by Glorious on 15 March 1991. It should be noted that the lifting of subjects by both buyer and seller was preceded by various exchanges but communicated in clear (if abbreviated) terms. Thus, the lifting of clause 10 was communicated to FEST by stating: "BAKRI LIFT THEIR BOD APPROVAL AND ARE OUTRIGHT IN THAT RESPECT . . .", and the lifting of the subjects in clauses 11 and 12 was communicated by FEST stating that Glorious "NOW DECLARED SUBJECT BOARD/ CHRTRS APPROVAL LIFTED".

The buyer's "subject" in clause 7 gave rise to difficulties which became the focus of this litigation. This "subject" had two elements, the inspection of the ship's records and the inspection of the ship itself. The first of these was lifted on 5 March 1991 when Seascope notified FEST "BUYERS LIFT THEIR CLASS RECORDS INSPECTION SUBJECT". But in the period before Glorious, as it would have it, broke off

negotiations on 16 April 1991, there was no communication by which, in terms, Bakri lifted the balance of the subject in clause 7. What happened was as follows.

Inspection was an important matter to Bakri. It had never purchased a tanker without first inspecting all the tanks and in the present case inspection was particularly important because the ship was a chemical tanker with stainless steel tanks. FEST was apprised of this concern, in direct terms, on 4 April 1991. Earlier, a partial inspection was carried out on 23 February 1991 when the vessel was in Newcastle, in Australia. On 5 March 1991, Seascope notified FEST that there was a balance of 5 stainless steel tanks and three wing tanks which had not been inspected, and that it had been told that Bakri would require inspection of each and every tank. Bakri sought a proposal by Glorious of a new amendment to the recap which would reflect its concern. A proposed amendment was provided by FEST to Seascope on 8 March 1991 (document 080302). FEST suggested an amendment of clause 7 of the recap so as to read:

> "THE FIRST VSLS INSPECTION HAS BEEN COMPLETED IN AUSTRALIA ON FEBRUARY 23, 1991 AND ACCEPTED BY THE BUYERS EXCEPT TANKS 1C 3-6C 4P+S 5P, ALL WBT (DBL BOTTOM) AND COFFERDAMS.
>
> SUBJECT TO 2ND VSLS INSPECTION TO BE CARRIED OUT ON OR AROUND MARCH 27, 1991 AT MUKAISHIMA DOCKYARD, DECLARABLE WITHIN 5 RUNNING DAYS AFTER THE INSPECTION COMPLETED. THE SELLERS SHALL RENDER MAXIMUM COOPERATION FOR SUCH INSPECTION BUT NOT TO INTERFERE THE SELLERS WORKS/ OPERATIONS.

CLASS RECORDS HAS BEEN INSPECTED AND ACCEPTED BY THE BUYERS."

On the same day, Seascope responded "RECAP OK". By this means there was a variation of the contract, as regards clause 7 of the recap. But that was not to be the end of the matter. The procedure specified in the new subject did not prove practicable. The result was a further proposal.

Physical Inspection of the Ship

Inspections in Japan in late March, as stipulated in the new subject in clause 7, and with Mr Kazunobu Doi in attendance together with a representative of Bakri, were unsuccessful. A partial reason for this was difficulties in communication between Glorious and the time charterer. For its part, Glorious accepted that it would be best to have no outstanding matters left after physical delivery of the ship to Bakri. The question was one of reaching a mutually acceptable modus vivendi so that the matter might proceed to settlement. It will be recalled that, save for physical inspection, the other subjects had all been lifted by 15 March. On 4 April 1991, after detailing difficulties of Glorious with the charterer, FEST indicated in a telex to Seascope (document 040403) that Glorious, like Bakri, did "NOT WANT MATTERS OPEN AFTER [delivery]". FEST continued:

"UNDER THE CIRCUMSTANCES, PRACTICAL SOLUTION IS STILL (1) TO CARRY OUT DELY IN DRYDOCK REGION MAY 26/JUNE 25 WITH RESERVATION TO INSPECT 345C AND (2) TO

> CARRY OUT INSPECTION 345C UPON REDELY OF VESSEL UNDER TC BACK.
>
> [The reference to redelivery is to delivery on termination of the additional time charter for one more round voyage to Australia which had been agreed upon between the parties.]
>
> IN THIS CONNECTION, UPON DELY OF THE VSL, THE SELLERS SHALL ISSUE 'LETTER OF UNDER-TAKING' TO THE EFFECT THAT THE SELLERS SHALL UNDERTAKE ANY REPAIR CENTER TANKS 3/4/5 AT THEIR TIME/COST, IF ANY DEFECTS FOUND BUT NOT LIMITED TO PITTING/ CRACKING/RUST/-DECOLOURATION.
>
> ANY DISPUTE IN THIS CONNECTION TO BE BROUGHT INTO NK SURVEYOR AS UMPIRE.
>
> ALL CARGO TANKS OTHER THAN 345C HAVE BEEN INSPECTION AND ACCEPTED.
>
> PLS AGREE."

On 8 April telexes passed along the line of brokers indicating that the wording suggested by FEST in document 040403 was acceptable to Bakri. In particular, on that day, Seascope sent to FEST a telex (document 080411) which included the following:

> "PLEASED TO ADVISE SELLERS LAST FOUND ACCEPTABLE TO BUYERS AND THEREFORE DEAL NOW CONFIRMED.
>
> ONE PROVISO THAT MUST BE REGISTERED IS THAT WORDING FOR 'LETTER OF UNDERTAKING' HAS TO BE APPROVED BY BUYERS LAWYERS WHICH SURE SELLERS CAN APPRECIATE.
>
> KINDLY DRAW UP MOA AND SEND OVER TO US FOR BUYERS APPROVAL.
>
> . . .
>
> NOTE BUYERS LAWYERS ARE LIKELY BE SINCLAIR ROCHE.

LETTER OF UNDERTAKING AS AGREED WILL BE FROM PARENT COMPANY LETTERHEAD AND KINDLY SEND OVER PROPOSAL OF SAME SOONEST.

ALTHO BAKRI HAVE TAKEN A FEW DAYS TO BE ABLE ACCEPT SELLERS TOUGH CONDITIONS ABOUT NO INSPECTION OF THE LAST TANKS THEY HAVE AT LAST DONE IT AND WE ASK YOU TO KINDLY PROVIDE ALL ABOVE NECESSARY WORDINGS ETC SOONEST POSSIBLE, EVEN PRIOR OUR OPENING TOMORROW IF POSSIBLE.

THANK YOU FOR EVERYTHING SOFAR AND LET'S NOW CLEAR UP THESE SMALL LITTLE DETAILS PROMPTLY.

ALSO KINDLY THANK SELLERS FOR THEIR PATIENCE OVER THE LAST FEW DAYS."

Counsel for Bakri submitted that the words in the first paragraph particularly "and therefore deal now confirmed" showed that the parties now accepted that their contract for sale and purchase of the ship was freed from any outstanding subject in clause 7 and that, in lieu thereof, it was now a term of the agreement that upon delivery of the ship by Glorious, it would issue a letter of undertaking in the terms specified. But counsel for Glorious emphasised that whilst in document 080411 Seascope indicated that the suggested wording from FEST in document 040403 had been found acceptable to the buyer, and stated "and therefore deal now confirmed", nevertheless the buyer introduced new material into the equation. This was done by the references to the approval of the letter of undertaking by the buyer's lawyers, and to the letter of undertaking as coming from the parent of Glorious in a form to be proposed promptly by FEST.

The telex which is document 080411 was transmitted from London at 5.48 p.m. on 8 April 1991. The use of the phrase "as agreed" in the statement in the sixth paragraph "LETTER OF UNDERTAKING AS AGREED WILL BE FROM PARENT COMPANY LETTERHEAD . . ." is a reference to communications which had passed between some of the parties in the period after document 040403 had been passed from Seascope to Cairnhope on 4 April 1991. On receipt of the FEST proposal, through the medium of Mr Bulow of Seascope, Mr Messenger of Cairnhope told Mr Bulow that FEST could not be serious if they were just talking about a guarantee from a single ship owning Panamanian company, and that Glorious would have to give a bank guarantee or a guarantee from its financiers. Mr Bulow then had a conversation with Mr Noda. He told Mr Noda that Bakri could never accept a letter of undertaking from a Panamanian one ship company as it would have no assets and be completely cleared out on the sale of the ship. Mr Noda told him that the letter of undertaking would be given in the parent company name. Then, on 8 April 1991, before sending the telex from Seascope to FEST (document 080411), Mr Bulow told Mr Messenger that the seller had confirmed that "the letter of guarantee" would come from the parent company.

In my view, the events which took place between 4 and 8 April 1991 are to be construed as giving rise to a contractual variation. In place of the buyer's replacement subject as to inspection of the ship, set out in document 080302, the parties now agreed to be bound, without any further or other

condition precedent to their obligations to perform the subsisting contract for sale and purchase of the ship. But that contract was varied so as to include a term whereby upon delivery of the ship, a letter of undertaking would be issued by the parent company of Glorious, to the effect specified in document 040403. The form of the undertaking was to be approved by Bakri's lawyers before it was issued, i.e. before delivery of the ship. The circumstance that the terms of the undertaking to be given to Bakri required prior approval of its solicitors, did not mean that the parties had not achieved forthwith a contractual variation of their bargain. In Godecke v Kirwan, supra at 645-646, Gibbs J. collected and discussed authorities illustrative of the proposition that it is no objection that the power to determine terms, even essential terms, to be incorporated in a contract is left to the solicitors for one of the parties. Here, rather less was involved, namely the approval of the wording of the undertaking proffered from the seller's side, as reflecting the intentions of both the parties indicated in the telexes, documents 080403 and 080411. In the meantime, the preparation of the MOA (and side agreement) was to continue, with the tender of drafts by Glorious to Bakri.

On 9 April 1991, Tokyo time, FEST sent to Seascope a fax including a draft of the MOA, side agreement and letter of undertaking. The letter of undertaking was as follows:

"WE, GLORIOUS SHIPPING S.A., PANAMA SHALL UNDERTAKE ANY REPAIR TO THE CENTER CARGO

> TANKS NO. 3/4/5 AT OUR TIME AND COST IF ANY DEFECTS ARE FOUND, BUT NOT LIMITED TO PITTING, CRACKING, RUST, AND DECOLORATION WHEN THE ABOVE-MENTIONED TANKS ARE INSPECTED AT TIME OF REDELIVERY OF THE VESSEL UNDER THE SIDE AGREEMENT EXECUTED BY AND BETWEEN YOUR GOODSELVES ACTING AS OWNERS AND OURSELVES ACTING AS CHARTERERS, A TRUE COPY OF WHICH IS PER HERETO ATTACHED.
>
> ANY DISPUTE THEREFROM SHALL BE BROUGHT INTO NK SURVEYOR AS A UMPIRE."

These terms reflected those suggested in document 040403, but were expressed as an undertaking by Glorious, rather than its parent. Accordingly, late in the same day, London time, Seascope responded (document 090416) with a telex to FEST as follows:

> "MANY THANKS FAX AND APPRECIATE VERY MUCH YR HARD WORK IN THE OFFICE UNTIL VERY LATE HOURS.
>
> WHEN WE DISCUSSED LETTER OF UNDERTAKING ON THE PHONE NODA SAN TOLD ME THAT OWNERS WOULD GIVE SAME IN PARENT COMPANY NAME AS BUYERS CAN NEVER ACCEPT SAME ON PANAMANIAN ONE SHIP COMPANY AS THIS WILL HAVE NO ASSETS AND COMPLETELY CLEARED OUT ON SALE OF THE VESSEL. THIS IS VERY IMPORTANT POINT SO PLS TRY TO RECONFIRM THIS PRIOR TO OUR OPENING."

At 7.11 a.m., London time, on the next day, 10 April 1991, Seascope sent a telex to FEST (document 100410) as follows:

> "DID YOU OBTAIN RECONFIRMATION THAT LETTER OF UNDERTAKING WILL BE FROM OWNERS PARENT COMPANY?"

There was a quick response from FEST in Tokyo. Later in the morning of 10 April 1991, Mr Bulow received from Mr Obata a fax (document 100419) stating:

> "Thanks your telex yesterday [i.e. document 090416] and today, [i.e. document 100410], we hereby attached [sic] typed draft of M.O.A., Side Agreement and Undertaking Letters of the captioned vessel."

The accompanying documents were then passed on to the other London brokers. There were two undertakings. The first was from Glorious in the terms previously set out from document 090407. The second was a letter of undertaking stating:

> "We, SANKO UNYU CO., LIMITED, as mother company of GLORIOUS SHIPPING S.A., Panama, hereby warrant about their performance to cover the undertakings per their letter addressed BAKRI NAVIGATION CO., LTD., Jeddah or its fully subsidiary company dated April , 1991 relating to sale and purchase of M/T GOLDEN GLORY."

At that stage, the buyer had received the draft text of the undertaking which would be provided on delivery of the vessel, in accordance with the agreement for sale and purchase, initially made on 20 February 1991 and later varied, on 8 April, in the manner I have described. But there was now a delay in settling the draft documents to be provided in implementation of the agreement for sale and purchase.

On 15 April 1991, Seascope sent a telex to Cairnhope (document 150403) stating:

> "SELLERS ARE EXPRESSING THEIR ASTONISHMENT OVER HAVING NO REPLY WHATSOEVER FROM BAKRI FOR A WEEK NOW. THEY WOULD VERY MUCH LIKE TO HAVE THIS MATTER ALL CLEARED SOONEST POSSIBLE AND ARE ASKING FOR THE BUYERS REPLY WITHIN JAPANESE CLOSING TIME TODAY.
>
> THE CONTRACT, SIDE LETTER AND ADDENDUM WERE ALL DRAWN UP VERY QUICKLY BY THE SELLERS SIDE AND WE WOULD EXPECT PROMPT REPLY FROM THE BUYERS ON SAME.
>
> WE ARE RECEIVING A LOT OF PRESSURE FROM THE SELLERS WHO SEE NO POINT IN LEAVING ANY LOOSE ENDS. ALSO IT WOULD BE IN BAKRI'S INTEREST TO GET CONTRACT SIGNED AND DEPOSIT UP ORDER GET HIS REPS ONBOARD."

The steps referred to in the last paragraph were those in clauses 1 and 8 of the recap of 19 February 1991. On 15 April 1991, FEST sent a telex to Seascope (document 150406) stating:

> "AWAITING ANY BUYERS COMMENTS FOR DRAFT OF MOA, SIDE AGREEMENT AND U/L."

The reference to "U/L" is to be read as "Letters of Undertaking". At this stage, then, the seller was pressing the buyer to deal with the outstanding "loose ends". On the same day, Cairnhope responded to Seascope (document 150407):

> "PLEASE EXPRESS TO SELLERS BUYERS APOLOGIES FOR NOT YET REPLYING OVER DRAFT M.O.A. THIS HAS BEEN CAUSED BY HEAVY COMMITMENTS ON OTHER URGENT BUSINESS, AND ALL THIS TAKING PLACE OVER RAMADAN

> RELIGIOUS PERIOD WHICH AS SELLERS MAY KNOW DOES DELAY BUSINESS IN MUSLIM AREAS. TODAY IS SIGNIFICANT IN BEING LAST DAY OF RAMADAN.
>
> BUYERS HAVE COMMENCED REVIEWING THE RELEVANT DETAILS AND WE EXPECT THEIR FORMAL REPLY TOMORROW.
>
> KINDLY REQUEST SELLERS TO KEEP PATIENT, AND BUYERS WILL BE REVERTING ASAP.
>
> (AS BROKERS WOULD COMMENT THAT BUYERS TEND TO VIEW MOA DETAILS AS FORMALITIES. HENCE WHEN TIME SHORT SUCH MATTERS DON'T ALWAYS GET THEIR TOP PRIORITY. HOWEVER, PLEASE BE ASSURED WE ARE DOING ALL WE CAN TO PUSH THIS ALONG. CERTAINLY THIS DELAY MUST NOT BE MISINTERPRETED WRONGLY. PLEASE KEEP SELLERS PATIENT -)"

This message was relayed, on the same day, by telex from Seascope to FEST. On the morning of 16 April 1991, London time, Seascope sent a telex to Cairnhope (document 160402) stating:

> "OWNERS THANK YOU FOR YR TELEX YESTERDAY WITH EXPLANATION FOR LONG DELAYS AND ARE EXPECTING YOUR REPLY WITHIN TODAY WITHOUT FAIL."

At this stage, one might have expected the sale and purchase to proceed uneventfully to completion. The parties were not conducting their affairs on the footing, as counsel for Glorious would have it, that there was outstanding a "conditional counter offer" by Bakri and in the meantime no contractual relations between them. They were dealing with outstanding "formalities" to consummation of their contract by completion of the sale and purchase of the ship pursuant to

the recap of 19 February and subsequent variations thereof. Then, on 16 April 1991, FEST sent a telex (document 160405) in which events took an abrupt turn. The telex read:

> "VERY REGRET TO ADVISE YOU THAT THE SELLERS HAVE NOW DECLINED TO PURSUE THIS NEGOTIATION WITH BAKRI BECAUSE DELAYED RESPONSE OF BAKRI TO MOA DRAFTS AND WORDINGS OF UNDERTAKING ETC NOW CAUSED GREAT SUSPISION [sic] OF THE CREDITORS WHO OFFICIALLY INSTRUCTED SELLERS TO DISCONTINUE NEGOTIATION/TRANSACTION.
>
> WE HAVE TRIED TO PERSUADE THE SELLERS TO BE PATIENT BECAUSE OF RAMADAN ETC BUT THOSE PARTIES SUCH AS CREDITORS/CHRTRS WERE TOTALLY UPSET AND THEIR CONCLUSION NOT RESTORED.
>
> UNDERSTAND THE VESSEL TO BE KEPT EMPLOYED BY THE PRESENT CHRTRS."

Finally, on 19 April 1991, Messrs Sinclair Roche & Temperley, London solicitors for Bakri, sent a fax directed to Mr Hidekazu Doi in Tokyo which included the following paragraph:

> "Our clients have informed us that they have completed their review of the draft MOA and after conforming the same to the agreed terms are arranging execution thereof as well as payment of the 10% deposit. We in turn have reviewed the draft letters of Undertaking, as drafted by yourselves and would ask that these be issued without delay . . . [W]ould you please confirm by close of business in London on Monday 22nd April 1991 that you are preparing the documentation referred to in Clause 8 of the MOA, failing which our clients must reserve their right to take such further steps as they think necessary to protect their position, including arrest of the Vessel, without

> further reference to Sellers. We await hearing from you accordingly."

As I have indicated, the ship was arrested on 28 April 1991.

Conclusions as to Question (1)

At the trial, various issues were agitated, but by the time addresses were taken, the area of dispute upon question (1) had been narrowed considerably. As I understood the defendant's submissions, it was denied that the recap of 19 February 1991 and the "reconfirmation" by Bakri on 20 February gave rise to any contract at all between the parties. I have given what in my view is the correct characterisation in law of those dealings between the parties, and I reject the defendant's submission in that regard. It was upon the footing that there was no prior and subsisting contractual relationship that the defendant approached the dealings between the parties in early April 1991. The submissions upon this aspect of the case thus, in my view, proceeded upon a false premise. But upon the analysis of the dealings of the parties before April 1991 which I accept, it is still necessary to determine whether in April the parties effected a contractual variation in the sense described in the authorities to which I have referred earlier in these reasons. The issue is not whether the parties then entered into contractual relations for the first time. It is whether they effected the variation of their subsisting contract to provide a regime for physical inspection of the ship after delivery to Bakri, or whether they failed to do so, so that (a) clause 7

remained in the form as substituted on 8 March 1991, and (b) this subject had not been lifted by Bakri before Glorious broke off its dealings with Bakri on 16 April 1991.

Counsel for Glorious submitted that upon a proper analysis of the telex of 8 April 1991 (which is document 080411) Bakri was stating, through the medium of Seascope, that in lieu of its subject in clause 7 of the recap, dealing with physical inspection of the ship, Bakri would agree to purchase the ship on the otherwise agreed terms, provided that a letter of undertaking was forthcoming from the parent of Glorious, and further provided that the terms of that letter of undertaking were approved by Bakri's lawyers. Counsel then submitted that on a true analysis this amounted to a "conditional counter offer" which, in truth, is no offer at all. That was said to be so because in effect Bakri's "offer" stipulated that it would not be bound merely by the notification by Glorious of assent to those provisos, but only upon satisfaction of the condition, inserted for Bakri's own benefit, namely approval by Bakri's lawyers. Glorious accepted that it was to procure the issue by its parent of the letter of undertaking. But the condition in question had not been satisfied before Glorious broke off its dealings with Bakri.

Particular reliance was placed by counsel for Glorious upon the judgment of Wilson J. in Buhrer v Tweedie [1973] 1 NZLR 517. In that case, it was held that no contract for the

sale of a dwelling house had been made. The owner, in response to an offer to purchase, wrote a statement of the terms upon which he was prepared to sell, "subject to final approval of my solicitors", and the response had been "I agree". The condition as to the solicitor's approval was a condition precedent to entry into any contract and until it was fulfilled, the owner was free to withdraw. The decision is one illustration of the operation of principles to which I have referred earlier in these reasons.

But the present case falls to be assessed in the particular circumstances and with due regard to the context in which the form of words in question was used. Thus, I have endeavoured to outline that context in some detail. Consistently with what I have already indicated when discussing the judgment of Gibbs J. in Godecke v Kirwan, supra, I accept the submission of the plaintiff, Bakri, that it would be artificial in the extreme and run counter to the apparent intentions of the parties to analyse what happened as the making by Bakri of a "conditional counter offer". The reference in document 080411 to the "one proviso" was no more than a statement that the form of the undertaking had to be checked by Bakri's lawyers to ensure that it reflected the intentions of the parties as expressed in documents 040403 and 080411.

In my view, at the time of the telex of 16 April 1991, which disrupted the procedures then under way to settlement of

the purchase and sale of the ship, there was in force an agreement for that sale and purchase. It had been entered into as described, on 20 February 1991, and the terms later had been varied as to price and by the provision of a side agreement for a further time charter. All subjects had been lifted, save for the provision in clause 7 as to physical inspection of the ship. Clause 7 had been varied on 8 March 1991 but then replaced by the agreement reached between 4 and 8 April 1991, whereby the parties accepted that, on certain terms, delivery of the ship might go ahead even though inspection of all tanks had not by then been completed.

The first question should be answered "yes".

The International Arbitration Act 1974

It follows from what I have said that the agreement for the sale and purchase of the ship included a term requiring arbitration in London, the terms otherwise being based on the Norwegian Saleform 1987 as the MOA. Clause 15 of that Saleform provides for the contract embodied therein to be subject to the law of the country agreed as the place of arbitration. The United Kingdom is a Convention country within the meaning of the Arbitration Act. Subject to the submissions for Bakri, to which I turn shortly, there was an arbitration agreement to which, by reason of para. 7 (1) (a), the Arbitration Act applied.

However, Bakri submitted that in the events that happened after the institution of the present litigation, and in particular by virtue of the terms of the Deed of Undertaking, there is no longer an arbitration agreement within the meaning of the Arbitration Act. This was said to be because (a) the term "arbitration agreement" is defined in sub-s. 3 (1) as meaning an agreement in writing of the kind referred to in sub-article (1) of Article II of the Convention and (b) this, in turn, requires

> ". . . an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

and (c) the effect of the Deed of Undertaking was to vary the contractual relationship between the parties so as to remove those provisions which answer the description of an undertaking to submit to arbitration. The question of whether there is in effect an arbitration agreement, for the purposes of the Arbitration Act, is, it is submitted, to be answered by looking at the state of affairs as it exists when the application for a stay is made. I accept that submission. But it remains to consider the effect of the Deed of Undertaking. Accordingly, it is necessary to have regard to the terms of that instrument.

The deed is expressed as made 3 May 1991 between the plaintiff ("Bakri") of the first part, the defendant ("Glorious") of the second part, and Sanko of the third part. The deed recites that Glorious is the legal owner of the ship M.T. "Golden Glory", that Bakri claims to be entitled to enforce an agreement with Glorious to acquire the ship, that Glorious disputes the existence of any such agreement, that Bakri has commenced proceedings in this Court seeking to enforce the agreement, and has procured the arrest of the ship pursuant to a warrant issued by this Court. Then it is recited that Sanko is the parent company of Glorious, and that Sanko and Glorious desire the release of the ship, and have agreed to make the covenants set out in the deed in order to procure that release. It is further recited that Glorious has given an undertaking to this Court in the terms of an annexed document "Annexure 'A'"; this reflects the text set out in the early pages of this judgment.

The proper law of the deed is expressed to be the law of England (clause 6). Clauses 1 - 5 are in the following terms:

> "1. Glorious covenants
>
> (a) to comply with the undertaking which is annexure 'A' hereto;
>
> (b) not to enter any charter or other contractual arrangement concerning the use of the ship without the prior written consent of Bakri pending the determination of the proceedings (including any appeals).
>
> 2. Sanko guarantees the performance by Glorious of its covenants contained in clause 1 hereof.

3. (1) This guarantee is a continuing guarantee and is not to be released or discharged by reason of any dealings between Bakri and Glorious whatsoever or for any other reason, and Sanko appoints Glorious its agent for all purposes relating to any acts which may be related to the continuing operation of this guarantee including its agent for the purpose of varying this deed.

(2) Without limiting the generality of the foregoing, this guarantee shall not be released or discharged by

(i) the granting of time or any other indulgence

(ii) the release in whole or part of any security which Bakri holds or might hereafter hold

(iii) any variation to any contract which might exist between Bakri and Glorious concerning the ship or the conduct of these proceedings

(iv) the winding up or dissolution of Glorious, the appointment of a receiver to Glorious, or Glorious being in any way impaired in the exercise of its legal powers.

4. As an independent covenant to those contained in clauses 2 and 3 hereof, Sanko irrevocably, absolutely and unconditionally, as primary obligor and not merely as surety, warrants that Glorious will perform its covenants contained in Clause 1 hereof, and indemnifies Bakri against all loss which Bakri suffers in consequence of any failure of Glorious to perform all or any of the said covenants.

5. In consideration of the foregoing Bakri covenants that pending the outcome of the proceedings (including any appeals therefrom) it will not cause the vessel to be arrested in any port which it might visit. This covenant is given without prejudice to Bakri's right to arrest the vessel in connection with any claim for damages which might hereafter arise."

By the Writ issued out of this Court, the plaintiff sought a declaration as to the existence of a contract and an

order for specific performance thereof. When the deed, particularly clauses 1, 4 and 5, is read together with the terms of the undertaking given the Court on 3 May 1991, it is apparent that the subject matter of the covenants and undertakings was the whole of the proceeding instituted in this Court including the claim to enforcement of the alleged agreement, and not merely the issue of whether any such agreement existed. The parties were not bargaining for a release of the ship on terms, so as to have this Court determine only the question of the existence and terms of the alleged contract.

This proceeding involves the question of whether the agreement as so found should be enforced, and insofar as this dispute is a difference between Bakri and Glorious concerning a subject matter capable of settlement by arbitration as provided for in that agreement, then there has been, in the events that have happened, a subsequent agreement which effects such a variation of the arbitration agreement as is necessary to give effect to the undertakings given the Court and to the covenants set out in the Deed of Undertaking. But the arbitration agreement is not thereby deprived of all effect in all circumstances that may arise from time to time hereafter. I would regard what was achieved as the rendering of the arbitration agreement inoperative or ineffective in respect of the claims involved in the present proceeding in this Court. I would not treat the result as the removal of

the provision for arbitration from the contractual relationship between Glorious and Bakri.

However, that is not the end of the matter. Earlier in these reasons I set out the text of sub-s. 7 (5) of the Arbitration Act which has the result that the order for a stay sought under sub-s. 7 (2) shall not be made if the Court finds that the arbitration agreement is "inoperative or incapable of being performed". In Paczy v Haendler and Natermann GmbH [1981] 1 Lloyd's Rep. 302 at 307, Buckley L.J. (with the agreement of Brightman L.J.) held, in relation to the corresponding British provision, that:

> "The agreement only becomes incapable of performance . . . if the circumstances are such that it could no longer be performed, even if both parties were ready, able and willing to perform it."

In this case, it is unnecessary to decide whether the phrase "incapable of performance" has any wider operation than these remarks would suggest.

This is because, in my view, the arbitration agreement has, in any event, become "inoperative" within the meaning of sub-s. 7 (5). In that regard, Sir Michael Mustill and Mr S.C. Boyd state, in the 2nd edition of their work, "The Law and Practice of Commercial Arbitration in England", 1989, at p. 464:

> "The expression 'inoperative' has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not void ab initio, has for some reason ceased to have effect for the future. Three situations can be envisaged in which an arbitration agreement might be said to be 'inoperative'. First, where the English Court has ordered that the arbitration agreement shall cease to have effect, or a foreign court has made a similar order which the English Court will recognise. Second, . . . there may be circumstances in which an arbitration agreement might become 'inoperative' by virtue of the common law doctrines of frustration, discharge by breach, etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties."

In relation to the third situation, the learned authors cite Kruidenier (London) Ltd v The Egyptian Navigation Co. [1980] 2 Lloyd's Rep. 166, where the dealings between the parties fell short of such a further agreement. But the contrary is the case on the present facts. I would accept what is said in the passage I have set out above. In the sense there given to the term 'inoperative', the facts in this case lead to the conclusion that an order for stay should not be made under sub-s. 7 (2).

Accordingly, I would answer questions (2), (3) and (4) by answering "yes" to question (2), "no" to question (3) and "yes" to question (4).

The proceeding should stand over for a short time after delivery of these Reasons for Judgment and directions then be given as to the further conduct of the trial.

I certify that this and the preceding forty (40) pages are a true copy of the reasons for judgment of the Honourable Mr Justice Gummow.

Associate: Paul Sims

Date: 5 June 1991.

Counsel and solicitors for the plaintiff:	Mr J.C. Campbell Q.C. and Mr N.C. Hutley instructed by Messrs Michell Sillar McPhee Meyer.
Counsel and solicitors for the defendant:	Mr A.J. Sullivan Q.C. and Mr J.W.J. Stevenson instructed by Messrs Ebsworth & Ebsworth.
Dates of hearing:	15, 16, 17, 23 May 1991.
Date of judgment:	5 June 1991.