15/10.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

[redacted]

712

A. No. 270/82

BETWEEN SEA LINK LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as agents

PLAINTIFF

A N D TRANZPACIFIC CONTAINER SERVICES LIMITED a duly incorporated company having its registered office in Auckland and carrying on business as agents

FIRST DEFENDANT

A N D ATLANTIS LINE LIMITED a company incorporated under the laws of the State of California and having its registered office at San Francisco and carrying on business as steamship agents and carriers

SECOND DEFENDANT

Hearing : 29th and 30th April 1982

Counsel : A.R. Galbraith for plaintiff
C.S. Blackie for first defendant
R.J. Johnson for second defendant

Judgment : 5 October 1982

JUDGMENT OF CHILWELL J.

There are two motions before the Court the first by the first defendant (Tranzpacific) for an order setting aside an interim injunction and charging orders made ex parte on 30th March 1982 and also the terms for discharge thereof made on 8th April 1982 and the second by the second defendant (Atlantis) for the same relief and for an order staying

proceedings in the action upon the grounds, in respect of the stay, that the plaintiff (Sea Link) has submitted to arbitration in San Francisco in respect of the matter in dispute and that Sea Link and Atlantis have contracted to determine any dispute in San Francisco in accordance with the laws of California and the U.S.A.

Sea Link filed the writ and statement of claim in this action on 30th March 1982 and at the same time moved the Court ex parte for an interim injunction and charging orders pending trial supported by an affidavit by a director, Mr. D.J. Batchelor, and a lengthy memorandum of counsel. Sinclair J. made the orders as moved on the same day. Tranzpacific was served with the orders on 1st April and some 16 Consignees of goods were served by sending them each a copy by registered post on 2nd April. Atlantis was advised in San Francisco by telephone of the making of the orders. On 2nd April 1982 Tranzpacific moved for an order setting aside the interim injunction. It was also intended to include the charging order. Counsel for Sea Link and Tranzpacific appeared before Sinclair J. on 8th April 1982 when the injunction and charging orders were discharged on terms on a basis which has been accepted as without prejudice to having the original ex parte orders reviewed and completel discharged. A motion for orders setting aside the original orders and the terms of the discharge was filed by Tranzpacific on 6th April 1982. On 27th April 1982 Atlantis filed its motion for similar orders and for an order staying proceedings in the action. It has not otherwise submitted to the jurisdiction of this Court.

The two motions came before me on 29th April. I made certain orders relating to late filing of affidavits, I gave leave to Mr. D. Done, a director of Atlantis, to give viva voce evidence in reply to a late filed affidavit of Mr.

D.J. Batchelor. I disallowed all requests to cross-examine deponents and Mr. Done. There was a substantial argument over two days. In affidavits of Mr. Done and of Mr. P.C. Breuer, the General Manager of Tranzpacific, the receipt of money by Sea Link direct from consignees was disclosed. At the end of the hearing I made an order by consent granting substantial partial relief to Tranzpacific. I regret the delay in delivering this judgment. It has, however, to some extent, been ameliorated by that consent order.

Sea Link's action is based on an agreement drawn up and signed in San Francisco on 11th September 1981. It was common ground that the agreement had been inforce since the end of 1980 or early 1981 and that the terms were finally reduced to writing on 11th September. In its statement of claim Sea Link alleged that it was appointed the general agent of Atlantis in New Zealand and :-

> "5. THE said agreement provided, inter alia, for the Plaintiff to make payments for demurrage, customs and shipping charges and associated charges on behalf of the Second Defendant and to charge commission on such payments to the Second Defendant.
>
> 6. THE said agreement further provided for all such payments and commission to be deducted from freight payments collected in New Zealand by the Plaintiff on behalf of the Second Defendant or to be paid by the Second Defendant.
>
> 7. THERE is now due and owing by the Second Defendant to the Plaintiff the sum of US$46,293.79 in respect of which the Second Defendant has been supplied with full details by way of statements, invoices and credit notes."
>
> (Particulars of the account were provided here)
>
> "8. PURSUANT to the said agreement containers have been transhipped to New Zealand by the Second Defendant on the ship 'Balderoe' due to arrive in New Zealand on 2 April 1982."
>
> (Particulars of 13 containers were provided here.)
>
> "9. THE Plaintiff is entitled to the credit to be received from freight charges to be paid in respect if these containers and to costs and commission in respect of the clearance of these containers.

10. ON or about 5 March 1982 the Second Defendant in concert with the First Defendant wrongfully purported to terminate the said agreement and to appoint the First Defendant as its general agent.

11. THE Plaintiff has accepted such repudiation in respect of all shipments subsequent to that on the ship 'Balderoe' without prejudice to its rights of action for breach of the agreement.

12. THE Second Defendant and the First Defendant are wrongfully purporting to exclude the Plaintiff from handling the containers on the ship 'Balderoe' the earning of costs and commission and the receipt of freight payments to credit against the amount owing by the Second Defendant.

WHEREFORE the Plaintiff claims :

(a) An injunction preventing the First Defendant and the Second Defendant from dealing in any way with the containers specified in paragraph 8 of the Statement of Claim or the consignees of such containers save through the agency of the Plaintiff

(b) Judgment in the sum of US$46,293.79 against the Second Defendant.

(c) Judgment against the Second Defendant in such sum as shall be ascertained by enquiry in respect of costs and commissions earned by the Plaintiff in dealing with the containers specified in paragraph 8 of the Statement of Claim.

(d) The costs of and incidental to this action.

(e) Such further or other relief as this Honourable Court deems just."

The ex parte orders made in Chambers by Sinclair J. were in the form of the ex parte notice of Motion. The orders made were :-

"FIRST by way of interim injunction pending the trial of the action in the following terms :

(a) Restraining the First Defendant or the Second Defendant and any agents or others acting on their behalf from collecting freight, dealing with the consignees, dealing with the Customs Department, remitting funds derived from the freight due on or in any way dealing with the following containers arriving on ship 'Balderoe' save through the agency of the Plaintiff."

(Particulars of 13 containers were provided here)

"(b) Restraining the consignees in respect of the said containers from paying freight or otherwise dealing with the containers save through the agency of the Plaintiff.

(c) Upon the terms that service of a sealed copy of this Order be forthwith effected on all consignees by registered post to the address shown in the consignment notes and that service of a sealed copy of this Order be effected upon the First and Second Defendants by personal service at the office of the First Defendant.

(d) and reserving leave for all parties to apply

AND SECONDLY by way of charging orders pending the trial of the action that the estate, right or interest of the Second Defendant in the following assets do stand charged with payment of the amount for which the Plaintiff may obtain judgment in this action namely :

(e) All shipping documents relating to the containers listed in paragraph (a) hereof arriving on the ship 'Balderoe'

(f) All monies, securities, assets or deposits held for or collected on behalf of the Second Defendant by the First Defendant."

In his affidavit in support of the ex parte motion Mr. Batchelor stated that the 13 containers on the Balderoe related to Sea Link's agency for Atlantis. The copy bills of lading annexed to his affidavit all show Sea Link as the delivery agent in New Zealand. He further stated that he had received advice that Tranzpacific would be dealing with these containers with the result that Sea Link would be deprived of the opportunity of collecting the freight from the consignees of approximately $30,000 and also of earning its commission in respect of the same containers. Sea Link, he said, would also lose its right to retain the sum of $30,000 to offset its account and in that event would be placed in an extremely difficult position to recover the money owing to it. He said that as far as he was aware Atlantis had no other assets of any significance in New Zealand. The urgency of the matter arose from the pending arrival of the Balderoe in New Zealand on 2nd April 1982 when the containers would begin immediately to be handled.

On 8th April 1982 Counsel for Sea Link and Tranzpacific appeared before Sinclair J. in Chambers on Tranzpacific's motion to set aside the interim injunction. Sinclair J. made an order setting aside the interim injunction and charging orders upon the following terms :-

> "(a) That there be paid forthwith on behalf of the Defendants to the Trust Account of Messieurs Towle & Cooper, Solicitors for the First Defendant at the Bank of New South Wales at Auckland the sum of THIRTY THOUSAND DOLLARS ($30,000.00) to be held on interest bearing deposit pending further order of this Honourable Court as security for any Judgment that the Plaintiff may subsequently obtain in this action.
>
> (b) That leave be reserved to all parties to be heard on all matters arising out of the original ex parte Order and this Order at a date to be appointed by the Court.
>
> (c) That the costs of and incidental to this Order be reserved."

Clearly Sinclair J. regarded the approximate amount of $30,000 payable for freight was money to be preserved for the benefit of Sea Link should it subsequently obtain judgment. In an affidavit sworn on 2nd April 1982 and filed by Mr. Breuer, the General Manager of Tranzpacific, he deposed that his company was appointed as general agents for Atlantis in New Zealand and that by that agreement his company was responsible for the handling of all Atlantis cargoes arriving in New Zealand after 16th March 1982. He said that he had made an analysis of the bills of lading relating to the 13 containers which showed that of the total freight payable U.S. $32,763.11 had been prepaid leaving US $30,139.49 to be collected in New Zealand. Converted to New Zealand currency the latter amount was N.Z. $38,939.91. On 8th April 1982 Messrs. Towle & Cooper advised the Registrar that they were holding $30,000 paid by Tranzpacific which they had placed on interest bearing deposit with the Bank of New South Wales that day.

After the sealed orders for injunction and charging orders had been served on Tranzpacific and on the 16 consignee Sea Link collected from 5 of the consignees amounts totalling N.Z. $22,073.41. The particulars are given in an affidavit sworn by Tranzpacific's operations manager on 29th April 1982 and filed in Court at the hearing before me. It was not made clear at the hearing precisely when the sums were received by Sea Link, but received they were, and this explains the order made by me at the conclusion of the hearing, recorded in minute form as follows :-

> "By consent the formal order of 8th April 1982 is varied by reducing the amount referred to in paragraph (a) to $10000. Further, by consent, Messrs Towle & Cooper may pay to the first defendant the sum of $20000 being part of the sum of $30000 directed to be held in that firm's trust account. The payment will in addition include such interest as is attributable to the sum of $20000.
> All other issues reserved for judgment to be prepared and delivered in the usual way."

In his memorandum in support of the ex parte motion for the interim injunction and charging orders counsel for Sea Link relied upon the Court's jurisdiction to grant a Mareva injunction and, in respect of the charging orders, upon Rule 314 of the Code of Civil Procedure. In regard to the Mareva injunction Sinclair J. was referred to several recent authorities in the United Kingdom and to Hunt v B.P. Exploration Company (Libya) Ltd. [1980] 1 N.Z.L.R. 104. Unfortunately the terms of the order moved and as made gave Sea Link much more than a Mareva injunction: it in effect granted specific performance of the agreement between Sea Link and Atlantis in a way which also bound Tranzpacific and 16 consignees. To the extent that Sea Link recovered $22,073.41 the injunction gave Sea Link not interim relief but substantive relief. Mareva injunctions are not intended to achieve such a result. See The Supreme Court Practice 1982 (The White Book) pages 520-522 paragraphs 29/1/11E, F, G

& H and in particular at page 521 :-

> "The essential character of a Mareva injunction, even if it related to a particularised asset, is relief in personam as against the defendant; it could not operate as an attachment of goods or money or other assets, because attachment meant a seizure of assets under a writ or order with a view to them being sold to meet an established claim or held as security for the discharge of an established claim or one yet to be established and must fasten upon an asset, and therefore a Mareva injunction does not prevail against a foreig debenture holder where the foreign floating charge crystallises after the injunction has been granted (Cretanor Maritime Co. Ltd. v Irish Marine Management Ltd. (1978) 1 W.L.R. 966; (1978) 3 All E.R. 164, C.A.).
>
> The purpose of a Mareva injunction is not in any way to improve the position of the plaintiff in the insolvency of the defendant or to obtain a priority, in the event of such insolvency to which he would not be entitled in English law nor is a Mareva injunction a form of pre-trial attachment but a relief in personam which prohibits the removal by a foreign defendant of his assets from the jurisdiction and therefore the court has jurisdiction to permit a qualification to a Mareva injunction to allow the application of an intervene for the transfer of assets by the defendant if the money is required for a purpose which did not conflict with the underlying purpose of the Mareva injunction (Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A. (Gillespie Bros. & Co. Ltd. intervening) ((1980) 2 W.L.R. 488; (1980) 1 All E.R. 480). "

So far as the charging orders are concerned they should have been orders nisi in the first instance in terms of Form 26 as follows :-

> "The Honourable Mr. Justice ..... hereby orders that until sufficient cause is shown to the contrary, the interest of the ..... in ..... do stand charged with the payment of the amount for which the plaintiff, may obtain judgment in this action." (Emphasis added)

Putting aside, in the meantime, the form in which the injunction and charging orders were made the principal issues to be determined on the present motions are :-

(a) Whether Sea Link is entitled to interim relief in the nature of an injunction against :

(i) Tranzpacific, and

(ii) Atlantis, and binding upon

(iii) The Consignees

(b) Whether the existing orders and the terms for the discharge should be set aside to the extent that they affect :

(i) Tranzpacific, and

(ii) Atlantis, and are binding upon

(iii) The Consignees

(c) Whether the proceedings ought to be stayed as against Atlantis.

There are conflicts in the evidence as between deponents for Sea Link and deponents for Atlantis and Tranzpacific but, as is to be expected in a commercial transaction, there are facts which are not in dispute.

I find the undisputed facts to be as outlined in this and subsequent paragraphs except where stated to the contrary or where inferences are drawn. Sea Link had a favourable slot rate agreement with a Norwegian company, Gearbulk Limited (Gearbulk) for shipments between Japan and New Zealand. Atlantis operates as a non-vessel operating common carrier which gives it the status of a shipping company. It had favourable slot rate arrangements in respect of Japanese vessels for shipments between the U.S.A. and Japan. By bringing together the favourable arrangements or agreements of Sea Link and Atlantis it was more economic to ship containers from the U.S.A. via Japan to New Zealand than by shipping direct on the Conference Lines. The containers shipped from the U.S.A. by Atlantis on Japanese vessels were transferred in Japan to Gearbulk vessels for shipment to New Zealand. The arrangement between

Atlantis and Sea Link had been in existence since late 1980 or early 1981. The agreement of the 11th September 1981 was, to use Mr. Done's expression,"the forma lisation" of that arrangement.

The agreement is divided into four parts, first "Nature of Service - Scope of Agreement"; secondly, "Duties of the Agent"; thirdly, "Freight Collection"; fourthly, "Service Management & Remuneration"; fifthly "Tenure of Agreement"; sixthly, "Termination of Agreement". There is a seventh clause at the end which is the arbitration and foreign law provision referred to earlier in this judgment. I will not recite the complete agreement. What follows is in part a summary, but, where relevant, I have recited the precise terms :-

(1) Nature of Service - Scope of Agreement

"(a) Whereby 'ATLANTIS' conducts a container shipping service between the United States of America, Canada and New Zealand and between New Zealand and the United States of America and Canada hereinafter referred to as 'the service'.

(b) SEA LINK shall act as the sole GENERAL AGENT in New Zealand, Japan, Far East and South East Asia for the service, appointing and controlling all sub-agents at any port or place where the agent does not maintain its own office."

(c) A term relating to other Atlantis operations.

"(d) SEA LINK acknowledges that, as the duly appointed General Agent of the service, is acting on behalf of and for the benefit of the service. As a result the service is the actual beneficiary of the duties and obligations to be performed by the agent under this agreement and the agent expressly agrees that its responsibility to perform runs to the service.

(e) SEA LINK are hereby authorised and empowered t endorse on behalf of the service any notes, cheques, drafts or bills of exchange or any other documents and to deposit in the agent's bank account any or all such notes, cheques, drafts, bills of exchange or other documents o the proceeds therefrom and any cash received on behalf of the service."

(2) Duties of the Agent

Terms requiring :-

Sea Link to maintain adequate staff for the service.

Sea Link to promote sell and market the service.

Sea Link to supervise cargo handling and provide services and activities related to a cargo agent.

Sea Link to maintain regular reporting procedures.

(3) Freight Collection

"SEA LINK shall collect all freights, and other revenue, payable to the trust account of the service. To be subject to the following authorized conditions :

(a) SEA LINK shall deduct all commissions, profit shares, fees and expenses which are payable on the service's behalf.

(b) SEA LINK shall forward the balance of all monies collected to a bank nominated by ATLANTIS, but qualified under New Zealand Exchange Laws as and when requested."

A term requiring Sea Link to assist and co-operate in any legal steps as may be taken by ATLANTIS to collect revenues.

(4) Service Management and Remuneration

"Under the scope of this agreement and for all intensive purposes relating to the service, (as distinguished from ATLANTIS LINE LIMITED), ATLANTIS LINE LIMITED hereby appoint SEA LINK LIMITED joint managers and operators of the service.

That is in addition to all commissions, fees, etc, earned and paid by SEA LINK (commensurate with those earned and paid by ATLANTIS LINE), SEA LINK LIMITED will participate in all profits and losses of the service on a basis of fifty per centum regardless."

A term requiring a party incurring unauthorised losses to pay the full amount thereof.

(5) Tenure of Agreement

"This agreement shall remain in force indefinitely but not less than 24 calendar months from the date hereunder and thereafter subject to cancellation at any time by mutual consent of the parties or on (90) ninety days' notice thereof in writing given by either party

(6) Termination of Agreement

"Notwithstanding the abovesaid in paragraph (5)

this agreement will be terminated with immediate effect by the dissolution of either party, (and in the case of ATLANTIS LINE LIMITED, to include the service), or by breach of contract by either party.

In the event of any such breach, the service, in its entirety is to be forfeited in favour of the innocent party....."

The clause then requires the party in default to account for documents etc.

"ATLANTIS LINE LIMITED will at all times, indemnify SEA LINK LIMITED, as agents, for the terms and conditions of this agreement should it be terminated at any time.

(7) Any difference of opinion or any claim or dispute arising out of this Agreement shall be settled by arbitration in San Francisco in accordance with the Laws of California and the United States of America."

It was common ground that until December 1981 a substantial portion of the cargoes were sent from the U.S.A with freight in whole or in part unpaid and therefore requiring collecting in New Zealand. At least the Japan-New Zealand section was serviced on that basis because Gearbulk did not require prepayment of freight from Sea Link. In consequence after each shipment there were surpluses due to Atlantis from Sea Link. But the position changed in December 1981. For whatever reason (whether deliberately on the part of Atlantis or not) several large shipments were arranged in December for ships arriving in New Zealand in February 1982 on which the freight had been completely prepaid to Atlantis by the consignor with the result that Sea Link found itself obliged to clear the shipments in New Zealand which involved it in paying the freight in New Zealand Because the shipping documents arrived only a few days ahead of the ships Sea Link had little warning and, accordingly, little time to arrange payment. Applications to Atlantis for financial assistance met with no response other than to require Sea Link to prepare accounts to establish what it considered to be due. Yet Atlantis had the freight and because the shipping time from U.S.A. to New Zealand was about 45 days

it had been in funds for that period. Instead of Sea Link having surpluses to be sent to Atlantis, the situation was now the reverse. At one stage Sea Link approached its banker for finance which was agreed provided some acknowledge ment was available from Atlantis. It is a proper inference from the evidence and the Telex messages which passed between the two companies that Atlantis was unwilling to prepare accounts for the purpose of ascertaining the financial adjustments required between the parties. Its attitude was that Sea Link had sufficient information to prepare accounts, it should do so and advise Atlantis of the amount allegedly due to Sea Link - an attitude which did nothing to preserve a satisfactory relationship between the parties. The Telex messages tell their own unembellished story :-

3.2.1982 Sea Link to Atlantis

"WE HAVE A SERIOUS CASH FLOW SHORTAGE. CUD U PLSE HELP BY REMITTING USD 8000 TO AALL " CO'S BANK SUMITOMO BANK. HIBIYA BRANCH TOKYO - A/C NO. 296060 A.S.A.P.
SHORTAGE DUE TO : THE FREIGHT PAYABLE ON 5 TEU PER AOTEA V9245. IS TO BE PREPAID IN JAPAN ON DEPARTURE OF VESSEL. AS WE DO NOT COLLECT ANY FRT UNTIL AFTER ARRIVAL IN NZ WE HV NO FUNDS TO COVER THIS.
ALSO AS TRANZPAC REQUIRE PAYMENT OF FRT BEFORE RELEASE OF CONTAINER WE ARE ALSO FINANCING THIS UNTIL WE OBTAIN PAYMENT FROM OUR CNGE'S.
WE WILL IMMEDIATELY REFUND YR USD 8000 ADVANCE UPON COLLECTION OF FRT ON ARRIVAL.
PLSE ACKNOWLEDGE BY RETURN"

5.2.1982 Sea Link to Atlantis

"CAN U PLSE ADV WHAT IS HAPPENING RE REMITTANCE?? IS ANY BODY THERE"

5.2.1982 Atlantis to Sea Link

"YES WE ARE REVIEWING YOUR FIGURES WHICH ARE NOT ENTIRELY CORRECT. NORMAL PROCEEDURE AS PER OUR CONTRACT IS TO RECONCIELE VESSEL AFTER LADING NZ. WE HAVE NOT GOT THIS DONE IN ADVANCE AND ARE WORKING ON IT RIGHT NOW.
THIS HAS COME SOMEWHAT AT A BAD TIME AS WE DID NOT ANTICIPATE THIS OCCURANCE AND WE PAY TAXES AND KEEP OUR BOOKS ON A CASH BASIS. OUR FINANCIAL YEAR ENDS JAN 31 AND AS OUR BOOKS ARE DONE ON A

CASH BASIS E WE HAVE DEPLETED OUR OWN CAPITAL A BIT. WE WILL HAVE TO GET BACJ TO YOU AS TO OUR INTENTIONS AS SOON AS WE CAN. I FIND IT A LITTLE HARD TO BELIEVE THAT YOU CANNOT COVER THIS SERVICE.
WILL TRY TO REVERT ASAP."

5.2.1982 Sea Link to Atlantis

"OK THE CARGOM WILL NOT BE DELIVERED UNTILL WE CAN GET SOME MONEY FROM SOMEWHERE. ALSO THE ORIGINAL ..... AGREEMENT WAS BASED ON N.Z. COLLECTING MOST FREIGHT. THIS SITUATION WAS NOT CONSIDERED. PLSE RVERT BACK ASAP."

9.2.1982 Sea Link to Atlantis

"RYTLX SN/507 YR TLX NOT ACCEPTABLE TO BANK FOR FINANCE. IT WILL NED TO SAY SOMETHING LIKE ''REMITTING USD 15,000 TO YR A/C ON 12.2.82. PLS ACKNOWLEDGE RECEIPT AND ADVISE.''
URGENT ASSISTANCE WUD BE APPRECIATED."

10.2.1982 Atlantis to Sea Link

"BASED ON UPCOMING RECONCILIATIONS WE WILL BE REMITTING USD 15,000 59 64 - : :97, 5 9, 12.2.82
PLS CONFIRM ACKNOWLEDGE RECEIPT AND ADVISE."

24.2.1982 Sea Link to Atlantis

"REMITTANCE REQUIRED:

BAL AS PER STAT 11.2.82	22435.31	DEBI
COLUMBUS WELLINGTON V33 INV 192	(721.22)	REMI
EXTRA T/SHIP COST BALD V29	1597.40	
EXTRA COSTS BALD V22	609.36	
AOTEA V9245 5 TEU ALL PREPAID	10,000	APPRO
2 TEU ON BALD 29 FRT COLLECT	(5,000)	APPRO
TOTAL DUE TO SEALINK FOR IMMEDIATE REMITTANCE	USD 28920.85	

WE STILL HV NOT RECVD DOC'S FOR ALL V.30, BUT FROM WHAT WE CAN SEE IT APPEARS THAT NOT MANY WILL BE FRT COLLECT.
THE ALD V30 IS DUE ON FRIDAY WHEN WE WILL HV TO PAY TRANZ THE FRT. WE ARE ALSO PRESSED TO PAY AALL " CO. 3 MIL YEN
DJB WILL PHONE SCOTT ABOUT 3 P.M. YR TIME."

25.2.1982 Sea Link to Atlantis

"RYTLX RECONCILIATION
1. AGREE TO CORRECTION OF INV 168 WHICH WAS DEBITED INSTEAD OF CREDITED. SORRY.
2. ASSUME THE SMALL ADJUSTMENT ARE FOR AMOUNT U HV NOT PREVIOUSLY INCLUDED SO WILL NOT ARGUE OVER THESE AMOUNTS BUT WILL WAIT TO SEE YR REASONS.

3. GOD 9147 HV NO RECORD OF THIS CONT OF WINE BEING CHANGED TO FRT COLLECT (ASSUME U ARE TALKING ABT B/L 4720) WE HV ONLY COLLECTED THE PSC.
4. WHY HV U NOT INCLUDED THE INV WE SENT TO U FOR EXTRA COST IN JAPAN, EAGLE ARROW V21 AND OLD VESSELS ADJUSTMENTS.
5. WHAT IS THE COLWELL CREDIT OF USD 1550.00.
6. U MUST HV THE ACCING INV'S FOR BALD V29 CONT WO'S CATO 2711106 AND CONU 3453786, PLS ADV YR AMTS AND NOT MY GUESS OF USD 5000.
(NOTE: at this point an account similar to that of 24.2.82 is itemised)
BALANCE DUE TO SEALINK USD 21301.53"

26.3.1982 Sea Link to Atlantis

"SORRY HV BEEN CUT OFF.
O.K. ASSUME U ARE CORRECT ON THE AOTEA 9147 BUT WILL NEED MORE DETAILS AND REF TO YR TLX'S. CLD U PLS FORWARD DETAILS OF MISC TRUCK USD 2400.50 AND THE COLWELL USD 1580.
IN THE MEANTIME CLD US PLSE REMIT AS MUCH AS U THINK IS DUE TO US AND SUPPLY TLX WITH DETAILS.
I THINK ABT USD 15,000.
WE HV SHIP INN NOW AND NO MONEY. ARE AT PRESENT FINANCED TO THE LIMITED - APPROX 80,000.
ALSO PLS SUPPLY COPY OF THE TWO MISSING INV ON BALD V 29.
PLS REPLY TO THIS TLX TONIGHT."

It is a matter for comment that even as at the time of the hearing before me in April the parties were completely at odds concerning the amount payable to Sea Link. A detailed account was set forth in the statement of claim. The amount shown as the balance due is U.S. $46,293.79. Annexed to Mr. Batchelor's affidavit of 29th March 1982 are statements for the periods ending 11th Februa and 17th March 1982 showing the same balance owing. An amended account dated 28th April 1982 was annexed to Mr. Batchelor's affidavit of 29th April showing a balance due to Sea Link of U.S. $62,626.23. In an affidavit sworn on 6th April 1982 Mr. Bruer deposed that he had 24 hours previously received a calculation from Atlantis stating that its audited accounts showed the amount owing to Sea Link was U.S. $3,383.22. In his affidavit sworn on 27th April Mr. Done deposed that the amount of $46,293.79 was "absolutely disputed by Atlantis". He annexed what he terme

a "balance sheet" which showed a credit in favour of Sea Link of U.S. $1,551.52 but that was arrived at after deducting U.S. $18,320.63 for "Balderoe V-31 unauthorised collections" i.e. the freight collected since the injunction was served on consignees. If his "balance sheet" is correct the amount payable to Sea Link before this action was commenced was U.S. $19,872.15. But he did not depose to the correctness of the figures. He said that the "balance sheet" had been prepared from figures which were available to Atlantis but that it was not in any way a final statement;

> "..... because sensible accounting has not been made by Sea Link and in addition, some of the items referred to in this are still disputed by Atlantis."

However, he did not indicate which of the items was in dispute in his "balance sheet" nor did he indicate what items in Sea Link's detailed account of 17th March 1982 were in dispute except that he was unable to understand an item credited to Atlantis of U.S. $8,636. He further said that Sea Link had failed to pay an account for freight to a Japanese Company amounting to U.S. $11,500 which Atlantis felt under an obligation to pay. It had not however been paid by Atlantis. The Japanese company is that referred to in the Telex message of 3rd February 1982 in which Sea Link implored Atlantis to make an advance by remitting money direct to Japan. With regard to Sea Link's amended account for U.S. $62,626.63, in his viva voce evidence Mr. Done disputed 8 items totalling U.S. $26,017.47. I am unable to, nor should I on this interim hearing, determine the validity or otherwise of his grounds for dispute. On the assumption that he is correct the balance owing to Sea Link, on the basis of that account, is $36,608.76. Mr. Done was advised by telephone on 1st April 1982 (U.S. time) that the injunction had been granted. His response was to send a

Telex message that night to Sea Link. It reads :-

> "YOU ARE APPARENTLY TAKING LEGAL ACTION AGAINST ATL SERVICE IN NZ. THIS IS UNACCEPTABLE.
> IF YOU READ THE CONTRACT YOU WILL LEARN THAT SLINK WAS THE AGENT FOR THE SERVICE IN NZ AND FURTHERMORE THE AGMT HAS BEEN TERMINATED BASED ON NUMEROUS AND SPECIFIC VIOLATIONS BY SEALINK.
> I HV SIGNED AFFADAVITS, DOCUMENTED EVIDENCE, TELEXES, ACCTG RECORDS AND RECONCILATIONS, AND A COMPREHENSIVE LEGAL STATEMENT FROM OUR WASH DC ATTORNEYS WHICH WILL BE USED IF YR PRESENT ACTIVITIES CONTINUE. I REPEAT IF THE ATL SERVICE OR ANY OF OUR CONSIGNEES ARE EFFECTED BY YR ACTIONS YOU WILL BE LIABLE FOR DAMAGES AND WILL BE SUED.
> I WANT AN AMICABLE SPLIT AND INTEND ON SETTLING ACCT. H EVER IF YOU DON'T CEASE AND DESIST YR ACTIONS AGAINST US IN NZ WE WILL COMMENCE LEGAL PROCEEDINGS IN NZ AND IN THE USA."

Despite the reference to documents, accounting records and reconciliations in that Telex there was surprisingly little evidence adduced to show in what respects and by how much the accounts prepared by Sea Link were false. Furthermore the reference to "an amicable split" suggests an amount worth the trouble of calculating for the purpose of a split: also the words "intend on settling account" are an admission that Sea Link had an account to be settled. Weighing up the material evidence I am left in no doubt that Sea Link was owed a substantial sum of money by Atlantis before this action was commenced.

On 4th March 1982 Atlantis sent a Telex message to Sea Link terminating the agreement. The Telex reads :-

> "REF MEMORANDUM OF AGREEMENT SEPT 1981 AT SAN FRANCISCO.
> IST IT WITH REGRET THAT I MUST INFORM YOU THAT WE HAVE TERMINATED THIS AGREEMENT UNDER THE FOLLOWING WITH IMMEDIATE EFFECT.
> SEA LINK HAVE NOT MANTAINED STABLE AND SUFFICIENT MARKETING, COMMERCIAL AND OPERATIONS STAFF TO REPRESENT ATLANTIS LINE ADEQUATELY. (REF PAGE 2 NO. 2).
> FREIGHT COLLECTIONS NS HAVE NOT BEEN HANDLED AND REMITTED, SATISFACTORILY (REF PAGE 3, NO 3.) WE CANNOT TOLERATE THE FINANCING OF BOTH ENDS OF THE SERVICE WHICH IS CONTRARY TO THE BASIS OF THE PAST JOINT VENTURE.
> AT THIS STAGE WE WISH TO THANK SEA LINK FOR PAST

ASSOCIATIONS AND TRUST THAT A PROMPT AND AMICABLE TRANSITION TO NEW ATLANTIS LINE AGENT CAN BE EFFECTED. WE ARE APPROACHING VARIOUS ORGANIZATIONS AND WILL ADVISE YOU OF THE EMPLOYED OWNERS REPRESENTATIVE PRESENTLY. IN THE INERETEREST OF THE CARGO AND THE SERVICE WE REQUEST ALL PRO-FORMA DISBURSEMENTS, CARGO ACCOUNTING, MARKETING, AND DOCUMENTATION FILES ETC BE PREPARED ACCORDINGLY."

On 5th March 1982 Sea Link received a Telex message from the Japanese company earlier referred to which stated that the Company had been advised that the agreement between Atlantis and Sea Link had been terminated with immediate effect and that Tranzpacific had been appointed the agent for Atlantis in New Zealand. On 8th March Tranzpacific sent a Telex message to Atlantis complaining of a breach of its agency agreement. The message states :-

"ATLANTIS/TRANZPACIFIC CONTAINER SERVICE AGREEMENT MR SEAN ROTHSEY HAS BEEN CONTACTING OUR AGENTS THIS MORNING THAT HE WILL BE ATLANTIS REPRESENTATIVE IN NZ AND WILL HOLD A NOMINAL SHAREHOLDING IN A CO. OWNED BY ATLANTIS USA. HE WILL BE RESPONSIBLE FOR MARKETING THROUGHOUT NZ AND HAS APPOINTED TPAC/CB AS OPERATIONAL AGENTS AND HAS NEGOTIATED A SLOT RATE AGREEMENT. THIS IS TOTALLY CONTRARY TO OUR AGREEMENT UND WOULD REQUEST THAT YOU TAKE THE NECESSARY STEPS TO STOP THIS SITUATION OTHERWISE WE HAVE NO ALTERNATIVE BUT TO SUSPEND OUR AGENCY AND SLOT RATE AGREEMENT AND INSTRUCT OUR AGENTS IN JAPAN NOT TO LOAD ATLANTIS CONTRS ON BALD V31/15. TRUST WE WILL NOT HAVE TO TAKE THIS ACTION BUT THE POSITION OF SEA ROTHSEY IS WELL KNOWN TO BOTH OF US AND IS NOT IN THE SPIRIT OF THE AGREEMENT."

On 10th March Mr. Breuer, as General Manager of Gearbulk Shipping N.Z. Ltd. (Gearbulk N.Z.), sent the following Telex message to Sea Link :-

"1. INSTRUCTIONS GIVEN TO JAPAN AGENTS APPLIED TO ATLANTIS LINE CONTAINERS NOT SEALINK CONTAINERS AND WERE GIVEN IN OUR CAPACITY AS ATLANTIS LINE AGENTS.

2. ACCORDING TO LEGAL ADVICE THE PARTY IN DEFAULT CANNOT MAKE USE OF THE DEFAULT AND DECIDE WHICH CLAUSES IN THE AGREEMENT ARE NO LONGER BINDING. IT IS ONLY THE PARTY NOT IN DEFAULT WHICH CAN DECIDE WHAT ATTITUDE SHOULD BE TAKEN.
IN THIS CASE IT IS YOU AND YOUR ASSOCIATED

COMPANIES WHO ARE IN DEFAULT DUE TO INVOLVEMENT WITH SIN WAH CONTAINER LINES.

3. WE REPUDIATE ANY CLAIM FOR LOSSES AS LIABILITY AND OBLIGATION MUST BE LEGALLY PROVEN. IN ADDITION IT MUST BE PROVEN THAT TRANZPACIFIC CONTAINER SERVICES AND GEARBULK HAVE TAKEN ACTION WHICH THEY SYOULD NOT HAVE DONE.

4. WE ARE NOT PREPARED TO ENTER INTO ANY FURTHER CORRESPONDENCE ON THIS SUBJECT."

Mr. Done and Mr. Breuer in their affidavits made a feature of stating that Tranzpacific was not appointed until 16th March. It would not be proper for me to determine exactly when Tranzpacific was appointed in the place of Sea Link. The above Telex messages support an arguable proposition, as pleaded in the statement of claim, that Tranzpacific acted in concert with Atlantis in terminating the agreement. Mr. Batchelor deposed in his affidavits that Gearbulk, Tranzpacific and Atlantis conspired together in an attempt to deprive Sea Link of its involvement in the container trade and further that part of the conspiracy involved the deliberate non payment of Sea Link's accounts by Atlantis so that Sea Link would suffer financial ruin and become unable to continue as a competitor. In consequence the conspirators would take over the container trade developed by Sea Link. Such a conspiracy is not pleaded in the statement of claim nor have Gearbulk or Gearbulk N.Z. been joined as defendants. Again, it would not be proper for me to make any determination on the issue of alleged conspiracy. It is denied by the defendants. Sea Link relies upon certain facts from which it invites the drawing of the appropriate inference. Those facts are : first an attempt by Gearbulk in September 1981 to reach an agreement with Atlantis to the exclusion of Sea Link (disputed by defendants). This, Mr. Batchelor deposed, was the proximate cause for the preparation and signing of the agreement of 11th September 1981. Secondly, the undisputed fact that Gearbulk N.Z. and Tranzpacific are wholly owned subsidiaries of Gearbulk. Mr. Breuer is the General Manger of both

subsidiaries. Thirdly, the undisputed change in pattern of trading from December 1981 whereby Sea Link had to financ the clearing of containers because freight had been prepaid by the consignors to Atlantis. Fourthly, the failure (undisputed) by Atlantis to account for money due to Sea Link promptly and its failure (undisputed) to assist financially in any way. Fifthly, the fact that simulatane-ously with the termination by Atlantis of its agreement, Gearbulk terminated its slot arrangement with Sea Link. Sixthly, the simultaneous appointment by Atlantis of Gearbulk's subsidiary Tranzpacific to replace Sea Link. There is sufficient evidence as it stands at the moment to support an arguable proposition that Gearbulk, Gearbulk N.Z., Tranzpacific and Atlantis acted in concert to terminate Sea Link's agreements and to replace Sea Link by Transpacific as the Atlantis agent. But before the further proposition that the intention was to put Sea Link out of business so that the conspirators could take over Sea Link's container trade could be regarded as arguable further evidence would be required.

With regard to the termination of Sea Link's agreement by Atlantis and the reasons given, it would not be proper for me to determine whether or not the agreement was wrongfully terminated. Nor is there any need to do so because Atlantis did not challenge Mr. Batchelor's evidence that Sea Link accepted the repudiation by Atlantis to become effective for cargoes subsequent to that on the Balderoe that acceptance being also without prejudice to Sea Link's contention that the Atlantis repudiation is a breach of contract.

The principles applicable to the granting of a Mareva injunction are succinctly stated in The White Book op cit and in particular at pages 520 and 521 from which I

have extracted the following for the purpose of deciding the present case :-

> "Where an action for a debt due and owing is brought against a defendant who is not within the jurisdiction but who has assets in this country, the Court has jurisdiction under s.45 of the Judicature Act 1925 to grant an ex parte or interim injunction to restrain the defendant from removing assets from the jurisdiction pending the trial of the action, and the discretionary remedy may be applied both to money and to goods and is to be exercised when it is just and convenient so to do..... Applicants for a Mareva injunction should be required to observe the following guidelines, namely, (1) the plaintiff must make full and frank disclosure of all matters in his knowledge which are material for the judge to know; (2) he must give particulars of his claim against the defendant stating the ground of his claim and the amount thereof, and fairly stating the points made agains it by the defendant; (3) he must give some ground for believing that the defendant has assets within the jurisdiction; (4) he must give some grounds for believing, beyond the mere facts that the defendant is abroad, that there is a risk of the assets being removed before the judgment of award is satisfied; and (5) he must give an undertaking in damages, if necessary supported by a bond or security ..... On the other hand, where a plaintiff is otherwise entitled to a mareva injunc ion, it will not be refused on the ground that his cross-undertaking in damages is or may be of limited or no value, e.g. where the plaintiff is legally aided .....
> The jurisdiction to grant a mareva injunction should not be limited to cases where the plaintiff could obtain summary judgment under O. 14, and, per Lord Denning, it can be exercised when the plaintiff shows that he has a 'good arguable case,' and there is no objection in principle to an order being made in respect of assets, in the expectation that this will compel the defendant, as a matter of business to provide security..... On the other hand, before such an injunction is granted over assets, care should ordinarily be taken that it will not bring the defendant's trade or business to a standstill or will inflict on him great loss, for that may not be fully compensated for by the undertaking in damages. Th jurisdiction to grant such an injunction to restra the removal of assets out of the jurisdiction may be exercised whether the defendant is within the jurisdiction or outside it .....
> This jurisdiction further extends, not merely to commercial actions or to debts only, but also to a claim for damages, e.g. in an action for damages for personal injury or under the Fatal Accidents Act 1976.....
> ....Although a Mareva injunction may be of great value towards securing for the plaintiff the fruit of his potential, even likely, judgment, great care and precision are necessary in drawing the terms of such an injunction, so as to particularis

> the fund, the moneys, the account, the goods or tl other assets affected thereby and so as to avoid placing innocent third parties, such as banks, at the risk of being in or committing a contempt of Court if they should perhaps unwittingly commi a breach of the injunction. A Mareva injunction should by its terms be free from doubt and should be clear, precise and definite in its operation.
>
> It should perhaps be further emphasised that if any person or body who is notified of a Mareva injunction which of course he must recognise at the risk of being guilty of contempt of court is put to any expense in regard to it, that expense must be paid by the plaintiff ..... Presumably, such a person or body could be allowe to intervene in the action under O.15, r.6 supra, in order, if necessary, to obtain an order for his costs to be taxed and paid by the plaintiff and he may be entitled to have his costs taxed on a solicitor and own client basis or at least on the common fund basis. In his turn, the plaintiff may be entitled to recover such costs owed as against the defendant."

For a more recent case decided since the inherent jurisdiction was replaced by Statute in the United Kingdom and where the principles are reviewed see Z Ltd. v A & Others (1982) 1 ALL E.R. 556.

In the present case it is my opinion that Sea Link has a good arguable case that Atlantis owes it a substantial sum of money and that Tranzpacific acted in concert with Atlantis in terminating Sea Link's agreement. Whether the termination was wrongful is open for argument. If it was wrongful then Sea Link was entitled to accept the repudiation at a convenient time for it - in this case in respect of cargoes subsequent to that on the Balder oe. Sea Link has in my view a good arguable case that it remained the agent of Atlantis and a joint manager and operator of the service until the last of the Balderoe cargo had been delivered to consignees and Sea Link's duties in respect thereof completed. The case comes within the general principle cited from The White Book; and it matters not that Tranzpacific is within the jurisdiction of the Court in New Zealand. Tranzpacific has at all times complained that Sea Link's claim arises

from an alleged breach of contract between Sea Link and Atlantis to which Tranzpacific is not a party and that the injunction is unreasonably onerous and will cause irreparable harm to Tranzpacific in the conduct of its ordinary business and be unduly disruptive of the business of customers trading with Transpacific. I was referred by counsel to Galaxia Maritime S.A. v Mineralimportexport The Eleftherios (1982) 1 ALL E.R. 796. The asset within the jurisdiction was a cargo of coal on a ship about to sail from a port in South Wales. The shipowner was an entirely innocent third party. A Mareva injunction was granted preventing the ship from sailing. The Court of Appeal discharged it. It was held, according to the head note :-

> "Where the effect of granting a Mareva injunction would be to interfere substantially with an innocent third party's freedom of action generally or freedom to trade (for example, by interfering with his performance of a contract made between him and the defendant relating to the assets in question), the third party's right to freedom of action and freedom to trade should prevail over the plaintiff's wish to secure the defendant's assets for himself. Accordingly, it was an abuse of the Mareva jurisdiction to allow a plaintiff to serve a shipowner with a Mareva injunction relating to cargo owned, or alleged to be owned, by the defendant which was on board the shipowner's vessel in order to prevent the vessel sailing out of the jurisdiction with the cargo. The fact that the plaintiff had undertaken to indemnify the shipowner against loss or damage suffered in consequence of the grant of the injunction was not a sufficient reason to allow the injunction to be served on the shipowner if he objected to the injunction, since the mere proffering of an indemnity did not entitle the plaintiff to interfere with the shipowner's business activities and to obtain the advantage of a Mareva injunction at the shipowner's expense. Since the effect of granting the injunction would be to prevent the shipowner sending its ship on a voyage out of the jurisdiction under a previously concluded contract with the defendants, it would be an abuse of the Mareva jurisdiction to allow the injunction to continue. Accordingly, the application would be granted, the appeal would be allowed and the injunction would be discharged ."

The present case is clearly distinguishable because it is arguably asserted that Tranzpacific is not an innocent third party, that it acted in concert with Atlantis in terminating Sea Link's agreement and in assuming agency over the Balderoe cargo. Sea Link was initially the agent in respect of that cargo and arguably claims to have remained the agent. In my judgment Tranzpacific was properl joined.

I turn now to the "guidelines" numbered 1 to 5 in The White Book.

1. Sea Link in my judgment made sufficient disclosure to Sinclair J. Since then there has without question been sufficient disclosure for the purposes of this hearing. In particular the foreign law, foreign jurisdiction provision was disclosed to Sinclair J. Counsel for Sea Link made submissions upon it in his memorandum filed in support of the ex parte motion. While criticism can be made of the validity of the propositions advanced, they sufficiently informed the Judge of the issues involved.

It was submitted that Mr. Batchelor misled Sinclair J. when he said in his affidavit of 29th March 1982 :-

> "I annex marked 'D' a photostat copy of a telex confirming that US $15,000 would be sent immediately. This has not been received."

The submission was that this was sent at Mr. Batchelor's request for the purpose of obtaining an overdraft for Sea Link from its bank at a time when he knew that the account was disputed. Now that I have considered all the

evidence and the relevant Telex messages I find the allegation that the Judge was misled not proved. And for the purpose of this hearing I am satisfied that there is an arguable case that US $15,000 was owing when the message was sent on 10th February 1982.

2. Sea Link gave particulars of its claim in Mr. Batchelor's affidavit of 29th March 1982 in sufficient detail for Sinclair J. to comprehend the points of defence. Since then there has without question been sufficient disclosure for the purposes of this hearing.

3. Atlantis did have assets within the jurisdiction - the right to the freight from New Zealand consignees.

4. Those freight revenues would clearly be dispersed before any judgment or award could be obtained by Sea Link in New Zealand or in San Francisco.

5. The undertaking in damages was given.

In my judgment it was a proper case for a Mareva injunction. In his written memorandum in support of the ex parte motion counsel for Sea Link relied entirely on the Mareva principle. Unfortunately the orders sought in the motion were not properly Mareva orders. I accept counsel's explanation that he now realises that in fact he obtained a different order. I accept that he had no intention of misleading Sinclair J. Sinclair J. clearly made the orders on the basis of counsel's memorandum. The papers were placed before him as a matter of urgency. In a busy Court such as Auckland there is no time to give meticulous attention to detail. The Judge was entitled to rely upon counsel's memorandum as certified in accordance with the rules. That is a purpose of the certificate. It

certifies in effect that the application is in all respects correct for urgent attention thereby relieving the Judge of the task of researching the authorities and engaging in a meticulous analysis of the papers placed before him for his urgent determination.

As I have observed earlier in this judgment the form of the injunction was such that it gave Sea Link not interim relief but substantial relief. The effect of it was to reinstate Sea Link's agency in respect of the Baldero containers and to require all who received the injunction to ensure that the freight to be paid by consignees in New Zealand was paid "through the agency of the Plaintiff". And this is precisely what some of them did. It was submitted that Sea Link had acted wrongfully by collecting the freight: but that is what the sealed order of the Court permitted. It was submitted that Sea Link acted wrongfully by obtaining copies of the bills of lading and converting them into delivery orders in the usual way. Mr. Dunlop said in his affidavit of 29th April 1982:-

> "SEA LINK has used photostat copies of certain of the bills of lading as delivery orders. The bills of lading concerned are annexed to the Plaintiff's original affidavit as exhibits H, M, R, S and U respectively. These we understand were provided to them by the agents in Japan, without the knowledge of Atlantis Line. The delivery orders were issued by Sea Link during the period that the injunction was in effect, enabling consignees to uplift the cargo. We cannot understand how this situation could occur when the documents for the delivery of the cargo were in our possession. No order was made by the Court for us to surrender the documents to Sea Link, so it appears to us that these delivery orders were issued incorrectly and without authority of the carrier, Atlantis Line, who had legal title to the cargo."

Those strictures would have been justified but for the injunction which had the effect of reinstating Sea Link's agency and the other effects mentioned. All the relevant bills of lading showed Sea Link as the "Delivery Agent".

It was not proved that the use of photocopies of bills of lading was unlawful. The main issue in this action is the date upon which the agreement between Sea Link and Atlantis ceased. Was it validly rescinded on 5th March for breach or was it wrongfully repudiated by Atlantis and in that event did Sea Link accept the repudiation effective from the completion of the Balderoe transaction? If the latter then, while Atlantis had a title to the cargo so, by the agreement, Sea Link had such right to possession of it and such right to deliver to the consignees as was conferred by the agreement. Mr. Dunlop's complaint raises the very issues before the Court and the answer to it must depend upon the final decision of the issues between the parties.

I conclude this part of my judgment by stating that Sinclair J. was justified in making an order granting interim relief against Tranzpacific and Atlantis and binding the Consignees. It ought to have taken the form of a Mareva injunction freezing the assets of Atlantis in New Zealand up to a maximum sum. The maximum amount which ought to have been fixed was within the discretion of Sinclair J. Whether he would have fixed it at the amount claimed by Sea Link (the New Zealand equivalent of U.S. $46,293.79) is now a matter of speculation. In my opinion the amount subsequently agreed upon by the parties (N.Z. $30,000) must now be taken as the appropriate amount.

With regard to the charging orders there was no jurisdiction to make the orders under Rule 314 in the absolute form in which they were made. It is not necessary for me to decide whether the facts brought the case within Rule 314 for the making of orders nisi because, what Sea Link sought was a Mareva injunction which is a form of charge. In my judgment this was not a case for combining

a Mareva injunction with charging orders. A Mareva injunction against Tranzpacific and Atlantis was all that was needed to protect Sea Link. I reserve for some future case whether the two forms of relief are sufficiently compatible for a Mareva injunction to be combined with a charging order or orders under Rule 314. It was proper to set them aside as was done in the order of 8th April. Pursuant to leave reserved in that order I declare that the charging orders ought not to have been made nor should they be reinstated.

If there had been no change in position following the grant of the injunction in the terms granted it would be a relatively simple matter to set it aside and substitute a Mareva injunction. That is not possible now since Sea Link has effectively recovered N.Z. $22,073.41 by enforcing the injunction. The Court must also consider the position of the consignees who obeyed the injunction and are justified in assuming that their liability for freight was discharged when they paid Sea Link. The injunction was set aside on agreed terms on 8th April 1982. The consenting parties were Sea Link and Tranzpacific. Atlantis was not then represented nor were the consignees. I was informed from the bar by counsel for Sea Link that all but $5,000 of the amount paid to it by the consignees has been used to meet the debts of the service. That is not a particularly satisfactory way of getting such information before the Court. However, it is clear from the evidence that Sea Link must have had debts of the service to discharge. I propose to fix an amount of $10,000 to cover debts. I agree that it is an arbitrary figure. I have come to the conclusion that justice requires that Sea Link ought not to have the full advantage of the payment of N.Z.$22,073.41, but ought to have security for N.Z. $10,000 out of that sum,

that Tranzpacific and Atlantis should continue to provide security in the sum of $10,000 as they are presently doing and that the consignees should continue to retain the protection which the injunction gave by virtue of their compliance. Pursuant to leave reserved on the 8th April 1982 I declare that Sea Link ought not to have been granted an injunction in the terms granted and that the Court ought to have made an interim injunction in the Mareva form against Tranzpacific and Atlantis and binding the consignees freezing the assets of Atlantis in New Zealand up to $30,000. For the reasons appearing in this judgment I make the following order :-

The order made in Chambers by the Honourable Mr. Justice Sinclair on the 8th April 1982 as varied by consent on the 30th April 1982 is set aside on the following terms :-

(a) That the interim injunction and charging orders made ex parte on 30th March 1982 be set aside except to the extent that any consignee therein referred to has complied with the terms thereof.

(b) That the sum of $10,000 plus interest at present lodged on behalf of the defendants in the trust account of Messieurs Towle & Cooper at the Bank of New South Wales at Auckland continue to be held by Messrs. Towle & Cooper on interest bearing deposit pending further order of this Honourable Court as security for any judgment that the plaintiff may subsequently obtain in this action.

(c) That the plaintiff shall forthwith pay on its behalf to the trust account of Messrs. Towle & Cooper at the Bank of New South Wales at Auckland the sum of $10,000 to be held on interest bearing deposit pending further order of this Honourable Court as security for any judgment that the plaintiff may subsequently obtain in this action.

(d) That leave be reserved to all parties to be heard on all matters arising out of terms (b) and (c) above.

I turn now to the arbitration and foreign law provision in the agreement of the 11th September 1981. It affects only Sea Link and Atlantis. Tranzpacific is not a party to that agreement. It is clearly a foreign jurisdiction clause, it clearly requires disputes to be settled in accordance with the Laws of California and the U.S.A. and, in my opinion, is an exclusive foreign jurisdiction clause. See 8 Halsburys Laws of England 4 Ed. para. 792. It makes no difference that the foreign tribunal is arbitral. See Australian Lloyd Steamship Co. v Gresham Life Assurance Society Ltd. (1903) 1 K.B. 249, The Cap Blanco (1913) P.130 and Radio Publicity (Universal) Ltd. v Compagnie etc. (1936) 2 ALL E.R. 721. In the present case Section 3 of the Arbitration Clauses (Protocol And The Arbitration (Foreign Awards) Act 1933 has no application. The signatories do not include, so counsel for Atlantis advised me, the U.S.A. or the State of California. The principles to be applied where the 1933 Act has no application are those developed by the Court in the exercise of its inherent jurisdiction. The general principle is stated in 8 Halsbury's Laws of England 4 Ed. para. 792 :-

> "The English court has power, under its inherent jurisdiction, to stay proceedings begun in England in breach of a provision in a contract, known as a foreign jursidction clause, that disputes are to be referred to the exclusive jurisdiction of a foreign tribunal. This power will be exercised on the defendant's application unless the plaintiff establishes that it is just and proper to allow the English action to proceed."

The Eleftheria (1970) P. 94 is the most often cited authority In his judgment Brandon J. (page 99) considered the relevant cases and collected from them the following set of principles:

> "The principles established by the authorities can, I think, be summarised as follows : (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, 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. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded :- (a) 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. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

5(a)

The issues of fact will relate to the quantum of Sea Link's claim, the termination of the contract by Atlantis and whether it was justifiable and the question of Tranzpacifi and Sea Link acting in concert.

With regard to the quantum of the claim it is obvious that there will have to be a full accounting between the parties. So far the items which appear to be in dispute affect the accounting aspect in New Zealand. Usually in a case such as this one would expect the evidence to be roughly equally balanced between both countries. Sea Link complains that Atlantis has failed to produce any accounts while Atlantis complains that Sea Link's accounts are false. I consider marginally that more evidence will require to be made available from New Zealand than from San Francisco

On the topic of termination of the contract the breaches of contract alleged by Mr. Done in his affidavit of 27th April 1982 are :-

> "13. THE matters giving rise to the rescission of the agreement by Atlantis were, inter alia, -
>
> (a) Between the signing of the agreement and the end of January 1982, Sea Link consistentl owed a sum of $US 21,155.67 which they had collected but failed to remit to Atlantis in terms of the agreement. Annexed hereto and marked with the letter "G" is a true copy of a telex from Sea Link dated 23rd December 1981 acknowledging indebtedness to Atlantis in that sum and a further telex dated 25th January 1982 in which they give an explanation for not having sent it at that date. In the end we received that sum some months later than its due date.
>
> (b) Sea Link was to sell and market the service but they had no office staff available to do this from the time of the agreement through to the end of January. For those months ther was no regular sales representative promoting the service.
>
> (c) Sea Link was responsible for the collection of freights and the off-hiring of containers. Our trans-shipment operation involves the leasing of containers which means that cargoes do not have to be repacked when they are trans-shipped between vessels. The one container goes right through the voyage. Because they are leased we need to put them to work, and Sea Link failed to terminate the leases when they arrived in New Zealand. This meant that they were incurring daily per diem charges. The effect of this was approximately to add an additional cost of $300 to each container."

Evidence relating to these matters will be more readily available in New Zealand than in San Francisco.

So far as acting in concert is concerned there is no claim for damages against Tranzpacific. An injunction only was sought. In substantive terms that has already effectively been granted. Nor is there any claim against Gearbulk or Gearbulk N.Z. Counsel for Sea Link indicated that Sea Link intends to take proceedings against Gearbulk and/or Gearbulk N.Z. and to amend, if leave can be obtained, the present statement of claim to include a claim for damages against Tranzpacific. In my opinion I should consider the statement of claim as it is now and not speculate about the form of possible claims for damages against Gearbulk and Gearbulk N.Z. and Tranzpacific. The only relevance, as I see it, of the three companies acting in concert or conspirin in some way is that it might have a bearing on the genuiness of Atlantis' stated reasons for terminating the agreement. It is my opinion that evidence on this issue would be evenly balanced between New Zealand and San Franciso sources.

Weighing all the above considerations it is my judgment that the balance is in favour of Sea Link in the sense that evidence is more readily available here. With regard to the relative convenience and expense as between a Judge alone trial in Auckland and an arbitral hearing in Sa Francisco there is little to guide me. The only proper assumption is that the more evidence available in the one country the more likely it is that expense will be saved by having the hearing where the greater availability of evidence is.

5(b)

The laws of California and the U.S.A. apply. These

laws are in the commercial and maritime fields. The laws are unlikely to differ in material respects from New Zealand law.

5(c)

Atlantis is closely connected with California and the U.S.A. Sea Link is closely connected with New Zealand.

5(d)

There is a suspicion that Atlantis is seeking procedural advantages. In its Telex message of 1st April 1982 Atlantis threatened to commence legal proceedings in New Zealand and in the U.S.A. Atlantis has made acknowledgements that money is owing and in that same Telex message stated that it wanted an amicable split and intended settling accounts. There has been an absence of any genuine step in that direction. As a matter of probability I find that Atlantis is neutral in its desire concerning place of trial.

5(e)

I do not think it would be proper to hold Tranzpacific and Atlantis to the security of $10,000 if the action is stayed because it is a case where the stay is likely to be final. I think the Court would have jurisdiction to retain the orders earlier made by me in this judgment, but I think it would be wrong to maintain them if, as I have stated, the stay is likely to be final. See The Rena K (1979) 1 ALL E.R. 397. As a condition of granting a stay, however, I could require Atlantis to give security: so there is probably little weight in the aspect of loss of present

security. With regard to enforcement of an arbitrator's award given in San Francisco there is, as I understand from counsel for Atlantis, no reciprocity of enforcement between New Zealand California and the U.S.A. because the protocol has not been signed by California and the U.S.A. There is no reciprocity of enforcement of Judgments of the Courts either. I cannot find that Sea Link would be unable to enforce a Californian arbitral award. But without reciprocity it would be difficult if Atlantis decided not to honour the award. As to time bars and fair trial there was no suggestion of the former and there can be no doubt that a fair trial would be had before an arbitrator in San Francisco assuming, as with all arbitrators wherever they may be, that they will fairly adjudicate.

On the question of reciprocity the test to be applied favours trial in New Zealand.

4. (Other relevant circumstances)

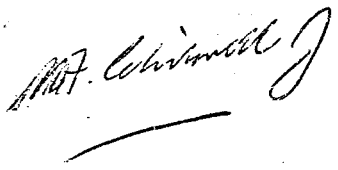
It is more than likely that Sea Link will establish that it is owed money under the agreement. That money is due and payable in New Zealand. Atlantis is represented by an agent in New Zealand i.e. Tranzpacific. That agent, who is already a party to the action, can safeguard Atlantis' interests as a litigant. When regard is had to the whole of the agreement of 11th September 1981, i.e. that it was more than a mere agency and has aspects of joint venture, and when regard is had to the consequences of a unilateral termination it is fairly arguable that the arbitration clause applies to termination. See, for example, Foster v Borough of Hastings (1903) 87 L.T. 736. In the event that Atlantis had been in breach of contract and Sea Link had, as "innocent party", terminated the

agreement under clause 6, would Atlantis accept that "the service in its entirety ..... be forfeited in favour of the innocent party" without the issue of breach justifying termination being first put to arbitration? It is significant that Atlantis did not put the issue of Sea Link's alleged breaches to arbitration, yet it seeks to impose the clause now.

I have weighed up all the above considerations and all the circumstances of the case. I have decided as a matter of probability that Sea Link has established a strong case for not granting Atlantis a stay.

The motion to stay the proceedings in this action is, accordingly, dismissed.

All questions of costs in respect of all proceedings to date in the action are reserved.



5th October 1982.

Solicitors :

Plaintiff	:	Oliphant, Bell & Ross, Auckland.
First Defendant	:	Towle & Cooper. Auckland.
Second Defendant	:	McVeagh Fleming Goldwater & Partners, Auckland.