FEDERAL COURT OF AUSTRALIA

BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd [2008] FCA 551

ARBITRATION – international arbitration – application for stay under s 7 of the *International Arbitration Act 1974* (Cth) – whether applicant party to arbitration agreement – whether applicant claiming "through or under a party" – test to be applied – waiver – whether court has inherent power to stay proceedings – nature of discretion

Contracts (Rights of Third Parties) Act 1999 (UK), ss 1, 8
International Arbitration Act 1974 (Cth), ss 7(2), 7(4)

A v B [2007] 1 Lloyd's Rep 237
ACD Tridon Inc v Tridon Australia Pty Ltd [2002] NSWSC 896
Adelaide Steamship Industries Pty Ltd v Commonwealth [1974] 8 SASR 425
Adelaide Steamship Industries Pty Ltd v Commonwealth [1974] 10 SASR 2
Advent Capital Plc v Ellinas Imports-Exports Ltd [2005] 2 Lloyds Rep 607
Aerospatiale Holdings Australia Pty Ltd v Elspan International Ltd (1992) 28 NSWLR 321
Akai Pty Ltd v People's Insurance Co Ltd (1996) 188 CLR 418
Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 1) (1996) 64 FCR 1
Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 2) (1996) 64 FCR 44
Al-Naimi v Islamic Press Agency Inc [2000] 1 Lloyd's Rep 522
Alto Constructions Pty Ltd v University of New South Wales (unreported, Supreme Court of NSW, Young J, 15 December 1995)
Anderson v G H Michell & Sons Ltd (1941) 65 CLR 543
Attorney-General v Times Newspapers Ltd [1992] 1 AC 191
Australian Granites Ltd v Eisenwerk Hensel Bayreuth GmbH [2001] 1 Qd R 461
Austrian Lloyd Steamship Co v Gresham Life Assurance Society Ltd [1903] 1 KB 249
Badgin Nominees Pty Ltd v Oneida Ltd [1998] VSC 188
Beswick v Beswick [1968] AC 58
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334
Compagnie des Messageries Maritimes v Wilson (1954) 94 CLR 577
CSR Ltd v Cigna Insurance Australia Ltd (1997) 189 CLR 345
CSR Ltd v New Zealand Insurance Co Ltd (1994) 36 NSWLR 138
Darlington Wagon Co Ltd v Harding and the Trouville Pier and Steamboat Co Ltd [1891] 1 QB 245
Delhi Petroleum Pty Ltd v Santos Ltd [1999] SASC 37
Evans Marshall & Co Ltd v Bertola SA [1973] 1 WLR 349
Great Southern Loans Pty Ltd v Locator Group Pty Ltd [2005] NSWSC 438
Halfhide v Fenning (1788) 2 Bro C C 336 [29 ER 187]
Hall v Hardy (1733) 3 P WMS 187 [24 ER 1023]
Hamlyn v Talisker Distillery [1894] AC 202
Hanessian v Lloyd Triestino Societa Anonima di Navigazione (1951) 68 WN (NSW) 98

Hide v Petit (1671) 1 Chan Cas 185 [22 ER 754]
HIH Casualty & General Insurance Ltd (in liq) v Wallace (2006) 204 FLR 297
Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194
Huddart Parker Ltd v The Ship Mill Hill (1950) 81 CLR 502
Incitec Ltd v Alkimos Shipping Co (2004) 138 FCR 496
Kill v Hollister (1746) 1 Wils KB 129 [95 ER 532]
King v Bowen (1841) 8 M & W 625 [151 ER 1189]
Kirchner & Co v Gruban [1909] 1 ChD 413
La Donna v Wolford AG (2005) 194 FLR 26
Law v Garret (1878) 8 ChD 26
Logan v Bank of Scotland (No 2) [1906] 1 KB 141
Mangion v James Hardie & Co Pty Ltd (1990) 20 NSWLR 100
McCaffrey v Port Stephens Shire Council (1992) 27 NSWLR 299
McDonald v Bojkovic [1987] VR 387
McHutchison v Western Research and Development Ltd [2004] FCA 419
Meissner v R (1995) 184 CLR 132
Morrow v Chinadotcom Corp [2001] ANZ ConvR 341
Mount Cook (Northland) Ltd v Swedish Motors Ltd [1986] 1 NZLR 720
Mulgrave Central Mill Co Ltd v Hagglunds Drives Pty Ltd [2002] 2 Qd R 514
Murphy v Benson (1942) 59 WN (NSW) 53
Neilson v Overseas Projects Corporation of Victoria Ltd (2005) 223 CLR 331
Nisshin Shipping Co Ltd v Cleaves & Co Ltd [2004] 1 Lloyd's Rep 38
Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 1 WLR 713
Olsson v Dyson (1969) 120 CLR 365
Racecourse Betting Control Board v Secretary for Air [1944] 1 ChD 114
R v Ellis [1899] 1 QB 230
R v McLachlan [1998] 2 VR 55
Savcor Pty Ltd v State of New South Wales (2001) 52 NSWLR 587
Scott v Avery (1856) 5 HLC 811 [10 ER 1121]
State of New South Wales v Banabelle Electrical Pty Ltd (2002) 54 NSWLR 503
Street v Rigby (1802) 6 Ves Jun 815 [31 ER 1323]
Strutt v Rogers (1816) 7 Taunt 213 [129 ER 86]
Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission [1994] 1 Lloyd's Rep 45
Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332
The "Pia Vesta" [1984] 1 Lloyd's Rep 169
The Cap Blanco [1913] P 130
The Fehmarn [1957] 1 WLR 815; [1958] 1 WLR 159
Thomas v Star Maid International Pty Ltd [1999] FCA 911
Thompson v Charnock (1799) 8 TR 139 [101 ER 1310]
Treacy v Director of Public Prosecutions [1971] AC 537
Tszyu v Fightvision Pty Ltd (2001) 104 IR 225
Welex AG v Rosa Maritime Ltd (The Epilson Rosa) (No 2) [2003] 2 Lloyd's Rep 509
Wellington v Mackintosh (1743) 2 Atk 569 [26 ER 741]
West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA (The Front Comor) [2005] 2 Lloyds Rep 257
Yeshiva Properties No 1 Pty Ltd v Lubavitch Mazal Pty Ltd [2003] NSWSC 615
Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] 2 Qd R 563
Zhang v Shanghai Wool & Jute Textile Co Ltd (2006) 201 FLR 178

Archbold, *Pleading, Evidence and Practice in Criminal Cases* (44th ed, 1992)
Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Halsbury's Laws of England (1907, 1st ed), vol 1
Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (1996) Law Com No 242
Law Revision Committee, *Statute of Frauds and the Doctrine of Consideration* (1937) Cmd 5449

BHPB FREIGHT PTY LTD v COSCO OCEANIA CHARTERING PTY LTD and BRAEMAR SEASCOPE PTY LTD (formerly known as SEAWISE AUSTRALIA PTY LTD and SOUTHERN CHARTERING PTY LTD)

VID 903 of 2006

FINKELSTEIN J
23 APRIL 2008
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 903 of 2006**

BETWEEN:	**BHPB FREIGHT PTY LTD** **Applicant**
AND:	**COSCO OCEANIA CHARTERING PTY LTD and BRAEMAR SEASCOPE PTY LTD** **Respondents**

JUDGE:	**FINKELSTEIN J**
DATE OF ORDER:	**23 APRIL 2008**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The injunctions granted on 1 June 2007 be discharged.
2. The first respondent be and it hereby is restrained, whether by itself, its servants or agents or otherwise howsoever, from:
   (a) taking any step, either directly or indirectly, in the English High Court of Justice or any other court (other than the Federal Court of Australia) seeking to restrain the continuation of this proceeding, or seeking to restrain the applicant from taking any step in this proceeding;
   (b) taking any step, either directly or indirectly, to continue with the arbitration purported to have been commenced by it against the applicant in London, England by the first respondent's purported appointment of Mr Alan Oakley as its arbitrator pursuant to clause 42 of the charterparty dated 12 October 2004 concerning the ship M/V "Global Hawk".
3. The first respondent pay the applicant's costs, both on the injunction application and the first respondent's stay application.

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

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REASONS FOR JUDGMENT

1 In this action the applicant, BHPB Freight Pty Ltd, alleges that it was induced by the misleading and deceptive conduct of the first respondent, Cosco Oceania Chartering Pty Ltd, to enter into a charterparty of a cargo vessel, the "Global Hawk". It seeks damages and other relief. Cosco asserts that the proceeding has been brought in breach of a 12 month contractual time bar for claims arising out of the charterparty. It applied to have the action stayed so that a London arbitrator could decide whether the claim against it has been brought out of time. The stay application was based on s 7 of the *International Arbitration Act 1974* (Cth) and, in the alternative, on the court's inherent jurisdiction. At the conclusion of the argument I ordered that Cosco's application be dismissed. What follows are my reasons.

2 In its amended statement of claim BHPB makes the following allegations. BHPB had taken a subcharter of the Global Hawk for a period of twenty months, beginning 7 May 2003. In September 2004 it retained the second respondent, Braemar Seascope Pty Ltd (formerly known as Seawise Australia Pty Ltd), a shipbroker, to offer the vessel for charter. Seascope entered into negotiations with Cosco, another shipbroker, with a view to chartering the vessel to New Century International Leasing Co Ltd (NCI). In due course it was agreed that NCI would charter the vessel for one trip of 16 to 25 days upon the terms of an unsigned charterparty dated 12 October 2004 in standard BHPB form for general dry cargo. The charterparty named BHPB as time charterer and NCI as charterer. But, without BHPB's

knowledge, the vessel was delivered to Nera Shipping Co Ltd, a shell company with little registered capital. The vessel then sailed from China to Thailand and was redelivered to BHPB on 27 November 2004. The hire and other charges due to BHPB under the charterparty were not paid. Accordingly BHPB commenced an arbitration against Nera Shipping in London which resulted in an award of US$1,063,716.19 in favour of BHPB. The award has not been satisfied either by Nera Shipping or NCI.

3 In this action BHPB seeks to recover as damages the unremitted hire charges or, alternatively, the quantum of the award, together with interest and costs, from both Cosco and Seascope. The claim against Cosco is based upon s 52 of the *Trade Practices Act 1974* (Cth) (falsely representing that it was negotiating the charterparty on behalf of NCI), negligent misstatement and breach of warranty of authority. As against Seascope, BHPB alleges that it acted negligently and in breach of its retainer in permitting the vessel to be delivered to Nera Shipping.

4 Before moving for a stay, Cosco took several steps in the action. The action was commenced by originating process with a statement of claim. The papers were served on Cosco on about 11 August 2006. Cosco then did the following. On 30 August 2006 it filed an unconditional appearance and apparently consented by email to draft orders pursuant to which each party would serve a list of discoverable documents and Cosco would file a cross-claim; on 7 September 2006 it served a notice to produce several documents referred to in the statement of claim; on 15 September 2006 it served a request for further and better particulars of BHPB's statement of claim; on 6 October 2006 it filed its defence, which included positive assertions indicating an intention to establish facts different from those that appeared in the statement of claim; on 15 November 2006 it received BHPB's list of documents; on 13 December 2006 it provided BHPB with its list of documents; on 31 January 2007 it filed further and better particulars of its defence; on 1 March 2007, it requested BHPB's consent to deferring the appointment of a mediator until BHPB had joined the second respondent to the proceeding (it did not, thereby, express the view that the matter not proceed to mediation); on 21 March 2007 it requested that BHPB provide further discovery; on 19 April 2007 it filed and served further particulars of its defence in which it foreshadowed a leave application to interrogate, and obtain further discovery from, BHPB.

5 Notwithstanding having taken those steps, at a directions hearing held on 23 April 2007 Cosco hinted that it might commence an arbitration in London. Early the next morning,

Cosco's London solicitors advised BHPB that Cosco had appointed Mr Oakley as its arbitrator "in respect of all disputes arising out of the charter, in particular the claims currently being pursued against [it] by BHPB before the Federal Court of Australia."

6 BHPB immediately moved for an ex parte injunction. It sought to restrain Cosco from taking any step in any court to restrain this proceeding or to restrain BHPB from taking any step in this proceeding (the anti-anti-suit injunction). It also sought to restrain Cosco from taking any further steps in the arbitration (the anti-arbitration injunction). The orders sought were made on 26 April 2007 and on 4 May 2007 a copy was sent by facsimile to Mr Oakley. He replied, stating that arbitration in London is subject to the *Arbitration Act 1996* (UK) and not the orders of a foreign court. No doubt Mr Oakley takes the view that being outside Australia he is not amenable to the jurisdiction of the Federal Court. He might have to reconsider this view. It is settled law that a person not party to a proceeding may nevertheless be guilty of contempt if that person deliberately undermines a court order: *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191 ("[A non-party] who knowingly acts in a way which will frustrate the operation of an injunction may be guilty of contempt": per Lord Jauncey at 231). The fact that a foreign national commits an act of contempt outside the territorial jurisdiction of the court that made the order will not necessarily relieve the party of such liability: *Federal Court of Australia Act 1976* (Cth), s 31; *Judiciary Act 1903* (Cth), s 24; *R v Ellis* [1899] 1 QB 230; *Treacy v Director of Public Prosecutions* [1971] AC 537, 562. See also *Crimes Act 1914* (Cth), ss 3A and 43; *McDonald v Bojkovic* [1987] VR 387, 390-392; *R v McLachlan* [1998] 2 VR 55, 58-59; *Meissner v R* (1995) 184 CLR 132, 156; Archbold, *Pleading, Evidence and Practice in Criminal Cases* (44th ed, 1992), vol 2, para 28-118. If Mr Oakley in fact took any step to further the arbitration after he became aware of the injunction, he may be in for a rude shock were he to find himself subject to the personal jurisdiction of the Federal Court.

7 Returning to the issue at hand, the basis of the stay application is cl 42 of the charterparty, which relevantly provides:

> (b) Any dispute arising out of this Charter Party or any Bill of Lading issued hereunder shall be referred to arbitration in accordance with the Arbitration Acts 1996 and any statutory modification or re-enactment in force. English law shall apply …
>
> (c) The arbitrators, umpire and mediator shall be commercial persons engaged in the shipping industry. Any claim must be made in writing and the

> claimant's arbitrator nominated within 12 months of the final discharge of the cargo under this Charter Party, failing which any such claim shall be deemed to be waived and absolutely barred.

8 This clause is said to attract s 7 of the International Arbitration Act. Section 7 relevantly provides:

> (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.

9 It may be accepted (indeed it was not in dispute) that cl 42 is an arbitration agreement for the purposes of s 7. First, it is an "arbitration agreement" as that expression is defined in s 3, namely an "agreement in writing of the kind referred to in sub-article 1 of Article II of the [*Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958)]." By operation of Art II(2), an "agreement in writing" referred to in sub-article 1 includes an arbitral clause in a contract which is in writing or is contained in an exchange of letters or

telegrams by which the parties undertook to submit disputes arising out of the contract to arbitration. Second, the arbitration agreement is "foreign" in the manner required by s 7(1). The charterparty satisfies at least two of the conditions in that subsection: the procedure in relation to an arbitration under the charterparty is governed by the law of England, a Convention country (s 7(1)(a)); and NCI was incorporated, and therefore "ordinarily resident", in China, another Convention country (ss 7(1)(d) and 3(3)).

10 The first question that arises is whether Cosco can invoke s 7. According to s 7(2) there must be a proceeding by one party to an arbitration agreement against another party to the agreement. And then only "a party to the [arbitration] agreement" may apply for a stay of curial proceedings brought in defiance of that agreement and obtain an order referring the dispute or part of the dispute to arbitration. It is common ground that Cosco is not a party to the charterparty or to cl 42 in the sense that it is not, as a matter of contract law, a person who is bound by the charterparty generally, or cl 42 in particular. Cosco says, however, that it is deemed to be a party, relying on s 7(4). This subsection provides that: "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." It is necessary therefore to consider whether the facts justify Cosco's claim that it enjoys the benefit of s 7(4).

11 Clause 42(b) of the charterparty provides that English law shall apply as the proper law governing the arbitration of any dispute arising out of the charterparty. Thus, issues such as the validity of the arbitration agreement (*Hamlyn v Talisker Distillery* [1894] AC 202), the rights and obligations of parties to the arbitration agreement (*Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45) and whether the matter in dispute falls within the scope of the arbitration agreement (*Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713) are governed by English law. I am prepared, without deciding, to proceed on the assumption that it is permissible to look at English law as regards the meaning of the expression "a person claiming through or under a party" in s 7(4): cf *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 442-443. However, there being no evidence that English law on this aspect is any different from the law in Australia, I will assume that it is in all respects the same: *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331, 372, 411, 420.

12 The starting point for considering the position under Australian law is *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332. There a foreign company proved

in the winding up of a New South Wales company for the price of goods sold under an agreement which contained an arbitration clause. The liquidator rejected the proof of debt. An appeal to the High Court against the rejection was stayed on the basis that the liquidator, who was not a party to the arbitration agreement, was able to show that he fell within s 7(4).

13 Brennan and Dawson JJ (with whom Toohey J agreed) said (at 342) that because s 7(2) speaks of both parties to an arbitration agreement, "a person claiming through or under a party may be either a person seeking to enforce or a person seeking to resist the enforcement of an alleged contractual right. The subject of the claim may be either a cause of action or a ground of defence." They went on to say (at 341-342) that the phrase "through or under a party" applies, for example, to a trustee of a bankrupt's estate, an assignee of a debt arising out of a contract containing an arbitration clause, and a subsidiary of a parent company which is party to an arbitration agreement (and vice versa) when claims are brought against both arising out of the same facts. As regards the general meaning of the phrase, they explained (at 342) that: "[T]he prepositions "through" and "under" convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be, or must have been, vested in, or exercisable by, the party before the person claiming through or under the party can rely on the cause of action or ground of defence. A liquidator may be a person claiming through or under a company because the causes of action or grounds of defence on which he relies are vested in or exercisable by the company; a trustee in bankruptcy may be such a person because the causes of action or grounds of defence on which he relies were vested in or exercisable by the bankrupt."

14 In *Mangion v James Hardie & Co Pty Ltd* (1990) 20 NSWLR 100, Samuels AP elaborated on the meaning of a "derivative action". He said (at 104) that an action brought by a dependant under the *Compensation to Relatives Act 1897* (NSW) was a derivative action because it was dependent on, or secondary to, a right of action vested in the deceased immediately before his or her death. It follows that, while the relationship between the claimant and the party to the arbitration agreement "must be an essential ingredient of the claim", that relationship must be relevant to the grounds advanced in support of the claim: *Mount Cook (Northland) Ltd v Swedish Motors Ltd* [1986] 1 NZLR 720, 725; *Alto Constructions Pty Ltd v University of New South Wales* (unreported, Supreme Court of NSW, Young J, 15 December 1995), 13; *Mulgrave Central Mill Co Ltd v Hagglunds Drives Pty Ltd*

[2002] 2 Qd R 514, 530; *McHutchison v Western Research and Development Ltd* [2004] FCA 419 [15].

15 In other words, these cases show that there are two somewhat overlapping criteria that must be met to trigger the operation of s 7(4). The first is that there is a relationship of sufficient proximity between the party to the arbitration agreement and the person claiming to prosecute or defend an action through or under that party. The second is that the claim or defence is derived from the party to the arbitration agreement.

16 It is difficult for Cosco to satisfy the first criterion. The only possible relationship between Cosco and a party to the arbitration agreement is that of shipbroker to NCI as charterer. Yet Cosco contends that it did not act as shipbroker for NCI when the charterparty was drawn up. It cannot for the purposes of this application say that it was: indeed, that was not put. Although I am prepared to accept that, for the purposes of the second criterion the time bar defence is, in a limited sense, "derived" from a party, in that the right to enforce the time bar might be available to the charterer, that of itself does not amount to a derivation of the right.

17 To overcome these difficulties Cosco relies on an English statute, the *Contracts (Rights of Third Parties) Act 1999* (UK) (the Third Parties Act) to make good its argument that it should be treated as a party or as a person claiming through or under a party to the charterparty or, at least, to the arbitration clause, cl 42.

18 According to the common law only a party to a contract is bound by, and entitled to enforce, its terms. This rule of privity has been described as a "fundamental", "elementary" and "established" rule. Nonetheless the rule has often worked an injustice. Hence the call by Lord Reid in *Beswick v Beswick* [1968] AC 58, 72 for its reform. See also Windeyer J in *Olsson v Dyson* (1969) 120 CLR 365, 393. In England the Law Revision Committee chaired by Lord Wright, in its Sixth Interim Report, recommended the statutory recognition of the right of third parties to enforce benefits that are conferred directly on them by a contract: *Statute of Frauds and the Doctrine of Consideration* (1937) Cmd 5449 at paras 41-49. It took more than half a century for the recommendation to be adopted by the Third Parties Act.

19 The central provision of the Third Parties Act is s 1. It relevantly provides:

> (1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—

> (a) the contract expressly provides that he may, or
> (b) subject to subsection (2), the term purports to confer a benefit on him. …
>
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.
>
> (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.
>
> (4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract. …
>
> (6) Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.

According to the Law Commission report that led directly to the introduction of the Third Parties Act, a third party may only enforce a contractual provision that purports to confer a benefit on him if he is expressly designated – either by name, class or description – as a beneficiary of that particular provision: *Privity of Contract: Contracts for the Benefit of Third Parties* (1996) Law Com No 242 at paras 7.6, 7.17 and 7.18.

20 Section 8 is one of the ancillary provisions. So far as is relevant s 8 provides:

> (1) Where—
> (a) a right under section 1 to enforce a term ("the substantive term") is subject to a term providing for the submission of disputes to arbitration ("the arbitration agreement"), and
> (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the [1996 c. 23.] Arbitration Act 1996,
> the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.

21 Cosco's argument, as I understand it, is as follows. Clause 42(c) of the charterparty imposes a 12 month limitation period, commencing at the time of the final discharge of the cargo, for claims "arising out of the charterparty" under cl 42(b). Section 1(1) of the Third Parties Act entitles Cosco to obtain the benefit of both the arbitration clause and the time bar. Particular reference is made to s 1(6), which stipulates that a contractual term that limits or excludes liability (including, no doubt, a time limitation) can be enforced by a third party. Cosco thereby contends that it is entitled to the benefit of the time bar, but only in arbitral

proceedings due to the effect of s 1(4). Cosco seeks the stay, arguing that by reason of the Third Parties Act it is either a party, or a person claiming through or under a party, to the arbitration clause.

22 The argument thus stated proceeds on an unstated assumption. The assumption is that for the purpose of deciding whether a person is "claiming through or under" a party to an arbitration agreement, regard may be had to foreign statute law. Again, I will assume, without deciding, that this is so.

23 There are nevertheless several reasons why Cosco cannot claim the benefit of the Third Parties Act. First of all, s 1(1), which provides that a party may enforce a term of a contract if (a) the contract expressly so provides or (b) the contract purports to confer a benefit on the third party, is not engaged. The charterparty neither provides that Cosco has the right to commence arbitration or the right to rely on the time bar.

24 Secondly, s 1(3) is not engaged. It is true that Cosco gets a mention in the charterparty. Clause 68 provides that Cosco is one of the brokers and entitled to a commission for chartering the vessel. But, as has been noted, the effect of s 1(3) is to require there to be an identified third party beneficiary of the particular term sought to be enforced. No provision of the charterparty identifies Cosco as a beneficiary of cl 42; cl 68 is confined in its terms to commissions.

25 Thirdly, to the extent that the Third Parties Act can have application to the charterparty by reason of the commission clause, it would only be to permit Cosco to enforce a claim for commission. That is the only benefit conferred on Cosco that could be picked up by the statute.

26 There is, in any event, another fallacy in Cosco's argument. It is clear from the terms of s 1 of the Third Parties Act ("a person who is not a party to a contract (a 'third party') may in his own right enforce a term") that the statute proceeds on the express premise that it applies to a third party and does not deem such a person to be a party to the contract. The exception is s 8, which deems a third party to be a party to an arbitration agreement, but only for the limited purposes of the UK Arbitration Act. Perhaps it was for these reasons that Cosco appeared to abandon its argument that, for the purposes of s 7(2) of the International Arbitration Act, it was a party to the charterparty. It ultimately relied on the Third Parties Act solely for the purpose of bringing it within s 7(4).

27 This brings us back to the two conditions necessary to invoke s 7(4), namely, a sufficiently proximate relationship between the parties and a derivative claim. On this point Cosco relies on Coleman J's analysis in *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2004] 1 Lloyd's Rep 38, 45 that, for the purposes of the Third Parties Act, a third party beneficiary is much like the assignee of a contractual promise. In my view, however, this kind of notional statutory assignment does not, of itself, satisfy the two conditions necessary to show that a person is claiming through or under another, because the conditions look to the actual relationship of the parties and the actual claim of the party seeking to arbitrate.

28 I now come to the second basis upon which the stay was sought, namely by reference to the court's inherent jurisdiction. Principally it was put that to press the claim in court in defiance of the arbitration clause was oppressive or vexatious, especially when, as here, Cosco would be prevented from relying on the time bar.

29 I should say at the outset that, although not put in issue, it is by no means clear that the court has an inherent power to grant a stay. Of course courts have always had power to stay proceedings and refer a matter to arbitration where both parties consent to that course: *Hide v Petit* (1671) 1 Chan Cas 185, 185 [22 ER 754, 754]; *Darlington Wagon Co Ltd v Harding and the Trouville Pier and Steamboat Co Ltd* [1891] 1 QB 245, 248; *Halsbury's Laws of England* (1907, 1st ed), vol 1, 482-483. What is not clear, however, is whether, in the absence of consent or statutory power, a court has jurisdiction to compel parties to go to arbitration.

30 Prior to 1854, the weight of authority was that an arbitration agreement could not stop an action whether in law or equity: *Wellington v Mackintosh* (1743) 2 Atk 569 [26 ER 741]; *Thompson v Charnock* (1799) 8 TR 139 [101 ER 1310]; *Street v Rigby* (1802) 6 Ves Jun 815 [31 ER 1323]; cf *Halfhide v Fenning* (1788) 2 Bro C C 336 [29 ER 187]. That is not to say that the court would refuse to recognise an arbitration clause in other ways. The breach of an arbitration agreement gave rise to an action in damages, although the damages would in most cases be nominal: *Street v Rigby* 6 Ves Jun at 818 [31 ER at 1324]; *Adelaide Steamship Industries Pty Ltd v Commonwealth* [1974] 10 SASR 203, 207. An award under an arbitration clause could be enforced by the court: *Strutt v Rogers* (1816) 7 Taunt 213 [129 ER 86] (by writ of attachment for contempt); *King v Bowen* (1841) 8 M & W 625 [151 ER 1189] (by action); *Hall v Hardy* (1733) 3 P WMS 187 [24 ER 1023] (by bill for specific performance). But, it has long been held that a submission to arbitration would not be

recognised to the extent that it purported to oust the jurisdiction of the court: *Kill v Hollister* (1746) 1 Wils KB 129 [95 ER 532]; *Scott v Avery* (1856) 5 HLC 811 [10 ER 1121]; *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577, 587.

31 The power to stay a proceeding to enforce an arbitration agreement was first given by the *Common Law Procedure Act 1854* (UK) (17 & 18 Vict c125). Section 11 provided that a defendant "after appearance and before plea or answer" could obtain a stay of an action, subject to certain conditions being satisfied, if there was an agreement with the plaintiff "that any then existing or future differences between them … shall be referred to arbitration". The Arbitration Acts of England and Australia and other legislation have included provisions to a like effect.

32 On several occasions the High Court has ruled that the power stay an action in favour of arbitration is only statutory (eg pursuant to an Arbitration Act) and that there is no inherent power to order a stay. In *Anderson v G H Michell & Sons Ltd* (1941) 65 CLR 543, the plaintiff and defendants had entered into a contract for the sale of lambs. The contract required the parties to submit their disputes to arbitration within 20 days of delivery of the lambs. The defendants refused to accept delivery on grounds that were ultimately rejected at trial. On appeal, they did not challenge that finding but instead relied upon the arbitration clause, there being no reference to arbitration and the writ having been issued after the expiry of the 20 day period. The appeal was dismissed. The High Court (Rich ACJ, Dixon and McTiernan JJ) held that the reference to arbitration was not a condition precedent to bringing suit and that the limitation period did not apply to the commencement of the action. In their joint judgment they said (at 548):

> An agreement to refer disputes, whether existing or future, to arbitration could, apart from statute, be enforced only by an action for damages against the party who refused to carry it out. Statute now gives the courts a discretion to stay an action if the claim falls within an agreement to refer, a power which in the present case the Court was not asked to exercise.

And later they went on to say (at 549):

> Apart from the statutory power of staying an action, the most express agreement to refer to arbitration and not to litigate could not prevent recourse to the courts or exclude their jurisdiction; that is, where the liabilities in question are absolute …

33 The second case is *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502. The

plaintiffs instituted two suits in the admiralty jurisdiction of the High Court against the ship "Mill Hill" and her cargo for compensation arising out of salvage services rendered by them. The defendants applied to have each suit stayed relying on an arbitration clause in the agreement to render the services. The application was heard by Dixon J. He held that the High Court had power by reason of s 79 of the *Judiciary Act 1903* (Cth) and s 5 of the *Arbitration Act 1928* (Vic) to stay the proceeding. In the course of that ruling Dixon J said (at 507): "There is no express statutory power conferred upon this Court to stay, on such a ground, proceedings otherwise properly brought in its original jurisdiction. It is not a power that can arise otherwise than from statute."

34 As to the discretion to grant a stay order under s 5 of the Arbitration Act Dixon J said (at 508-509):

> Under the statutory power expressed in s. 5 of the Arbitration Act 1928 (Vict.) the Court or the judge, assuming that the other necessary conditions are fulfilled, must be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. This language might appear to place the burden upon the defendants applying for a stay. But the Courts begin with the fact that there is a special contract between the parties to refer, and therefore in the language of Lord Moulton in *Bristol Corporation v. John Aird & Co*, consider the circumstances of a case with a strong bias in favour of maintaining the special bargain or as Scrutton L.J. said in *Metropolitan Tunnel and Public Works Ltd. v. London Electric Railway Co.*, "A guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it." At the same time, as is shown by the two cases cited, the Court's discretion has not been restricted by any exclusive definition of the circumstances which will warrant a refusal of a stay: see per Lord Parker in *Aird's Case*, and per Scrutton L.J. in the *Metropolitan Tunnel Case* [citations omitted].

35 Finally in *Compagnie des Messageries* 94 CLR 577, 582 the High Court confirmed that "[a]t common law no contract could oust or lessen the jurisdiction of the courts of the Crown" per Dixon CJ (with whom McTiernan and Kitto JJ agreed). It was also said (at 585) that the "application for a stay is made, and could only be made, under the [Arbitration Act]" per Fullager J (with whom Kitto J agreed).

36 Most, but not all, of the cases to which I have referred involved an agreement to submit a dispute to arbitration. The others, for example *Compagnie des Messageries*, are instances of an agreement to submit a dispute to the jurisdiction of a foreign court. On a strict view, this kind of agreement should not be covered by the Arbitration Acts. Nonetheless, a

submission to the jurisdiction of a foreign court was treated as a submission to arbitration for the purposes of the Arbitration Acts: *Law v Garret* (1878) 8 ChD 26; *The Cap Blanco* [1913] P 130; *Austrian Lloyd Steamship Co v Gresham Life Assurance Society Ltd* [1903] 1 KB 249; *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141; *Kirchner & Co v Gruban* [1909] 1 ChD 413. In *Huddart Parker* 81 CLR at 508 and *Compagnie des Messageries* 94 CLR at 582, 585, 590 this approach was followed with great reluctance, Dixon CJ saying that, in the absence of the authorities, he would not have accepted that a submission to a foreign court could be treated as a submission to arbitration.

37 In England, it is no longer necessary to find power in a statute to give effect to a submission to a foreign court. It has been the settled position since 1943 that the court has an inherent power to stay an action brought in breach of such an agreement: *Racecourse Betting Control Board v Secretary for Air* [1944] 1 ChD 114. The judgment that is most often cited is that of Mackinnon LJ. First he referred to the fact that the trial judge had based his decision on the cases that hold a submission to a foreign court is to be treated as a submission to arbitration. He then went on to say (at 126) that:

> It is, I think, rather unfortunate that the power and duty of the court to stay the action was said to be under s. 4 of the Arbitration Act, 1889. In truth, that power and duty arose under a wider general principle, namely, that the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined. Section 4 of the Arbitration Act, 1889, only applies this principle to one type of such an agreement. The three cases cited [that apply the Arbitration Act to a foreign jurisdiction clause] really apply it to another type, and it would have been, I think, more logical to say, not that the plaintiff could be restrained under s. 4 of the Act, but that he could be restrained under the principle of which that section is a particular example.

38 That the inherent jurisdiction has now become the preferred basis for a stay in the case of a submission to a foreign court is apparent from cases such as: *The Fehmarn* [1957] 1 WLR 815 and on appeal [1958] 1 WLR 159; *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349; *The "Pia Vesta"* [1984] 1 Lloyd's Rep 169. Thus, there is in England no longer a need to deem a choice of jurisdiction clause as a submission to arbitration.

39 Although *Racecourse Betting* [1944] Ch 114 involved a submission to a non-arbitral tribunal, the language of the judgments suggested there was no distinction, for the purposes of the inherent jurisdiction, between such a case and a submission to arbitration. This was

ultimately settled by the House of Lords. In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 the parties had entered into a contract for the construction of a tunnel under the English Channel. The contract contained a clause requiring disputes to be submitted to a panel of three independent experts with a right of appeal to three arbitrators in Brussels. It was not originally contemplated, but it later became apparent, that the tunnel would require a cooling system upon opening. The contract was varied and a dispute arose regarding the price of the additional works, with the defendants threatening to stop construction of the tunnel. The plaintiffs applied for an injunction to restrain the suspension of work. The defendants sought to have the proceeding stayed on two bases, s 1 of the *Arbitration Act 1975* and the inherent power of the court. Whether the dispute-resolution clause – with its initial submission to a panel of experts and its two-step process – constituted an "arbitration agreement" for the purposes of the Arbitration Act was put in issue.

40 Lord Mustill, who delivered the leading speech, said (at 352) that the rule in *Racecourse Betting* [1944] Ch 114 that an action brought in breach of a foreign jurisdiction clause may be stayed under the general jurisdiction "provides a decisive analogy" to the case under consideration. He reasoned that if a foreign jurisdiction clause is enforced under the court's inherent power then it must be appropriate to use the same power to enforce a dispute-resolution clause which is "nearly an immediately effective agreement to arbitrate, albeit not quite." Lord Mustill provided a further justification, which echoed the comments of MacKinnon LJ. He said (at 353) that:

> [T]hose who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go.

41 The position that now holds in England is that a foreign jurisdiction clause and an arbitration clause will be enforced by appeal to the court's inherent jurisdiction: *Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522, 524-525; *A v B* [2007] 1 Lloyd's Rep 237, 253-254.

42 For reasons that are not readily apparent the position in Australia as regards the inherent power to grant a stay in favour of an arbitration or a foreign jurisdiction is unsettled. There are cases that have followed the rule laid down by the High Court in *Anderson* 65 CLR 543, *Huddart Parker* 81 CLR 502 and *Compagnie des Messageries* 94 CLR 577. These

include: *Murphy v Benson* (1942) 59 WN (NSW) 53, 54; *Adelaide Steamship Industries Pty Ltd v Commonwealth* [1974] 8 SASR 425, 439-440; on appeal [1974] 10 SASR 203, 208-213; *Delhi Petroleum Pty Ltd v Santos Ltd* [1999] SASC 37 [39]; *Mulgrave Central Mill* [2002] 2 Qd R at 528-529; *Yeshiva Properties No 1 Pty Ltd v Lubavitch Mazal Pty Ltd* [2003] NSWSC 615 [72].

43 On the other hand, there are cases that have followed the English authorities. Some of them simply assume that the court has inherent power to stay an action brought in breach of an arbitration agreement: eg *Aerospatiale Holdings Australia Pty Ltd v Elspan International Ltd* (1992) 28 NSWLR 321, 324; *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587, 598. When the court has attempted to explain how the inherent jurisdiction arises, one of two rationales is applied. The first is that parties who have made a contract should keep it: eg *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 [28]-[44]; *Morrow v Chinadotcom Corp* [2001] ANZ ConvR 341 [4]; *HIH Casualty & General Insurance Ltd (in liq) v Wallace* (2006) 204 FLR 297, 341. Although *Badgin Nominees* and *Morrow* did not specifically concern a submission to arbitration, the principles were framed in such wide terms they were clearly intended to include arbitration (cf *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] 2 Qd R 563, 569). The second rationale is that a proceeding brought contrary to an agreement to submit a dispute to arbitration is an abuse of process: eg *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, 211 (a conciliation case); *McCaffrey v Port Stephens Shire Council* (1992) 27 NSWLR 299, 301-302 (an arbitration case); *State of New South Wales v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503, 517 (an expert determination case). The proposition is that it is vexatious or oppressive to bring an action in defiance of an agreed method of dispute resolution. Sometimes reliance is placed on *Racecourse Betting* [1944] Ch 114 or *Channel Tunnel* [1993] AC 334 to support the use of the court's inherent jurisdiction: eg *Hanessian v Lloyd Triestino Societa Anonima di Navigazione* (1951) 68 WN (NSW) 98, 99; *Savcor* 52 NSWLR at 599.

44 None of the cases refer to *Anderson* 65 CLR 543, *Huddart Parker* 81 CLR 502 or *Compagnie des Messageries* 94 CLR 577 as denying the existence of the inherent jurisdiction. Those that cite *Huddart Parker* principally do so by reference to what Dixon J said (at 508-509) about the discretionary considerations to be taken into account in deciding whether or not to grant a stay.

45 The approach that, in my view, I am required to follow is that laid down by the High Court, namely that there is no inherent power to grant the relief sought by Cosco. This is so notwithstanding that the High Court may well in the future adopt the English approach. But even if there be inherent power to grant a stay this is not a case in which the power should be exercised. Let me explain.

46 First of all, there is no agreement between BHPB and Cosco which BHPB is attempting to circumvent. It is immaterial that there is an arbitration clause in the charterparty. Cosco is not a party to that agreement. The Third Parties Act cannot make up for this deficiency. Secondly, as McPherson JA said in *Mulgrave Central Mill* [2002] 2 Qd R at 529, where there is no arbitration agreement "there is no reason and no power, inherent or otherwise, to grant a stay."

47 To get around these problems Cosco fell back on the High Court's discussion in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 392 about the jurisdiction to restrain unconscionable conduct or the unconscientious exercise of a legal right. Strictly speaking, this may be distinct from the court's inherent power to stay proceedings as an abuse of process. Cosco relied on two passages in the reasons. First, the majority (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) said (at 392):

> In some cases, the equitable jurisdiction to restrain unconscionable conduct may be exercised in aid of legal rights. Thus, as the respondents correctly contend, if there is a contract not to sue, an injunction may be granted to restrain proceedings brought in breach of that contract, whether brought here or abroad …

48 In my view this passage has no application to the case at bar. As I have already pointed out, the parties have not agreed to resolve their dispute in any particular forum. It follows that there is no basis for holding that BHPB is acting unconscionably in prosecuting the action.

49 The second passage is taken from the same judgment (at 401):

> Proceedings which are brought for the dominant purpose of preventing another party from pursuing remedies available in the courts of another country and not available in this country are "seriously and unfairly ... prejudicial [and] damaging". They are, thus, oppressive in the *Voth* sense of that word.

50 Cosco contends that BHPBF is attempting to exclude or limit Cosco's rights (its

capacity to rely on the time bar) by bringing its substantive claim in the Federal Court. This argument, however, is premised on the proposition that Cosco is entitled to avail itself of the time bar in a foreign arbitration. The premise is false because, for reasons I have explained, the Third Parties Act does not relevantly apply to Cosco.

51 Finally on the aspect of a stay I should address some brief comments on Cosco's position were I to be wrong in my view, first, that it is not for the purposes of s 7 claiming through or under a party to an arbitration agreement and, second, there is no inherent power to grant a stay in favour of arbitration.

52 I would hold that Cosco has waived its right to ask for a stay. In *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, Austin J discussed waiver in the context of a stay application. He said that two forms of waiver could arise where there is an attempt to enforce an arbitration clause. The first, which he referred to (at [62]) as "waiver in the stronger sense", occurs when a party makes an intentional and irrevocable choice not to exercise a right when it has notice of the right, with the result that the right is abandoned. The second, which he referred to (at [69]) as "waiver in the weaker sense", occurs when a party fails to insist upon a right at an appropriate time either by choice or default. He said (at [60]) that the latter form of waiver applies to the exercise of the court's discretion whether or not to grant a stay. In this connection he said (at [88]) that the knowledge of the party of the existence of the right to a stay will be a relevant but not decisive consideration. See also *Zhang v Shanghai Wool & Jute Textile Co Ltd* (2006) 201 FLR 178, 185; *La Donna v Wolford AG* (2005) 194 FLR 26, 30.

53 The present case is a strong case of waiver in the weaker sense. The facts show an intentional and unequivocal choice by Cosco not to insist on its purported right to arbitrate and instead accept the curial process: cf *Australian Granites Ltd v Eisenwerk Hensel Bayreuth GmbH* [2001] 1 Qd R 461; *Zhang* [2006] VSCA 133. First, Cosco entered an unconditional appearance. Second, it did not raise the possibility of an arbitration until 23 April 2007, some eight and a half months after the action was commenced. This occurred in circumstances where, according to Mr Liu, an employee of Cosco, the shipbroker had given active consideration to the possibility of referring the dispute to arbitration in London from, or very soon after, the commencement of the action. Early on Cosco even took advice from its Australian lawyers on the possibility of arbitration. In late February 2007 it also sought advice from its London solicitor. Still it took weeks to make its move.

54 The third point is that the various steps taken by Cosco in the proceeding indicate a willingness on its part to allow the claim to be resolved by the court. I refer in particular to filing a positive defence, giving and taking discovery and seeking and obtaining an order to cross-claim. These steps imposed a burden on BHPB consistent only with the premise that Cosco would defend the claim in court: *La Donna* 194 FLR at 31.

55 It would for the same reasons be perverse to grant a stay if there was an inherent power to do so. There is, here, an additional point. It is the position of Seascope. It does not seek a stay. If Cosco were to be successful, BHPB would face two sets of proceedings, the arbitration and this action. In *Incitec Ltd v Alkimos Shipping Co* (2004) 138 FCR 496, 508 Allsop J said: "The very existence of the possibility, if not probability, of duplicated litigation is, on modern authority of the highest persuasive stature a cogent consideration in assessing the effect of an exclusive jurisdiction clause. This is for good and powerful reasons based on the cost and inconvenience of litigation and the desire not to foster the circumstances of courts coming to different conclusions about the same facts on perhaps different, or even the same, evidence." See also *Thomas v Star Maid International Pty Ltd* [1999] FCA 911.

56 In virtue of my decision to dismiss the application to stay the action, the anti-anti-suit injunction and the anti-arbitration injunction that had been granted ex parte were continued pending trial, subject to an argument that they should be made permanent. In addition BHPB said it should have its costs, both of its application for the injunctions and of the failed application for a stay, taxed and paid on an indemnity basis.

57 As to the form of the injunctions, Dr Bell SC, who appeared with Mr Austin, referred me to several decisions in which an anti-suit injunction was granted by way of final relief. The cases include: *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd (No 1)* (1996) 64 FCR 1; *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd* (No 2) (1996) 64 FCR 44; *CSR Ltd v New Zealand Insurance Co Ltd* (1994) 36 NSWLR 138; *Tszyu v Fightvision Pty Ltd* (2001) 104 IR 225; *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA (The Front Comor)* [2005] 2 Lloyds Rep 257; *Welex AG v Rosa Maritime Ltd (The Epilson Rosa) (No 2)* [2003] 2 Lloyd's Rep 509. In particular in *Great Southern Loans Pty Ltd v Locator Group Pty Ltd* [2005] NSWSC 438, an arbitration clause case, McDougall J issued an anti-suit injunction on a permanent basis because "there [was] nothing left to litigate."

58 I think I should accede to Dr Bell's application. It appears that this action will dispose of all issues that are in dispute between BHPB and Cosco so that "there will [in reality] be nothing left to litigate" as between them. The only possible risk is that, for some reason, this action does not proceed to trial. That, however, is not a sufficient basis to decide that the injunctions should only be temporary. If the action stalls then even if granted, final relief can be varied to meet the new circumstances: see eg *Advent Capital Plc v Ellinas Imports-Exports Ltd* [2005] 2 Lloyds Rep 607, 618. There is therefore no reason not to proceed by way of final order.

59 As to costs, there is no doubt that BHPB should have them in respect of both applications. Still, I am not persuaded that they should be taxed on an indemnity basis. It is plain that Cosco's case was weak. On the other hand, it had received advice from its London solicitor that it had an "argument … [albeit] not an easy argument" for a stay based on the Third Parties Act. Moreover, the lawyer advised that "these issues are extremely complex", thereby implying that the application was worth pursuing. While I formed the clear view that the arguments while forcefully put lacked merit, I do not say they were so weak that Cosco ought be punished with indemnity costs for having brought them before the court.

I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finkelstein.

Associate:

Dated: 23 April 2008

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Solicitor for the Second Respondent:	DLA Phillips Fox
Date of Hearing:	28 May 2007 and 1 June 2007
Date of Judgment:	23 April 2008