FEDERAL COURT OF AUSTRALIA

PRACTICE & PROCEDURE – whether orders granting stays interlocutory or final – orders staying Federal Court proceedings and referring parties to arbitration pursuant to *International Arbitration Act* 1974 (Cth) – trial judge refused leave to appeal – applicants seeking leave to appeal from stay orders or from refusal of leave to appeal – whether appeal lies as of right from decision to stay proceedings – leave required where judgment interlocutory – construction of the *International Arbitration Act* – construction of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards – possibility of circumstances arising justifying a lifting of the stay – possibility of arbitration agreement becoming null and void, inoperative or incapable of being performed – inequitable for parties to be precluded from litigating issues the subject of an ineffective arbitral award – stay orders pursuant to the *International Arbitration Act* interlocutory in nature – appeal incompetent.

Federal Court of Australia Act 1976 (Cth), ss 24(1), 24(1A)
International Arbitration Act 1974 (Cth), ss 7, 8, 8(5)-(8), 9(1)
Trade Practices Act 1974 (Cth), ss 52, 82
Admiralty Act 1988 (Cth)
Carriage of Goods by Sea Act 1991 (Cth), s 11(2)

Port of Melbourne Authority v Anshun Pty Limited (No 1) (1980) 147 CLR 35, discussed
Computer Edge Pty Ltd v Apple Computer Inc (1984) 54 ALR 767, cited
Hall v The Nominal Defendant (1966) 117 CLR 423, cited
Tampion v Anderson (1974) 48 ALJR 11, cited
Salter Rex & Co v Ghosh [1971] 2 QB 597, cited
Hunt v Allied Bakeries Ltd (1956) 1 WLR 1326, cited
Carr v Finance Corporation of Australia Ltd (No 1) (1981) 147 CLR 246, cited
Licul v Corney (1975) 180 CLR 213, discussed
Rena K [1979] 1 QB 377, discussed
Golden Trader [1975] 1 QB 348, discussed
Associated Bulk Carriers Ltd v Koch Shipping Inc [1978] 2 All ER 254, discussed
Oceanic Sun Line Special Company Inc v Fay (1941) 65 CLR 197, cited
Bank of America v Bank of New York (1995) ATPR 40-334, discussed
Chaparral [1968] 2 Lloyd's Rep. 158, cited
Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, cited
Akai Pty Ltd v Peoples Insurance Co (1997) 126 FLR 264, cited
Akai Pty Ltd v Peoples Insurance Co (1997) 188 CLR 418, cited
Jenkins v NZI Securities Australia Ltd (1994) 124 ALR 605, cited
John Grant & Sons Ltd v Trocadero Building and Investment Co Ltd (1938) 60 CLR 1, cited
Hope v RCA Photophone of Australia Pty Ltd (1937) 59 CLR 348, cited
Lloyd Werft Bremerhaven GmbH v The owners of the ship Zoya Kosmodemyanskaya as surrogate for the ships Taras Shevchenko, Delphin and Kazakhstan and Tor Shipping Company (Full Federal Court, 31 October 1997, unreported), cited

Strathmore Group Ltd v Fraser [1992] 2 AC 172, discussed
Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332, cited
The Tuyuti [1984] 1 QB 838, cited
Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd (1979) 25 ALR 605, cited
Paczy v Haendler [1981] 1 Lloyd's Rep. 302, cited
Commonwealth Scientific and Industrial Research Organisation v Perry (1988) 92 FLR 182, cited
Australian Mid-Eastern Club Ltd v Yassim (1990) 8 ACLC 46, cited
Johnston v Agnew [1980] AC 365, cited
Levis v McDonald (1997) 75 FCR 36, cited

HI-FERT PTY LIMITED & ANOR v
KIUKIANG MARITIME CARRIERS INC & ANOR
NG 1100 of 1997
NG 1101 of 1997

BEAUMONT, BRANSON & EMMETT JJ
SYDNEY
26 MAY 1998

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NG 1101 of 1997**

BETWEEN: **HI-FERT PTY LIMITED**
FIRST APPELLANT

CARGILL FERTILIZER INC
SECOND APPELLANT

AND: **KIUKIANG MARITIME CARRIERS INC**
FIRST RESPONDENT

WESTERN BULK CARRIERS (AUSTRALIA) LIMITED
SECOND RESPONDENT

JUDGES: **BEAUMONT, BRANSON AND EMMETT JJ**

DATE OF ORDER: **26 MAY 1998**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. That the appeal be dismissed as incompetent.

2. That Hi-Fert Pty Limited and Cargill Fertilizer Inc pay the costs of Kiukiang Maritime Carriers Inc and Western Bulk Carriers (Australia) Ltd of and incidental to the notices of motion dated 6 March and 10 March 1998.

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

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NG 1100 of 1997**

BETWEEN: **HI-FERT PTY LIMITED**
FIRST APPLICANT

CARGILL FERTILIZER INC
SECOND APPLICANT

AND: **KIUKIANG MARITIME CARRIERS INC**
FIRST RESPONDENT

WESTERN BULK CARRIERS (AUSTRALIA) LIMITED
SECOND RESPONDENT

JUDGES: **BEAUMONT, BRANSON AND EMMETT JJ**

DATE OF ORDER: **26 MAY 1998**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

That the respective parties have liberty to restore this matter for further hearing by arrangement with the Associate to Beaumont J.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NG 1100 of 1997**
NG 1101 of 1997

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **HI-FERT PTY LIMITED**
FIRST APPLICANT

CARGILL FERTILIZER INC
SECOND APPLICANT

AND: **KIUKIANG MARITIME CARRIERS INC**
FIRST RESPONDENT

WESTERN BULK CARRIERS (AUSTRALIA) LIMITED
SECOND RESPONDENT

JUDGES: **BEAUMONT, BRANSON AND EMMETT JJ.**

DATE: **26 MAY 1998**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

BEAUMONT J:

INTRODUCTION

In order to understand the nature of the several matters before us in the exercise of the Court's appellate jurisdiction, it will be necessary to explain some of the background as follows.

Hi-Fert Pty Limited ("H-F"), the first applicant, was the consignee from Cargill Fertilizer Inc, the second applicant, of cargo to be transported by sea between American and Australian ports. Kiukiang Maritime Carriers Inc. ("KMC"), the first respondent, was the owner of the vessel. Western Bulk Carriers (Australia) Limited ("WBC"), the second respondent, was the charterer of the vessel. In proceedings against the respondents instituted in this Court, the applicants alleged that KMC had breached its duty of care and its contractual obligations in respect of the cargo; and that WBC had engaged in misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act* 1994 ("TPA") or, alternatively, was liable to H-F in negligence and for breach of collateral warranties.

The charter party between H-F and WBC provided for arbitration in London of "any dispute arising from" the charter, or any bill of lading issued thereunder, in accordance with the *Arbitration Act* 1950 [Eng.]; and the charter was to be covered by English law. Both respondents sought a stay of the proceedings on the basis that the applicants had agreed to submit the dispute to arbitration. WBC also contended that Australia was an inappropriate forum for the resolution of the dispute.

On 4 December 1996, a Judge of the Court (Tamberlin J) held, *inter alia*: (1) that the language of the arbitration clause in the charter party was sufficiently wide to permit the inclusion of allegations of misleading or deceptive conduct under the TPA; (2) that an arbitrator can be validly clothed with power to determine claims arising under the TPA; (3) that the operation of s 11(2) of the *Carriage of Goods by Sea Act* 1991 ("CGSA") (which provides, *inter alia,* that an agreement has no effect so far as it purports to preclude or limit the jurisdiction of a court of the Commonwealth in respect of a bill of lading, or a similar document of title, relating to the carriage of goods from any place outside Australia to any place in Australia) is to render ineffective the requirement of an arbitration in London, but to leave in tact the agreement to arbitrate; (4) that s 11(2) of the CGSA does not prevent the Court, when exercising its discretion whether to grant a stay, from taking into account the fact that the parties have evinced an intention to submit to a London arbitration; and (5) that since the claims against KMC raise questions common to the claims against WBC, which are to be stayed, English law will apply as a result of the parties' agreement, the only place in which the dispute can be

resolved in its entirety is London, and it is appropriate that there be a "one-stop" adjudication, failure to grant a stay against KMC may result in an undesirable duplication of proceedings, and the parties having agreed to a London arbitration, the Court is a "clearly inappropriate" forum for the determination of the claims, notwithstanding that London has no direct connection with the subject matter of the dispute (see *Hi-Fert v Kiukiang Maritime Carriers* (1996) 71 FCR 172).

The learned Judge made no formal orders at that stage, indicating that he proposed to hear further submissions on, *inter alia,* the operation and constitutional validity of the provisions of s 7 of the *International Arbitration Act* 1974 ("IAA"), dealing with the enforcement of "foreign arbitration agreements". It has been assumed that s 7 applies here, if valid. Section 7(2) provides that where proceedings instituted by a party to a "foreign arbitration agreement" "against another party to the agreement are pending in a court"; and the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration - on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

On 30 June 1997, his Honour held, *inter alia*, that: (1) section 7 was not invalid as impermissibly ousting the jurisdiction of an Australian court, or as unlawfully directing a court as to the conclusion it must reach when exercising its jurisdiction in circumstances where justiciable issues otherwise calling for the exercise of the judicial power of the Commonwealth had been instituted in the court; and that (2) the arbitrators in London were not exercising Australian judicial power, but were performing a contractual function specifically conferred on them (see the report (1997) 145 ALR 500). Again, no formal orders were made at that stage. The matter was stood over for further argument for this purpose.

On 7 November 1997, Tamberlin J heard further argument. On 12 December 1997, for the reasons his Honour then gave (see (1997) 150 ALR 345), the following orders (except as to

costs) were made (at 353-4):

> *"**Order***
>
> *(1) On the conditions in para 2, the whole of the proceedings against the first defendant be stayed and referred to arbitration in respect of that matter in London.*
>
> *(2) The conditions referred to in para (1) are:*
>
> > *(a) that the arbitration as between the first defendant and the plaintiffs be treated as if it had been commenced with the appointment of the plaintiffs' arbitrator on the same day as the commencement of these proceedings, namely 20 September 1996. The plaintiffs shall commence such proceedings within six months from the date of these orders;*
> >
> > *(b) that the first defendant furnish security in respect of the arbitration, in the form annexed and marked "A".*
>
> *(3) The whole of the proceedings against the second defendant be stayed and referred to arbitration in respect of that matter in London.*
>
> *(4) Leave to appeal is refused."*

By notice of appeal filed on 18 December 1997, H-F appeals from the judgments given on 4 December 1996, 30 June 1997 and 12 December 1997. By another application filed at the same time, H-F applies for leave to appeal from these judgments, if leave were required.

By notice of motion filed in March 1998, WBC seeks to have H-F's application for leave to appeal struck out as incompetent for two reasons: (1) such leave was previously sought, but refused; and (2) in refusing such leave, Tamberlin J had exercised the Court's jurisdiction, which was now spent.

By another notice of motion, also filed in March 1998, WBC seeks to have H-F's notice of appeal struck out as incompetent for the following reasons:

- The decision sought to be appealed was interlocutory in character.

- Accordingly, by virtue of s 24(1A) of the *Federal Court of Australia Act* 1976 ("FCA") leave to appeal is required.

- But such leave has been refused.

- That refusal involved the exercise of the Court's appellate jurisdiction conferred by s 25(2); reliance is placed upon *Thomas Borthwick & Sons Ltd v Trade Practices Commission* (1988) 18 FCR 424.

- This Full Court has no jurisdiction (a) to grant leave in the present circumstances or (b) to entertain an appeal, or an application for leave to appeal, from that refusal.

THE ISSUES BEFORE THE FULL COURT

The following issues now arise for determination:

(1) Does an appeal lie as of right from the orders granting the stays and referring the parties to arbitration?

(2) If not, should *Borthwick* be followed?

(3) If not, should leave be granted to appeal from (a) the stay and reference orders, or (b)

the refusal to grant leave?

We heard argument, and reserved our decision, on issue (1) above, before hearing submissions on issues (2) and (3).

CONCLUSION ON THE QUESTION WHETHER AN APPEAL LIES AS OF RIGHT FROM THE ORDERS GRANTING THE STAYS AND REFERRING THE PARTIES TO ARBITRATION

By s 24(1)(a) of the FCA, subject to that section, the Court has jurisdiction to hear and determine appeals from judgments of the Court constituted by a single Judge. The word "judgment", which is defined by s 4 of the FCA to mean "a judgment, decree or order, whether final or interlocutory...", refers only to operative judicial acts, so that there is no appeal against reasons standing alone (see *Jenkins v NZI Securities Australia Ltd* (1994) 124 ALR 605). However, by s 24(1A) of the FCA (inserted in 1984), an appeal shall not be brought from an "interlocutory" judgment, unless the Court or a Judge gives leave to appeal. The word "interlocutory" is not defined.

(Although not directly relevant at this stage of these appellate proceedings, it should for completeness be noted that by s 25(1) of the FCA, the appellate jurisdiction of the Court shall, subject to that section, be exercised by a Full Court; and by s 25(2)(a) of the FCA, applications for leave to appeal to the Court may be heard and determined by a single judge or a Full Court.)

The question then is whether the stay and reference orders were "interlocutory".

The characterisation of a stay order for this purpose was considered in *Port of Melbourne Authority v Anshun Proprietary Limited (No. 1)* (1980) 147 CLR 35. At first instance, it was ordered that an action by the Authority be stayed, on the ground that it was an abuse of process

(on the basis that the matters in question could, and therefore should, have been litigated in earlier proceedings, so that the parties could not be permitted to re-open the same matter of litigation). The Full Court of the Supreme Court dismissed an appeal from that order. The Authority appealed to the High Court. Anshun objected to the competency of the appeal on the grounds that the order made at first instance was interlocutory, so that leave to appeal was required. On behalf of the Authority it was argued that all orders staying actions on the ground that they are an abuse of process are interlocutory. Reliance was placed upon the decision of the Privy Council in *Tampion v Anderson* (1973) 48 ALJR 11 that an order staying an action (in that case for defamation and misfeasance in public office against members of a board of inquiry) on the ground that it is frivolous, vexatious (and thus an abuse of process) is interlocutory. The Privy Council there referred to a long line of English authorities to this effect, including well known observations in *Salter Rex & Co v Ghosh* [1971] 2 QB 597 per Lord Denning MR (quoting Lord Evershed MR in *Hunt v Allied Bakeries* Ltd (1956) 1 WLR 1326) at 601 holding that orders staying vexatious or frivolous proceedings "have for a very long time been treated as interlocutory".

In the course of the Authority's argument, Mason J said (at 36):

> *"[MASON J. Is there not a distinction to be drawn between orders based on a judgment that litigation was vexatious or that there was no reasonable cause of action and* ***those which provide for a perpetual stay of the action on the ground that a party is precluded by a rule of law*** *from pressing his claim such as the doctrine of res judicata? In the former case, there is good reason for requiring an appellant to seek special leave.]"* (Emphasis added).

Counsel for the Authority contended that "[s]uch a distinction would involve a departure from *Tampion v Anderson*". Gibbs J referred to observations his Honour had made in *Licul v Corney* (1976) 50 ALJR 439 at 444 (now reported at (1976) 180 CLR 213 at 225). There, Gibbs J had noted that, since *Hall v Nominal Defendant* (1966) 117 CLR 423, it "should... be regarded as settled in Australia (that the test) depends on the nature of the order made" rather than the nature of the application, as was decided in *Ghosh*.

In giving the judgment of the Court in *Anshun*, Gibbs J (Mason and Murphy JJ agreeing) said (at 38):

> *"If the view expressed in* Licul v. Corney *is correct, and the true test of finality is whether the judgment or order, as made, finally disposes of the rights of the parties, it would seem clear that the order made in the present case was a final judgment. It is not necessary to consider whether the view expressed in* Tampion v. Anderson *is one which is consistent with the view taken in the Australian authorities. There may well be a difference between a case in which the action is frivolous or vexatious in the ordinary sense, or in which the proceedings disclose no reasonable cause of action, and a case in which the abuse of process lies in an attempt to litigate an issue which is res judicata, and* Tampion v. Anderson *has nothing to say about a case of the latter kind.*
>
> *It seems to me that in the present case,* ***as a matter of reality, the order made does finally dispose of the rights of the parties****, and on that ground I would consider it to be a final order so that the objection to competency in my opinion ought to be overruled."* (Emphasis added).

In my opinion, his Honour's concluding observations express the relevant statement of principle for present purposes. Here also, it is not necessary to consider whether *Tampion* may be distinguished for the reason suggested by Mason J, since no issue of abuse of process arises here. The test for our purposes is whether the orders of stay and reference to arbitration, "as a matter of reality... finally dispose of the rights of the parties".

In my view, nothing in the subsequent judgment of Gibbs J (with the agreement of Murphy and Wilson JJ) in *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 54 ALR 767 detracts from the reasoning in *Anshun (No. 1)* and its relevance here. In *Apple*, some of the issues were determined by the Full Federal Court (the injunctions) but others (damages) were not. Gibbs J said (at 768):

> *"... the court in applying the test must have regard to the legal rather than the practical effect of the judgment. So that the question in the present case is whether the whole judgment finally determined, in a legal sense, all the rights of the parties that were at issue in these proceedings. And the answer is, plainly, that it did not,* ***because it left undetermined the question whether any, and***

what, damages were payable." (Emphasis added).

There is nothing analogous to that situation here. Tamberlin J did not reserve or withdraw any issue, damages or otherwise, from the arbitrators.

In *Apple,* Gibbs J referred to observations by Dixon J in *John Grant & Sons Ltd v Trocadero Building and Investment Co Ltd* (1938) 60 CLR 1 in an appeal from orders made by the Supreme Court of New South Wales on demurrers to pleas to some counts in a declaration filed in an action by a builder for work done. Dixon J said (at 35):

> *"The judgment of the Supreme Court did not determine the action, for the demurrers did not affect pleas to or replications in relation to all counts of the declaration. The judgment was, therefore, interlocutory, and this appeal did not lie without leave (See* Hope v. R.C.A. Photophone of Australia Pty Ltd.*)"*

In *Hope* (1937) 59 CLR 348 Dixon J (Evatt J agreeing) said (at 360):

> *"This is an appeal as of right brought by the defendant in the action from a judgment for the plaintiff given on demurrer. The demurrer was to the plaintiff's replication to a plea by way of cross-action. The plea by way of cross-action sets up an independent cause of action upon which the defendant seeks to recover against the plaintiff.* ***The judgment, therefore, means that the matters pleaded in the replication answer the cause of action so set up****. It is just as if upon demurrer to a plea to a declaration judgment were given for the defendant. Leave to amend was not exercised, and to amend would have been useless. The defendant did not plead as well as demur to the replication. Thus,* ***the judgment ended the cross-action****. It is, therefore, a final judgment..."* (Emphasis added).

See also *Lloyd Werft Bremerhaven GmbH v The owners of the ship Zoya Kosmodemyanskaya as surrogate for the ships Taras Shevchenko, Delphin and Kazakhstan and Tor Shipping Company,* Full Federal Court, 31 October 1997, unreported, at 11.

An illustration of an order by way of final determination of a separate collateral question from which an appeal lay as of right is *Strathmore Group Ltd v Fraser* (1992) 2 AC 172 (at 178-9). There, an appeal was brought from an order determining finally the separate collateral question whether the causes of action sued on had been compromised. The Privy Council held that an appeal lay as of right.

Did the primary Judge's orders of stay and reference to arbitration, "as a matter of reality", finally dispose of the relevant rights of the parties and thus "end" the proceedings? In my opinion, the orders did and were thus final, rather than interlocutory. The orders should, I think, be viewed for present purposes as analogous to an "Anshun" (i.e. *Henderson v Henderson* extended estoppel) kind of stay or order; to a demurrer answering the whole cause of action, whatever amendment of the pleading of the material facts might be attempted, as in *Hope*; and to the final determination of a preliminary collateral question, as in *Strathmore.* In these senses, the stays and the references, as a matter of reality, ended the proceedings. The parties' rights were conclusively determined accordingly (cf. *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 per Deane and Gaudron JJ at 351).

It is true that these orders here were made on certain terms. But, in substance, they should be viewed for our purposes upon the footing that the conditions are reasonably capable of being satisfied (see *The Tuyuti* [1984] 1 QB 838 per Robert Goff LJ (Ackner LJ agreeing) at 849: cf. *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* (1979) 25 ALR 605 at 614).

It is also, theoretically, true that, in appropriate supervening circumstances (and none is now apparent here), the stays might be lifted and the references might be revoked (see *Paczy v Haendler* [1981] 1 Lloyd's Rep. 302 at 307). But the residual power of a court to lift a stay or discharge an injunction is equivocal for present purposes. The general position with respect to injunctions is stated by I. C. F. Spry, *The Principles of Equitable Remedies* (5th ed. 1997) as follows (at 382):

> *"A perpetual injunction is an injunction that is directed towards the final settlement and enforcement of the rights of the parties that are in dispute; and it is none the less perpetual if those rights are themselves restricted in point of time. So an injunction may be granted in order to protect a leasehold interest in land that expires after a specified date; and the fact that that injunction will not prevent the commission of acts after that date does not prevent its being perpetual for those purposes.*
>
> *The accepted antithesis to a perpetual injunction is an interlocutory or interim injunction, which is granted in order that the position of the parties may be preserved either in statu quo or in some other appropriate manner until a further adjudication by the court of their rights subsequently takes place.* ***Both perpetual and also interlocutory and interim injunctions may at any time be dissolved by the court by which they were granted, should it subsequently become appropriate to do so****."* (Emphasis added).

Thus, in *Commonwealth Scientific and Industrial Research Organisation v Perry* (1988) 92 FLR 182 it was held that a final injunction should be dissolved upon a change in the applicable legislation. But it would not follow that this injunction should have been characterised as interlocutory.

The present orders had both a negative aspect (the stay), and a positive one (the reference). If the stay may be treated as tantamount to an injunction, it should still, I think, be regarded as final, being analogous to an order permanently restraining the presentation of a winding up petition (see *Australian Mid-Eastern Club Ltd v Yassim* (1990) 8 ACLC 46 at 49; R P Meagher, W M C Gummow and J R F Lehane, *Equity-Doctrines and Remedies* (3rd ed. 1992) at 531). On the other hand, the present orders may be viewed as akin to an order for specific performance of the agreement to arbitrate in the mandatory statutory context of s 7(2) (see, as to the enforcement by the court of an agreement to arbitrate, *Heyman v Darwins, Ld.* [1942] AC 356 per Lord Macmillan at 373-4). So viewed, the stay, or injunction, may be seen as granted in aid of enforcement of the promise to settle the dispute by arbitration rather than litigation; that is, his Honour's orders may be treated as tantamount to an order for the specific performance of the arbitration agreement. An order for specific performance is clearly final rather than interlocutory. It is not robbed of its final character by the undoubted circumstance that it "may be dissolved or varied by the court when it is just to do so" (Spry, op. cit. at 319) for instance, when supervening impossibility of performance either renders the order entirely inappropriate,

or requires its modification (see *Johnson v Agnew* [1980] AC 367 per Lord Wilberforce at 399).

Since writing the foregoing, I have had the benefit of reading the draft reasons of Branson J. As has been seen, I accept that, if appropriate supervening circumstances were to arise (and none is presently anticipated), the Court would have the power to discharge or vary the stay and the reference; but that, notwithstanding this power, the orders made by Tamberlin J were, in law and in reality, final.

Although his Honour's views on the question whether his orders were final or interlocutory are not binding for our purposes, it is significant that in refusing leave to appeal his Honour said (at 345):

> *"The consequence of the two decisions in this matter is that the plaintiffs are required to comply with their agreement to submit to arbitration."*

His Honour clearly contemplated that the arbitration would go forward and that this Court would have no further function to perform by way of adjudication of the whole dispute.

Another analogy for our purposes may be seen in the approach taken to an order made for preliminary discovery. Such an order has been held to be final. In *Levis v McDonald* (1997) 75 FCR 36, Lindgren J said (at 43):

> *"Without reference to authority, I would have thought that an application for the relief provided for in O 15A, r 3 or O 4, r 17 is not an interlocutory proceeding, since the relief provided for finally determines the rights of the parties in relation to the particular issue tendered for decision, that is to say, the issue whether the person concerned is to be ordered to do the things provided for in the rule."*

I would respectfully agree. In the present case also, the rights of the parties are finally determined in respect of the preliminary, or separate collateral question whether the dispute ought to be resolved in the Court or by arbitration. Tamberlin J finally determined the latter, and there is no suggestion from his Honour of any intention to revisit the issue.

Lindgren J then went on to cite authority and comment as follows (at 43):

> *"The question has been the subject of judicial decision. In Stewart v Miller [(1979) 2 NSWLR 128], Sheppard J referred to similar orders with which he was concerned as 'intended to be final': see at 133B-134D. In John Fairfax & Sons Ltd v Cojuangco (1988) 165 CLR 346, the High Court had to consider Pt 3, r 1(1) of the Supreme Court Rules (NSW). In a joint judgment, the members of the court said that an application under the provision was 'not an interlocutory proceeding' (at 356) in the substantive defamation action that was in question in that case.*
>
> *It was submitted that the present proceeding is shown to be interlocutory by the fact that the making of the order sought is only a step on the way to the obtaining of the information. The submission is that the making of the order is not the end of this proceeding and that further orders may be necessary to enable Messrs Levis, Armstrong and Lee to enjoy the benefit of the order sought, for example, orders compelling Mr Daly to answer questions or to produce documents. It seems to me, however, that this submission is analogous to a submission that an order for payment of damages or an injunction is not a final order because further orders may be necessary to enable the successful party to have the benefits of the order. I do not think that the order sought is any the less final because further orders may become necessary to compel compliance with it."*

Those authorities and observations are equally apposite here.

For these reasons, I am of the opinion that the subject orders were not interlocutory, so that an appeal does lie as of right.

ORDERS PROPOSED

Accordingly, I would propose that the objection to competency be overruled, with costs.

I certify that this and the preceding thirteen (13) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Beaumont

Associate:

Dated: 26 May 1998

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NG 1100 of 1997**
NG 1101 of 1997

BETWEEN: **HI-FERT PTY LIMITED**
FIRST APPLICANT

CARGILL FERTILIZER INC
SECOND APPLICANT

AND: **KIUKIANG MARITIME CARRIERS INC**
FIRST RESPONDENT

WESTERN BULK CARRIERS (AUSTRALIA) LIMITED
SECOND RESPONDENT

JUDGE(S): **BEAUMONT, BRANSON AND EMMETT JJ**

DATE: **26 MAY 1998**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

BRANSON J:

INTRODUCTION

I have had the advantage of reading the draft reasons for judgment of Beaumont J in this matter.

I gratefully adopt his Honour's outline of the background to the issues before this Court and his summary of such issues. However, I have the misfortune to disagree with his Honour as to the answer to the first of such issues, namely that of whether an appeal lies as of right from the orders of Tamberlin J granting the stays and referring the parties to arbitration.

RIGHT TO APPEAL

Section 24 of the *Federal Court of Australia Act* 1976 (Cth) *("the Federal Court Act")* is concerned with the appellate jurisdiction of the Court. Subject to certain qualifications not here relevant, s 24(1) gives to the Court jurisdiction to hear and determine appeals from judgments of the Court constituted by a single judge. However, the effect of s 24(1A) is that an appeal cannot be brought from an interlocutory judgment of the Court constituted by a single judge unless the Court or a judge gives leave to appeal.

It is common ground in this case that neither the Court nor a judge has given leave to the appellants to appeal the orders of Tamberlin J or any of them. Indeed one of the orders of Tamberlin J made on 12 December 1997 was an order that "[l]*eave to appeal is refused"*.

The issue of whether an appeal lies as of right from the orders of Tamberlin J granting the stays and referring the parties to arbitration thus comes down to the issue of whether such orders constituted an interlocutory judgment or judgments within the meaning of s 24(1A) of the Federal Court Act.

STAY OF PROCEEDINGS AGAINST WESTERN BULK CARRIERS (AUSTRALIA) LIMITED

The order of Tamberlin J granting a stay of the proceedings against Western Bulk Carriers (Australia) Limited *("WBC")* was an order made pursuant to s 7 of the *International Arbitration Act* 1974 (Cth) *("the IA Act").*

Section 7 of the IA Act provides as follows:

> *"(1) Where:*
>
> *(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise by the law of a Convention country;*
>
> *(b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made,*

domiciled or ordinarily resident in Australia;

(c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or

(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country;

this section applies to the agreement.

(2) Subject to this Part, where:

(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and

(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

(3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

(4) For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

(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."

It is not in dispute that s 7 of the IA Act applies to the charter party between Hi-Fert Pty Limited *("Hi-Fert")* and WBC. Tamberlin J held that the proceedings in this Court instituted by Hi-Fert involve the determination of a matter that, pursuant to the charter party, is capable of settlement by arbitration (s 7(2)(a) and (b)). His Honour ordered:

"The whole of the proceedings against the Second Defendant be stayed and referred to arbitration in respect of that matter in London."

The second part of the order is to be understood not as a referral of the proceedings to arbitration in London, but as a referral of the parties to arbitration. Section 7(2) of the IA Act provides for the referral of the parties to arbitration, rather than for the referral of proceedings to arbitration. An order referring a proceeding in the Court to arbitration would be in conflict with Chapter III of the Constitution.

The principal issue to be determined so far as the character of his Honour's order concerning the proceedings against WBC is concerned is, in my view, one of statutory construction. That is, what was the intention of the legislature in providing that, in the circumstances identified in paragraphs (a) and (b) of s 7(2), *"the court shall, by order … stay the proceedings?"* Did it intend, as Hi-Fert contends, that a permanent stay of proceedings should result from such order, or did it intend that the stay order should ordinarily be interlocutory in nature? That is, was it the intention of the legislature that an order under s 7(2) of the IA Act should necessarily *"as a matter of reality … finally dispose of the rights of the parties"* so far as the proceedings in the Court are concerned *(Port of Melbourne Authority v Anshun Pty Limited (No 1)* (1980) 147 CLR 35 per Gibbs J at 38; see also *Computer Edge Pty Ltd v Apple Computer Inc* (1984) 54 ALR 767 per Gibbs CJ at 767-768), or, rather that, if circumstances should change, the applicant should ordinarily be entitled to apply to have the stay lifted *(Hall v The Nominal Defendant* (1966) 117 CLR 423 per Taylor J, with whom Owen J agreed, at 440-441). I have expressed the questions this way because it may be that circumstances could arise, although they have not done so in this case, in which the interests of justice would require that a stay order under s 7(2) of the IA Act should be final in nature. Nothing in the orders made by Tamberlin J suggests that his Honour regarded himself as dealing with a case of such a kind.

Another way of looking at the question might be to ask whether s 7(2) of the IA Act is to be understood as a rule of law precluding a party to an arbitration agreement, over the objection of the opposing party, from litigating issues which fall within the terms of the arbitration agreement, or rather as a provision authorising an order whereby a party is restrained from so litigating whilst the rights of the other party under the arbitration agreement remain operative. An order of this latter kind would, in my view, be analogous to an order staying proceedings on the ground that they are frivolous or vexatious. Such an order has long been recognised as

interlocutory in nature (*Tampion v Anderson* (1974) 48 ALJR 11; *Salter Rex & Co v Ghosh* [1971] 2 QB 597; *Hunt v Allied Bakeries Ltd* (1956) 1 WLR 1326; *Hall v The Nominal Defendant* per Taylor J, at 440, which passage was apparently approved by Mason J in *Carr v Finance Corporation of Australia Ltd (No 1)* (1981) 147 CLR 246 at 255).

The IA Act was enacted to enable Australia to accede to the United Nations Convention known as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards *("the Convention").* The English text of the Convention is set out in Schedule 1 of the IA Act. As the long title to the IA Act reflects, the IA Act is principally concerned with "*the recognition and enforcement of foreign arbitral awards, and the conduct of international commercial arbitrations in Australia* …". The Convention does not itself provide for a court to stay an action in a matter in respect of which the parties have reached an arbitration agreement. It merely calls for the court to refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

It is appropriate in the circumstances to look first to the words of s 7(2) of the IA Act. It may be noticed that the subsection neither provides for an order that the proceedings be dismissed or that they be **permanently** stayed. One or other of these expressions might have been expected had it been the intention of the legislature that an order pursuant to s 7(2) would have the effect of bringing the proceedings to an end. As was recognised by the High Court in *Port of Melbourne Authority v Anshun Pty Limited*, a stay order does not of itself technically bring proceedings to an end. In certain cases, of which *Anshun* was one, as a matter of reality, although not of form, a stay order does finally dispose of the rights of the parties. That is because circumstances which would justify the lifting of the stay can not arise. I turn below to the question of whether circumstances could arise in the present case which could justify the lifting of a stay.

I turn to the statutory context in which s 7(2) of the IA Act is found. Section 8 of the IA Act is concerned with the recognition in Australia of foreign arbitral awards. Section 8(2) provides that, subject to Part II of the Act, such awards may be enforced in a court of a State or Territory. However, ss 8(5)-(8) provide for circumstances in which a court may refuse to enforce the award. That is, the subsection recognises that an arbitral award made pursuant to an arbitration agreement may not necessarily result in an enforceable award. It is appropriate to set out the

terms of ss 8(5)-(8) of the IA Act:

> *"(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:*
>
> *(a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him, under some incapacity at the time when the agreement was made;*
>
> *(b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;*
>
> *(c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;*
>
> *(d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;*
>
> *(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*
>
> *(f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.*
>
> *(6) Where an award to which paragraph (5) (d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.*
>
> *(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:*
>
> *(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or*

(b) to enforce the award would be contrary to public policy.

(8) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

Of the equivalent English legislation (*Arbitration Act* 1975), Mustill and Boyd: *Commercial Arbitration*, 2nd Ed at p 466 say as follows:

"(b) Removing the stay

The stay of proceedings does not permanently deprive the Court of jurisdiction over the dispute. The Court's jurisdiction may be resumed in two circumstances. First, if the proceedings take the form of an Admiralty action in rem, the proceedings remain available for the purpose of enforcing an award in the plaintiff's favour, and the stay will be lifted to enable this to be done. Second, the arbitration agreement may become "null and void, inoperative or incapable of being performed" after the stay has been granted. In these circumstances we submit that the Court may, and if asked to do so, must lift the stay and take the matter into its own hands again."

Section 9(1) of the IA Act requires a person seeking the enforcement of a foreign arbitral award to produce to the court –

"(a) the duly authenticated original award or a duly certified copy; and

(b) the original arbitration agreement under which the award purports to have been made or a duly certified copy."

That is, the IA Act recognises that only an arbitration agreement can provide a basis for a foreign arbitral award within the meaning of the Act. An order of an Australian court referring the parties to arbitration does not provide a basis under the IA Act for an enforceable foreign arbitral award. This factor has, in my view, some potential significance. No question arises of any merger of any rights of the parties under such arbitration agreement in an order of the court under s 7(2) of the IA Act. An arbitration agreement, like any other agreement between parties,

may be varied or terminated by agreement between the parties, or its performance may be frustrated. A party to such an agreement may waive its rights under such agreement. The effective termination of an arbitration agreement by agreement between the parties, an event of frustration, or a waiver of rights, occurring after an order made under s 7 of the IA Act, would deprive that part of the order which refers the parties to arbitration of any ongoing significance.

The above provisions, in my view, suggest against the legislature intending the stay order for which s 7(2) of the IA Act provides to be a stay order which conclusively determines the rights of the parties. It seems to me that s 7 discloses an intention that the Australian court should, in relevant proceedings, in the circumstances set out in s 7(2), recognise and respect the agreement of the parties to submit relevant differences between them to arbitration. This result is achieved, in my view, by the court preventing the parties litigating the matters in dispute between them unless and until it becomes clear that an arbitral award effective under the law of Australia cannot be achieved.

Nothing in the Act, or in the Convention which it is designed to implement, suggests, in my view, that such recognition and respect requires that such proceedings in the circumstances set out in s 7(2) should be permanently stayed in the sense that the rights of the parties in such proceedings are finally disposed of or conclusively determined.

Subsections 7(3) and 7(5) of the IA Act also, in my view, suggest against a stay order under s 7(2) of the IA Act being intended conclusively to determine the rights of the parties. Section 7(3) authorises the court which makes the stay order, also to make, for the purpose of preserving the rights of the parties, *"such interim or supplementary orders as it thinks fit"* in relation to any property that is the subject of the relevant dispute between the parties. Although such a power in the court is not necessarily incompatible with the stay order of the court conclusively determining the rights of the parties, it does, in my view, tend to suggest that the proceedings in the court continue on foot beyond the entry of the stay order.

The terms of s 7(5) of the IA Act are also, in my view, of significance on this issue. Section 7(5) of the IA Act provides that the court shall not make a stay order under s 7(2) if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. It might

well prove to be the case that the court is unable, on an application for an order under s 7(2), positively to find that the arbitration agreement is null and void, inoperative or incapable of being performed. Yet, at a later time, this might prove to be the case. In such circumstances, it would be highly inconvenient if the effect of an order under s 7(2) were that new proceedings were required to be instituted. Particularly in circumstances, such as the present, where the proceedings involve a claim under ss 52 and 82 of the *Trade Practices Act* 1974 (Cth), such claim might be out of time before it became apparent that the arbitration agreement is incapable of lawful performance. This is another factor, in my view, which points to an order under s 7(2) of the IA Act being intended to be interlocutory, rather than final, in nature.

I conclude that the subject orders against WBC are interlocutory so that an appeal from them does not lie without the leave of the Court or a judge.

STAY OF PROCEEDINGS AGAINST KIUKIANG MARITIME CARRIERS INC

His Honour's decision to stay the proceedings in this Court against Kiukiang Maritime Carriers Inc *("KMC")* was based on his finding that this Court is clearly an inappropriate forum to consider the issues between Hi-Fert and KMC. In making this finding, his Honour placed weight on the fact that Hi-Fert's claim against KMC raises questions common to its claims against WBC. He concluded that, in the circumstances, the only place in which the dispute can be resolved in its entirety is London, and that it was appropriate that there should be *"one-stop"* adjudication in the proceedings.

In my view, his Honour did not intend the order staying the proceedings against KMC to have any different effect from the order staying the proceedings against WBC. As I have concluded that the order staying the proceedings against WBC was interlocutory, and not final, in character, I reach the same conclusion as to the order staying the proceedings against KMC.

CONCLUSION

I conclude that the subject orders are interlocutory so that an appeal from them does not lie without the leave of the Court or a judge.

I certify that this and the preceding nine (9) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated:

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA **NG 1100 of 1997**
NEW SOUTH WALES DISTRICT REGISTRY **NG 1101 of 1997**

BETWEEN: **HI-FERT PTY LIMITED**
First Applicant

CARGILL FERTILIZER INC.
Second Applicant

AND: **KIUKIANG MARITIME CARRIERS INC.**
First Respondent

WESTERN BULK CARRIERS (AUSTRALIA) PTY LTD
Second Respondent

JUDGE: **BEAUMONT, BRANSON & EMMETT JJ**

DATE: **26 MAY 1998**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

EMMETT J:

Hi-Fert Pty Limited ("Hi-Fert") and Cargill Fertilizer Inc. ("Cargill") were the plaintiffs in a proceeding commenced under the *Admiralty Act 1988 (Cth)* against Kiukiang Maritime Carriers Inc. ("KMC") and Western Bulk Carriers (Australia) Ltd ("WBC") as defendants. Cargill was the consignor of a cargo of fertiliser intended to be discharged at Newcastle. Hi-Fert was the consignee of the cargo. The cargo was carried on the MV Kiukiang Career which is owned by KMC. KMC who employed the master and the crew of the vessel and WBC was the charterer of the vessel.

The cargo became contaminated with a quarantinable disease and, as a consequence, the cargo could not be discharged. Both negligence and breach of contract were alleged against KMC. The plaintiffs alleged that KMC failed to make the vessel seaworthy and to make the holds fit for the reception, carriage and preservation of the cargo. Allegations of misrepresentations

were made against WBC as well as allegations of contravention of section 52 of the *Trade Practices Act 1974*. It was also alleged that WBC negligently stowed the cargo and failed to act with due diligence.

Both WBC and KMC applied for a stay of the proceedings. The application by WBC was based on clause 34 of the time charter between Hi-Fert and WBC. Clause 34 provides that any dispute arising from the charter, or any bill of lading issued thereunder, was to be settled in accordance with the provisions of the *Arbitration Act 1950* in London. The clause also provided that the charter party was to be governed by and construed in accordance with English Law. KMC's application was based on the ground that each of the bills of lading issued by it in respect of the cargo was subject to the charter party and incorporated clause 34.

The stay applications were heard by Tamberlin J who gave reasons on 4 December 1996 for concluding that stays should be granted, subject to hearing further submissions on a constitutional question raised by KMC. Having heard further argument on that question, on 30 June 1997 his Honour gave reasons for rejecting the argument and concluding that stays should be ordered. His Honour directed that the parties bring in short minutes to give effect to his reasons for judgment of 4 December 1996 and 30 June 1997.

On 7 November 1997, his Honour heard argument as to the form of the orders which were to be made to give effect to his reasons, including argument as to the conditions upon which the stay against KMC would be granted. On the same day, the plaintiffs moved for:

> *leave to appeal from the whole of the judgments of Tamberlin J given on 4 December 1996 and 30 June 1997 at Sydney.*

On 12 December 1997 his Honour made the following orders:

> *1.* *On the conditions in par 2, the whole of the proceedings against* [KMC] *be stayed and referred to Arbitration in respect of that matter in London.*
>
> *2.* *The conditions referred to in par 1 are:-*
>
> *(a)* *That the arbitration as between* [KMC] *and the Plaintiffs be treated as if it had been commenced with the appointment of the Plaintiffs' arbitrator on the same day as the commencement of these proceedings, namely 20 September 1996. The Plaintiffs shall commence such proceedings within six months from the date of these orders.*
>
> *(b)* *That* [KMC] *furnish security in respect of the arbitration in the form annexed and marked "A".*

1. *The whole of the proceedings against* [WBC] *be stayed and referred to arbitration in respect of that matter in London.*
2. *Leave to appeal is refused.*
3. *The Plaintiffs shall pay the Defendants' costs of the stay application, including costs of an incidental to the settling of these orders, and the costs of the application for leave to appeal.*

On that day his Honour gave reasons for imposing the conditions and for refusing leave to appeal.

On 18 December 1997, the plaintiffs filed notice of appeal:

> *from the whole of the Judgments of Tamberlin J given on 4 December 1996, 30 June 1997 and 12 December 1997 at Sydney.*

It may be observed that no orders were made on 4 December 1996 or 30 June 1997 from which any appeal could be brought. It is only from the orders made on 12 December 1997 that any appeal could be brought. However, nothing turns on that at this stage.

By notice of motion filed on 9 March 1998, WBC sought to have the appeal struck out. By notice of motion filed on 10 March 1998 KMC sought to have the appeal dismissed as incompetent. The basis for each application is that the relevant stay ordered on 12 December 1997 is an interlocutory order and the appeal is incompetent without leave pursuant to section 24(1A) of the *Federal Court of Australia Act 1976*.

The plaintiffs had anticipated such a contention by filing, on 18 December 1997, an application for:

> *leave to appeal from the Judgments of Tamberlin J given on 4 December 1996, 30 June 1997 and 12 December 1997 at Sydney and the Orders of 12 December 1997.*

In the alternative, the application sought:

> *leave to appeal from the order of Tamberlin J given on 12 December 1997 at Sydney refusing leave to appeal."*

On 9 March 1998 WBC filed a notice of motion for orders that the application for leave to appeal be struck out. On 10 March 1998 KMC filed a notice of motion seeking an order that the application for leave to appeal be dismissed as incompetent or alternatively pursuant to Order 20 rule 2 (which deals with summary dismissal of proceedings which are vexatious, frivolous or an abuse of the process of the Court).

The following questions are thus raised:

1. Whether an appeal lies as of right to the Full Court from the decision to stay the proceedings as against KMC and WBC. If the answer to that question is yes, the appeal must be heard and determined.

2. If the answer to the first question is no, whether it is open to the plaintiffs to apply to the Full Court for leave in circumstances where an application to Tamberlin J has already been refused. If the answer to the second question is yes, it will be necessary for the Court to determine whether leave should be granted.

3. If the answer to the second question is no, whether it is open to the Full Court to grant leave to appeal from the decision of Tamberlin J refusing to grant leave to appeal. If so, it would be necessary to consider whether leave should be granted and whether the decision was correct.

When the matter came before the Full Court, the parties were directed to address, in the first instance, only the first question. After hearing argument, the Court reserved its decision on that question and has not yet heard argument on the other questions.

APPEALS AS OF RIGHT

By section 24(1)(a) of the *Federal Court Act*, the Court, subject to that section, has jurisdiction to hear and determine appeals from judgments of the Court constituted by a single Judge. The orders presently in question are clearly within the term "judgment" when used in section 24(1)(a). However, under section 24(1A) of the *Federal Court Act*, an appeal cannot be brought from an "*interlocutory*" judgment, unless the Court or a Judge gives leave to appeal. The word "*interlocutory*" is not defined. The first issue raises the question of whether either of the orders granting stays is interlocutory.

BASIS OF THE STAYS

The stay order against WPC was made under section 7(2) of the *International Arbitration Act 1974 (Cth)* ("the IA Act") which provides as follows:

> ***(2)*** *Subject to this Part, where:*

> *(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and*
>
> *(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;*
>
> *on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.*

Once the prerequisites of section 7(2) of the IA Act are satisfied, a stay is mandatory. It is common ground that Hi-Fert, KMC and WBC are parties to an arbitration agreement to which section 7(2) applies. However, one of the issues determined by his Honour, as explained in his reasons of 4 December 1996, is the extent to which the proceedings before him involved the determination of a matter that is capable of settlement by arbitration. His Honour concluded that all questions raised in the proceedings were amenable to arbitration. The constitutional question, which was the subject of his Honour's reasons of 30 June 1997, was whether section 7 of the *IA Act* is invalid. His Honour held that it was not.

For the reasons which his Honour gave on 4 December 1996, the stay against KMC was not ordered under section 7(2). His Honour determined that the effect of section 11(2)(c) of the *Carriage of Goods by Sea Act 1991 (Cth)* was that the obligation to arbitrate and the submission to a jurisdiction in which the arbitration must take place should be severed from the agreement between the parties. It followed that a mandatory stay was not available under section 7(2) of the IA Act in respect of the claims against KMC.

However, his Honour concluded that the Court had a discretion to stay the proceedings in favour of arbitration in London if the prosecution of the claim against KMC in the Federal Court was clearly inappropriate. After cataloguing the circumstances which his Honour considered relevant to the question, his Honour concluded that, while London has no strong connection with the subject matter of the present dispute, those circumstances were sufficient to make the Federal Court a clearly inappropriate forum in which to decide the questions raised, primarily because of the fragmentation of jurisdiction likely to result following the mandatory order of a stay against WBC under section 7(2) of the IA Act. His Honour therefore ordered a discretionary stay against KMC on the grounds that the Federal Court is a *forum non conveniens*.

STAY AS FINAL ORDER

A stay order can in some circumstances be characterised as not being an interlocutory order. That follows from the decision of the High Court in *Port of Melbourne Authority v Anshun Pty Ltd (No. 1)* (1980) 147 CLR 35. At first instance, a judge of the Supreme Court of Victoria ordered that an action by the *Authority* be stayed on the ground that the matters in question could and should have been litigated in earlier proceedings and that it was therefore an abuse of process for those matters to be litigated subsequently.

The Full Court of the Supreme Court of Victoria dismissed an appeal from that order and the *Authority* appealed to the High Court. *Anshun* objected to the competency of the appeal on the grounds that the order made at first instance was interlocutory, such that leave to appeal to the High Court was required. On behalf of the *Authority* it was argued that any order staying an action on the ground that it is an abuse of process is interlocutory.

In the course of argument Mason J said (at page 36):

> *Is there not a distinction to be drawn between orders based on a judgment that litigation was vexatious or that there was no reasonable cause of action and those which provide for a perpetual stay of the action on the ground that a party is precluded by a rule of law from pressing his claim such as the doctrine of res judicata? In the former case, there is good reason for requiring an appellant to seek special leave.*

In giving his reasons for overruling the objection to competency, Gibbs J (with whom Mason and Murphy JJ agreed) referred to *Licul v Corney* (1975) 180 CLR 213 where the Court held that the order there appealed from was interlocutory. The order in question was an order relating to substituted service. While a summons issued out of the County Court of Victoria was still on foot, it could no longer be served and the time for service could not be extended.

In *Licul v Corney* Gibbs J said (at 225) that the true test of finality is whether the judgment or order, as made, **finally disposes of the rights of the parties**. In *Anshun No. 1* his Honour concluded that, "as a matter of reality", the stay order made by the Supreme Court of Victoria did finally dispose of the rights of the parties. Accordingly, he considered it was a final order such that leave was not required.

A stay based on an arbitration agreement is to be contrasted with a defence to a claim based on a *Scott v Avery* arbitration clause. Such a clause can be pleaded as a defence. That is to say, the making of an award is a condition precedent to a cause of action arising. If that condition precedent has not been satisfied, there is simply no cause of action. If that issue is determined by the court, there will be a judgment for the defendant and that judgment will be a final judgment. There will be no discretion involved in the decision making process of the court. If the defence is made out as a matter of the proper construction of the contract containing the arbitration agreement, the court will be bound to find for the defendant.

In a stay application, however, no question is determined as to the existence of the cause of action relied on by the plaintiff. A stay order will not resolve any question as between the parties other than the question of whether or not the court should resolve the dispute which has arisen between them. No substantive rights of the parties are disposed of. No plea of issue estoppel or *res judicata* could be raised in another jurisdiction if the same claims were made in that jurisdiction as were being made in the proceedings which are stayed. Thus, the decision in *Anshun No. 1* does not determine the question of whether the stays ordered in the present case are interlocutory.

It is preferable to deal separately with the stay against WBC and the stay against KMC.

STAY AGAINST WBC – SECTION 7(2) OF THE *INTERNATIONAL ARBITRATION ACT*

The effect of section 7(2) of the IA Act is that where the prerequisites are satisfied, the Court **must** stay the proceedings and refer the parties to arbitration in respect of the matter which is capable of resolution by arbitration. The IA Act was enacted to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") (see Second Reading speech, Hansard, 2 December 1974, page 4390). By section 4 of the IA Act, approval is given to accession by Australia to the New York Convention and its terms are set out in Schedule 1 to the IA Act.

Article II of the New York Convention relevantly as follows:

> *(1) Each Contracting State shall recognise 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…, concerning a subject matter capable of settlement by arbitration.*
>
> ….……..
>
> *(3) The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, **shall**…, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.* [Emphasis added.]

It is apparent that the language of section 7(2) of the IA Act introduces a directive which is not expressly provided for in the New York Convention, namely, the directive for a stay in respect of the proceedings. Article II(3) does not employ the word *"stay"*. Rather, it simply requires that the Court of a contracting State *"shall refer the parties to arbitration"*. That expression appears in Article 4(1) of the Geneva Protocol of 1923 and its use appears to have been continued in the New York Convention without any discussion.

The expression could have two technical procedural meanings as follows:

(i) A court directive staying the Court proceedings.

(ii) A court directive imposing arbitration on the parties.

The expression should not be taken as having the meaning of obliging the parties to arbitrate. I do not consider that the New York Convention requires a Court directive to go to arbitration if a party refuses to participate. Such a directive would not be appropriate because it is up to the parties, or at least one of them, whether an arbitration will take place or proceed. An award could be made in the absence of an unwilling party without a Court directive, provided only that the party has been duly notified of the initiation of the arbitration.

Such an interpretation appears to have been accepted in the United Kingdom. In the implementing legislation in the United Kingdom, namely the *Arbitration Act 1975,* the expression "refer the parties to arbitration" does not appear but is rephrased in what appears to be the technical procedural sense intended, namely, "*to stay the Court proceedings*" (see Section 1(1)).

Bearing in mind that the purpose of the IA Act is to enable Australia to accede to the New York Convention, it is appropriate to construe section 7 by reference to the provision of the

New York Convention to which it is designed to give effect. Thus, section 7(2) must be interpreted in the light of Article II(3). Accordingly, while section 7(2) requires that the Court must both "stay the proceedings" and "refer the parties to arbitration", that provision should be construed as being no more than a statement of the procedural means whereby Article II(3) is given effect. In other words, a stay order is simply the mechanism whereby the parties are referred to arbitration.

In so far as an order pursuant to section 7(2) of the IA Act is expressed to "refer the parties to arbitration" it should be construed as doing no more than stating the consequence of the stay. An order should not be construed as having a compulsive effect. In other words, if the dispute is to be resolved it will be necessary for it to be referred to arbitration. If the plaintiff chooses not to refer the dispute to arbitration, the claim could not otherwise be pursued. On the other hand, the refusal of a defendant to participate in a reference to arbitration commenced by the plaintiff could never constitute a failure to comply with a court order. The consequences of not participating, once duly notified of the reference, is simply that an award may be made *in absentia*.

Even after an order has been made pursuant to section 7(2) of the IA Act, the Court would not be rendered completely incompetent. The effect of an order is to render the Court incompetent to try the merits of the case. However, it may retain competence for matters relating to the arbitration, particularly where the arbitration is to take place within the geographical area over which the Court has jurisdiction. More significantly, the competence of the Court may also continue for the ordering of provisional remedies, such as attachment for securing the amount in dispute. That competence will continue irrespective of where the arbitration is to take place. Such a conclusion is to be inferred from the absence of any reference to stay in Article II(3) itself. (See generally Albert Jan Van Den Berg *The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation,* Amsterdam 1981).

In the *Rena K* [1979] 1 QB 377, Brandon J (at 404C) drew a distinction between a choice of forum on the one hand and a right to security on the other. His Lordship considered that that distinction should be recognised whether a grant of stay is mandatory as it is under section 1(1) of the *Arbitration Act 1975* or discretionary. His Lordship considered that there is nothing in section 1(1) of that Act which obliges the Court, whenever it grants a stay of an

action *in rem* in which security has been obtained, to make an order for the unconditional release of that security (404F).

If, on the one hand, the case is one where in all probability the stay will be final and there will therefore never be any judgment in the action to be satisfied, the Court should exercise its discretion by releasing the security unconditionally. If, on the other hand, the case is one where the stay may well not be final and there may therefore still be a judgment in the action to be satisfied, the Court should exercise its discretion either by refusing to release the security at all, or by only releasing it subject to a term that the defendants shall provide alternative security for payment for any award in the arbitration (per Brandon J at 404H).

Brandon J was prepared to assume, without finally deciding, that a cause of action *in personam* which is adjudicated upon by an English arbitral tribunal merges in the award of that tribunal (405F-G). However, his Lordship considered that a cause of action *in rem*, being of a different character from a cause of action *in personam*, does not merge in a judgment *in personam*, but remains available to the person who has it so long as, and to the extent that, such judgment remains unsatisfied. The situation must, in his Lordship's view, be the same in the case of an arbitral award, which is likewise based on a cause of action *in personam* (405H-406A). His Lordship concluded (406D-E) that if an award should be made against the ship owners and they should be unable to satisfy it, the cargo owners would be entitled to have the stay of the action removed and to proceed to a judgment *in rem* in that action.

The IA Act itself recognises that the Court may retain competence in relation to certain ancillary matters of the nature under consideration by Brandon J in the *Rena K*. Section 7(3) provides that where a Court makes an order under section 7(2) it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the order under section 7(2) relates. Orders for attachment, for example, may well fall within section 7(3). Unless the Court were satisfied that there will never be any judgment in the action to be satisfied, the Court may, in the exercise of its discretion, retain security such as might be constituted by an arrest in proceedings *in rem*. In an action *in rem* a stay may then be removed to enable the plaintiff to proceed to a judgment *in rem*.

The present proceedings were not commenced as an action *in rem* but as an action *in personam* against the defendants. On the basis of the observations made by Lord Brandon, it may be that, upon a stay being granted in respect of an action *in personam*, there will not always be a basis for removal of the stay because the proceedings are *in personam* and the cause of action in respect of which they are brought would merge in any award. However, it is clear from his Lordship's reasoning that even in the case of an action *in personam* it may be appropriate in some cases for security to be retained against the possibility that a judgment may yet be entered in the action.

The proviso in Article II(3) finds expression in section 7(5) of the IA Act which provides that a Court shall not make an order under section 7(2) if the Court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 7(5) does not address the consequences if, following the ordering of a stay, an arbitration agreement which at that stage is not within section 7(5) subsequently becomes null and void, inoperative or incapable of being performed for any reason.

In the *Golden Trader* [1975] 1 QB 348 Brandon J accepted that if an arbitration agreement, or an arbitration begun pursuant to it, should thereafter become inoperative or incapable of proceeding, there might well be grounds for the Court making an order removing a stay and allowing the action to proceed (358F-G). Clearly, in those circumstances, it would be inequitable for the plaintiff in the stay proceedings not to be able to have the disputes resolved in court. If the stay finally disposed of the rights of the parties in the manner contemplated by *Anshun No. 1*, the plaintiff would be met, in any fresh proceedings, with the plea of *res judicata*. Accordingly, it must be possible for a court to remove a stay ordered under section 7(2) of the IA Act, at least in those circumstances.

The possibility that a plaintiff could apply for a stay to be removed in some circumstances suggests that the stay does not finally dispose of the rights of the parties. The possibility that the Court would retain limited competence in relation to the arbitration proceedings and that the stay could be removed so as to enable the original claims to be litigated, leads to the conclusion that an order under section 7(2) is interlocutory in its character. There is nothing final about such an order in the sense that it does not dispose of any of the rights of the parties. It does not determine any of the substantive disputes which have arisen between the plaintiffs and the defendants.

In *Associated Bulk Carriers Ltd v Koch Shipping Inc* ("the Fuohsan Maru") [1978] 2 All ER 254 a divisional judge ordered a stay under section 1(1) of the UK *Arbitration Act 1975* (which is the UK equivalent of the *IA Act*) and dismissed an application for summary judgment. Upon appeal, the Court of Appeal by majority (Denning MR dissenting) confirmed that the order for stay should be confirmed and dismissed the appeal. The report in the All England Reports records the appeal as "interlocutory appeal" (page 256). Another report of the decision of the Court of Appeal (121 Sol. Jo. 708) records the appeal as being "Interlocutory Appeal from Kerr J". Although the question of whether or not the order appealed from was interlocutory or final does not appear to have been an issue in the proceedings, the appeal was apparently treated as interlocutory in character.

After 1988, the position in the United Kingdom became clearer. Order 59 rule 1A, which was inserted in the Supreme Court Rules with effect from 1 October 1988, relevantly provides as follows:

> *1A (1) For all purposes connected with appeals to the Court of Appeal, a judgment or order shall be treated as final or interlocutory in accordance with the following provisions of this rule.*
>
> *(2) ……*
>
> *(3) A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the Court below had decided the issues before it.*
>
> *(4) ……*
>
> *(5) Notwithstanding anything in paragraph (3), the following orders shall be treated as final –*
>
> *(a) an order for discovery of documents made in an action for discovery only;*
>
> *(b) an order granting any relief made at the hearing of an application for judicial review;*
>
> *(c) an order made on an originating summons under Order 85 rule 2 (which relates to administration actions);*
>
> *(d) an order of the winding up of a company;*
>
> *(e) a decree absolute of divorce or nullity of marriage;*
>
> *(f) an order absolute for foreclosure;*
>
> *(g) an order as to costs made as part of a final judgment or order;*
>
> *(h) an order of committal.*

(2) Notwithstanding anything in paragraph (3), but without prejudice to paragraph (5), the following judgments and orders shall be treated as interlocutory –

…….

(m) an order staying proceedings or execution.

…….

(2) Notwithstanding anything in paragraph (3)-

*(a) Orders made on an appeal to the High Court under section 1(2) of the Arbitration Act 1979 (*which deals with questions of law arising out of an award*) shall be treated as final orders.*

(b) All other orders made in connection with or arising out of an arbitration or arbitral award shall be treated as interlocutory orders.

…….

In the light of the decision in *Anshun No. 1*, that rule can have no persuasive weight in relation to the question presently under consideration. In other words, the order under consideration in *Anshun No. 1*, which was held by the High Court not to be an interlocutory order, would have been interlocutory within the meaning of rule 1A. Nevertheless, in the present context it is significant that the Rule Committee in the United Kingdom deemed it appropriate to characterise **all** stay orders as interlocutory.

In the light of the above, I consider that the order of a stay of the proceedings against WBC was interlocutory in character and the appeal in proceedings NG 1101 of 1997 is incompetent in relation to WBC.

KMC – *FORUM NON CONVENIENS*

Clearly, a refusal to grant a stay on the ground that the Court seized with jurisdiction is a *forum non conveniens* is interlocutory in character (see *Oceanic Sun Line Special Company Inc. v Fay* (1941) 65 CLR 197 at 201). Further, in *Bank of America v Bank of New York* (1995) ATPR 40334, the Court of Appeal of New South Wales dismissed an application for leave to appeal against an order made in the Commercial Division of the Supreme Court that the service of the proceedings be stayed or, alternatively, that the proceedings be set aside on the ground that New South Wales was not a convenient forum. Leave to appeal was unanimously refused.

There appears to have been no question but that leave was required notwithstanding that the effect of the orders made in the Commercial Division was to ensure that the disputes between the parties would not be determined in New South Wales.

In the *Chaparral* [1968] 2 Lloyd's Rep. 158 at 164, the English Court of Appeal made it clear that leave was required from a decision to give effect to an exclusive jurisdiction clause. The case involved service out of the jurisdiction as opposed to a stay. However, in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, the High Court observed that the principles of a service out of the jurisdiction application mirror those applicable to a stay application. In *Akai Pty Ltd v Peoples Insurance Co.* (1997) 126 FLR 264 the character of the order made in the Commercial Division which was under appeal does not appear to have been an issue in the Court of Appeal. In the High Court ((1997) 188 CLR 418 at 431.1), the majority noted without demur, that the appeal to the Court of Appeal had been brought with leave.

Those decisions suggest that a stay ordered at the discretion of the Court is to be treated as interlocutory so as to require the grant of leave before an appeal may be brought. It follows that the appeal in proceedings NG 1101 of 1997 is incompetent in relation to KMC.

CONCLUSION

It follows from the above that the appeal in proceedings NG 1011 of 1997 is incompetent and should be dismissed with costs. It will therefore be necessary to consider the second and third questions referred to above.

In *Salter Rex & Co. v Ghosh* [1971] 2 QB 597 Denning MR observed:

> *This question of* "final" *or* "interlocutory" *is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point.*

An adequate definition of "*interlocutory*" in the *Federal Court Act* along the lines of that found in Order 59 rule 1A referred to above, would obviate the need to litigate questions such as that presently before the Court.

I certify that this and the preceding fourteen (14) pages are a true copy of the Reasons for Judgment herein of

the Honourable Justice Emmett

Associate:

Dated: 26 May 1998

Counsel for the Applicant:	P.E. King M.J. Watts
Solicitor for the Applicant:	Withnell Hetherington
Counsel for the First Respondent:	G.J. Nell
Solicitor for the First Respondent:	James Neill Solicitor
Counsel for the Second Respondent:	N.C. Hutley SC A.S. Bell
Solicitor for the Second Respondent:	Ebsworth & Ebsworth
Date of Hearing:	14 May 1998
Date of Judgment:	26 May 1998