Case No: QBCMF 2000/2211/A3

Neutral Citation Number: [2001] EWCA Civ 418
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION COMMERCIAL COURT
(MR JUSTICE LONGMORE)

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 29th March 2001

B e f o r e :

LORD JUSTICE POTTER
LORD JUSTICE SEDLEY
and
LORD JUSTICE JONATHAN PARKER

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Claimant
Part 20 Defendant to First part 20 Claim (1st Claim)

PETROLEO BRASILIERO SA

First Defendant
First Part 20 Claimant (1st, 2nd and 3rd Claims)

MELLITUS SHIPPING INC.

Second Defendant
CHEMIKALIEN SEETRANSPORT GMBH

Part 20 Defendant to First Part 20 Claim (2nd Claim)
Second Part 20 Claimant (4th Claim)

FORTUM OIL AND GAS (formerly NESTE OY)

Part 20 Defendant to First Part 20 Claim (3rd Claim)
Part 20 Defendant to Second Part 20 Claim (4th Claim)

SAUDI ARABIAN MARKETING & REFINING COMPANY

and

Claimant
Part 20 Defendant to First Part 20 Claim (1st Claim)

PETROLEO BRASILIERO SA

First Defendant
First Part 20 Claimant (1st, 2nd and 3rd Claims)

MELLITUS SHIPPING INC.

Second Defendant
CHEMIKALIEN SEETRANSPORT GMBH

Part 20 Defendant to First Part 20 Claim (2nd Claim)
Second Part 20 Claimant (4th Claim)

FORTUM OIL AND GAS (formerly NESTE OY)

Part 20 Defendant to First Part 20 Claim (3rd Claim)
Part 20 Defendant to Second Part 20 Claim (4th Claim)

SAUDI ARABIAN MARKETING AND REFINING COMPANY

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(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Jonathan Gaisman QC and Stephen Kenny Esquire (instructed by Messrs Richards Butler, London, for Saudi Arabian Marketing and Refining Company)
Iain Milligan QC and Michael Coburn Esquire (instructed by Messrs Middleton Potts, London, for Fortum Oil and Gas (formerly Neste Oy))

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Judgment

LORD JUSTICE POTTER:

INTRODUCTION

1. In these two appeals, raising identical issues, the appellants and fourth party ("Saudi Aramco"), who are in each case defendants to a Part 20 claim for contribution by the respondents and third party ("Fortum"), appeal against orders to similar effect made by Longmore J on 10 April 2000, whereby he (inter alia) dismissed Saudi Aramco's applications to set aside Fortum's Part 20 claims and/or service of those claims out of the jurisdiction upon Saudi Aramco and, in consequence, also ordered that Saudi Aramco pay one half of Fortum's costs of the application in the first action (1998 Folio 645) and the whole of Fortum's costs of the application in the second action (1998 Folio 856).

2. The actions concern two shipments of propane each carried on the vessel "Baltic Flame" in April and November 1993 respectively. The parties and the factual allegations in each action are essentially the same. Saudi Aramco was the shipper of both cargoes and the original party to the Bills of Lading under which they were carried. Both cargoes were shipped from Yanbu in Saudi Arabia, six Bills of Lading being issued, dated 9 April 1993, in respect of the April cargo and one only, dated 16 November 1993, in respect of the November cargo.

3. Both cargoes were tested on loading and found to be "on specification". However when they arrived at their intended ports of discharge, both cargoes failed copper strip corrosion tests. As a result the cargoes had to be carried on to other discharge facilities and sold at a discount by their intended receivers ("Petrobras"), who are the plaintiffs in each action. Further, as a result of the apparent contamination of the shipments, the shipowners ("Mellitus"), who are the defendants in the actions, lost time and incurred expenses at the discharge ports and elsewhere, and incurred further costs in cleaning and removing residues of the cargoes from the vessel's tanks after each carriage.

THE PARTIES AND THE ISSUES

4. In the first action (relating to the April shipment) and the second action (relating to the November shipment) Petrobras claimed as lawful holders of the Bills of Lading against Mellitus as owners of the vessel, alleging that the cargo was contaminated during the voyage from Yanbu. Petrobras also claimed in respect of demurrage which it alleged it became liable to pay to the charterers of the vessel.

5. Mellitus counterclaimed against Petrobras on the basis that the cargo was contaminated on shipment and that Petrobras, as lawful holder of the Bills of Lading, was liable under the contracts of carriage contained therein for the loading of a dangerous/injurious cargo. The counterclaim was in respect of time lost and bunkers and stores used in removing residues and cleaning tanks after each carriage ("the tank-cleaning costs"), which were US$585,610 in the first action and US$180,608 in the second action..

6. Mellitus also issued Third Party/Part 20 proceedings against the time-charterer of the vessel ("Fortum"), claiming a contractual indemnity and/or damages in respect of any liability that Mellitus might be under to Petrobras and also for the tank cleaning costs. The indemnity was claimed on the basis that the liability to pay Petrobras (if any) and the incurring of the tank-cleaning costs were caused by compliance with Fortum's orders as time-charterer. Damages were also claimed for various breaches of express and implied terms of the time-charter.

7. Mellitus also issued Third Party/Part 20 proceedings against Saudi Aramco as the shipper and original party to the Bills of Lading, claiming damages on a similar basis to its counterclaim against Petrobras, namely that the cargo was contaminated on shipment and that Saudi Aramco as shipper was, and remains, liable under the Bill of Lading contracts for having loaded a dangerous/injurious cargo.

8. The Bill of Lading contracts pursuant to which Mellitus claimed damages against Saudi Aramco expressly incorporated the terms of charterparties including the arbitration clauses. The relevant charterparties were in the Asbatankvoy form, additional clause 33 of which provided for LMAA arbitration in London before a panel of three arbitrators, the contract being governed by English law. Accordingly, on 27 September 1999 a consent order was made staying Mellitus' Part 20 proceedings against Saudi Aramco.

9. At a case management conference on 22 October 1999, Fortum obtained permission to serve its own Part 20 claim forms in both actions upon Saudi Aramco out of the jurisdiction. The order was made on the basis that Saudi Aramco was a "necessary or proper party" to the proceedings within the meaning of RSC Order 11 rule 1(1)(c) because, to the extent that Fortum is liable to Mellitus under its time-charter, then so too must Saudi Aramco be liable to Mellitus under the Bills of Lading, thus entitling Fortum to claim a contribution from Saudi Aramco under s.1 of the *Civil Liability (Contribution) Act 1978* ("The 1978 Act"). At the time the order for leave was made, the attention of the court was specifically drawn to the fact that the Part 20 proceedings commenced by Mellitus against Saudi Aramco had been made subject to a stay on the grounds that Mellitus' claim against Saudi Aramco was one which had been referred to arbitration pursuant to s.9 of the Arbitration Act 1996.

SAUDI ARAMCO'S APPLICATIONS

10. By notices of application dated 5th January 2000, Saudi Aramco challenged the jurisdiction of the court and applied to set aside Fortum's Part 20 Claim Forms and/or service of them on the grounds that Saudi Aramco was not a proper party to the proceedings within RSC Order 11 rule 1(1)(c) and/or the court should in any event exercise its discretion to set aside jurisdiction on the basis that it was not a proper case for service out: see Order 11 rule 4(2). It submitted in broad terms, and upon the particular facts, that the interests of justice did not require that Saudi Aramco as a foreign party should be brought to England to answer Fortum's claims for contribution.

11. The submissions of Saudi Aramco to the judge, repeated in this court, may be summarised as follows.

> (1) The exercise of jurisdiction under RSC Order 11 is "exorbitant" ("i.e., it is one which, under general English conflict of rules, an English court would not recognise as possessed by any foreign court": per Lord Diplock in *Amin Rasheed v Kuwait Insurers* [1984] AC 50 at 65); thus it ought to be exercised with care.
>
> (2) The power to join necessary or proper parties under RSC Order 11 rule 1(1)(c) needs to be exercised with "special care" because the cause of action may have no connection whatsoever with England: see *Dicey & Morris: Conflict of Laws* (13th Ed.) Vol. 1 p.315, citing *The Brabo* [1949] AC 326 per Lord Porter at 338-9 and per Lord Normand at 357; see also *Multinational Gas & Petrochemical Co. v Multinational Gas & Petrochemical Services Ltd* [1983] Ch.258 per May L.J. at 271E and per Dillon L.J. at 292C-D and *Arab Monetary Fund –v- Hashim* (No 4) [1992] 1 WLR 553 at 557.

(3) Because the notion of a "proper" party represents a wide class of persons and because Order 11 rule 1(1)(c) lacks formal control to prevent the inappropriate joinder of foreign parties, a careful weighing of the applicable discretion by the court is necessary, particularly where the claim against the foreigner is a contingent claim in the nature of third, or as here, fourth party proceedings.

(4) The operation of the 1978, Act in combination with Order 11 rule 1(1)(c), creates the possibility of joinder of a foreign party to answer a claim in contribution where that party could not be sued directly by the plaintiff who has suffered the original damage in respect of which contribution is sought, e.g. where (as in this case) it has been agreed that the primary liability should be the subject of arbitration.

(5) If the foreign party is joined to meet a possible secondary liability by way of contribution, his primary liability to the person who has suffered damage will in effect (if not in strict law) be adjudicated upon in the English Court proceedings; yet that forum may be one which is neither the natural nor chosen forum so far as the foreign party is concerned.

(6) Thus the combination of the Act and the Rule can work to outflank the normal jurisdictional rules relating to the determination of the primary liability and may act against the expectations of the parties to the primary relationship as to the forum in which their disputes are to be resolved.

(7) In this respect, since the law is generally assiduous to uphold and give effect to arbitration clauses, the court should exercise its jurisdictional discretion with extra caution.

(8) The fact that, if a foreign party is not joined to the English proceedings, he will have to be sued elsewhere (thus giving rise to further litigation or arbitration and the risk of inconsistent findings) is not in itself a strong reason to grant leave since that is a feature which will be present in every case in which Order 11 rule 1(1)(c) is sought to be invoked.

(9) Since Saudi Aramco agreed to submit claims and disputes between itself and Mellitus to arbitration (which agreement had already been enforced by application in these actions), Fortum should not be permitted to join Saudi Aramco in court proceedings to meet Fortum's claim for contribution in what is only a contingent liability for Mellitus' loss.

THE JUDGMENT OF LONGMORE J.

12. Before the judge it was clear from the affidavits of the parties' solicitors (Mr Newall for Fortum and Mr Brown for Saudi Aramco) that there was a measure of common ground in that:

(i) Saudi Aramco did not dispute that in respect of the tank cleaning claims there was at least a good arguable case against them under the 1978 Act and that, subject to questions of *forum conveniens*, those claims would fall within O.11 r.1(1)(c);

(ii) Nor did Saudi Aramco dispute that the issues which arise as to the condition of propane on shipment and on arrival at the discharge port, and as to the cause of the damage to the ship's tanks, are central and common to the claim between Petrobras and Mellitus and between Mellitus and Fortum and that the claim by Fortum against Saudi Aramco raises the same issues and is in respect of the same damage;

(iii) Saudi Aramco's objection to their being joined as a "necessary or proper party" was and is an objection to the English court as the forum for Fortum's claim against them, based (a) on the desire and expectation of Saudi Aramco that disputes arising out of shipment of the cargoes would be resolved by arbitration and (b) on the fact that a right to contribution in these circumstances would not be recognised in the Saudi courts. .

13. The judge accepted the main thrust of Mr Gaisman's argument set out above under paragraph 11(1)-(5), as to the caution to be exercised in granting leave under O.11 r.1(1)(c) particularly in relation to a claim under the 1978 Act, buttressed as it was by its "outflanking" effect on the operation of an arbitration clause as between the party to be joined and the party in respect of whose claim contribution is sought. He accepted that it was far from every case in which a foreign applicant who was prima facie a necessary or proper party that he should be brought within the jurisdiction to meet a third party claim. Indeed, the judge stated that in these circumstances:

> "There must be some special factor, and such special factor could not be constituted [simply] by a plurality of claims or risk of inconsistent decisions in respect of such claims because that state of affairs exists in every necessary or proper party case."

14. He then went on to identify the special factor which, for him, was conclusive in favour of the grant of leave, namely the non-availability of contribution proceedings in Saudi Arabia so that, if Saudi Aramco's application were granted, any right of Fortum to claim contribution in respect of its liability to Mellitus would be defeated. In that respect he said:

> "I was unable to discern from Mr Gaisman's submission how, if Saudi Aramco were not parties to these proceedings and if it was decided, whether in court as between Mellitus and Fortum, or in arbitration as between Mellitus and Saudi Aramco, or both, that the cause of the contamination was the pre-shipment condition of the cargo, Saudi Aramco would discharge their responsibilities. There is no way in which it will be possible to tell them to do so.
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> Mr Gaisman's response to this was to refer to the parochiality of the right to contribution as between independent contractors and the fact that Saudi Aramco owe no allegiance to an Act of the United Kingdom Parliament. This approach is too dismissive of Mr Howard's submission. Any civilised system of law has, or should have, some system of contribution between those jointly responsible for the same loss. It has long existed in English law between co-debtors and co-insurers at common law and between co-sureties and trustees in equity As Chief Baron Eyre put the matter in Dering's case, the right to contribution "is bottomed and fixed on general principles of justice and does not spring from contract, though contract may qualify" (see page 321 of the Report). The principle of contribution in general average has likewise long been recognised by English law (see The Copenhagen (1799) 1 C Rob 289)…and has become part of the general law of maritime nations.
>
> It is true that neither the common law nor equity involved the principle of contribution between joint tortfeasors or between separate contractors apart from co-sureties or co-insurers..[until]…the Law Reform (Married Women) and Tortfeasors Act of 1935, and .. the Civil Liability Contribution Act 1978 ...

> But the argument that a right of contribution as between contractors is a local remedy peculiar to English Law with which Saudi Aramco need have no concern or cannot expect to be engaged, itself portrays an inappropriate parochialism. Mr Gaisman accepted the fact that a particular remedy might not be available in the place of a defendant's domicile or residence could sometimes be of importance in the exercise of the court's discretion. If, for example, a claim might be defeated by a local time-bar, that might sometimes be an argument for confirming leave to serve out of the jurisdiction: Spiliada Maritime – v Cansulex [1987] AC 460 at 483-4 and more generally Mohammed v Bank of Kuwait of Middle East [1996] 1 WLR 1483…
>
> ..Saudi Aramco does engage in international trade. They have in this case made an international contract of carriage providing for arbitration in London. Exposing themselves to potential English liability cannot have been outside their contemplation. There is, moreover, no question of their activities offending any English law. All that Fortum … ask is that they be prepared to accept their share of responsibility, if indeed they are responsible."

THE GROUNDS OF APPEAL

15. In this court, Mr Gaisman has adopted and asserted the judge's view that, save for some 'special factor', the circumstances would not have warranted leave to serve Saudi Aramco outside the jurisdiction. However, he has attacked the judge's assessment and conclusion in relation to the special factor identified in the extract from his judgment quoted above. Mr Gaisman argues as follows:

> (1) He asserts that the judge overlooked that, if it were decided in arbitration between Mellitus and Saudi Aramco that the cause of the contamination was of pre-shipment origin, Saudi Aramco would be held liable and would 'discharge its responsibilities' to Mellitus directly. Thus there would be no need for a claim in contribution by Fortum against Saudi Aramco. If Mellitus were successful in the arbitration which it was entitled to pursue, the award would be enforceable in Saudi Arabia, which is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and if Mellitus failed, then Fortum's need for contribution would not arise. Thus, because it was unlikely that Fortum would in fact suffer prejudice or disadvantage, the 'special factor' identified by the judge lacked real substance and should have been regarded as insufficient to outweigh his apparent acceptance of the undesirability that the arbitration agreement between Saudi Aramco and Mellitus would be "out-flanked".
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> (2) In any event, the fact that a contribution claim by Fortum against Saudi Aramco, if brought in Saudi Arabia, would fail is not itself a reason why Fortum should be allowed to bring its contribution claim in this country. Saudi Arabia is an 'available forum' in the *Spiliada* sense. It has competent jurisdiction, and the fact that Fortum might fail in its claim if it sued there does not render Saudi Arabia an unavailable forum as such: see *The Eras EIL Actions* [1992] 1 Lloyd's Rep 570 at 610.
>
> (3) The judge was wrong to rely generally upon the view that 'any civilised system of law…should have some system of contribution between those jointly responsible for the same loss' to the extent provided for in s.1 of the 1978 Act. There was no evidence that Saudi Arabian law did not recognise rights of contribution in

various of the particular situations referred to by the judge as recognised in English law prior to the passing of the 1978 Act.

(4) Even if the unavailability of a contribution claim in Saudi Arabia were relevant to the judge's exercise of discretion, there was no indication in his judgment that he consciously weighed such 'special factor' against the other factors which he indicated would have led him to conclude that the exercise of jurisdiction was inappropriate. He was in error in treating the special factor as a 'trump card', when what was required was a reasoned balancing of the factors militating against the exercise of the jurisdiction on the one hand, as against any which tended to support the assumption of the jurisdiction on the other. Had such an exercise been carried out, the judge would not or should not have come to the decision he did.

16. Mr Milligan QC, for Fortum, supports the decision of the judge and, in particular, his finding that the absence of a claim in contribution in Saudi Arabia was a decisive factor justifying service of the proceedings on Saudi Aramco. However, he does not accept (as the terminology of the judgment might suggest) that in a 'necessary and proper party' case it is necessary in all cases to demonstrate the existence of a *special* factor over and above the desirability of avoiding multiplicity of proceedings. He submits, rightly in my view, that the general consideration of the need to avoid multiplicity of claims and risk of inconsistent decisions may well be enough to justify service out of the jurisdiction in appropriate cases and that, in every case, the court should look at the matter 'in the round' without pre-conception or pre-disposition in respect of any particular factor which may be advanced as relevant to the exercise of the court's discretion, save for the necessity to scrutinise with care the grounds on which it is sought to oblige the foreign party to participate in English court proceedings. He points out, again rightly, that there is nothing in the leading authorities to support the proposition that any particular consideration should be elevated to the level of a 'special factor' or 'trump card' on the one hand, or decried as an 'outflanking' exercise on the other. What is needed in every case is a careful weighing process of all the relevant considerations in which some factors will inevitably emerge as more or less potent in the estimation of the judge.

17. In this context, Mr Milligan submits as follows in relation to the principal points argued before the judge. He submits that the argument that Saudi Aramco will be deprived of the opportunity to have its rights vis-à-vis Mellitus dealt with by arbitration should not be accorded substantial weight. It is not an argument which would have any real prospect of success if Saudi Aramco were resident within the jurisdiction, and it should gain nothing when 'bolted on' to an application to set aside service out of the jurisdiction. Furthermore, if Saudi Aramco's 'right' to arbitrate its dispute with Mellitus is regarded as one which is not to be 'outflanked', and thus treated as decisive on the question of its joinder, then Fortum will be deprived of the right to contribution which is conferred upon it by the 1978 Act.

18. As to that right of contribution, Mr Milligan submits that, given that it is conferred by the 1978 Act and made available against a foreign defendant by RSC O.11 r1(1)(c), now CPR 6.20(3), Saudi Aramco is plainly a 'proper' party subject to the necessary caution to be exercised by the court to ensure that the claim is genuine and involves no abuse of procedure and subject also to the matters with which the court traditionally concerned itself under O.11 r1(4), in particular, the question of *forum conveniens* ("the *Spiliada* principles"). As to the former, there is no dispute that there is at least an arguable claim and there is no suggestion of bad faith; as to the latter, there is no suggestion that London is *forum non conveniens*.

19. On the question of forum, while the skeleton arguments below raised questions as to whether or not England or Saudi Arabia is the appropriate forum for the hearing of the dispute between

Fortum and Saudi Aramco, in the sense of being the 'natural forum', i.e. the one with which the action has the most real or substantial connection, such questions were not addressed in the judgment and do not figure in the grounds of appeal. No doubt that is because, in its nature and context, this is essentially international litigation without a 'natural' forum, but in which the English High Court is already the venue for the trial of disputes which arise out of the same subject matter and affect other parties who proceed here by right and are not amenable to process in Saudi Arabia. Further, Saudi Aramco is in any event committed to arbitration proceedings in which it will be necessary to bring the relevant documents and witnesses to London.

DISCUSSION

20. Mr Gaisman has referred us to the statement in *Cheshire and North: Private International Law (13th ed)* at 301, that in the case of a party seeking service out of the jurisdiction against a second defendant/third party under O.11r.1(1)(c):

> "There has, for many years, been a particular reluctance to exercise the discretion to allow service out of the jurisdiction under this head, even though a refusal may require more than one claim in more than one country."

21. The authorities are sufficiently well known not to require quotation here. They are principally to be found in the cases and references referred to in Mr Gaisman's proposition (2) in paragraph 11 above. However, closer reference to those authorities reveals that they do not speak in terms of actual 'reluctance', but rather in terms of 'caution' or 'special care', in the sense that the court will give careful examination to the cause of action relied on, both as to its substance and its prospects (is it bound or very likely to fail?), whether it is brought in good faith or with some improper motive or ulterior purpose, and whether or not full and fair disclosure has been made. Provided these hurdles can be overcome, there is no identification of any wider requirement than the need to satisfy the court under the former O.11 r4(2) that the case is appropriate for service out of the jurisdiction under the order. This in turn invokes particular consideration of the *Spiliada* principles, in relation to which the burden is on the claimant to persuade the court that England is the appropriate forum for trial of the claim. This will frequently not be easy, because the rule applies to cases where there is no territorial connection between the claim which is the subject of the relevant action and the jurisdiction of the English courts (unlike the other categories of case where service out was permitted under the former Order 11). The jurisdiction is thus exorbitant in the sense indicated by Lord Diplock in the *Amin Rasheed* case at p.65 (see also per Lord Goff in the *Spiliada* case [1987] AC 460 at 481). Nonetheless, as *Cheshire and North* go on to observe:

> "Although this head is a dubious one in terms of a lack of connection required, it is a good provision in terms of litigational convenience. It allows for the consolidation of litigation in one state, which is in the interests of all concerned"

22. It is of course the position that, because of the very nature and wording of the rule, the argument of litigational convenience is able to be advanced by the claimant in every case where leave is sought in relation to Part 20 proceedings. While that will not necessarily be sufficient in itself to persuade the court into a favourable exercise of its discretion, it is, in my view, a factor which may properly encourage a judge to lean in favour of allowing service out of the jurisdiction in the absence of positive counter-indications. As it seems to me, the very existence of the rule and its underlying rationale bring into play the factor of litigational convenience as a matter to be weighed against any reluctance (as opposed to 'caution' in the

sense referred to above), on the part of the court when considering whether to exercise its discretion under Ord.11 r.4(2).

23. This was made clear by Mustill LJ in *The Eras EIL Actions* [1992] 1 Lloyd's Rep 570 at 591. He there considered a statement of Waller J at first instance that:

> "the plaintiff must satisfy both the test of necessary or proper party and O.11 r.4, that the case is a proper one for service out …. That brings into play the discretion and the application of the principles enunciated by Lord Goff in the *Spiliada* case but, having said that, I would think that necessary or proper party cases will often be just those type of cases referred to by Lord Goff in *Spiliada* at 481G, when leave will normally be given once the judge is satisfied on the high test for O.11 that a person is a proper party. Since the forum is already chosen, it will normally be a case when the discretion is exercised in favour of service, but the question must be posed in two distinct stages, I accept: Is the defender a necessary or proper party to the application? Is it right to bring him here to be a party?"

Mustill LJ observed in respect of Waller J's statement:

> "The appellants treat this as a statement of principle to the effect that there is a presumption in favour of granting leave in a case falling within par.*(c),* and they complain that it is an unjustified fetter on the free exercise of the court's discretion. If this had indeed been what the judge meant we should have thought the criticism well-founded, but we do not so read the passage quoted. *The judge was saying only that in practice the factor which make the party served a necessary or proper party within par.(c), will also weigh heavily in favour of granting leave to make the foreigner a party although they will not be conclusive. So understood the judge's statement is obviously right."* (emphasis added)

See also per Lord Simonds in *The Brabo* at p.349.

24. There are three cases upon which Fortum placed particular reliance before the judge, and which Mr Milligan has submitted to us support his contention that litigational convenience is an important element in the exercise of the court's discretion. In *The Kapetan Georgis* [1988] 1 Lloyd's Rep 352, Hirst LJ considered the application of a Canadian company (Devco) to set aside third party proceedings, inter alia, for contribution under the 1978 Act, by a defendant charterer who had been sued by a plaintiff owner for breach of contract and/or negligence in delivering and loading on board the owner's vessel a dangerous cargo of Devco coal as a result of which an explosion occurred. The third party had also claimed in tort for economic loss, a claim which the judge held to be arguable. However, he also considered the matter on the basis of the 1978 Act. Despite the fact that the judge considered that Canada was the natural and more convenient forum for Devco, he considered all the arguments with which he had been presented and in particular what he termed 'the virtues of a single trial with all effective parties present and bound by the result'. Devco had submitted that it was the charterers' own doing that they were parties to the action in England, since they could perfectly well have declined jurisdiction by insisting on the arbitration clause. Devco also submitted that a Canadian court would be likely to follow the decision of an English court. Hirst 9J said:

> "There was nothing in any way improper or open to criticism in Skaarup [the charterers] accepting English jurisdiction, not least because in this case a series of arbitrations under each of the arbitration clauses contained in the respective charters would, to say the least, be a highly unsatisfactory mode of procedure. One of the main purposes and indeed virtues of third party proceedings is to ensure that all relevant parties are bound by one single decision, and I am by no means persuaded that inconsistent decisions will be out of the question if there were separate sets of proceeding in England and Canada. As to discovery, even if Devco were disposed to be co-operative, that is asking a great deal of even the most public spirited Corporation comprehensively to open all their book and records on a voluntary basis, consequently I think discovery is more likely to satisfactory if there is one single proceeding here. It is also in my view as Mr Jacobs submits likely that Devco's evidence (which is of great importance to all the other parties in the litigation) will be rather more satisfactorily available to the court if Devco are parties here, but I do not make great weight on this last point.
>
> *Conclusion*
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> Taking all these matters into account, and bearing fully in mind as I have already stressed the undoubted inconvenience to Devco of litigating here, I am satisfied that the considerations above in the preceding section of my judgment provide, in Lord Wilberforce's words quoted and approved in *The Spiliada,* good reasons why the service of a third party proceedings calling for appearance for Devco before an English court should be permitted."

25. Similarly, in *The Goldean Mariner* [1989] 2 Lloyd's Rep 390 at 400, a judgment later upheld in the Court of Appeal [1990] 2 Lloyd's Rep 215 at 222, Phillips J stated, on an application to set aside service by a number of foreign underwriters sued in respect of a marine casualty:

> " … there was one consideration which, in my judgment, outweighed all others in making London the obvious forum for trial of the plaintiff's claims against the defendants … the English forum …. was the only jurisdiction in which it was open to all the plaintiffs to sue all of the defendants."

While the decision of Phillips J was scarcely surprising in a case where the parties joined were all co-insurers and parties to the same contract as the party duly served, it nonetheless serves to emphasise the importance of the factor of litigation convenience.

26. Finally, in *The Berge Sisar* [1997] 1 Lloyd's Rep 635, a case in which the facts were very similar to the instant case, Waller J considered an application to set aside a concurrent writ served upon Saudi Aramco out of the jurisdiction under O.11 r.1(1)(c) by the purchasers ("Borealis") of a cargo of propane from sellers who had in turn bought from Saudi Aramco who had shipped the cargo aboard the vessel. The shipowners ("Bergesen") made a claim on Borealis. Upon that application, a number of similar arguments arose to those deployed in this case (although there was no evidence that a claim in contribution was not available to Borealis in Saudi Arabia). Mr Gaisman, who appeared for Saudi Aramco in that case also, similarly argued that O.11 r.(1)(c) involves a greater claim to jurisdiction than any other provision of O.11 and that the 1978 Act had the effect of providing a cause of action for

contribution against a foreigner, even where jurisdiction might not be obtained against him by the person to whom he was said to be primarily liable. Mr Gaisman asked how it could be that Saudi Aramco, which had a Saudi Arabian jurisdiction clause in its sales contracts, and an arbitration provision in the bills of lading, could be brought before the English court under O.11 on the basis of a claim to contribution.

27. Waller J held (at p.640 rhc) that:

> ".. if Bergesen have a genuine claim against Borealis the argument in favour of allowing Saudi Aramco to be joined has very great force. If it is a genuinely arguable claim, then since Borealis are at risk if Saudi Aramco are not bound by the relevant findings, and if Borealis are for some reason either unable to recover from Stargas, (or even not re-cover 100% in an as yet unpleaded contribution claim) there must be a very strong case for bringing Saudi Aramco into the action. On the basis that Bergesen has a genuine claim against Borealis the answer to various of the points made by Mr Gaisman QC would be as follows:
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> 1. In relation to the jurisdiction of Saudi Courts, and the distinct possibility that proceedings may take place in those Courts in any event; first, there is no agreement between Borealis and Saudi Aramco that the Saudi Courts should have jurisdiction over any dispute between them, and it would be the very fact that there would be a risk of inconsistent findings which would make it just and convenient for Saudi Aramco to be joined and thus bound by those findings which may render Borealis liable.
>
> 2. In relation to arbitration: once again Borealis is not bound vis-à-vis Saudi Aramco to arbitrate disputes as to contribution; there is furthermore an action proceeding in the English Court which on this basis puts Borealis at risk. Justice would point to Borealis being entitled to have Saudi Aramco bound by these findings which would render Borealis itself liable.
>
> 3. Inconvenient forum: an action is being fought in this country in any event. The issues to which par. 30(7) of the skeleton of Mr Gaisman QC point as being ones which would be more conveniently tried in Saudi Arabia will in fact be tried in London. There will be some inconvenience to Saudi Aramco being forced to bring its witnesses here and being forced to take part in that trial here, but as against that, Saudi Aramco would have been bound to come to London to arbitrate the same issues, and thus physical inconvenience is not something on which they should be entitled to place strong reliance."

28. An appeal from Waller J's decision succeeded upon another point. However, the appeal in respect of the exercise of his discretion failed. In that respect, Sir Brian Neill (with whom Millett LJ and Schiemann LJ agreed) said as follows ([1999] QB 863 at 873H-874B):

> "It is clear … that Waller J was well aware that the jurisdiction which he was exercising was an exorbitant one and that he also had in mind the fact that the claim by Borealis was based on the Act of 1978. It will be seen therefore that, apart from the argument on the Act of 1992 to which I shall soon turn, the submissions on discretion before us were

> substantially the same as those before Waller J. These submissions are formidable and they were attractively presented but I have come to the firm conclusion that they must be rejected. An appellate court should be very careful not to interfere with the exercise of the judge's discretion unless the appellate court can detect an error of principle or is satisfied that the judge's decision was plainly wrong. It seems to me that this case was near the borderline, but I think that the judge was entitled to reach the conclusion that he did and I cannot see any error of principle."

29. Bearing those observations in mind, Mr Gaisman has sought, in arguing the appeal before us, to demonstrate some error of principle on the part of Longmore J which would justify our interfering with his decision. Mr Gaisman's submissions as set out at para 15 above, can be pared down to two particular errors upon which he relies as invalidating the 'special factor' identified by Longmore J. First, he has picked upon what he suggests was a surprising error of understanding on the part of the judge in the first paragraph of the quotation from his judgment in paragraph 14 above. He submits that the judge overlooked the fact that, if Saudi Aramco were responsible for pre-shipment contamination, Mellitus could establish that responsibility in an arbitration award enforceable against Saudi Aramco; see para 15(1) above. Having perused the judgment carefully, I do not consider that the judge misunderstood the position. Most of the argument before him was based upon the 'outflanking' submission that Mellitus' right to arbitrate against Saudi Aramco represented the proper method of resolution of the dispute. In the passage criticised, the judge was plainly referring to Saudi Aramco's responsibilities vis-à-vis Fortum, on the assumption that Mellitus succeeded in its action against Fortum under the timecharter in these proceedings. That seems to me plain also from the passage which immediately followed, dealing with the contribution point.

30. As to the assertion that, in any event, Mellitus' right to recover against Saudi Aramco in the arbitration meant that there was no substantial prejudice to Fortum if it could not assert its right to contribution, that does not seem to me to amount to an adequate answer to the concerns of Fortum to have its own position protected and alleviated in the only proceedings to which it is a party and in which it is vulnerable to the claim of Mellitus. Fortum, not being a party to any arbitration proceedings between Mellitus and Saudi Aramco, and thus being in no position to affect their progress or influence their outcome, is on any view at risk that its liability to Mellitus will be determined in these proceedings before and/or without resolution of the arbitration proceedings.

31. I turn now to the submissions of Mr Gaisman on the 'special factor' central to the judge's decision, namely that, unless Fortum could maintain its contribution claim against Saudi Aramco in this country, it could not be enforced or otherwise provided for, because the law of Saudi Arabia allows no remedy of contribution: see points (2)-(4) at paragraph 15 above.

CONTRIBUTION

32. CPR 20.3(1) provides that, subject to exceptions which are not relevant to this case,

> "A Part 20 claim shall be treated as if it were a claim for the purposes of the rule …"

CPR 6.20 provides:

"6.20 In any proceedings to which rule 6.19 does not apply, a claim form may be served out of the jurisdiction with the permission of the court if –

(1) ..

(2) ..

(3) a claim is made against someone on whom the claim form has been or will be served and –

(a) there is between the claimant and that person a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

(3A) a claim is Part 20 claim and the person to be served is a necessary and proper party to the claim against the Part 20 claimant."

CPR 6.21 provides that:

"2(A) The Court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim."

33. Although the wording of rules 6.20 and 6.21 differs from that of the former O.11 r1(1) and r4, the principles expounded in former authorities relating to O.11 remain applicable. That being so, the starting point for the grant of leave is that generally a person who may be joined in proceedings in accordance with the rules as to joinder parties is a 'proper party' and that, when the liability of several persons (whether cumulative or alternative) depends on one investigation, if one of them is a foreigner residing out of the jurisdiction then CPR 6.20 applies: see *Massey –v- Haynes* [1881] 21 QBD 330.

34. As made clear by Hobhouse J in *RA Lister & Co Limited –v- EG Thomson (Shipping) Ltd No2 (The Benarty)* [1987] 1 WLR 1614, for the purposes of recovering contribution under s.1 of the 1978 Act the liability to the injured party of the person from whom contribution is sought does not need to be procedurally enforceable as a current and subsisting liability provided it had the character of a liability at the time the damage was inflicted/suffered. All that is required is that liability 'has been *or could be* established in the action against him in England and Wales by or on behalf of the person who suffered damage': see s.1(6) of the 1978 Act which also provides that 'it is immaterial whether an issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales'. In that context the use of the words 'could be' connotes that a substantial or remedial criterion of liability is being referred to and that the subsection is concerned with the character of the liability and not with any merely procedural considerations as to how it might be enforced: see *The Benarty* p.1622A-H. Thus the mere fact that the claim of Fortum against Saudi Aramco is subject to a stay for the purposes of arbitration is no bar to Fortum's contribution claim, which is itself subject to no requirement of arbitration and indeed is unenforceable unless it is permitted to be pursued. In those circumstances, it seems to me that there can be no real argument that Saudi Aramco is a proper party to the proceeding subject only to the overall discretion of the court under CPR 6.21(2A), which discretion is, generally at least, principally concerned with the question of *forum*

conveniens, namely in which forum the case could most suitably be tried for the interests of all the parties and the ends of justice.

35. It is of course the case that, in principle, Saudi Arabia is an 'available forum' in the *Spiliada* sense, in that there is no physical or administrative barrier to Fortum seeking to take proceedings there, but it is common ground that there would be no point whatever in Fortum doing so, since the remedy it seeks is not available. It is also correct, as made clear by Mustill LJ in a different context in *The Eras Eil Actions* at p.610, that in a case where the parties between whom a contribution is sought have *expressly chosen* a foreign substantive or procedural law applicable to all disputes between them, the fact that that law does not include a right to contribution will not be sufficient to persuade the court that the foreign party from whom contribution is claimed should be joined in proceedings in England. However, that was a case where, not only had the parties chosen Illinois arbitration as the forum for disputes between them, but the arbitration proceedings were already afoot between the parties in Illinois and the court considered that it was plain that all the parties' disputes should be dealt with together. What the court did *not* say was that the absence of a right to contribution in Illinois was itself a reason why joinder in the English proceedings should not be permitted.

36. Nor in my view is it. The 1978 Act is strictly territorial in scope. However, it is unequivocal in its application to all proceedings brought in England, and there is nothing in the Act, or in particular in s.1(6), to limit the right of contribution to liabilities incurred in England and Wales: see the observations of Hirst J in *'The Kapetan Georgis'* at p.357-9. Contribution proceedings are in turn generally proceedings appropriate to be tried in the course of proceedings already afoot. The draftsman of the 1978 Act and the Supreme Court Rules Committee may be taken to have had in mind that the combined effect of the 1978 Act and O.11 r1(1)(c) would be to permit joinder of a foreign party who would not be liable if sued directly in his own country. Similar issues arise in cases where the limitation period in the foreign country may be different from that in England. Depending on the overall circumstances, a shorter local time bar may on occasions be an argument for confirming the need to serve out of the jurisdiction.

37. In that respect, in dealing with the treatment of legitimate juridical advantage in *forum non conveniens* cases, Lord Goff observed in *Spiliada* at p.483C-484B:

> "… the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to a different conclusion in other cases …. . Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which in the opinion of the court is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred … a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But in my opinion this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example by

> issuing a protective writ) in that jurisdiction within the limitation period applicable, it would not, I think, be just to deprive the plaintiff the benefit of having started proceedings within the limitation period applicable in this country … it is not to be forgotten that, by making its jurisdiction available to the plaintiff - even the discretionary jurisdiction under RSC Ord 11 – the courts of this country have provided the plaintiff with an opportunity to start proceedings here; accordingly, if justice demands, the court should not deprive the plaintiff of the benefit of having complied with the time bar in this country."

38. In my opinion, in relation to a question of contribution, the court should similarly be guided by the interests of the parties and considerations of practical justice. This is a case where plainly Fortum are acting reasonably in seeking to issue contribution proceedings against Saudi Aramco in proceedings in which Fortum have themselves been sued and require to protect their position. So far as practical justice is concerned, while Saudi Aramco would be under no liability if sued in Saudi Arabia, it will only be held liable to contribute in this country if it is in truth directly liable to Mellitus pursuant to a claim for damage already asserted and required to be determined in England under English law (albeit in arbitration proceedings). In such circumstances, as it seems to me, the demands of practical justice plainly favour joinder of Saudi Aramco.

39. This view was plainly shared by the judge. In that respect he was at pains to address the argument which had been addressed to him by Mr Gaisman that the demands of practical justice did not include the upholding of a right to contribution where such right was not recognised by the law of the relevant foreign state, and that the right to contribution, as conferred by the 1978 Act, was a remedy 'parochial' to this country and not universally recognised. It was in that context that the judge made the remark which Mr Gaisman criticises as flawing the exercise of his discretion, namely that 'any civilised system of law has, or should have, *some* system of contribution between those jointly responsible for the same loss' (my emphasis). Mr Gaisman submits that such remark indicates that the judge based his exercise of discretion upon the view that Saudi Arabian law is uncivilised for not recognising a general right to contribution between those jointly responsible for the same loss, when such general right was not recognised in this country until 1978. That seems to me both a simplistic and unwarranted characterisation of what the judge was saying. His remark was not merely made to rebut Mr Gaisman's argument of parochialism, but as an introduction to his brief review of the areas in which a right to contribution had been recognised in England prior to the 1978 Act. It was also a precursor to his eventual conclusion that, as a matter of practical justice, Saudi Aramco could scarcely complain if its international operations exposed it to potential liability to a claim for contribution. Had the judge omitted the reference to any 'civilised' system of law and limited himself to his quotation from *Dering's* case to the effect that the right to contribution 'is bottomed and fixed on the general principles of justice', there would scarcely be room for the point which Mr Gaisman makes. In my view the judge was in truth saying no more than that.

40. Mr Gaisman has criticised the judge's observation that, by engaging in international trade and making an international contract of carriage, Saudi Aramco have exposed themselves by such activity to potential claims in English court proceedings. He has submitted that the fact that Saudi Aramco had agreed that its contractual relations with Mellitus should be governed by English law, but that the contractual disputes between them should be resolved privately by London arbitration demonstrated an intention to minimise any exposure to court proceedings. That may be, but to allow such an argument to prevail is, in my view, to take too narrow a view of the matter. It seems to me that, in the context of considering the practical justice of

requiring a foreign resident to answer to a claim in court proceedings in respect of which he would not be liable in the courts of his own country, the point that the judge was making was highly relevant. By freely entering, in the course of its international business, into contracts of carriage which incorporate English law, Saudi Aramco plainly contemplated that English law shall govern Saudi Aramco's liabilities arising therefrom. Although, it may well be the case that many bills of lading incorporate the terms of a charter which provides for London arbitration (as in the Asbatankvoy form) it is plainly a possibility that the relevant charterparty will be in a form which, like the Shellvoy charter, contains an English High Court jurisdiction clause with an option for London arbitration instead. Looked at broadly, therefore, Saudi Aramco cannot realistically expect to carry on its world-wide business free of the prospects of joinder in English proceedings.

41. Finally, I would reject the suggestion that the judge failed consciously or properly to weigh in the balance the various factors going to the exercise of his discretion. He certainly treated as decisive the 'special factor' that, if service were set aside, the remedy of contribution would be unavailable to Fortum in any jurisdiction; however, there is no reason to think that he did not properly weigh it in the balance together with all the other factors which had been drawn to his attention.

CONCLUSION

42. I consider that the decision of the judge represented a proper exercise of his discretion and would accordingly dismiss the appeal.

LORD JUSTICE JONATHAN PARKER: I agree

LORD JUSTICE SEDLEY I also agree

ORDER: Appeal dismissed with the costs of £24,500. Permission for leave to appeal refused.

(Order does not form part of approved Judgment)