JUDGMENT : Mr Justice Langley: Commercial Court. 5th April 2000.

INTRODUCTION

1. The claim in these proceedings is for damage to a drum of electrical cable which formed part of a cargo carried on two vessels from Southampton to Singapore and Singapore to Bangkok in March and April 1998. The damage was found at Bangkok on April 29, 1998. The claim is for some £250,000.

2. The first defendant was the carrier of the drum. The second and third defendants were the owners of the vessels, neither of which has been served with the proceedings although there are proceedings in rem against the second defendant which are proceeding in this jurisdiction. The second defendant's vessel "*Danube*" carried the drum on the first leg of the voyage from Southampton to Singapore.

3. The first defendant issued a NVOCC bill of lading in respect of the goods dated March 31, 1998. The claimants claim to be holders of the bill. The claim is for breach of the contract of carriage evidenced by the bill. Clause 27 of the bill provided for disputes to be determined in Thailand to the exclusion of the jurisdiction of any other country. The Hague-Visby Rules were also applicable to the bill by virtue of the Carriage of Goods by Sea Act 1971 and Article X of the Rules. Thailand, at the time, was not a party to the Brussels Convention of 1924 nor the Brussels Protocol of 1968. If the claim were to be tried in Thailand under the relevant Thai legislation lower limitation figures would be applicable than apply under the Hague-Visby Rules.

THE APPLICATION

4. The first defendant makes two applications. First it seeks an order setting aside the concurrent writ and/or its service upon the company. Second, and in the alternative, it seeks an order to stay the action in favour of the Courts of Thailand.

5. The first of these applications is based on the submission that the concurrent writ for service out of the jurisdiction is a nullity because it was issued after the expiry of the original writ and no extension of the validity of the original writ was sought or granted.

6. The second application relies on the exclusive jurisdiction clause in the bill of lading and the submission that Thailand is the more appropriate forum for the determination of the disputes in the proceedings.

THE PROCEEDINGS

7. The proposed claim was a subrogated claim by insurers and there were difficulties in obtaining the second and third claimants' authority for their names to be used in the proceedings. Advice was also sought in January 1999 on Thai law, from which it was learnt that the Hague Rules would not apply in the Thai courts.

8. On January 27, 1999 the writ was issued. It was generally indorsed and stamped *"not for Service out of the Jurisdiction."* No authority had been obtained from the second and third claimants at the time. The in rem writ was also issued against the Danube on the same date.

9. By a letter dated February 18, 1999 the first defendant was informed of the claim and sent a copy of the writ described as *"protecting our rights against*" the first defendant. In January 1999 the Rules of the Supreme Court were of course still in force. The writ was therefore "*valid in the first instance"* for 4 months beginning with the date of issue by virtue of RSC Order 6 rule 8(1)(c) and so valid for service within the jurisdiction until and including May 26, 1999.

10. The claimants' solicitors continued to press for authority to use the second and third claimant's names in the proceedings. The CPR came into force on April 26 and the 12 month limitation period for the claim under the Rules (and Thai law) expired on April 30.

11. On May 25 the problems over authority had been resolved. It is apparent from a fax sent to the third claimant on May 25 by the partner (Mr Dalzell) in the claimant's solicitors who had conduct of the matter and an E-mail sent by him the same day to the firm's outdoor clerk (Mr Redd) that Mr Dalzell understood that May 26 was "*the last day for making an application for leave to issue concurrent writs and to serve them out of the jurisdiction"* and that he was awaiting the final authority so he could complete the affidavit in support of such an application.

12. There is a record of a telephone conversation between Mr Dalzell and Mr Redd on May 26 recording that Mr Dalzell had explained the need to get confirmation of the time and date the application was lodged and that the drafted documents would be with Mr Redd by 10.30 that morning. The documents were duly sent accompanied by two instruction slips. The first instruction related to the application for leave to issue concurrent writs and serve them on the defendants out of the jurisdiction. It stated that *"the concurrent writs should when issued be dated today. Please check/verify this with court."* The second instruction related to the issue of three concurrent writs. The instruction said each should be stamped concurrent "and sealed with today's date."

13. There are contemporary annotations on the first instruction slip. Two of these read:

   When you get leave to serve out the writ is valid for 6 months rather than 4 months automatic. As you are making application before ....

   If leave not given can't serve need to apply to extend validity of writ.

14. The application itself was made, as it had to be (CPR Part 23) on the CPR Application Notice form. As drafted it included an application *"pursuant to Order 6 rule 8 RSC to extend the validity of the writ for a period of 2 months"*. However the evidence of Miss Burgin, a legal Assistant at the claimants' solicitors, is that this part of the application was not pursued "*because we were confident that the application for leave to issue the concurrent writ*

would be successful, we had been informed that it would be dealt with that day, (and) after that the writ and concurrent writ would be dated with the date of the application".

15. Miss Burgin was involved in the matter at the time under the supervision of Mr Dalzell. Mr Dalzell has confirmed the accuracy of her evidence (so far as he can). At the time she prepared her evidence for the present applications Mr Redd (not surprisingly) had no recollection of the matter.

16. The Application Notice is annotated against the Admiralty and Commercial Registry stamp "*12.55. 26.5.99.*"

17. Finally on May 26 there is a further note made by Mr Dalzell of a conversation with Mr Redd that day. It reads

    John Connolly as long as apply before Writ then writ will be valid for six months rather than 4 months. Concurrent writ will be dated. He will take the whole lot. Lodging now.

18. John Connolly worked in the Registry.

19. The application in fact came before Mr Justice Thomas on paper on May 28. He made the orders requested (the court copy has the application for an extension of the validity of the writ deleted). The order was sealed on June 1 and the concurrent writs were issued on that day.

20. The Order grants permission "*to issue concurrent Writs of Summons, valid for six months from 27th January 1999 ... and to serve the said Writs ...*" on the defendants out of the jurisdiction.

21. On May 28 the correspondents for the first defendant's P & I Club sent a fax to the claimants' insurers referring to the progress of discussions with the carrier and requesting them to *"hold/ extend the action of service of writ for sometime."* On June 3, insurers sent the correspondents a copy of the Order of Thomas J, said they were proceeding with service without delay and invited settlement based on the Hague Visby "*limitation fund*". On July 5, the first defendant's solicitors took the points which are the subject of the present applications. On July 15 the claimants obtained an extension of the validity of the concurrent writ for service until November 26 (which is not challenged) and the writ was served on August 5, 1999.

VALIDITY OF THE CURRENT WRIT

22. The issues to which this application gives rise are not uncomplicated. There is a dispute as to whether the RSC or CPR apply. Mr Macey-Dare submits the former, Mr Waller the latter. Even if the RSC apply Mr Waller submits the concurrent writ was valid under those Rules. The only measure of agreement is that if the RSC apply and would otherwise make the writ invalid, then there is still a discretion in the court in effect now to extend the validity of the original writ so as to validate the concurrent writ applying the principles which would have been applicable at the time. Mr Waller, however, also submits that the discretion is wider than that.

RSC OR CPR

23. The original writ was issued when the RSC were in force. The Application for permission to issue concurrent writs and to serve them out of the jurisdiction was made after the CPR had come into force.

24. The transitional arrangements in the CPR are to be found in Part 51 and the Practice Direction made under it. First *"the overriding objective of enabling the court to deal with cases justly"* applies: paragraph 12 of the Practice Direction.

25. Paragraph 13 (3) provides that:

    An application made on or after 26 April 1999 to extend the validity of originating process issued before 26 April 1999 must be made in accordance with CPR Part 23 (general rules about applications for court orders) but the court will decide whether to allow the application in accordance with the previous law.

26. Had there been, or if it is necessary now to consider the matter as if there had been, an application to extend the validity of the original writ, there can therefore be no doubt that the RSC would apply.

27. Paragraph 3 of Part 51 provides that:

    Where an initiating step has been taken in a case, in particular one that uses forms ... required by the previous rules, the case will proceed in the first instance under the previous rules ....

28. Paragraph 14(2) provides in relation to applications made after 26 April 1999 that:

    Any other relevant CPR will apply to the substance of the application unless this practice direction provides otherwise.

29. Mr Waller refers to these provisions to submit that the claimants' application was not to extend the validity of the original writ (it only "*indirectly"* had that effect), and therefore the substance of the application falls to be dealt with under the CPR.

30. In my judgment this submission fails. Under the CPR (Part 7.5) as under the RSC (Order 6 rule 8) a claim form or writ is valid for service for 4 months unless it is to be served out of the jurisdiction when it is valid for 6 months. The CPR make no reference to concurrent claim forms albeit they are referred to in paragraph 4 of Appendix 17 to the Commercial Court Guide. There was not (and never has been) a claim form in these proceedings. If there had been it would have had to be served in 4 months or an extension of time applied for. Mr Waller submitted that CPR Part 7.5 simply permitted and provided that a claim form which is to be served out of the jurisdiction is to be valid for service for 6 months, and so that "*the simple question under the CPR is whether the writ (or claim form), whether in original or concurrent form, was served on the defendant within the prescribed time limit for service*". But I do not think it is permissible to read "*writ"* and "*claim form*" interchangeably; nor I would add can there be any doubt that the application in fact made was made under the RSC and treated and dealt with by the court as such.

31. For the same reasons I cannot accept Mr Waller's submission that paragraph 5.1 of the Part 7 Practice Direction applies. It provides that:

Proceedings are started when the court issues a claim form at the request of the claimant ... but where the claim form as issued was received by the court office on a date earlier than the date on which it was issued by the court, the claim is brought for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date.

32. Again, there never was a claim form in these proceedings nor a request to the court by the claimant to issue one. The proceedings were started by the issue of the original writ. On the other hand, on issues of discretion, the principle underlying this provision of the CPR, which I think is that the expiry of limitation provisions should not be affected by the accidents of timing in the court's administrative procedures, is one which in my judgment has relevance. In this case had the paper application been placed before and dealt with by Thomas J on May 26 itself no problem would have arisen.

33. Nonetheless, I do not think the CPR apply to the application because I can see no answer to the dilemma facing Mr Waller. If there was an application to extend the validity of the original writ it had to be made under the RSC. If there was not, the CPR offer no escape route.

34. I will therefore turn to the RSC.

35. **The RSC**

Order 6 rule 1 provided that:

One or more concurrent writs may, at the request of the plaintiff, be issued at the time when the original writ is issued or at any time thereafter before the original writ ceases to be valid.

36. Order 6 rule 8 provided :

(1) For the purposes of service, a writ (other than a concurrent writ) is valid in the first instance -

(a) ...

(b) where the writ has been issued ... with leave to issue and serve the same out of the jurisdiction ... for 6 months;

(c) in any other case, for 4 months, beginning with the date of issue.

(1A)(a) A concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

(b) If an original writ has been issued not for service out of the jurisdiction, then provided a concurrent writ for service out of the jurisdiction ... has ben issued within the period of 4 months from the date of issue of the original writ, such concurrent writ shall in the first instance be valid for service out of the jurisdiction for a period of 6 months beginning with the date of issue of the original writ.

(2) [Power to extend the validity of a writ which has not been served]

(3) ....

(4) Where the validity of a writ is extended by order made under this Rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served so as to extend the validity of that other writ until the expiration of the period specified in the order.

37. Paragraph (1A)(b) was added to the rule in 1996 following the decision of Mance J in ***Dong Wha Enterprise Co. Ltd v Crowson Shipping Ltd*** [1995] 1 LL Rep. 113. In that case the plaintiffs issued a writ marked not for service out of the jurisdiction on November 3 1993. The writ was served on the Defendants' solicitors in England on February 23, 1994 in the (as it was held) mistaken belief that the solicitors had agreed to accept service. On March 2 (so within 4 months from the date of issue of the original writ) the plaintiff obtained an order renewing the writ for a further 4 months and giving leave to issue a concurrent writ and serve it out of the jurisdiction. The concurrent writ was issued on March 2. It was served (as if out of the jurisdiction) on April 19. There were objections to the order granting an extension of the validity of the writ and so one of the questions for the court was whether the concurrent writ was in any event valid for service for 6 months without reference to the order for an extension and despite the wording of what became rule 1(A)(a). Mance J held that it was, and so the service in April was valid. He held that the then existing rule was to be construed so that once it was established that leave to serve out was justified the validity of the original writ extended for 6 months as did the concurrent writ. The two were effectively the same.

38. The notes to the Annual Practice (1999) stated that paragraph (1A)(b) "adopted the solution" proposed by Mance J for the validity of original and concurrent writs. Mr Waller submitted that the effect was that the revised rule had to be construed so that once it was shown that leave to serve out was justified the original writ automatically became valid for service for 6 months or at least once leave was granted the effect was to extend the validity of the original writ to 6 months.

39. I cannot accept these submissions either. In ***Dong Wha*** the application for leave to issue a concurrent writ and the issue of the writ both took place during the 4 month period of validity of the original writ. Thus the terms of the amended rule are quite consistent with the decision in ***Dong Wha.*** They are also in my judgment quite inconsistent with Mr Waller's submission. Rule (1A)(b) is expressly subject to the proviso that to be valid for service for 6 months a concurrent writ must be issued within the 4 month period of the validity of the original writ.

40. That was not in the event what happened in this case nor can I accept that the issue date of the concurrent writ can simply be treated as the date on which application for its issue was made. Unless therefore the position can properly be cured now the first defendant must succeed in the first application.

DISCRETION

41. As I have noted it is agreed that the court has power now to cure the defect in the proceedings which I have found to exist and to do so by granting an extension of the validity of the original writ for a period of (say) 7 days so that it would have been valid when the concurrent writ was in the event issued. Whilst the basic question is whether the Court would have granted such an extension had it been sought at the time, the considerations which I think to be material now are that:
    - *(1)* The limitation period for the claim had expired by May 26.
    - *(2)* Authority had not been obtained (but was being chased) from the second and third claimants and that was why the application to the court was only made on May 26. Whilst Mr Macey-Dare submitted (rightly) that the application could nonetheless have been made earlier and ratified later (just as the original writ had been issued without authority) I think that has to be seen in the context of the undoubted belief that there would be no problem if the application was made on May 26 itself.
    - *(3)* The application was carefully prepared and the evidence does satisfy me that, whether through a misunderstanding with or from information from the court, it was believed that provided the application was made on May 26 and was granted the concurrent writ would be valid from that date. Whilst it is true that the documents do not record any reference to the court agreeing to deal with the matter on that day and that (without apparent protest) the concurrent writ was not in the event dated May 26, I do think that it is understandable that the claimants (or the solicitors) considered there was no problem and clear that if they had thought otherwise an extension of time would have been sought to cover the position.
    - *(4)* There was plainly no prejudice to the first defendant. It was expressly suggested that service of proceedings should be delayed.
    - *(5)* The concurrent writ was served within the time in fact referred to in the Order of Thomas J (as validly extended). This is not a case where service was out of time. Moreover the rules recognise that where proceedings are to be served out of the jurisdiction validity for 6 months in the first instance is appropriate.
    - *(6)* The court is, on the present application, entitled and obliged to approach it in accordance with the overriding objective of the CPR: See ***Bua International Ltd v Hai Hing Shipping Co Ltd*** [2000] 1 LL Rep. 300.
    - *(7)* The claim is properly presented, arguable and for a substantial sum.
    - *(8)* The error made was one of procedure which itself would have had no consequences if the application had been (as it might have been) dealt with on the day it was made.

42. These factors in my judgment overwhelmingly lead to the conclusion that had an extension of the validity of the original writ been sought for the few days necessary to cover any delay in the issue of the concurrent writs a court would have decided that there were good reasons for granting it and would have done so. Refusal leading in effect to the loss of the claim by limitation would have been then and is now a wholly disproportionate consequence for any delay or default which could properly be attributed to the claimants.

43. In my judgment, therefore, it is right to cure the matter and the appropriate way to do so is to order that the validity of the original writ for service be deemed to be (or have been) extended to six months from January 27, 1999 as was the case with the concurrent writ.

STAY

44. There is no doubt that the Bill of Lading contained a reference on its front to terms and conditions on its reverse which themselves provided for the exclusive jurisdiction of the courts of Thailand. It is the bill of lading which the indorsement on the Writ alleges evidenced the "*written and/or oral contract*" the breach of which is the principal cause of action alleged. I have been shown the original bill. That was because Mr Waller's first submission on this application was that the jurisdiction clause (like all the conditions) was so faint and in such small writing as to be effectively illegible and so, he submitted, the consequence was that it was not effective. Whilst I sympathise to an extent with the criticisms of the bill, I do not accept the consequence. Mr Macey-Dare referred me to the decision of the Court of Appeal of New South Wales in ***Chellaram & Co v China-Ocean Shipping Co ("The Zhi Jiang Kou")*** [1991] 1LL Rep 493 and in particular the robust approach of Kirby, P to just this issue at page 520 of the report. I respectfully agree. This too is a case where the existence of conditions was apparent and if the claimants had been interested to know what they were they could have asked for and would have obtained a more legible copy. It is true that the claimants did not sign the bill, but it is (and has to be) the basis of their claim against the first defendant. I would add that the jurisdiction clause itself is in terms which are in no way exceptional.

45. It follows that I am satisfied that the jurisdiction clause formed an effective part of the contract on which the claimants rely. However by choosing Thailand as the forum for claims the first defendant in fact limited its liability to a sum lower than that to which it was entitled to limit it if the Hague-Visby Rules applied.

46. The consequence is that unless and until the first defendant undertook not to take advantage of the lower limit, the claimants were entitled to disregard the jurisdiction clause and so to bring proceedings in this country as they did: ***The Hollandia*** [1983] 1 AC 565; ***Baghlaf Al Zafer v Pakistan National Shipping Co*** [1998] 2 LL Rep 229.

47. The first defendant offered an appropriate undertaking not to rely on the lower limitation figure only in November 1999. It was not forthcoming when notice was given in February of the issue of the original writ nor in June when told of the Order made by Thomas J. On the other hand the claimants did not expressly seek such an undertaking either.

48. In my judgment, however, the claimants acted reasonably in commencing proceedings in England and allowing time to expire in Thailand. They were aware of the lower liability limitation in Thailand. So, it must be assumed, was the first defendant. The intention to proceed in England was made clear before the time limit expired, and so the first defendant was on notice of the claim in good time. I do not think the circumstances of this case can be distinguished in principle from those which were considered in the ***Baghlaf*** case and thus if a stay is to be granted on the basis of the jurisdiction clause it should be granted only on terms that the first defendant also undertakes to waive the time limit for the commencement of proceedings in Thailand.

49. The evidence as to which of the two countries is the more appropriate forum for a trial is, I think, nicely balanced. The Claimants say the great majority of the witnesses are based in England. However, relevant witnesses are also based in Thailand (and indeed Singapore and Hong Kong) particularly those who might be called by the first defendant. The likely issues are whether the drum was damaged in the course of the carriage or otherwise and quantum. The damage was first discovered and inspected in Thailand. The first defendant and third claimants are Thai companies and the second claimant was involved through its office in Thailand.

50. The claimants also say that the procedures in the courts of Thailand add to the difficulties in particular because the trial can be expected to take place only at the rate of one or a few days each month until it is concluded. But the impression I have is that any trial would be unlikely to be of more than a few days' duration.

51. The relevant test for the exercise of the court's discretion to grant a stay where, as here, I have held that there is an exclusive jurisdiction clause is that a stay should be granted unless "*strong cause*" for not doing so is shown: ***Baghlaf,*** Phillips LJ at page 235. I am not satisfied that the claimants have shown such a case. At most they have shown that a trial in England might be a little more convenient. That cannot justify overriding a jurisdiction clause.

52. Mr Waller rightly submits that the proceedings have already been delayed by the present applications, that they involve a straightforward claim for a substantial but not enormous sum, and that costs have already been incurred in this country where the parties are represented. He also points to the existence of the in rem proceedings against the second defendant in this country which could and should properly be heard together with these proceedings if a stay were not granted. The courts are however not infrequently faced with situations where despite the sense of different proceedings taking place in one forum that is not permissible either as a matter of statute or contract.

53. I have considerable sympathy with these submissions reflected as they are in the concerns expressed in the judgment of Waller LJ in ***Baghlaf.*** But the result in ***Baghlaf*** was that a stay was granted in circumstances in which, again, I do not see any real distinction of principle from the present circumstances. It follows that on the basis that the first defendant gives the undertakings referred to in this judgment think the jurisdiction clause must be applied and a stay of these proceedings granted.

Mr R. Waller ...instructed by Messrs Dibb Lupton Alsop for the Claimants)
Mr T. Macey-Dare ...instructed by Messrs Holmes Hardingham for the Defendants)