QUEEN'S BENCH DIVISION
(COMMERCIAL COURT)

14-15 May; 11 June 2018

P
v
Q

Q
v
R

R
v
S

[2018] EWHC 1399 (Comm)

Before Sir Richard FIELD, sitting as a Deputy High Court Judge

Arbitration Time-bar Disponent owners in chain of voyage chargers making claims against respective charterers Whether claims brought in time notwithstanding made outside stipulated period Whether claimants entitled to extension of time Arbitration Act 1996, section 12.

The parties to these three sets of proceedings were parties to back-to-back voyage charters based on the Norgrain 1973 form and occupying the middle of a charter chain. The charters included an arbitration clause stipulating that all disputes arising out of the contract should be arbitrated at London and, in addition, the following time bar in clause 67:

"Any claim other than the demurrage claim under this contract must be notified in writing to the other party and claimant's arbitrator appointed within thirteen (13) months of the final discharge of the cargo and where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred."

The cargo of 52,000 mt of Distillers Dried Grain Solubles (DDGS) shipped under the charterparties in the chain was finally discharged by the carrying vessel at Nansha, China on 16 October 2015.

On 9 September 2016 the bill of lading holders issued proceedings in the Xiamen Maritime Court against the head owners, claiming that the cargo had been delivered in a damaged condition caused by overheating.

On 16 November 2016 the sub-time-charterers gave notice to their voyage charterers (Sinochart Beijing) of a claim and commenced proceedings against them.

On 16 November 2016 at 18.44, after P's office had closed for the day, an email arrived sent on behalf of Sinochart Beijing giving notice of arbitration under the voyage charterparty between Sinochart Beijing and P. That email first came to the notice of P's staff the following morning on 17 November 2016, by which time the 13-month time limit in clause 67 had expired.

On 17 November 2016 P informed Q by email that it had received the notice sent on behalf of Sinochart Beijing and asked for information. Q did not respond to P's email. At 09.41 on 17 November 2016 Q received an email from the brokers between them and P stating that P had received from Sinochart Beijing the previous day a notice of appointment of an arbitrator. The same day, Q passed on that message to R and appointed solicitors. On the same day (17 November 2016) Q's solicitors appointed an arbitrator and, via an email to B&J Shipping (the brokers between Q and R), gave notice to R of that appointment and of a claim in connection with the DDGS cargo. That email was received by R at 18.43 on 17 November 2016 and read for the first time the following day. By letter dated 30 November 2016 R's solicitors contended that Q's notice sent on 17 November 2016 was not an effective notice of commencement of arbitration on the ground that B&J Shipping did not have authority to receive it on behalf of R. On 30 November 2016 Q's solicitors served a fresh notice of Q's claim and commencement of arbitration without prejudice to their position that the notice served on R on 17 November 2016 was a valid notice.

Between 17 and 24 November 2016 P attempted to obtain further details of the claim from the brokers that had acted for it in respect of the charterparties with Sinochart Beijing and Q. On 23 November 2016, following earlier telephone calls to both brokers, P sent a message to Q stating that they had been trying to find out more detail about the claim but there was a lack of information from the owners. Their understanding was that the arbitration related to a cargo claim of discoloured DDGS at the discharge port between the head owners and the charterers. Once they knew more, they would inform Q. In the meantime, they asked Q to revert with the full charterparty chain as they had previously requested. They also asked for details of the head charterers. On 23 November 2016 P's operations department informed their legal department about the message received from Sinochart Beijing on 16 November 2016. The legal department checked the terms of the charterparty and became aware of the terms of clause 67. P then contacted their P&I Club who instructed solicitors, who instructed an arbitrator. On 25 November 2016 P's legal department sent a notice to Q commencing arbitration. On 30 November 2016 P appointed an arbitrator in the arbitration with Sinochart Beijing.

At 11.02 on 17 November 2016 R received notice of P's email to Q sent earlier that day giving notice of the claim made by Sinochart Beijing and asking for information. At 18.43 on the same day R received notice of Q's claim against R. Thereafter, R attempted to obtain information on the claim and on 28 November 2016 instructed solicitors who, on 29 November 2016, appointed an arbitrator in R's dispute with S. On 1 December 2016 R's solicitors served notice on S of its claim and the commencement of arbitration.

All the claimant disponent owners now applied for declarations that their claims made against the respective charterers had been brought in time, notwithstanding the wording of clause 67. Alternatively, they applied pursuant to section 12 of the Arbitration Act 1996 for a sufficient extension of the time for commencing arbitration to validate the notices of arbitration they served on the defendant charterers.

Held by QBD (Comm Ct) (Sir Richard FIELD, Deputy Judge) that:

(1) The court would decline to make a declaration to the effect that the notices of claim and commencement of arbitration served by the claimant disponent owners were served in time. The words used in clause 67 were clear and unambiguous and should be given the same construction as

was given to the Centrocon arbitration clauses (*see* paras 46 to 53);

The Himmerland [1965] 2 Lloyd's Rep 353, *The Stephanos* [1989] 1 Lloyd's Rep 506 and *The Evje* [1974] 2 Lloyd's Rep 57; [1975] AC 797, considered.

(2) As to the applications for extension of time under section 12 of the Arbitration Act 1996, the question was whether there were circumstances beyond the reasonable contemplation of the parties when they agreed the time bar provision, and if so whether the parties would also have contemplated that the time bar might not apply. In general, time limit clauses were addressed at steps which the party in question could reasonably be expected to take within the prescribed time. In the present case, P only received notice of a claim after business hours on the last day of the time limit with the result that P and the other claimants down the chain were only able to serve notices of claim outside the time limit. Those circumstances were such as to be outside the reasonable contemplation of the parties when they agreed to clause 67 in that the circumstances were an eventuality which would in all probability be relatively exceptional. The parties in those circumstances would have contemplated that the time bar might not apply given their expectation that claims could be passed up or down the charter chain (*see* paras 55 to 63);

SOS Corporacion Alimentaria SA v Inerco Trade SA [2010] 2 Lloyd's Rep 345, followed.

(3) As to whether it would be just to grant the extensions of time sought:

(a) P's application for an extension of time would be refused. It would only be just to extend time on the application of a party in a charter chain if it had acted expeditiously and in a commercially appropriate fashion to commence proceedings once it had become aware that a claim was being made against it under the charterparty above or below in the chain. P did not act expeditiously and in a commercially appropriate fashion when dealing with Sinochart Beijing's claim from 17 November 2016. Charterparties, including in particular voyage charters, invariably included a time bar and one of the first things that P's operational staff should have done on 17 November 2016 was to investigate what time bar had been incorporated into the contract, either by perusing the contract themselves or by informing P's legal department and/or the company's P&I Club of what had happened and asking for urgent advice on what action should be taken. If that step had been taken and then followed by appropriately expeditious action, an arbitrator would have been appointed and Q notified thereof and of P's claim on 20 November 2016 at the latest, instead of on 25 November 2016. For those reasons it would not be just to extend time (*see* paras 65 to 67).

(b) Q's application for an extension of time would be granted. On 17 November 2016, the day after the expiry of the time limit, Q appointed solicitors who in turn appointed an arbitrator and served notice on R of its claim and the commencement of an arbitration. Q sought an extension of time to 30 November 2016 to cover the fresh service of its notice in an email of that date to R's solicitors, without prejudice to the contention that the notice sent via B&J Shipping on 17 November 2016 was a validly served notice. It was just and appropriate to grant Q the extension it sought. Whatever the niceties of the argument as to B&J Shipping's authority to receive the notice sent on 17 November 2016, that notice was received by R and read on 18 November 2016 and thus it would be just to extend time (*see* para 68).

(c) R's application for an extension of time would be refused. R failed expeditiously and in a commercially appropriate fashion to commence proceedings against S once it had become aware on 18 November 2016 that it had been served with Q's notice of claim and commencement of arbitration. A notice of claim and commencement of arbitration should have been served by R on S by no later than 22 November 2016. For those reasons it would not be just to extend time (*see* paras 69 and 70).

The following cases were referred to in the judgment:

A/S Det Dansk-Franske Dampskibsselskab v Compagnie Financiere d'Investissments Transatlantiques SA (Compafina) (The Himmerland) (QBD (Comm Ct)) [1965] 2 Lloyd's Rep 353;

Bede Steam Shipping Co Ltd v Bunge Y Born (KBD) (1927) 27 Ll L Rep 410;

Comdel Commodities Ltd v Siporex Trade SA (No 2) (CA) [1989] 2 Lloyd's Rep 13;

E B Aaby's Rederi A/S v The Union of India (The Evje) (HL) [1974] 2 Lloyd's Rep 57; [1975] AC 797;

Eurico SpA v Philipp Brothers (The Epaphus) (CA) [1987] 2 Lloyd's Rep 215;

Exfin Shipping (India) Ltd v Tolani Shipping Co Ltd (QBD (Comm Ct)) [2006] EWHC 1090 (Comm); [2006] 2 Lloyd's Rep 389;

Hardwick Game Farm v Suffolk Agricultural & Poultry Producers Association Ltd (QBD) [1964] 2 Lloyd's Rep 227;

Investors Compensation Scheme Ltd v West Bromwich Building Society (HL) [1998] 1 WLR 896;

Pinnock Bros v Lewis & Peat Ltd (KBD) (1923) 14 Ll L Rep 277; [1923] 1 KB 690;

SOS Corporacion Alimentaria SA v Inerco Trade SA (QBD (Comm Ct)) [2010] EWHC 162 (Comm); [2010] 2 Lloyd's Rep 345;

Sparta Navigation Co v Transocean America Inc (The Stephanos) (QBD (Comm Ct)) [1989] 1 Lloyd's Rep 506.

These were: (1) applications by three disponent owners occupying the middle of a charter chain for declarations that claims made against their respective charterers were brought in time, notwithstanding that they were made after the expiry of a contractual time-bar provision; and (2) alternatively, applications for extensions of time under section 12 of the Arbitration Act 1996.

Michael Nolan QC, instructed by Mills & Co Solicitors Ltd, for P; Christopher Jay, instructed by Barrett Solicitors, for Q; Nevil Phillips, instructed by Reed Smith Richards Butler Hong Kong, for R; Julian Kenny QC, instructed by Winter Scott LLP, for S.

The further facts are stated in the judgment of Sir Richard Field.

Judgment was reserved.

Monday, 11 June 2018

JUDGMENT

Sir Richard FIELD:

Introduction

1. The parties to these proceedings were parties to back-to-back voyage charters based on the Norgrain 1973 form and occupying the middle of a charter chain. The charters[1] included in clause 44b[2] an arbitration clause stipulating that all disputes arising out of the contract should be arbitrated at London by each of the arbitrators appointed by the parties with power to appoint an umpire and, in addition, the following time bar in clause 67:

"Any claim other than the demurrage claim under this contract must be notified in writing to the other party and claimant's arbitrator appointed within thirteen (13) months of the final discharge of the cargo and where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred."

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[1] Save for that between R and S, referred to below, which provided in clause 44b simply "ARBITRATION IN LMAA LONDON, ENGLISH LAW TB APPLIED".

[2] Clause 44 (b): "London. All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be Members of the Baltic Mercantile & Shipping Exchange and engaged in the Shipping and/or Grain Trades, one to be appointed by each of the parties, with power to such Arbitrators to appoint an umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. Any disputes arising under this Charterparty shall be governed by English law".

2. The running order in the charter chain of the charterparties referred to in para 1 was as follows. At the top of the middle section is the voyage charter made between China National Chartering Co Ltd ("Sinochart Beijing") as disponent owners and P. Next down the line is the charterparty made between P as disponent owners and Q. Next down is the charterparty made between Q as disponent owners and R. And last down the line is the charterparty made between R as disponent owners and S.

3. The head owners at the top of the entire chain were Sea Dolphin Shipping Ltd ("Sea Dolphin") which had concluded a time charter with Pan Ocean Shipping. Pan Ocean Shipping had in turn concluded a time charter with Polaris Shipping which was the head disponent owner. It would seem that the voyage charterers at the bottom end of the chain were ADM Intermare.

4. The cargo of 52,000 mt of Distillers Dried Grain Solubles ("DDGS") shipped under the charterparties in the chain was finally discharged by the nominated vessel, *Capetan Giorgis*, at Nansha, China on 16 October 2015.

5. On 9 September 2016 Xiamen C & D Agricultural Product Co Ltd, the holders of the bills of lading covering the cargo, issued a statement of claim in proceedings brought in the Xiamen Maritime Court against Sea Dolphin, claiming that the cargo had been delivered in a damaged condition caused by overheating.

6. On 16 November 2016 Polaris Shipping gave notice to Sinochart Beijing of a claim and commenced proceedings against them.

7. On 16 November 2016 at 18.44, after P's office had closed for the day, an email arrived sent on behalf of Sinochart Beijing which recited the arbitration clause in the charterparty between it and P and continued: "Disputes have arisen under the CP and our Members have appointed Mr Alan Oakley as their arbitrator in respect of all and any disputes whatsoever (including but not limited to cargo claim) arising under the CP . For avoidance of doubts, please treat this letter as our Members' notice of commencement of arbitration and written notification of claims to you in accordance with the CP".

8. The email sent on behalf of Sinochart Beijing first came to the notice of P's staff the following morning on 17 November 2016, by when the 13-month time limit in clause 67 had expired. No one at P or at Q or R had any prior knowledge about a claim being made for breach of any of the charterparties in the chain whether in respect of the cargo or otherwise.

9. On 17 November 2016, P informed Q by email that it had received the notice sent on behalf of Sinochart Beijing and asked for: (a) details of the full charterers' chain; (b) whether those charterers had received notice of a claim; (c) information concerning the cargo claim; and (d) whether Q had received a similar notice.

10. Q did not respond to P's email. At 09.41 on 17 November 2016, Q received an email from the brokers between them and P stating that P had received from Sinochart Beijing the previous day a notice of appointment of an arbitrator. The same day, Q passed on this message to R and appointed Barrett Solicitors to act in the matter. Also on the same day (17 November 2016), Mr Dominic McAleer of Barrett Solicitors appointed Mr Timothy Rayment as Q's arbitrator and via an email to B&J Shipping, the brokers between Q and R, gave notice to R of this appointment and of a claim in connection with the carriage and/or damage to the DDGS cargo. This email was received by R at 18.43 on 17 November 2016 and read for the first time the following day. By letter dated 30 November 2016, R's solicitors, Reed Smith Richards Butler Hong Kong ("Reed Smith") contended that Q's notice sent on 17 November 2016 was not an effective notice of commencement of arbitration on the ground that B&J Shipping did not have authority to receive it on behalf of R. Barrett Solicitors refuted that contention but on 30 November 2016 they replied to Reed Smith serving a fresh notice of Q's claim and commencement of arbitration without prejudice to their position that the notice served on R on 17 November 2016 was a valid notice.

11. Between 17 and 24 November 2016, P attempted to obtain further details of the claim from the brokers that had acted for it in respect of the charterparties with Sinochart Beijing and Q. On 23 November 2016, following earlier telephone calls to both brokers, they sent a message to Q stating that they had been trying to find out more detail about the claim but there was a lack of information from the owners. Their understanding (based on information provided unofficially over the telephone) was that the arbitration related to a cargo claim of discoloured DDGS at the discharge port between the head owners and the charterers. Once they knew more, they would inform Q. In the meantime, they asked Q to revert with the full charterparty chain as they had previously requested. They also asked for details of the head charterers. On 23 November 2016 P's operations department informed their legal department about the message received from Sinochart Beijing on 16 November 2016. The legal department checked the terms of the charterparty and became aware of the terms of clause 67. They then contacted their P&I Club who instructed Mr Williams of Mills & Co, solicitors. On 25 November 2016, Mr Oakley having been appointed as P's arbitrator, P's legal department sent a notice to Q commencing arbitration. On 30 November 2016, P appointed Mr Rayment as their arbitrator in the arbitration with Sinochart Beijing.

12. At 11.02 on 17 November 2016, R received notice of P's email to Q sent earlier that day giving notice of the claim made by Sinochart Beijing and asking for information. At 18.43 on the same day, R received notice of Q's claim against R. Thereafter, R attempted to obtain information on the claim and on 28 November 2016 instructed Reed Smith as their solicitors who, on 29 November 2016, appointed Mr Clive Aston as R's arbitrator in the dispute with S. On 1 December 2016 R's solicitors served notice on S of its claim and the commencement of arbitration.

13. Having served notice of claims on their counterparty charterers after the expiration of the 13-month time limit set in clause 67, all of the claimant disponent owners now apply for declarations that their claims made against those charterers have been brought in time, notwithstanding the wording of clause 67.

14. In the alternative, if their claims have not been brought in time, the claimants apply pursuant to section 12 of the Arbitration Act 1996 ("the Act") for a sufficient extension of the time for commencing arbitration to validate the notices of arbitration they served on the defendant charterers or for such further time as the court sees fit.

15. In light of the fact that the relevant charters were all on back-to-back terms, it was agreed by the parties that counsel for P, Mr Nolan QC, should take the lead in advancing the case for the declarations sought and in the alternative for extensions of time under

section 12 of the Act. Counsel for the other claimants therefore limited their submissions to specific additional matters, including in particular the facts relevant to their clients' section 12 applications.

16. In the alternative, the parties beneath P in the chain submitted that the claims made against them from above were irretrievably out of time and contended that no extension under section 12 should be granted to parties above them in the chain. Mr Kenny QC for S took the lead in advancing these alternative submissions, with counsel for the other parties beneath P making short supplementary submissions in support of Mr Kenny QC's submissions.

17. At the request of the parties, in determining the applications before the court: (1) I have proceeded on the basis, without deciding, that Sinochart Beijing's notice received by P on 16 November 2016 was served in time under clause 67 and I have made no other findings as to whether that notice was a compliant notice; (2) as to P and Q, I have made no findings as to whether there was a dispute between them for the purpose of clauses 44 and/or 67 by 25 November 2016; whether or not the notice given by P to Q on 25 November 2016 was a sufficient notice in writing of the claim pursuant to clause 67; and whether or not on the true construction of clause 67, giving notification in writing of a claim within 13 months of final discharge was a step that was separate and distinct from the commencement of the arbitration so that even if the court extends the time for taking the steps necessary to commence arbitration, P's claim is still time-barred; (3) I have made no findings as between Q and R as to the matters set out in (2) mutatis mutandis save that the respective dates should be 30 November 2016; and (4) I have made no findings as between R and S as to the matters set out in (2) mutatis mutandis save that the respective dates should be 1 December 2016.

The background facts in more detail

18. The terms of the voyage charterparty between P and Q were contained in a recap dated 20 April 2015. Under these terms P chartered to Q a "VSL TBN' Kamsarmax ... to be nominated 15 days in advance of ETA Loadport for [the carriage of 50,000 mt 10% more or 5% less in Owners' option of DDGS from one safe berth/anchorage Mississippi river not above Baton Rouge to 1-2 safe berths, 1-2 safe ports China] Owners to provide following upon vessel nomination: full CP Chain Headowner and all the disponent owners up the CP Chain Other terms/dets as per BTB CP (as attached) with logical amendments as per main terms agreed and inserted the foll: Owrs responsibility to ensure that C/P Chain is a Blue Chip Chain' Owner to have the right to relet but it is clearly understood that the parties number of the Chain fm the T/C owners of performing vessel to [P] can not exceed two and chain of vessels or management of vessels can not include flw companies ...".

19. The attached "BTB CP" was a charterparty on the Norgrain 1973 form with various deletions and additions including clause 44 (b) and a series of rider clauses including clause 67.

20. The terms of the voyage charterparty concluded by P with Sinochart Beijing in order to enable P to perform the charterparty with Q were contained in a recap dated 28 May 2015 and were materially identical to the prior charter between P and Q.

21. The terms of the charterparties between Q and R and between R and S were respectively contained in a recap dated 5 March 2015 and a replacement recap dated 14 July 2015 and were also on materially the same terms as the charterparty between P and Q.

22. *Capetan Giorgis* completed loading on 13 August 2015 and sailed the same day. She arrived at Zhangzhou on 19 September 2015 where she berthed on 21 September 2015. The Statement of Facts for Zhangzhou records that between 14.00 and 15.00 on 21 September 2015 quarantine officers took a sample of the cargo for testing and the vessel was informed that that test had been passed at 23.10, after which discharge commenced at 23.54. Between 10.40 and 13.50 on 22 September 2015, discharging was suspended on the instructions of the quarantine office which suspension continued until 15.50 when the quarantine office gave notice that discharging could continue; but due to rain, discharging did not recommence until 19.30. Discharge was completed at 17.05 on 26 September 2015.

23. The Statement of Facts for Nansha record that on 29 September 2015 between 10.30 and 16.30 the cargo failed a quarantine inspection on the basis of a cargo oxygen test. Then, after a draft survey and a plant quarantine inspection between 11.00 and 18.10, there were discussions involving the P&I Club, SGS Surveyors and a terminal representative until 18.40 the following day, when discharge commenced and continued on and off due to rain with a suspension between 03.30 and 06.00 due to disputes over the cargo quality. The master signed the Statement of Facts for receipt only "without acceptance any liability".

24. Following completion of the voyage, there was extensive communication between P and Sinochart Beijing about laytime calculations including an email dated 2 March 2016 from the latter to the former stating: "Since LTC has been revised as per charterers comments, owners would like to have charterers conformation (sic) as soon as possible so that we can close file timely". On 8 March 2015 P received a final freight invoice from Sinochart Beijing which P paid on 19 April 2016, after which it closed the file.

The construction issue

The argument advanced in favour of the case that the notices of claim and commencement of arbitration were served in time, notwithstanding the expiration of the time limit of 13 months from the date of discharge of the cargo contained in clause 67

25. Mr Nolan QC argued that clause 67 in the charterparties in question should be construed against the background of those charterparties forming part of a chain of voyage charters on back-to-back terms that had been concluded on the understanding that claims for breach of contract could be passed up and down the chain. Clause 67 should therefore not be given its literal meaning, for otherwise, contrary to the intention of the parties, the result would be that no notice of claim and commencement of arbitration received within the time limit could be validly passed up or down the chain by a party who, during the stipulated period, was unaware of the claim or of the receipt of a notice of claim. Instead, there had to be an implicit limitation on the literal meaning of clause 67 or the clause had to be read so as not to apply where it was impossible for a claim to be passed on within the stipulated time because the recipient of a notice of claim was unaware of the claim or receipt of a notice thereof, or where, at the expiration of the time limit, no dispute existed that could be made the subject of a commencement of arbitration.

26. In support of this argument, Mr Nolan QC began by citing the following passage in the judgment of Sir John Donaldson MR in *Eurico SpA v Philipp Brothers (The Epaphus)* [1987] 2 Lloyd's Rep 215, at page 218 col 2:

> "My starting point is that parties to a contract are free to agree upon any terms which they consider appropriate, including a term requiring one of the parties to do the impossible, although it would be highly unusual for parties knowingly so to agree. If they do so agree and if, as is inevitable, he fails to perform, he will be liable in damages. That said, any court will hesitate for a long time before holding that as a matter of construction, the parties have contracted for the impossible, particularly in a commercial

contract. Parties to such contracts can be expected to contemplate performance, not breach."

27. Mr Nolan QC also drew the court's attention to the observations of Roche J in *Pinnock Bros v Lewis & Peat Ltd* [1923] 1 KB 690 at pages 695 to 696 and Havers J in *Hardwick Game Farm v Suffolk Agricultural & Poultry Producers Association Ltd* [1964] 2 Lloyd's Rep 227 at page 273 that contemplate the possibility that a time bar in arbitration agreements might be limited to disputes capable of arising, and of being brought forward, within the stipulated period. (It is to be noted, however, that the time bars in question did not provide, as clause 67 does, that any claim brought outside the stipulated time shall be deemed to be waived and absolutely barred.)

28. Mr Nolan QC submitted that the parties to the chain of back-to-back charters cannot have contemplated that claims unknown within the 13-month period could not be passed on once they were first known after the expiration of the period, and as Lord Hoffmann said in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at page 913, the law does not require judges to attribute to parties an intention which they plainly could not have had.

29. Mr Nolan QC acknowledged that it had been held by Mocatta J in *A/S Det Dansk-Franske Dampskibsselskab v Compagnie Financiere d'Investissments Transatlantiques SA (Compafina) (The Himmerland)* [1965] 2 Lloyd's Rep 353 and Saville J in *Sparta Navigation Co v Transocean America Inc (The Stephanos)* [1989] 1 Lloyd's Rep 506 that the Centrocon arbitration clause should be given a literal construction, so that claims or disputes that had not even arisen within the stipulated period were nonetheless time-barred, but he sought to distinguish these decisions and the subsequent cases in which they have been approved (eg *E B Aaby's Rederi A/S v The Union of India (The Evje)* [1975] AC 797 especially at page 810C to F; and *Comdel Commodities Ltd v Siporex Trade SA (No 2)* [1989] 2 Lloyd's Rep 13) on the ground that the charterparties in question in these cases were not part of a contractual chain.

30. Mr Nolan QC also argued that it was to be inferred from *Bede Steam Shipping Co Ltd v Bung Y Born* (1927) 27 Ll L Rep 410 that the word "claim" in clause 67 did not mean literally *any* claim arising out of the charterparty and thus the way was open to give "claim" a construction that was consistent with the parties' intention to pass claims freely up and down the contractual chain.

31. In *Bede*, the voyage charterparty in question contained in clause 39 the equivalent of the Centrocon arbitration clause. The owners served on the charterers a bill for freight in the net sum of £568-odd and claimed that sum outside the stipulated three-month time limit. The charterers had admitted that £416-odd was due but contested the balance. MacKinnon J held that the claim for £568 fell within clause 39 and was time-barred but went on to hold that a claim for the admitted sum of £416 was not within the clause because a refusal to pay money admitted to be due did not create a dispute that had to be referred under the clause. He went on to say, at page 414 col 1: " I think that where there is a claim, the amount of liability for which is not disputed, I do not think that there is any dispute within the meaning of Clause 39 which must be sent to arbitration".

32. In *The Himmerland*, the charterparty was on the Gencon form and included the Centrocon arbitration clause, the first part of which was in the same terms as the first sentence of clause 44(b) of the charterparties in the instant case. The second part of the clause provided that any claim had to be made in writing and claimant's arbitrator appointed within three months of final discharge and where this provision was not complied with the claim was deemed to be waived and absolutely barred. The cargo was sugar to be carried to the west coast of Italy. Discharge of the cargo was completed on 4 July 1963. Well after the three-month time limit had expired the cargo underwriters intimated that a claim had been made under the bills of lading and shortly thereafter a claim was started in the Copenhagen Maritime Court against the owners. Counsel for the owners, Mr Mustill, argued that on the true construction of the arbitration clause, the time bar did not apply. An arbitrator could not be appointed unless there was a dispute at the end of the three months and there had been no dispute. Moreover, if the claim over against the charterer was for an indemnity, the cause of action had not arisen until after the three-month time bar. Shipowners would face an intolerable burden if they had to appoint an arbitrator every time there was a suggestion that cargo receivers were complaining.

33. Mr Goff for the charterers submitted that the second sentence of the clause by its wording clearly barred any claim not made in writing within three months of final discharge followed by the appointment of the claimant's arbitrator within the same three-month period if the claim was not admitted. It was immaterial whether a cause of action had arisen before or after the expiry of the three months. The clause was one which worked equally against claims by shipowners and charterers.

34. Mocatta J declined to accept Mr Mustill's argument, at page 360 col 2:

"In my judgment, on the true construction of the clause, the provisions of the second sentence apply to bar a claim, whether it is sought to pursue it by action or in arbitration, if the claim is not made in writing and the claimant's arbitrator appointed within three months of final discharge, even though the cause of action giving rise to the claim has not arisen or come to the knowledge of the claimant until too late to enable him to comply with the clause. The matter is largely one of first impression and does not bear much elaboration. The words of the sentence to my mind convey that meaning. I do not think it an extravagant or unreasonable meaning, since the clause is mutual in its operation and may very well be accepted by businessmen because of the advantages it affords in (a) providing some limit to the uncertainties and expense of arbitration and litigation and (b) facilitating the obtaining of material evidence. Cases of undue hardship can be left to be dealt with under Sect 27 of the Arbitration Act."

35. Mocatta J went on to refuse the shipowner's application for an extension of time under section 27 of the Arbitration Act 1950 in light of the delay before that application was made to the court.

36. Mr Nolan QC argued that neither of the advantages of the Centrocon arbitration clause identified by Mocatta J had any real application where the clause had been adopted in a back-to-back charter chain. Thus, whilst litigation or arbitration is never desirable, at least in the case of a back-to back-contract it is relatively certain and relatively inexpensive because the party in the middle will simply be able to pass on submissions coming up or coming down the chain without having to make much of an independent input. So far as the gathering of evidence is concerned, if clause 67 were construed in the manner adopted by Mocatta J, this would make the gathering of evidence more difficult or impossible, rather than less difficult, as exemplified by the position in which P found itself because the evidence concerning the claim is going to be with the head owners and the charterers at the bottom of the chain, since they are the parties who were involved in the events at the discharge port, events in which P had no involvement at all.

37. In *The Stephanos* it was argued that, having regard to the first sentence of the Centrocon arbitration clause, since an arbitrator

cannot be appointed unless there is a dispute between the parties, the word "claim" in the second sentence can only be contemplating cases where disputed claims have arisen within the stipulated period. In the alternative, it was argued that the second sentence could not have been intended to cover cases where the claimant's cause of action only arises after the expiry of the stipulated period and, in such a case, since there could be no claim during this period, there could likewise be no dispute within the period.

38. Saville J rejected these arguments, at page 509 col 1:

"In my judgment the Centrocon arbitration clause is open to another and preferable construction, namely, that it is designed not only to require all disputes arising under the contract to be referred to arbitration, but also to bar all claims arising under the contract save claims arising before the end of the stipulated period, in respect of which the claimant has made a written claim and appointed his arbitrator. On this construction, whether or not the claimant has a valid or sustainable claim (ie a cause of action) during the stipulated period and whether or not he knew or ought to have known during that period that he had or might have a claim of any nature are quite immaterial considerations. The commercial sense of such a construction is to my mind obvious at the end of the stipulated period the parties will know where they stand in the sense of knowing what claims (if any) are outstanding against each other: and the difficulties and uncertainties often inherent in trying to deal with claims only long after the event would be largely, if not wholly averted.

Mr Tomlinson submitted that it could hardly have been the intention of the draftsman of the clause to bar claims that could not properly be advanced during the period, such as a claim on an express or implied agreement to indemnify against a liability, where the liability has yet to be ascertained If, however, the clause is designed to provide a time limit for claims arising under the contract (as I consider to be the case) then the parties have simply agreed to take the risk (for the commercial reasons I have mentioned) that after the expiry of the period they will in effect both lose any contractual rights they might otherwise have possessed. In short, I respectfully agree with the construction of the Centrocon arbitration clause adopted by Mr Justice Mocatta in *The Himmerland* and the views expressed in *The Evje* [1974] 2 Lloyd's Rep 57".

39. In *The Evje* a general average claim was made outside the 12-month time limit from final discharge contained in a Centrocon arbitration agreement in a voyage charter. The House of Lords rejected the submission made in various guises on behalf of the shipowners that the clause did not apply where the claim had not been disputed until after the time limit. Lord Morris of Borth-y-Gest said at page 810D to F:

"I cannot accept these contentions. The arbitration clause must be read as a whole without severing or excluding any part of it or without making additions to it. The words are imperative and decisive which say that unless a provision is complied with any claim "shall be deemed to be waived and absolutely barredIt seems to me to follow that, being subject to a compelling time bar and the time limit a claimant must take all the steps as may be necessary to ensure not only that his claim in writing is in time but also that within time he has appointed arbitrators to settle a disputed claim. In the case of a voyage charter for the carriage of a cargo of wheat in bulk a time limit expiring 12 months after the date of final discharge of the cargo may not be thought to be oppressive "

40. In *Comdel v Siporex*, one of the matters before the Court of Appeal was an application for leave to appeal the decision of the trial judge (Steyn J) holding that an arbitration in respect of a claim for "Goods sold" for reimbursement in respect of two performance bonds was time-barred under the FOFSA rules of arbitration that required notification of the claim and of the name of the appointed arbitrator not later than 120 consecutive days after the last day of the contractual delivery period. In refusing the application for leave to appeal, Staughton LJ expressed the view (at page 21) that Mocatta J's judgment in *The Himmerland* had been approved by the House of Lords in *The Evje* and the reasoning of the lordships ought to be followed.

The argument advanced in favour of the case that on the true construction of clause 67, the notices of claim and commencement of arbitration were served out time and are deemed to be waived and absolutely barred

41. Mr Kenny QC submitted that clause 67 should be construed in the same way as the Centrocon arbitration clause was construed in *The Himmerland*, *The Stephanos* and *The Evje*. The wording of the clause was unambiguous and its perfectly clear terms should be given effect to. The fact that the clause was in back-to-back charters in the middle of a charter chain was no reason for departing from this approach.

42. The background facts contemplated in Lord Hoffmann's approach to contractual construction in *ICS v West Bromwich* had to be in existence at the time the contract was made, but when the charterparty between P and Q was concluded on 20 April 2015, the chain below that charter was still in its formative stages and was not referred to in the recap or the pro forma; nor was the chain above established. The position was that there was no basis for saying the parties had in mind any more than the possibility that the P/Q charter would be part of a chain of back-to-back charters.

43. In Mr Kenny QC's submission, the expectation and interests of the parties in a charter chain were not materially different from the situation where there was no chain. The parties had an interest in passing on claims, but only if they were exposed to claims from above and this limited interest in passing on claims was no justification for concluding that clause 67 did not mean what it says.

44. Mr Kenny QC contended that it ought to have been appreciated by the parties that it was possible that notice of a claim and the commencement of arbitration might be received in circumstances where that notice was a valid notice but there was insufficient time to pass the claim down the chain within the stipulated time period. He suggested that the following contractual options were available to deal with this possibility:

(1) Stipulate for a shorter time limit in which the party up the chain must serve the necessary notice than the time limit applicable to a notice to be given to the party down the chain.

(2) Adopt the 24-month time bar (from date of delivery) in the Inter-Club New York Produce Exchange Agreement (1996).

(3) Agree a limitation provision modelled on article III r 6*bis* of the Hague-Visby Rules which provides: "An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seised of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself".

(4) Where there is uncertainty whether there is going to be a claim within the stipulated period, agree an extension of time.

(5) Alternatively, serve notice of what is suspected to be a possible claim and the appointment of an arbitrator to determine all claims that arise under the charterparty.

45. Mr Jay for Q and Mr Philips for R adopted Mr Kenny QC's submissions, with Mr Jay making the point that it was P's own decision to conclude a back-to-back charter including clause 67 with Sinochart Beijing after having entered into the charterparty with Q. Thus, the risk flowing from the charter with Sinochart Beijing that it could be impossible to pass on a valid claim to Q within the time limit was not part of the background to the P/Q charterparty.

Discussion and decision

46. The words used in clause 67 are clear and unambiguous. In my judgment, they should be given the same construction as was given to the Centrocon arbitration clauses in *The Himmerland*, *The Stephanos* and *The Evje*. In those cases, very similar arguments to those of Mr Nolan QC founded on impossibility and the meaning of "dispute" were rejected as being incompatible with the clear words of the clause. I accept Mr Kenny QC's submission that the expectation of parties where it was on the cards that their charterparties might be part of a chain of back-to-back charters is substantially the same as where there is no chain. The parties desire the benefits that flow from a literal construction of the time bar because, whilst they also have an interest in passing on claims up or down the chain, that is only in so far as they are exposed to claims made in accordance with the time bar. The interest in passing on claims is no reason for giving the clear words of the clause a qualified meaning.

47. As Saville J said in *The Stephanos*, the commercial sense of the construction he and Mocatta J gave to the clause is that at the end of the stipulated period the parties will know where they stand as to what claims (if any) are outstanding against each other: and the difficulties and uncertainties often inherent in trying to deal with claims only long after the event are largely, if not wholly averted.

48. In my judgment, in opting for these commercial advantages by agreeing to clause 67, the parties took the risk that it might not be possible within the 13-month time limit to pass on a claim validly received within the period, just as the parties in *The Himmerland* and *The Stephanos* took the risk that an indemnity claim might only arise after the expiration of the time limit. If the parties had wanted to avoid the risk of not being able to serve a compliant notice within the time limit following receipt of a valid claim, they should have agreed the necessary modification to clause 67 with the disponent owners in the upward charterparty. This they did not do, and they must bear this downside aspect of clause 67 whilst at the same time enjoying the upside commercial benefits of the clause identified by Saville J.

49. Mr Kenny QC accepted that the availability of an extension under section 27 of the Arbitration Act 1950 in a case of undue hardship played an indirect role in Mocatta J's conclusion that the arbitration clause should be given its literal meaning. Mr Nolan QC adopted the same approach in his reply and submitted that the court should take into account the much narrower provisions of section 12 in the Act when deciding whether to give clause 67 its literal meaning.

50. With respect, I think that Mr Kenny QC went too far in making the concession he did. In my judgment, looking at Mocatta J's judgment as a whole, his reference to the availability of relief under section 27 of the 1950 Act was not part of his reasoning on the construction issue but merely an acknowledgment of the availability of relief under section 27 in cases of undue hardship. It is also clear to me that Saville J arrived at his literal construction of the clause quite independently of the availability of relief under section 27.

51. If I be wrong about this, in my judgment the literal meaning given to the clauses in *The Himmerland*, *The Stephanos* and *The Evje* is the meaning that must be given to the plain and clear words of clause 67, even if relief under section 12 of the Act is significantly harder to obtain than under section 27 of the 1950 Act.

52. For completeness, I ought also to say that I agree with Mr Kenny QC's submission that in *Bede*, MacKinnon J was expressing what today is to be regarded as a heterodox opinion. First, it is tolerably plain that the claim in that case for the agreed sum was a claim not arising out of the contract but arising out of a separate agreement that the admitted sum was due. Secondly, these days it is plain that there is a dispute within a clause providing that all "disputes" arising from a contract are to be referred to arbitration even if a debtor has admitted a debt but has simply failed to pay it; see eg *Exfin Shipping (India) Ltd v Tolani Shipping Co Ltd* [2006] 2 Lloyd's Rep 389 (Langley J). Accordingly, *Bede* is not, in my opinion, to be taken as suggesting that there is scope for giving the word "claim" in the Centrocon arbitration clause some meaning other than its ordinary, literal meaning.

53. It follows that I decline to make any declaration to the effect that the notices of claim and commencement of arbitration served by the claimant disponent owners were served in time.

The section 12 applications

54. Section 12 of the Act provides:

"(1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step

(a) to begin arbitral proceedings, or

(b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun,

the court may by order extend the time for taking that step.

(2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.

(3) The court shall make an order only if satisfied

(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or

(b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question."

55. I agree with the view of Hamblen J in *SOS Corporacion Alimentaria SA v Inerco Trade SA* [2010] 2 Lloyd's Rep 345, para 48(4) that the approach to the construction of section 12 should start from the assumption that when the parties agreed the time bar, they must be taken to have contemplated that if there were any omission to comply with its provisions in not unusual circumstances arising in the ordinary course of business, the claim would be time-barred unless the conduct of the other party made it unjust that it should be.

56. I also agree with and adopt the following further observations of Hamblen J in SOS:

(a) The relevant question posed by section 12 is: (1) whether there were circumstances beyond the reasonable contemplation of the parties when they agreed the provision; and (2) if so, whether, if the parties had contemplated them, they would also have contemplated that the prima facie time bar might not apply; para 56.

(b) The circumstances in which the time limit was not observed must include those which caused or significantly contributed to the claimant's failure to comply with the time bar; para 63.

(c) If the circumstance was one that was "not unlikely" or "prone to" occur or "not unusual", the test will probably not be satisfied but if it was relatively exceptional it would be outside the reasonable contemplation of the parties; paras 65 and 66.

(d) As to whether the parties would also have contemplated that the time bar might not have applied in the circumstances in question, the test is whether they would contemplate that the time limit "might not" apply rather than it "would not" apply or "must not" apply. In general, time limit clauses are addressed at steps which the party in question can reasonably be expected to take within the prescribed time.

57. In his second witness statement served on behalf of P, Mr Simon Williams of P's solicitors, Mills & Co, accepts that very often proceedings are commenced shortly before the expiry of a time limit, but he goes on to state that in his experience it is very unusual indeed for notice of a cargo claim, or of the circumstances giving rise to it, first to be given only on the last day of a contractual time limit or outside that limit. He also states that he is informed by Mr Kyubaek Yeom, Assistant Manager in P's Legal Affairs and Compliance team that, so far as Mr Yeom is aware, receipt of Sinochart Beijing's notice on 16 November 2016 at 18.44 was the first time that P has been told about a cargo claim right at the end of a limitation period. In Mr Yeom's experience, such claims are usually notified well in advance of the expiry of that period and messages are exchanged in attempts to agree a commercial solution before any legal fees are incurred.

58. Mr Nolan QC submitted that the relevant circumstances in P's case against Q were that P first discovered the existence of a claim only after the expiry of the 13-month time limit some seven months after they had closed the file and eight months after they been told by Sinochart Beijing that they were going to close *their* file once the laytime calculation had been sorted out. Whilst the parties might have contemplated that this was something that might happen, it was not something that was "not unlikely" or "not unusual" or "prone to occur"; instead it was an eventuality which would in all probability be relatively exceptional. Further, the parties would also have contemplated that in such circumstances the time bar might not apply given their expectation that claims could be passed up or down the charter chain.

59. Mr Kenny QC submitted that the burden was on the claimants to show that their failure to comply with the time limit was not due to their own negligence and the claimants had failed to discharge this burden. He went on to assert that all the parties involved in the charter chain were aware that substantial damage to the cargo had been found or was alleged to have been found on arrival in China and that it was obvious that there would be, or at least might be, a claim made in China in respect of the damage with an attempt to pass the claim down the chain. However, the parties in the charter chain had chosen to adopt a strategy of letting sleeping dogs lie and had made no enquiries as to what had happened following completion of discharge or whether a claim was being made in China. It followed, submitted Mr Kenny QC, that the circumstances that caused the claimants to miss the time bar were that they had all taken a deliberate decision not to make any enquiries about the damage to the cargo discovered on discharge or about the existence of a claim in China resulting from that damage. If they had prepared for the possibility of a late claim, as they should have done, they would have been able to comply with clause 67, even if Sinochart Beijing's notice of claim only arrived at 18.44.

60. Further, in P's case, it was irrelevant that Sinochart Beijing's claim was only served on P after business hours on 16 November 2016 since, even if the claim had been served weeks or days earlier, P would still not have been able to comply with clause 67 given that they had not informed their legal department of the claim until 23 November 2016 and it was only after this that they became aware of the terms of clause 67 and contacted their P&I Club.

61. I reject Mr Kenny QC's submission that the parties were aware that a cargo claim would likely be made and had failed to enquire as to whether this was the case, adopting a policy of letting sleeping dogs lie. This assertion was made first in Mr Kenny QC's written argument well after the evidence served by the other parties had closed, Sinochart Beijing itself having served no evidence. There is therefore no evidence that suffices to contradict the evidence served on behalf of the claimants that none of them knew anything about a possible cargo claim until after the expiry of the stipulated period. The statement of facts (SOF) for Nansha recorded that on 29 September 2015 a quarantine test on the cargo had failed and there followed a lengthy discussion between P&I personnel, surveyors and a terminal representative about how to separate and discharge mouldy and caked cargo, but thereafter discharge commenced and was only interrupted by rain, save for an interruption at 03.30 due to disputes about cargo

quality which was resolved by 06.00. There was no statement that substantial quantities of cargo were damaged. There is no reference to the vessel being arrested or to security being put up. Thus, overall the picture that emerges in my view is that there was some concern about some mouldy and caked cargo at one discharge port which was fairly quickly resolved and which did not lead to any substantial delay in the discharge of the cargo. I accordingly find that there was no reason for any of the claimants to anticipate that a cargo claim would be made.

62. I also reject Mr Kenny QC's submission that the service of Sinochart Beijing's notice of claim on the last day of the time limit at 18.44 was not the cause of P's service of a notice of claim occurring after the expiry of the time limit because it is to be inferred from the dilatory way that P proceeded after 17 November 2016 that, even if the notice had been received in business hours and with sufficient time to serve an effective follow-on notice, such a notice would still have been served out of time. In my judgment, the direct, dominant and effective cause of P's notice of a claim being served after the expiry of the 13-month time limit was the receipt of Sinochart Beijing's notice of claim on the last day of the stipulated period after P's business hours. In my view, Mr Kenny QC's alternative causation theory involves an exercise in speculation based on a theory of a propensity for inefficiency which I find to be insufficient to displace the hard fact that Sinochart Beijing's notice was received after business hours on the last day of the time limit.

63. In my judgment, the circumstances in which each of the claimants served their notices out of time were that P only received notice of a claim after business hours on the last day of the time limit with the result that P and the other claimants down the chain were only able to serve notices of claim outside the time limit. I further find that: (i) these circumstances were such as to be outside the reasonable contemplation of the parties when they agreed to clause 67 in that the circumstances were an eventuality which would in all probability be relatively exceptional and were not something that was merely "not unlikely" or "not unusual" or "prone to occur"; and (ii) the parties in these circumstances would have contemplated that the time bar might not apply given their expectation that claims could be passed up or down the charter chain.

64. I therefore turn to consider in respect of each of the applicants whether it would be just to grant the extension of time sought.

P

65. In my opinion, at the very least, it will only be just to extend time under section 12 on the application of a party in a charter chain if the applicant has acted expeditiously and in a commercially appropriate fashion to commence proceedings once he (it) has become aware that a claim is being made against the applicant under the charterparty above or below in the chain. I say this bearing in mind that the parties will have agreed to the time bar in question and any extension will therefore be to the detriment of the party against whom the applicant wishes to take proceedings.

66. In my judgment, P did not act expeditiously and in a commercially appropriate fashion when dealing with Sinochart Beijing's claim from 17 November 2016. Charterparties, including in particular voyage charters, invariably include a time bar and in my view, one of the first things that P's operational staff should have done on 17 November 2016 was to investigate what time bar had been incorporated into the contract, either by perusing the contract themselves or by informing P's legal department and/or the company's P&I Club of what had happened and asking for urgent advice on what action should be taken. In my judgment, if this step had been taken and then followed by appropriately expeditious action, an arbitrator would have been appointed and Q notified thereof and of P's claim on 20 November 2016 at the latest, instead of on 25 November 2016 as in fact was the case.

67. For these reasons I am of the view that it would not be just to extend time under section 12 on P's application for an extension to 25 November 2016 and that application is accordingly refused.

Q

68. In contrast to P, on 17 November 2016, the day after the expiry of the time limit, Q appointed solicitors who in turn appointed Mr Rayment as Q's arbitrator and served notice on R of its claim and the commencement of an arbitration. Q seeks an extension of time to 30 November 2016 to cover the fresh service of its notice in an email of that date to R's solicitors, Reed Smith, without prejudice to the contention that the notice sent via B&J Shipping on 17 November 2016 was a validly served notice. In my judgment, it is just and appropriate to grant Q the extension it seeks. Whatever the niceties of the argument as to B&J Shipping's authority to receive the notice sent on 17 November 2016, that notice was received by R and read on 18 November 2016 and thus I conclude that it would be just to extend time to 30 November 2016 as sought by Q.

R

69. The issue here is whether R's delay between 18 November and 1 December 2006 in serving its notice of claim and commencement of arbitration on S is such as to render it unjust to grant the extension sought. As I have said in para 65 above, in my opinion, at the very least, it will only be just to extend time under section 12 on the application of a party in a charter chain if the applicant has acted expeditiously and in a commercially appropriate fashion to commence proceedings once he (it) has become aware that a claim is being made against him (it) under the charterparty above or below in the chain. Despite the fact that R became aware of Sinochart Beijing's claim against P at 11.02 on 17 November 2016 and in the morning of 18 November 2016 read Q's notice of claim against R received at 18.43 the previous evening, R waited until 28 November 2016 to instruct Reed Smith as their solicitors and it was only on 29 November 2016 that Reed Smith appointed Mr Clive Aston as R's arbitrator in the dispute with S and on 1 December 2016 that Reed Smith served notice on S of R's claim and the commencement of arbitration.

70. In my judgment, R failed expeditiously and in a commercially appropriate fashion to commence proceedings against S once it had become aware on 18 November 2016 that it had been served with Q's notice of claim and commencement of arbitration. In my view, a notice of claim and commencement of arbitration should have been served by R on S by no later than 22 November 2016. I am therefore of the opinion that it would not be just to extend time to 1 December 2016 as requested by R and accordingly, R's application under section 12 is refused.