IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P059 of 2014

BETWEEN

L. J. WILLIAMS LIMITED

APPELLANT

AND

ZIM INTEGRATED SHIPPING SERVICES LIMITED
(formerly Zim Israel Navigation Co. Ltd.)

AND

ZIM AMERICAN SHIPPING SERVICES Co. Inc.
(formerly Zim American Israeli Shipping Co. Inc.)

RESPONDENTS

PANEL: **Mendonça, J.A.**
P. Jamadar, J.A
M. Rajnauth-Lee, J.A.

APPEARANCES: **Mr. J. Walker for the Appellant**
Ms. D. Peake, S.C. for the Respondents

DATE OF DELIVERY: June 4th, 2014.

I agree with the judgment of Mendonça J.A. and have nothing to add.

P. Jamadar,
Justice of Appeal

I too agree.

M. Rajnauth-Lee,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This appeal is from the grant of a stay of the Appellant's counterclaim under section 7 of the Arbitration Act Chap.5:01.

2. These proceedings were commenced on October 3rd 2012 by the second Respondent, Zim American Integrated Shipping Services Co. Inc. (formerly Zim American Isreali Shipping Co.Inc.) (hereinafter referred to as Zim American). On November 15th 2012 the Appellant, L.J. Williams Limited, filed its defence outside of the 28 day deadline as provided for in Civil Proceedings Rules, 1998 (the CPR) together with a notice to extend the time to file the defence. The application for the extension of time was opposed. Directions were subsequently given by the Court for the filing of affidavits and submissions. May 8th 2013 was ultimately fixed as the date for the decision on the application to extend time for the filing of the defence.

3. On December 20th 2012, the Respondents filed an amended claim form and statement of case by which the first Respondent, Zim Integrated Shipping Services Limited (formerly Zim Isreal Navigation Company Limited) (hereinfter referred to as Zim Isreal) was joined as a claimant.

4. On January 18th 2013, the Appellant filed an amended defence and counterclaim in response to the Respondents' amended claim form and statement of case.

5. On May 8th 2013, the Court granted the Defendant's application for an extension of time for the service of its original defence to November 15th 2012, the date it was in fact filed and served. The Judge then adjourned the matter for a status hearing to July 11th 2013 but encouraged the parties to hold discussions with a view to settling all matters. According to the Respondents it was with this judicial encouragement in mind that the parties undertook in writing "that pursuant to without prejudice settlement discussions that were to take place between the parties, the [Appellant] would not take any step to obtain judgment on the counterclaim and the [Respondents] would not file any application during the same period. Furthermore any delay between May 9th 2013 and the determination of the settlement discussions would not work against the [Respondents]".

6. On July 3rd 2013 the settlement discussions were determined without success. On July 4th 2013, Zim Isreal filed its application for a stay of the Appellant's counterclaim pursuant to section 7 of the Arbitration Act and the inherent jurisdiction of the Court.

7. According to the claim form and statement of case Zim Israel is a corporation organized in Israel and carries on the business of global container shipping. Zim America is the wholly owned subsidiary of Zim Isreal and was at all material times acting as its agent. By an agency agreement dated January 9th 1996 (the agency agreement) and made between Zim America as an agent for Zim Isreal and the Appellant, the Appellant was appointed the agent of Zim Isreal for all its shipping services calling at Trinidad and Tobago. As part of its duties under the agency agreement the Appellant was required to collect, inter alia, ocean freight, inland freight charges and assessments on behalf of Zim Isreal and deposit these sums in a designated bank account (the agency account) for further transfer to an international account as instructed by the Respondents. The Respondents alleged that in breach of the agency agreement the Appellant instructed its bankers to debit the agency account with sums amounting to US$1,300,000. and issue drafts in its favour for the amount so debited. The Respondents alleged that at a meeting among the parties the Appellant admitted that it had withdrawn the sums but said this was because of a potential tax liability of Zim Israel arising out of the agency agreement.

8. The Respondents aver that the income under the agency agreement was assessable to tax in the Appellant's name as its agent in Trinidad. The Appellant was only authorized to retain such amounts as were required to discharge the Respondents' tax liability. The Respondents' tax liability was assessed in the sum of TT$1,806,890.50 but the Appellant has failed to repay the balance despite requests to do so.

9. In its defence the Appellant contends that the agency agreement, under which the Respondents claim, was replaced by an agreement dated December 31st 2003 (the joint venture agreement). Pursuant to the joint venture agreement, the Appellant ceased to be the agent of Zim Israel and instead became its joint venture partner and operated as same until December 2009 when Zim Israel unilaterally purported to terminate its relationship with the Appellant. The Appellant alleges that save that the parties did not operate a joint venture entity, the parties implemented the terms of the joint venture agreement including the profit spilt contemplated by that agreement. The Appellant says that under both the agency agreement and the joint venture agreement it would collect ocean freight and inland charges and assessments on behalf of Zim Israel and deposit these sums into a designated account in the name of the Appellant. The Appellant alleges that it was authorized to deduct or otherwise withdraw from that its share of commission or any other authorized sums.

10. The Appellant admits to withdrawing the sums from the designated account but denies this was in breach of "whatever agreement might have been governing its relationship with Zim Israel" and avers that at all material times it was authorized and entitled to withhold payment of the said sums to Zim Israel. The Appellant further alleges that each joint venture partner was responsible for reporting their income and paying taxes thereon. However in breach of the joint venture agreement Zim Israel in 2008 failed and neglected to report its income and pay taxes. The Appellant, being concerned that the tax authorities might deem it to be the agent of Zim Israel and liable to tax payable by Zim Israel, initially withheld the sums claimed in order that it would meet the potential liability in the event it was required by the Board of Inland Revenue to account for the failure by Zim Israel to report its income and pay taxes thereon. The Appellant calculated this potential tax liability to be US$1,300,000. and informed the Respondents of its intention to transfer sums up to that amount. The Appellant further alleges that subsequently Zim Israel requested that the Appellant pay the Board of Inland Revenue the outstanding tax that was owed

by Zim Israel based on its calculation. The Appellant complied with this request and accounted to the Board of Inland Revenue for the taxes that were due from Zim Israel by including in its tax returns Zim Israel's income and utilizing its (the Appellant's) accumulated tax losses thus giving Zim Israel the benefit of those tax losses and rendering same unavailable to the Appellant to be used against future profit.

11. In the circumstances the Appellant denies that it is liable to pay the Respondents the sum claimed or any part of it. If the sum claimed is due the Appellant says that it is entitled to set off (1) the value of the tax losses that is utilized in accounting to the Board of Inland Revenue for the tax liability of the Respondents and (2) so much of its counterclaim as may be necessary.

12. By way of counterclaim the Appellant alleges the wrongful termination of the joint venture agreement as well as certain breaches by Zim Israel of duties, including fiduciary duties alleged to be owed by Zim Israel to it under and by virtue of the joint venture agreement. The Appellant further alleges that certain conduct by Zim Israel was contrary to honest business practices and constitutes unfair competition contrary to section 4 of the Protection Against Unfair Competition Act Chap.82:36 The Appellant consequently counterclaims for, inter alia:

1. An account of profits made on the provision of shipping services by or on the behalf of Zim Israel on shipments to Trinidad and Tobago from January 2010 and continuing.

2. Damages for breach of fiduciary duty. and

3. Damages for acts of unfair competition.

13. Zim Israel's application for a stay of the Appellant's counterclaim was grounded on clause 15.2 of the joint venture agreement and was made under section 7 of the Arbitration Act as well as the inherent jurisdiction of the Court.

14. Clause 15.2 of the joint venture agreement is as follows:

> *"The Parties agree that all disputes and disagreements or demands which may arise between them out of this Agreement (including any amendments or supplements hereto) or in connection with it including any question regarding its existence, validity or termination*

shall be referred and finally settled by arbitration in accordance with the LCIA Arbitration Rules of Procedure at present in force (hereinafter referred to as "LCIA Rules"), which rules are deemed to be incorporated by reference into this clause."

The clause therefore contains the agreement between the parties to refer to arbitration all disputes, disagreement or demands which may arise between them out of the joint venture agreement or in connection with it including any question regarding its existence, validity or termination. It is therefore a clause of broad application.

15. In **Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP** [2013] UKSC 35, it was observed by Lord Mance (at para.1) that:

"An agreement to arbitrate disputes has positive and negative aspects. A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever forum is prescribed. The (often silent) concomitant is that neither party will seek such relief in any other forum. If the other forum is the English court, the remedy for the party aggrieved is to apply for a stay under section 9 of the Arbitration Act 1996."

16. In this jurisdiction the equivalent to section 9 of the English Arbitration Act 1996 is section 7 of the Arbitration Act under which Zim Israel's application was made. This section is as follows:

"7. If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

17. Zim Israel's application for the stay as I mentioned was also made under the inherent jurisdiction of the Court. It is not in dispute that, in addition to the power to stay proceedings under section 7 of the Arbitration Act, the High Court also has the power under its inherent jurisdiction to control proceedings to stay proceedings in favour of arbitration. The scope of this jurisdiction has to a large extent been overtaken by the power given under section 7 of the Arbitration Act. It is fair to say that in this matter the focus was on the statutory jurisdiction and it was not advanced by Zim Israel that should its application fail under section 7 the Court should nevertheless grant the stay under its inherent jurisdiction.

18. It is apparent from section 7 that the Court has a discretion to stay proceedings in favour of arbitration. In Civil Appeal 32 of 1974 **Sakawat v Denis Turton and another** Hassanali, J.A. stated (at p. 4) with reference to the discretionary power of the Court under section 7 that:

> *"In plain and unambiguous language section 7 of the Ordinance prescribes two conditions precedent to the exercise of the discretionary power in the court to stay the appellant's action. They are the conditions upon which that discretionary power is based. The court could not exercise that power unless it is satisfied of them both - namely (the first) that there is 'no sufficient reason why the matter should not be referred in accordance with the agreement'- and (the second) that the respondents were at the time when the action was commenced and still remained (at the time of the hearing) 'ready and willing to do all things necessary to the proper conduct of the arbitration…'"*

19. In order for the Court therefore to exercise its discretionary power it must be satisfied of the two conditions set out in "the plain and unambiguous language of section 7" namely, (1) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with agreement and (2) that the person seeking the stay was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

20. However before the Court may exercise its discretion to grant a stay there are certain mandatory or threshold requirements prescribed in the section. In the plain wording of the section these are: 1. there must be a concluded agreement to arbitrate; 2. the legal proceedings which are

sought to be stayed must have been commenced by a party to the arbitration agreement or a person claiming through or under that party; 3. the legal proceedings must have been commenced against another party to the arbitration agreement or any person claiming through or under that person; 4. the legal proceedings must be in respect of any matter agreed to be referred to arbitration; and 5. the application for the stay must be made at any time after appearance but before delivery of pleadings or the taking of any other step in the proceedings.

21. Before the Judge below the Appellant argued, inter alia, that the counterclaim raises disputes that did not fall within the scope of the arbitration agreement as contained in clause 15.2. This is one of the mandatory requirements noted at 4 above. This argument was however not pursued before this Court. I think this is a well informed decision as the counterclaim clearly reflects disputes arising out of or in connection with the joint venture agreement and is within the scope of the arbitration agreement contained in clause15.2 of the joint venture agreement.

22. This appeal challenges the exercise of the Judge's discretion to stay the counterclaim. It is well established that before an appellate court is entitled to interfere with the exercise of the Judge's discretion it is not enough for the appellate court to say that it might or would have made a different order. It must be shown that the Judge was plainly wrong such as where, for example, the Judge disregarded or failed to take into account relevant considerations or took into account irrelevant ones or misdirected herself on the evidence or the law or that her decision exceeded the generous ambit within which reasonable disagreement is possible.

23. The Appellant advances the following three points all of which were raised before the Judge but rejected by her:

1. there was delay in the making of the application for the stay which was fatal to it;

2. the first Respondent, Zim Israel, has not shown that it was at the commencement of the counterclaim and remains ready and willing to do all things necessary to the proper conduct of the arbitration; and

3. the referral of the matter to arbitration will result in multiple actions with a risk of inconsistent decisions.

24. On the first point Counsel submitted that before granting the stay of the counterclaim the Court had to consider whether Zim Israel acted promptly and did not delay in the making of the application for the stay. It was submitted that there were two aspects to this. The first is that the applicant should act promptly and without delay. The second is that the applicant should comply with the procedural requirements of rule 9.7 of the CPR which required an application disputing the Courts' jurisdiction or arguing that the jurisdiction should not be exercised to be made within the time fixed for the filing of the defence. Here the application was made well beyond the time fixed by the CPR for the filing of the defence to the counterclaim.

25. As to the first aspect, namely the requirement to act promptly, Counsel for Zim Israel referred to **The Elizabeth H** [1962] 1 LLR 172 where it was submitted that it was held that the defendants by their conduct and silence for a period of 18 months from the service of the proceedings on them had been treated as having assented to the Courts' jurisdiction to proceed with the action and by their action and silence had agreed to a variation of the agreement to arbitrate. Reliance was also placed on **Russell on Arbitration** (23rd edition), where it is said that "where the other party wishes to have the dispute referred to arbitration he must apply without delay for a stay of the proceedings brought in breach of the agreement to arbitrate".

26. The Judge's response to this submission was that there was no delay in the making of the application. The Judge noted that the application for the extension for filing the defence was not granted until May 18th 2013. Thereafter the Judge encouraged the parties to hold settlement discussions. Certain undertakings were given as outlined earlier to the effect that the parties would hold their hands until the end of the settlement discussions. These discussions ended without success on July 3rd 2013 and the application for the stay was filed on July 4th 2013. In those circumstances the Judge was of the view that there was no delay in the making of the application.

27. Counsel for the Appellant however submitted that the amended defence and counterclaim was filed and served on January 18th 2013 and there was no good reason for delaying the taking of

any action against the counterclaim until after the resolution of the application to extend the time for the filing of the original defence.

28. The Respondents seemed to have proceeded on the basis that it would not have been appropriate to make the application to stay the counterclaim until after the termination of the application for the extension of time for filing of the defence. The Judge's conclusion that there was in fact no delay seems to concur with this approach. It is however difficult for me to understand why this should be so. The filing and service of the amended claim form and statement of case, it seems to me, in effect reset the clock. The amendment added Zim Israel as a party. It seems to me that the Appellant could file its defence to the amended claim of Zim Israel and at the same time it filed and served the defence make a counterclaim without the Court's permission (see rule 18.5). This is what the Appellant did. The defence and counterclaim were filed and served at the same time. In those circumstances it was open to Zim Israel to make the application for the stay from January 18th 2013 when the counterclaim was filed. Taking into consideration the undertaking given by the parties at the time when they were invited by the Court to try to resolve the matter amicably the delay in making the application was just around four months. What then is the relevance of that delay?

29. It is relevant to note that the submission of the Appellant is based simply on the delay in making the application. There is no allegation of any other conduct on the part of Zim Israel such that would entitle the Appellant to advance a claim of waiver or estoppel. It is a question therefore of the relevance of the simple or mere delay by Zim Israel in making the application.

30. The case of **The Elizabeth H** relied on by the Appellant does not support the proposition that mere delay would defeat the right to a stay of the proceedings and I agree with the Counsel for the Respondents' submission that to the extent that **Russell on Arbitration** may have relied on **The Elizabeth H** for the proposition that mere delay may be a ground to refuse the stay that that statement must be construed in the light of that case.

31. The facts in **The Elizabeth H** are very different to this case. In that case there was an application by the ship owners to stay proceedings that had been commenced by the cargo owners. A question arose as to whether there was in fact an agreement to arbitrate between the cargo

owners and the ship owners. The Court was not prepared to find that there was such an agreement and accordingly there was no basis on which a stay could be granted. In the event however that an agreement to arbitrate did exist, the Court also considered the effect of an undertaking given by the ship owners to secure the release of the vessel which had been arrested by the cargo owners. The Court found that by the terms of the undertaking the ship owners had given "a clear invitation" to the cargo owners to continue with the action. Further, the application for the stay was not made for another 15 months during which time nothing was done to indicate to the cargo owners that the ship owners were relying on any agreement to arbitrate, if it existed. It was in that context that the Judge said (at p 179):

> *"From this it appears to me that, by their conduct and by their silence for 18 months, the applicants, that is the defendants in the action, assented to this Court's jurisdiction and agreed by their action and silence to a variation of the agreement, if it existed, to arbitrate in New York, by which time, as I have been told, the plaintiffs would be out of time to effect a further arrest of the ship in rem in the United States."*

The Court was also prepared to hold that as the conduct of the ship owners caused prejudice or detriment to the cargo owners that they were estopped from making their application for the stay.

32. In **The Elizabeth H** therefore there was in fact no agreement to arbitrate. But even if there was such an agreement there was a representation by the ship owners that they were prepared to proceed with the English court proceedings which amounted to a variation of the agreement to arbitrate, if it existed. Further, the conduct of the ship owners caused the cargo owners to suffer prejudice or detriment and gave rise to an estoppel. Nothing of the kind exists in this case.

33. In **The Nerano** [1996] 1 Lloyd's L.R 1 the question arose whether the defendant by obtaining the plaintiff's agreement for an extension of time for the service of its defence had waived its right to apply for a stay or was estopped from so doing. The Court held that it was not. Saville, L.J, with whom the other members of the Court agreed, stated in his judgment that (at p 6):

> *"In view of the fact that under the 1975 Act [which for present purposes is similar to our Act], the right to a stay is only lost if the applicant serves a defence or takes some other*

step in the proceedings, it seems that an agreement for an extension of time for a defence, without more, could not have amounted to an agreement to abandon the right to a stay."

34. Saville, L.J noted that reliance was placed by the defendant on **The Elizabeth H** to support the submission that by obtaining the plaintiff's agreement to extend the time for the service of the defence, the plaintiff had agreed to accept the jurisdiction of the Court. It was said however that that case was clearly distinguishable "because (apart from anything else) unlike the present case the defendants there [in **The Elizabeth H**] had expressly agreed to accept service of the English proceedings".

35. The authorities therefore do not support the proposition advanced by the Appellant that mere delay or delay without more is a sufficient ground to refuse an application for a stay under section 7 of the Arbitration Act. I therefore am unable to accept this aspect of the submission by the Appellant.

36. The other aspect of Counsel's submission on delay as I have mentioned relates to rule 9.7 of the CPR. Counsel contended that the application for the stay must comply with the procedural requirements set out in rule 9.7 so that the application for the stay had to be made within the time allowed for the filing of defence as provided for in rule 9.7(3) and not before the actual filing of the defence and failure to do so meant that the application was to be treated as having accepted that the Court has jurisdiction to try the claim as provided for in rule 9.7(5). There is no dispute that the application was not made within the time provided in the CPR for the filing of the defence to the counterclaim. Counsel therefore submitted that as the application was not made within that time then by rule 9.7(5), Zim Israel should be treated as having accepted that the Court has jurisdiction to try the claim.

37. A similar issue arose in **Bilta (UK) (in liquidation) v Nazir and others** [2010] Bus LR. 1634. There the submission by counsel opposing the grant of the stay was that Part 11 of the Civil Procedure Rules in England (which for the purposes of this appeal is the same as our rule 9.7) govern applications seeking a stay of court proceedings on the ground that the dispute is governed by an arbitration agreement and as the application for the stay was not made within the time

provided for in Part 11 the applicant was to be treated as having accepted the Court's jurisdiction to try the claim as provided for in Part 11.

38. It should be obvious that the submission made in **Bilta** was essentially the submission that has been advanced on behalf of the Appellant. In essence the submission is that the time line in 9.7 of the CPR governs the making of the application for the stay and not the time period provided for in section 7 of the Arbitration Act.

39. The Judge in Bilta however did not agree with the submission. He noted that section 9 of the Arbitration Act, 1996 (which is similar to our section 7) is part of a code contained in primary legislation. He stated that, "one of the major purposes of the 1996 Act was to set out most of the important principles of the law of arbitration in a language sufficiently clear and free from technicalities as to be readily comprehensible to the layman and international users of London arbitration." He further noted that the layman reading section 9 would understand that it creates a right to seek a stay "within the time parameters laid down" in the section. He then stated, (at p 1641):

> *"There is no indication that the right in section 9(1) is to be further limited by the additional procedural rules in CPR Pt 11 and no layman or international user of London arbitration reading the statute would understand that such additional limits might be imposed. Accordingly on its true construction, section 9(1) read with section 9(3), displaces any possible application of CPR Pt 11 which might otherwise arguably be relevant."*

40. The same can be said of the Arbitration Act in this jurisdiction. It seeks to set out the important principles of the law of arbitration in this jurisdiction. Section 7 is part of that Act and is therefore contained in primary legislation regulating proceedings concerning disputes governed by arbitration agreements. As it is primary legislation it is not to be circumscribed or overridden by subsidiary legislation, in this case procedural rules, unless the Act so provides. There is nothing in Act that allows the provisions of the Act to be overridden or circumscribed by subsidiary legislation.

41. There is no ambiguity in section 7 as to the time constrains for the making of the application. It is to be done at any time after appearance and before delivery of any pleadings or the taking any other step in the proceedings. This is quite different from what is provided for in rule 9.7 which requires an application disputing the Court's jurisdiction or arguing that it should not be exercised to be made within the time provided for the filing of the defence. To adopt the language of the court in **Bilta**, section 7 on its true construction displaces any possible application of rule 9.7. As in **Bilta** it can be said that no user of the arbitral process reading the statute would understand that the time for making the application stated in the Act is to be overridden or circumscribed by the rules of Court.

42. Counsel for the Appellant submitted that this Court should adopt a different construction because in **Bilta** the Court relied on other matters to support its construction of the statutory provision which he submitted were not applicable or present in this jurisdiction, such as the fact that the 1996 Act was drafted with the terms of the UNCITRAL Model Law on International Commercial Arbitration (1985) in mind. That may be so, but that is not a sufficient reason for this Court to adopt any different conclusion. Section 7 is part of primary legislation, is clear and unambiguous and excludes, in my judgment, any possibility that it is to be circumscribed by or overridden by the rules of Court.

43. The second issue raised by Counsel for the Appellant was that Zim Israel was not ready and willing to do all things necessary to the proper conduct of the arbitration.

44. The onus is on the person seeking the stay to show that he was ready and willing at the time of the commencement of the proceeding and still remains ready and willing to do all things necessary to the proper conduct of the arbitration. In an affidavit filed on behalf of Zim Israel in support of the application for the stay of the counterclaim, the deponent deposes "that at the time the counterclaim was commenced [Zim Israel] was, and remains, ready and willing to do all things requisite to enable all the alleged matters in dispute regarding the counterclaim, to be determined by arbitration in accordance with the provisions of the [joint venture agreement]". The Judge noted that this evidence was uncontradicted and stated there was no reason provided that it should be rejected. The Judge therefore accepted the evidence and found that Zim Israel was ready and willing to do all things necessary to the proper conduct of the Arbitration.

45. Counsel for the Appellant submitted that on a proper analysis of the circumstances the assertion that Zim Israel was ready and willing to do all things necessary to the proper conduct of the arbitration cannot be supported. The Judge was therefore wrong to come to the conclusion that she did. Counsel submitted that Zim Israel by its application for the stay has acknowledged the validity of the joint venture agreement. However Zim Israel joined in these proceedings and elected to prosecute the claim under the agency agreement. In those circumstance the Appellant submitted that the fact that Zim Israel has brought and continues with the proceedings in the Court is clear evidence that it is neither ready nor willing to do the things necessary to the proper conduct of the arbitration. Further Counsel relies on 1) the delay by Zim Israel in making the application and 2) that the Appellant before the filing of the counterclaim had written to the attorneys for the Respondents inviting them to consider referring the issues between the parties to mediation or other forms of alternative dispute resolution.

46. In my judgment the fact that Zim Israel has sued under the agency agreement provides no evidence that it is not ready and willing to do the things necessary to the proper conduct of the arbitration. According to Counsel for the Respondents in response to a query raised by the court, the Respondents' position is that the agency agreement is the governing agreement between the parties. Counsel accepts that the joint venture agreement was signed but says that it was not "effectuated". The joint venture agreement therefore was not the agreement that governed the relationship between the parties and was abandoned before its implementation. In those circumstances suing on the agency agreement is entirely consistent with their position and does not support the argument that they are not ready and willing to do all things necessary to the proper conduct of the arbitration of the issues arising between the parties in relation to the joint venture agreement.

47. So far as the delay in making the Application is concerned that also does not provide any basis from which it can be inferred that Zim Israel is not ready and willing. The fact of the matter is that section 7 of the Arbitration Act provides that an application may be made at any time after an appearance and before delivery of any pleadings or the taking of any step in the proceedings. When an application is made within that time, the fact that it may not have been made as soon as it

could have been made can provide no basis for the Court rejecting the applicant's evidence that it is ready and willing.

48. As regards the letter written by the Appellant prior to the making of the counterclaim and inviting the parties to consider some form of arbitration dispute resolution, this letter it seems was written shortly after the commencement of the proceedings and may have been written in ignorance of the fact that proceedings were in fact commenced. It was written before the counterclaim was filed but referred to issues on which the counterclaim is based. Counsel submitted that in those circumstances had Zim Israel really been ready and willing to do all things necessary to the proper conduct of the arbitration it was reasonable to expect that Zim Israel would have replied to that letter suggesting the possibility of arbitration. That did not happen and an inference can be drawn that Zim Israel was not ready and willing as claimed.

49. I agree that it is possible to draw the inference suggested by Counsel from the circumstances he has outlined. The Judge however had before her sworn evidence that Zim Israel was ready and willing to do all things necessary to the proper conduct of the arbitration. This evidence was unchallenged and it was open to the Judge to accept it notwithstanding the possible inference Counsel submitted could be drawn from the circumstances. In the circumstances the Judge was entitled to come to the conclusion that she did and I cannot say that she was plainly wrong to do so.

50. Lastly we come to the Appellant's argument that the grant of the stay will result in multiple actions with a risk of inconsistent decisions.

51. The Judge was of the view that in this case the Respondents' claim and the Appellant's counterclaim raised distinct issues. The Judge said the Respondents' claim was based on the unlawful withholding of money by the Appellant to discharge a tax liability in breach of the agency agreement whilst the counterclaim was based on the unlawful termination of the joint venture agreement, breach of fiduciary duties as a joint venture partner and acts of unfair competition in the context of the joint venture agreement.

52. I however do not agree that the matters are as distinct as the Judge has made it out to be. The Judge seemed to have overlooked the fact that an issue raised by the defence to the claim is

whether the joint venture agreement governed the relationship between the parties. The Appellant contends that the agency agreement was replaced by the joint venture agreement in 2003. It was the latter agreement that governed the relationship between parties. The Respondents' position on the joint venture agreement is that it was not given effect to and was in essence abandoned. Whether the joint venture agreement was the prevailing agreement is an issue in the claim. The Appellant has sued on the joint venture agreement in the counterclaim. Whether that agreement was given effect to or was abandoned must therefore also be an issue on the counterclaim. There is therefore an issue that is common to both the claim and the counterclaim. The effect of a stay of the counterclaim would be that the claim would proceed in Court and the counterclaim would be determined before the arbitrator. The effect therefore is that there would be separate proceedings and the risk of inconsistent decisions. Insofar as the Judge decided otherwise I do not agree with her and I am of the view that she fell into error in the view she took as to the distinctiveness of the issues of the claim and the counterclaim. This Court is therefore entitled to exercise its own discretion. The question that arises therefore is what is the appropriate order given the fact that there would be separate proceedings and the risk of inconsistent decisions.

53. There are two principles at play as stated by Pearson L.J. in **Taunton-Collins v Cromie and anothe**r [1964] 2 ALL ER 332:

> "*In this case there is a conflict of two well-established and important principles. One is that parties should normally be held to their contractual agreements. The present parties, the plaintiff and the building contractor, have agreed that any dispute or difference between them shall be referred to arbitration. It can be said in support of the application here that that is what the parties have agreed and that, when the question is brought before the court, the court should be willing to say by its decision what the parties have already said by means of their own contract. That is one principle. The other principle is that a multiplicity of proceedings is highly undesirable for the reasons which have been given. It is obvious that there may be different decisions on the same question and a great confusion may arise."*

The reasons for the undesirability of multiple proceedings was set out in the judgment of Lord Denning MR in the same case. He said:

"It seems to me most undesirable that there should be two proceedings in two separate tribunals - one before the official referee, and the other before an arbitrator - to decide the same questions of fact. If the two proceedings should go on independently, there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator. There will be much extra cost involved in having two separate proceedings going on side by side; and there would be more delay."

54. In **Taunton-Collins** the stay was granted because of the multiplicity of proceedings and the risk of inconsistent decisions. In the words of Lord Denning "[a]ll in all the undesirability of two separate proceedings is such that I should have thought that it was a very proper exercise of discretion for the official referee to say that he would not stay the claim against the contractors". Pearson, L.J was of a similar mind and said, "[t]here are very strong reasons based on the principle of avoiding the multiplicity of proceedings why this action should be permitted to continue as an action by the plaintiff against both defendants and for that reason I would dismiss the appeal".

55. In **Bulk Oil (Zug) A.G. v The Trans-Asiatic Oil Ltd. S.A**. [1973] 1 Lloyd's LR 129 Kerr J. considered **Taunton-Collins** as well as **Halifax Overseas Freighters Ltd. v Rasno Export** [1958] 2 Lloyd's Rep. 146 in which the risk of separate tribunals and inconsistent conclusions was the main basis of the decision and which was approved and followed in **Taunton-Collins.**

56. Kerr J noted that there were two features in those cases that were not present in the case before him namely, first, in both those cases the multiplicity of proceedings covering the same issues did not arise from a choice made by the party wishing the whole dispute to be dealt with by litigation and secondly, in both cases the risk of multiplicity of proceedings relating to the same issue was in those cases liable to result in substantial injustice because the plaintiffs were making alternative claims which might both be defeated if different conclusions were reached by two different tribunals. Kerr J stated that taking these two distinguishing features together it seems that the principle underlying these cases is really as follows:

"Where there are disputes under two related agreements of which only one contains an arbitration clause the Court will exercise its discretion to allow both disputes to proceed to

litigation together if (among other reasons relevant to the discretion) the stay of the litigation relating to one of these disputes would be liable to cause substantial injustice to the party which wants them to be litigated together. In this connection the Court will take into consideration whether or not the parties seeking to litigate both disputes together is in some way to be held responsible for the dilemma in which he finds himself."

57. Kerr J concluded that the grant of the stay would not cause any injustice to either party. Specifically with reference to the risk of different conclusions being reached by different tribunals he stated that he did not see "how it can be said that the risk of different conclusions being reached by two different tribunals is in itself a potential source of injustice to the defendants."

58. The **Bulk Oil** case was referred to in **Berkshire Senior Citizens Housing Association Ltd. v Mc Carthy E. Fitt Ltd. and National Westminister Bank Ltd**. 15 BLR 27, without any adverse comment. In that case the facts, which I take essentially from the head note, were that the plaintiffs were the owners of a block of flats constructed by the first defendant contractors under a building contract containing an arbitration clause. The second defendants were the trustees of the will of the building's architect whose terms of engagement had also contained an arbitration clause. The plaintiffs discovered several defects in the building and brought proceedings in respect of such defects against both defendants jointly and severally. The first defendant applied for a stay. On the hearing of that application the Court was told that the second defendant intended to plead by way of defence that any defects for which the architects might otherwise be thought liable were in fact the fault of the engineers who were not parties to the present action. The Judge below granted the stay against both defendants. The plaintiff appealed. On the appeal Goff, L.J noted that there were two conflicting principles in play as stated in **Taunton-Collins** and stated that the second of the principles namely, the risk of multiplicity of proceedings giving rise to inconsistent decisions was of paramount importance in the case "because, if there were separate proceedings, [the plaintiffs] may lose altogether not by reason of separate defences but because the different tribunals reached different conclusions on the same facts and that, if it happens, must be a substantial injustice." Sir David Cairns was of a similar mind and stated:

"This is a strong case for the application of the doctrine of such cases as ***Taunton-Collins v Cromie****, that the desirability of avoiding several arbitrations so that issues between all*

concerned can be resolved in one action may be a proper ground for refusing a stay. It is a strong case because of the risk that if they were two arbitrations, or an arbitration and an action, the result might be that an innocent plaintiff, or claimant, might fail to get damages against anybody because of inconsistent findings in two different sets of proceedings."

Roskill L.J, who was the other Judge on the panel in the **Berkshire** case, also referred to the multiplicity of proceedings and the risk of conflicting decisions and agreed with both the judgment of Goff L.J and of Sir David Cairns.

59. **SGS United Kingdom Ltd. v Snamprogretti Ltd. and others** 46 Con LR 1 was another case dealing with an application for a stay of proceedings in preference to arbitration. In this case the first defendants (SPL) was awarded a contract to supply, erect and install storage tanks for chemicals. SPL subcontracted the fabrication of parts of the tanks and the manufacture of ancillary equipment to the second, third and fourth defendants. It engaged the plaintiff, SGS, to carry out inspections and tests in the UK of equipment and material bought by SPL or their clients. The contract between SPL and SGS contained an arbitration clause. SPL found defects in some of the manufactured parts and the ancillary equipment. As a result of the defects the tanks were rejected and SPL suffered loss. SPL was in the course of preparing to serve detailed points of claim and notice to arbitration on SGS when SGS issued a writ and statement of claim. By the writ and statement of claim SGS sought a declaration that it complied with the terms of its contract with SPL and that any defects could not have reasonably been discovered by the periodic inspection and tests carried out by it. It also sought an indemnity and contribution against the second, third and fourth defendants in the event it be proved that SGS did not comply with its contract.

60. SPL applied to stay the action and that application was resisted by SGS. SGS claimed that if the stay was granted there was likely to be a multiplicity of proceedings and a risk of inconsistent findings. The Judge however granted the stay. He noted that there were the two competing principles as set out in **Taunton-Collins** and referred to the principle as derived by Kerr J in the **Bulk Oil** case. He observed that while the Court will not encourage multiple proceedings that did not mean that "the Court will ride rough shod over the contractual arrangements made between the two parties".

61. He accepted that in the arbitration it would be necessary for SPL to establish that there were defects in the manufactured parts and ancillary equipment. This was also an issue in the action commenced by SGS. The result of a stay of the action against SPL would therefore mean that the arbitrator would have to decide that issue between SPL and SGS and the Court would also have to decide that same issue between SPL and the other defendants. He however did not think that that in itself was sufficient to refuse the stay. He considered other factors raised by SGS to refuse the stay. Those the Judge concluded were indicative only that of the fact it might be more convenient to SGS to be able to pursue its contribution claim against the second, third and fourth defendants in proceedings in which SPL's claim against SGS was being litigated but that did not amount to any injustice to SGS. Mere inconvenience therefore was not sufficient. The Judge concluded that the factors raised including the multiplicity of proceedings and the risk of inconsistent findings were not sufficient to permit SGS to be relieved of its agreement to arbitrate the dispute between it and SPL.

62. These cases, it seem to me, to establish that where the objection to the stay is that it may result in separate or a multiplicity of proceedings and a risk of inconsistent findings, there are two principles at play. One is that the parties should be held to their contractual arrangements to arbitrate and the other that multiplicity of proceedings is highly undesirable. The cases however establish that the mere fact that there may be a multiplicity of proceedings and hence the risk of inconsistent findings is not by itself sufficient to grant a stay, or in other words permit a party to ignore or ride "rough shod" over his contractual commitment. There must be something more from which the Court can conclude that the party resisting the stay or seeking to be relieved from his contractual obligation will suffer substantial injustice if the disputes are not all permitted to be litigated. A sufficient basis to so conclude that there is substantial injustice is where the risk of inconsistent decisions by the different tribunals may result in the party seeking the stay losing altogether. In that event the Court will also consider the extent to which the party seeking the stay is an innocent party or in other words the extent to which he is responsible for the multiplicity of proceedings.

63. In this case there has been nothing more raised by the Appellant other than to say that if the stay is not granted there is likely to be separate proceedings before the arbitrator and the Court and

the risk of inconsistent decisions. But more is needed. As I mentioned there must be something that would amount to substantial injustice. The mere risk of inconsistent decisions is not sufficient. This is not a case as in **Taunton-Collins, Halifax** and **Berkshire** where there is the possibility that inconsistent decisions may result in the person resisting the stay losing altogether. In this case the common issue is whether the joint venture agreement was given effect to. An inconsistent finding on that issue would not result in the Appellant losing altogether. And it has not been suggested, nor could it be, that the arbitral tribunal is more likely to arrive at a wrong decision than the Court. In consonance with what Kerr J said in **Bulk Oil** I do not see how it can be said that the risk of different conclusions being reached by the High Court and the arbitral tribunal is in itself a potential source of injustice to the Appellant.

64. In the circumstances I do not think that sufficient reason has been shown by the Appellant why the dispute between the parties as reflected in the counterclaim should not be decided in arbitration. Accordingly, I would dismiss the appeal.

65. On the question of costs I see no reason that the costs should not follow the event and I therefore order that the Appellant pay the Respondents' costs and that such costs be determined at two thirds of the costs allowed on the application in the Court below.

A. Mendonça,
Justice of Appeal