**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN COMMON LAW**

**SUIT NO. C.L. A-087 OF 1999**

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| **BETWEEN** | **ADECON SHIP MANAGEMENT INC.** | **PLAINTIFF** |
| **AND** | **EMPRESA DE NAVEGACION CARIBE** | **DEFENDANT** |

Heard on October 23, November 8, 2002; February 28, March 14 and March 21,2003;

Mr. Wendell Wilkins instructed by Robertson, Smith, Ledgister & Co. for the Plaintiff
Ms. Daniella Gentles instructed by Livingston Alexander & Levy for the Defendant

**ANDERSON J:**

On March 21, 2003 when I gave judgement for the defendant, I promised to set out my reasons in writing. This is now in fulfillment of that promise.

This action was commenced by a Writ of Summons filed in the Supreme Court on the 3rd day of August 1999, by the Plaintiff, a company registered in Canada, against the defendant, a company registered and doing business in Cuba. The issue of the writ arose out of a contract signed between the parties. The contract document is the "Towcon International Ocean Towage Contract" between the parties to whom I shall refer, as "Adecon" and "Empresa", respectively.

A brief history of the progress of the action and how we have got to this point may be useful. After the filing of the writ, Adecon sought the permission of the court to serve the writ out of the jurisdiction. It received an order of this court to this effect, and that order

was filed on August 5, 1999. Adecon subsequently sought and secured the grant of an Ex Parte Mareva Injunction restraining the defendant from dissipating its assets held whether within or without the jurisdiction.

On the 22nd December 1999, Adecon filed its Statement of Claim in which it claimed, inter alia, that,

> "In or about August 1997 the Plaintiff and the Defendant entered into a "Towcon" International Ocean Towage Agreement, (hereinafter referred to as "the Contract") whereby the Defendant would provide towage services for the plaintiff".

Pursuant to this contract, the defendant was to tow the plaintiff's motor vessel "Josiff – 1" to Kingston, Jamaica. In Jamaica, it would then pick up another of the plaintiff's vessels, the Pilar del Caribe, where it would also be placed in the tow and both vessels would then be towed by the motor tug, the "Mermaid Salvor", to Cartagena, Colombia. The plaintiff alleges that in breach of the express or implied terms of the contract or owing to the negligence of the defendant, the vessel Pilar del Caribe broke loose from the towage and ran aground in Kingston Harbour. Thereafter, "The defendant in breach of the express or implied terms of the contract or due to negligence failed to take any or any sufficient steps or proper or appropriate steps to recover the motor vessel from where it was grounded". As a consequence, the plaintiff has suffered loss and damages.

There being no appearance entered by or on behalf of the defendant up to that time, on March 14, 2000, the plaintiff secured an interlocutory judgment in default of appearance against the defendant and an order to proceed to assessment of damages. On November 27, 2000 the Defendant entered a conditional Appearance, "without prejudice to an application to set aside the writ of summons, statement of claim and/or other process in

this action and the service thereof". The Entry of Appearance was conditional because they would not have wished to waive their purported rights under the contract, to which reference is made below and which is the foundation of this action by the plaintiff. If they entered an unconditional appearance the effect may have been to waive those rights.

On December 7, 2000 the defendant filed its application in the terms set out below and in February 2001, apparently in response to that summons, the plaintiff filed its application to amend its statement of claim to allege as an alternative ground of claim, "the breach of a separate contract of salvage (My emphasis) entered in on or about the end of August 1997 by the plaintiff and the defendant".

The matter before me concerns these two summonses, one filed by each party. The defendant's application by way of summons is in the following terms:

1. That the default judgment entered herein be set aside.
2. That the action filed herein be dismissed as showing no cause of action and /or being frivolous, vexatious and an abuse of the process of the Court and under the inherent jurisdiction of the Court.
3. Alternatively, that the proceedings herein be stayed on the grounds that:
   a. The Supreme Court of Judicature of Jamaica is not the appropriate and/or convenient forum for the determination of this action and/or
   b. That by contract the matters raised in this action are for the determination of the High Court of Justice in London.
4. Alternatively, the Defendant be at liberty to file and deliver a Defence within twenty-one days of this Order.

On the other hand, the plaintiff's application is for leave to amend its statement of claim and is in the following terms.

1. The Statement of Claim be amended by inserting as a new Paragraph 7A the following Paragraph:

   7A. Alternatively, the grounding and subsequent loss of the Plaintiff's motor vessel Pilar del Caribe in the territorial waters of Jamaica was due to the breach of a separate contract for salvage entered in or about the end of August 1997 by the Plaintiff and the Defendant.

   There be further or other relief as the Court deems fit.

As a matter of procedure, it was agreed that the application by the defendant should be pursued first, since if any of the applications were successful, that would be the end of the matter.

Counsel for the defendant submitted that with respect to the application to set aside, it only had to show an "arguable defence that carries some degree of conviction"; **Evans v Bartlam (1937) 2 AER 646;** The defendant could also show that there were triable issues. In any event, the court had an unfettered discretion.

> "The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence.....The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the

> expression of its coercive power where that has been obtained only by failure to follow any of the rules of procedure". (Per Lord Atkin in the House of Lords at page 650 of the All England Report)

See also **Day v RAC Motoring Services Ltd (1999) 1 AER 1007**. In that case it was held that:-

> "When considering whether to set aside a judgment obtained in default of defence, the court did not need to be satisfied that there was a real likelihood that the defendant would succeed, but merely that the defendant had an arguable case which carried some degree of conviction".

Defence counsel also referred to **VANN v AWFORD, The Times April 23, 1986** where it was held that:-

> "A defendant who deliberately misled the court, lying about the reason for not defending an action was nevertheless entitled to have the judgment and the award of damages made against him in default of appearance set aside because he was able to show that there were triable issues arising out of the plaintiff's claim".

She submitted that the defendant was able to show that it had an arguable defence based upon the evidence provided in the affidavit of Janet Francis (one of the defendant's attorneys-at-law) sworn to on the 7th December 2000, and that of Francisco Javier Curiel Estevez (a director of the defendant company), sworn to on the 5th January 2001. She submitted further that, in any event, the plaintiff was in material breach of clause 12 of the agreement, which required that it exercise due diligence to ensure that the Pilar del Caribe was "tow-worthy" as required by that clause. Not only did the plaintiff fail to exercise such due diligence, but it also failed to warn the defendant who was, on counsel's assertions, merely "operators" of the tug Mermaid Salvor, that the Pilar del Caribe was not in fact tow-worthy. She also referred to paragraphs of those affidavits which purported to

show that the contract was really between the plaintiff and the Mermaid Salvor Shipping Company Limited, and that the defendant was at all material times, merely the agent of a disclosed principal, Mermaid Salvor Shipping Company Limited. I have to say at this point that Mr. Wilkins for the plaintiff in his submissions on this point made a telling observation that it certainly seemed that the name "Mermaid Salvor Shipping Company Limited" was added after the plaintiff and the defendant had been put down as the main parties to the contract. This appears to be based upon the averment of Alexander Printzios, (a director of the principal) in his affidavit of February 12, 2001. I believe that this was in fact the case, and I hold that the contract was in fact between the plaintiff and the defendant, and not the plaintiff and Mermaid Salvor Shipping Company Limited.

It was also submitted on behalf of the defendant that pursuant to clause 18.2(b), the defendant was, in any event, indemnified by the plaintiff, defined as the "hirer" for purposes of this agreement. That clause provides:

> The following shall be for the sole account of the Hirer without any recourse to the Tug-owner, his servants or agents, whether or not the same is due to breach of contract, negligence or any fault on the part of the tug-owner, his servants or agents:
>
> i. Loss or damage of whatsoever nature, howsoever caused to or sustained by the Tow.
> ii. Loss or damage ------
> iii. Loss or damage of whatsoever nature suffered by the Hirer or by third parties in consequences of the loss or damage referred to in (i) and (ii) above;
> iv. Any liability in respect of wreck removal.....

The submission was to the effect that by virtue of the exemption clause in these provisions, the Hirer had indemnified the defendant (if indeed it was the correct contracting party), as well as the Mermaid Salvor Shipping Company Limited in the event that that company was properly the other contracting party. It was submitted further that even if the plaintiff were to be allowed to amend its statement of claim, which application

was being resisted, the effect of clause 18 referred to above was to bar the plaintiff from recovering any damages from the defendant.

It was also submitted by the defendant's attorney at law, that clause 24 of the agreement was a complete bar to any suit. That clause provided that:

> "Time for Suit
> Save for the indemnity provisions which may arise under clause 18 of this Agreement, any claim which may arise out of or in connection with this Agreement or of any towage or other service to be performed hereunder shall be notified by telex, cable or otherwise in writing within six months of delivery of the Tow or of the termination of the towage or other service for any reason whatever, and any suit shall be brought within one year of the time when the cause of action first arose. If either of these conditions is not complied with the claim and all rights whatsoever and howsoever shall be absolutely barred and extinguished".

It was the submission of counsel that the meaning, and indeed the only meaning, of this clause was that the plaintiff was bound to notify the other party in writing within six (6) months and file suit within one (1) year, of the incident giving rise to the claim. This had not been done and was an effective bar to this action which had been commenced in August 1999, fully two (2) years after the incident giving rise to the action. Again, it was also submitted that even if the amendment were granted, this would not cure the defect in the original suit, it having been filed out of time under the provisions agreed between the parties.

It was also submitted that, with respect to the application to amend, even if granted, this would not assist the plaintiff, as the incident out of which the action (and the statement of claim now sought to be amended) arose was, pursuant to the choice of law provision in clause 25, justiciable only in the High Court in London. The court was urged to strike out

the Statement of Claim in light of the provisions of the Agreement limiting time for bringing the action. Any amendment to allow the plaintiff to allege another contract, ("a contract of salvage"), or negligence, would be founded upon the same facts and would accordingly be allowing the plaintiff to institute an action well outside of the time allowed under the terms of the Agreement.

Finally, the Court was urged, if the submissions to set aside or to strike out were not accepted, to stay the proceedings in light of the choice of law provisions set out in the contract. The parties had agreed to submit to the jurisdiction of the High Court in London, and to allow one of them to bring suit in Jamaica, would represent a derogation from the terms of the Agreement, dealing with choice of law and jurisdiction. Clause 25 is in the following terms.

> "Law and Jurisdiction
> This Agreement shall be construed in accordance with and governed by English Law. Any dispute which may arise out of or in connection with this Agreement or the services to be performed hereunder *shall be referred to the High Court of Justice in London*. (My emphasis)
>
> *No suit shall be brought in any other state or jurisdiction* (My emphasis) except that either party shall have the option to bring proceedings *in rem* to obtain conservative seizure or other remedy against any vessel or property owned by the other party in any state or jurisdiction where such property may be found''.

In regard to this submission, Ms. Gentles for the defendant, cited **UNTERWESER REEDEREI G.m.b.H. V ZAPATA OFF-SHORE COMPANY (The "Chaparral")[1968] Vol. 2 Lloyd's Law Reports 158**, a decision of the English Court of Appeal and the decision of the Supreme Court of the United States of America in a matter

arising out of the same facts, reported as **ZAPATA OFF-SHORE COMPANY v THE "BREMEN" AND UNTERWESER REEDEREI G.m.b.H. Part 7 [1972] Vol. 2 Lloyd's Law Reports 315**, as authority for the general proposition that courts will normally hold the parties to their bargains unless special circumstances are shown that lead the court to rule otherwise. The headnote in the United States Supreme Court is instructive and I cite it *in extensu* below.

> The plaintiff, American owners of the drilling barge Chaparral, entered into a towage contract with the defendant German owners of the tug Bremen for the towing of the Chaparral from Venice, Louisiana, to Ravenna, Italy. The contract contained a "forum selection clause", which stated that any dispute arising under it "must be litigated before the High Court of Justice in London, England". On January 9, 1968, the Chaparral suffered a casualty while proceeding in the Gulf of Mexico, and in accordance with the plaintiff's instructions, the Bremen towed her to Tampa Bay. The Bremen was arrested and the plaintiffs commenced an action in the U.S. District Court against the defendants claiming damages. The defendants then brought an action against the plaintiffs in the High Court of London, claiming money due under the towage contract and damages for breach of contract. The plaintiffs contended that the High Court had no jurisdiction, but the English Court of Appeal held that the forum selection clause was reasonable and that it had jurisdiction. Meanwhile the defendants filed a complaint in the U.S. District Court seeking exoneration or limitation of liability arising from the casualty. The plaintiffs applied for an injunction to prevent the defendants from litigating further in the English Courts, and the defendants applied for their own limitation proceedings to be stayed pending the determination of their claim in the English Courts.

In delivering the judgment of the US Supreme Court, Chief Justice Warren Burger stated at page 320 of the Lloyd's Law Report:-

> "It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow. Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the *Bremen* or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to

> think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations. Under these circumstances, as Mr. Justice Karminski reasoned in sustaining jurisdiction over Zapata in the High Court of Justice, "the force of an agreement for litigation in this country, freely entered into between two competent parties, seems to me to be very powerful".
>
> Thus, in the light of present-day commercial realities and expanding international trade we conclude that *the forum clause should control absent a strong showing that it should be set aside*. (My emphasis) Although their opinions are not altogether explicit, it seems reasonably clear that the District Court and the Court of Appeals placed the burden on Unterweser to show that London would be a more convenient forum than Tampa, although the contract expressly resolved that issue. The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. Accordingly, the case must be remanded for reconsideration".

Ms. Gentles adopted the reasoning of Chief Justice Burger for the purposes of her submission that the action should be stayed. In particular, it was her submission on behalf of Empresa, that the court will normally hold the parties to their bargain. However, if there was an attempt to get the court to adopt a different course, the burden for showing that it would be right in all the circumstances was on the person asking for such a change, and the burden would not lightly be discharged.

When the matter resumed on the 28th February, Mr. Wilkins commenced his submissions. In pursuing his application to amend the Statement of Claim, he submitted that the amendment merely sought to clarify Adecon's case and to accord with the evidence to be led by the plaintiff at the trial. This would therefore ensure that the defendant was not taken by surprise. In his submission, the amendment merely sought to particularize the specific breaches in Contract and Tort Law that the plaintiff was alleging. The right to

amend was founded upon section 259 of the Judicature (Civil Procedural Code) Law which permitted amendments to pleadings at any time with leave of the court. He submitted that there was no question of the amendment itself being time-barred, as it was not seeking to pursue new causes of action. In support of his submission that the amendment should be granted, Mr. Wilkins cited the case of ***COLLINS V HERTFORDSHIRE COUNTY COUNCIL & ANOR (1947) KB page 598***. In that case, leave was granted to amend a Statement of Claim to allow a plaintiff to plead that a local authority that operated a hospital whose doctors were sued for negligence, was also liable for the negligence of a pharmacist employed at the hospital. I am of the view that that case may be distinguished, as on the facts therein, there was already a claim in negligence and this amendment merely sought to show an additional aspect of that negligence. That was not an additional head of claim. In the instant matter before me, an allegation of breach of a contract of salvage would appear to be an attempt to introduce a new cause of action in circumstances where it would not otherwise be allowable.

Mr. Wilkins contended that any claim for protection under the indemnity provisions of clause 18 of the agreement was illusory. Any protection granted pursuant to clause 18(2)(a) of the contract, is to be "strictly confined to the tow and towage of that specific towage contract only. The limitation in the clause cannot be extended to other contracts to be entered into by the parties like the instant contract of salvage, as it was not in the contemplation of the parties when making the contract of towage that the Pilar del Caribe would run aground and a subsequent contract of salvage would be necessary between the parties". (See plaintiff's written submissions paragraph 21). He conceded, however, that there was no written contract of salvage and it seems clear to the court that any action in

relation to salvage or negligence which may be advanced, could only have arisen on the same factual foundation as the towage contract. There is, in any event, no evidence of any terms of such a "salvage contract".

To this submission, I would only say that it was clearly reasonably foreseeable that in a towing operation, the tow could be lost, and any damages flowing therefrom would be recoverable on the basis that it was not too remote.

As far as the application to set aside the judgment previously given in default was concerned, he submitted that the issue of setting aside is clearly a matter for the court's discretion. He also submitted that the case of ***Vann v Awford*** (supra) cited by the defendant's counsel, should not be accepted as authority for the proposition that, even where such an application to set aside is shown to contain untruths, the court would still grant the order to set aside. He submitted that the court ought also to look at the reasons given by the applicant for delay in not defending the action and to rule against the application if it was not satisfied with those reasons given. In the instant case, he invited the court to come to the view that the alleged excuse that papers had been mislaid, was not sufficient basis to grant the application to set aside.

With respect to the affidavit evidence submitted on behalf of the defendant which suggested that the defendant was acting on behalf of a disclosed principal and therefore should not be before the court, he pointed out that the contract document clearly had the defendant's name and address in box No. 2, which dealt with the "tug owner and the tug owner's place of business". He submitted that the addition of the "Mermaid Salvor Shipping Co. Ltd"., in brackets, was an after-thought by the defendant. I have already

indicated my view of this piece of the evidence and hold that the court is satisfied that the present defendant is the proper party in this suit.

Mr. Wilkins said he was prepared to concede that the defendant had an arguable defence but urged the court to accept his submission about the need to be satisfied as to the credibility of the defendant's excuse for not defending the action in a timely fashion. He cited the case of ***Day v RAC Motoring Services Ltd. (1999) 1 AER page 1007***, as being authority for his submission about the reason for not defending action. I need to say that any such conclusion is, in my view, inconsistent with settled law and is not authority for the proposition advanced by counsel. The classic statement of the law is that set out in ***Evans v Bartlam*** (supra), to the effect that until the hearing of the matter, the court reserves the right "to revoke the expression of its coercive power where that has been obtained only by failure to follow any of the rules of procedure".

Mr. Wilkins also submitted that the application to dismiss the plaintiff's claim on the ground that it was frivolous and/or vexatious and/or otherwise an abuse of the court's process, should also be denied. He suggested that to the extent that the plaintiff was relying on a breach of a separate contract of salvage, Clause 12 of the towage contract could not assist the defendant. That clause related to an allegation that the plaintiff had failed to put the Pilar Del Caribe in tow-worthy condition. It is the view of the court that such an allegation is to be determined at the trial after the court has heard appropriate evidence, and does not assist with the determination of this issue.

Mr. Wilkins' final submissions related to what, in my view, was the most trenchant of the submissions advanced by counsel for the defendant. This was in relation to Clause 25 and whether the action should be stayed in this court for want of jurisdiction. He submitted correctly that in a case where the parties to a contract have chosen a particular forum and law it still remains within the competence of the court to determine whether to hear the matter or to force the parties to stick to their bargain. In this regard he cited **THE FEHMARN (1957) VOL. 1 LLOYD'S LIST LAW REPORTS page 511.** In that case, a first instance court in England presided over by Willmer J. (later to be a member of the Court of Appeal in the Chaparral case referred to below) agreed to hear a matter in the admiralty division although a clause of the contract of carriage provided that these disputes should be heard and determined in the Soviet Union. Counsel referred, in particular, to the following section of the Willmer J's judgment at page 514.

> "Where there is an expressed agreement to submit to a foreign tribunal, clearly it requires a strong case to satisfy the court that that agreement should be overridden and that proceedings in this country should be allowed to continue. But, in the end, it is, and must necessarily be, a matter for the discretion of the court having regard to all the circumstances of the particular case. That being so, I do not think it would be profitable to refer in detail to the numerous cases which were cited to me, where the principle as I have tried to state it has been stated over and over again, but the discretion of the court was exercised one way or other having regard to the circumstances of the particular case"

Mr. Wilkins submitted that the court ought properly to consider that the alleged breach of contract and/or negligence occurred in the territorial waters of Jamaica and that the loss, damage and expense also occurred there. He gave other instances of what he saw as reasons why the matter should be tried in Jamaica. On the other hand, he submitted that the incident giving rise to the action had no special nexus with London, England, and the cost of litigation is less in Jamaica than in England.

I am of the view that a determination in relation to this submission could dispose of these applications one way or the other, and for that reason I shall spend some time to consider the authorities which had been cited before me in relation to this area of the Conflict of Laws. The first cases to which I shall refer are two cited by Ms. Gentles in her submissions. As noted above, these cases are **UNTERWESER REEDEREI G.m.b.H. V ZAPATA OFF-SHORE COMPANY (The "Chaparral")[1968] Vol. 2 Lloyd's Law Reports 158**, and **ZAPATA OFF-SHORE COMPANY v THE "BREMEN" AND UNTERWESER REEDEREI G.m.b.H. Part 7 [1972] Vol. 2 Lloyd's Law Reports 315.** The facts of the case are clearly set out above in the headnote of the United States Supreme Court decision. The English case in the Court of Appeal was by way of an application by the defendants, Zapata Off-Shore Company for leave to appeal from a decision of Karminski J, rejecting their application to set aside an order giving leave to the plaintiffs, Unterweser Reederei G.m.b.H., to serve a writ on the company outside the Court's jurisdiction. Karminski J. in his decision had stated:

> "I accept at once that in cases of this kind the contract by itself is not conclusive. If it could be shown that other circumstances made it fair and right that the contract should be departed from, the Court in its discretion could do that very thing".

In that case, it was held by the Court of Appeal, (WILLMER, DIPLOCK and WIDGERY, L.JJ.), that

> *"prima facie,* it was the policy of the Court to hold parties to the bargain into which they had entered; that that was not an inflexible rule; and that Court had a discretion which, in the ordinary way and in the absence of strong reason to the contrary would be exercised in favour of holding parties to their bargain; that it had not been shown that the learned Judge's exercise of his discretion had been plainly wrong; and that, therefore, the Court should not interfere".

As noted above, Mr. Wilkins for the plaintiff had cited **THE FEHMARN**, a case from 1957, in which Willmer J. (as he then was) allowed the parties to depart from their choice of law provision. In the latter case, Willmer L.J. commented upon the earlier case, the Fehmarn. He said, (at page 162), speaking of the general rule that the courts will hold the parties to their bargain:-

> "But that is not an inflexible rule, as was shown, for instance, by the case of *The Fehmarn*, (C.A.) [1957] 1 Lloyd's Reports, 511, in which I myself was concerned, and which came to this Court. That was a case in which the Court, in its discretion, declined to give effect to a stipulation made by the parties in their contract conferring jurisdiction on a foreign Court".

But Lord Justice Willmer at page 163, continued thus:-

> I approach the matter, therefore, in this way, that the Court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reasons to the contrary, will be exercised in favour of holding parties to their bargain. The question is whether sufficient circumstances have been shown to exist in this case to make it desirable, on the grounds of balance of convenience, that proceedings should not take place in this country, the stipulated forum, but that the parties should be left to fight out their battles in the United States of America.

He continued:

> I am unable to see that the Judge acted on any wrong principle. I do not think that the new facts said to have been brought to light really alter the complexion of the case to any material extent, nor am I prepared to say that the learned Judge's exercise of his discretion is shown to have been plainly wrong.

The learned Diplock, L.J. in arriving at the same conclusion had this to say:

> "This does not raise any question of conflict with ordinary comity because, so far as I know, it is the policy of the Courts of most countries, if it be reasonable at any rate to do so, to see that parties keep their word; and having had the privilege of reading a memorandum brief which has been accepted in the Federal District Court at Tampa on behalf of the plaintiffs in this action, it looks to me as if there is some ground at any rate for saying that the Federal Courts and State Courts in the United States take the same view".

In **THE ELEFTHERIA, [1969] 2 All E.R. page 642**, also cited by Ms. Gentles for the defendant, the following passage from the headnote reinforces the principle enunciated by **The Chaparral** above.

> Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay under s. 41 of the Supreme Court of Judicature (Consolidation) Act 1925, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. The burden of proving such strong cause is on the plaintiffs. In exercising its discretion, the court should take into account all the circumstances of the particular case. In particular, but without prejudice to taking into account all the circumstances of the particular case, the following matters, where they arise, may properly be regarded: (i) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (ii) whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (iii) with what country either party is connected and how closely; (iv) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (v) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would, (a) be deprived of security for that claim, (b) be unable to enforce any judgement obtained, (c) be faced with a time-bar not applicable in England, or (d) for political, racial, religious or other reasons be unlikely to get a fair trial.

In my view, in light of the principles set out above, which I hold to be persuasive, even though not binding upon me, on a proper reading of Clause 24, the burden is on the plaintiff to show that he should be allowed to bring his case in this jurisdiction. That burden is a heavy one and it has not been discharged in this case, and a proper exercise of the court's discretion must lead to a decision that the parties should be held to their bargain, and I so hold.

Even if that were an not a correct finding, I would also be prepared to hold that the action is time-barred by the provisions setting a time limit for bringing of the action. This is so whether the amendment sought by the plaintiff is granted or not, for it arises on the plaintiff's case, only out of the Contract signed on or about August 15, 1997. Action was to have been brought within six months, and so it is out of time, and should be struck out.

Before concluding, there are a few other observations that I would make. Part of the opposition to set aside the default judgment was based upon an assertion that the affidavits supported a conclusion that there was a contract of salvage. The authorities all indicate that a "court should be wary of trying issues of fact on affidavit evidence where the facts were apparently credible and were to be set against the facts being advanced by the other side, since choosing between them was the function of the trial judge, not the judge in an interlocutory application, unless there was some inherent improbability in what was being asserted, or some extraneous evidence which would contradict it". (See **DAY V RAC MOTORING SERVICES LTD., [1999] 1 All E.R.** page 1007.

I should also observe that it is trite law that when a matter comes before the court, the judge is entitled to look at all the information which is put before him in arriving at his decision. In the instant case, I have observed an affidavit, sworn by the plaintiff's managing director, Mr. Alexander Printzios, on the 30th day of July 1999. It avers in relevant part, that even if the plaintiff recovered a judgment against the defendant, a Cuban company, in the Jamaican Courts, it would still have to try to enforce the judgment against the "worldwide" property of the defendant, as it "has no property in Jamaica". It would seem that what might have been the plaintiff's strongest reason for asking the court to ignore the forum clause, is inapplicable.

There is another affidavit on behalf of the plaintiff, and sworn by counsel for the plaintiff on May 26, 2000, which I also find instructive. That affidavit was filed in support of an application for leave to serve "other judicial process on the defendant, outside of the jurisdiction" of this Court. The affidavit states in paragraph 12:-

> "That subsequent to the lost (sic) of the Pilar del Caribe, the Plaintiff and the Defendant agreed that part of the Plaintiff's loss would be reduced by the Defendant servicing the Plaintiff's motor vessel(s) while they are in Cuba. The Defendant reneged on the agreement in January last year when it refused to implement the agreement when one of the Plaintiff's motor vessels called at a Cuban Port. Accordingly, the Plaintiff was constrained to implement the suit herein".

It would appear that, based upon that affidavit, there was discussion, after the loss of the Pilar del Caribe, leading to accord and satisfaction, with the defendant agreeing to carry out the servicing of the Plaintiff's vessels when they visited Cuba in return for the Plaintiff not insisting upon the full extent of any claim it might have from the loss of the Pilar del Caribe. If that is a correct interpretation of the averment in the affidavit, the question arises whether there is, in any event, (and even leaving aside the issue of the time of filing or the forum and jurisdiction clause), any other subsisting agreement, apart from the one for the servicing of the Plaintiff's motor vessels in Cuba, which seems to have been the basis for at least a partial stipulated settlement of the earlier claim. Ought this to have been the contract sued on, if the terms were sufficiently defined? I merely pose the question, but the implications of such an ex post facto "*agreement*", the word used in the affidavit, are at the very least, significant.

Even if I am wrong on all of the above, I would still be constrained to hold that defendant would be entitled to have judgment set aside and to file defence. In the result, I deny the Plaintiff's application to amend its Statement of Claim, and I grant the Defendant's

application to stay the hearing of the matter on the basis that this Court is not the proper forum for the determination of this dispute.

I award costs to the Defendant to be taxed if not agreed.

Leave to Appeal granted, if necessary.