I. ENGLAND AND WALES COURT OF APPEAL (CIVIL DIVISION) DECISIONS

A. HALKI SHIPPING CORPORATION v. SOPEX OILS LIMITED [1997] EWCA CIV 3062 (19TH DECEMBER, 1997)

IN THE SUPREME COURT OF JUDICATURE QBCMI 97/1082/B
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Royal Courts of Justice
Friday, 19th December 1997

Before:

LORD JUSTICE HIRST
LORD JUSTICE HENRY
LORD JUSTICE SWINTON THOMAS

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HALKI SHIPPING CORPORATION
Appellant

-v-

SOPEX OILS LIMITED

Respondent

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(Transcript of the Handed Down Judgment of Smith Bernal Reporting Limited, 180 Fleet Street, London, EC4A 2HD. Telephone No: 0171-421 4040. Shorthand Writers to the Court.)

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MR. N. HAMBLEN (instructed by Messrs Dorman & Co.) appeared on behalf of the Appellants/Plaintiffs.

MR. R.B. WALLER (instructed by Messrs Clifford Chance) appeared on behalf of the Respondents/Defendants.

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J U D G M E N T
(As approved by the Court)

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LORD JUSTICE HIRST:

Introduction

This case raises an important question under section 9 of The Arbitration Act 1996, namely whether it is still open to a plaintiff to bring Order 14 proceedings to enforce a claim to which the defendant has no arguable defence, where the claim arises under a contract which contains an arbitration clause.
Section 9 of The Arbitration Act 1996 provides so far as relevant as follows:-
"Stay of legal proceedings

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

....

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

This section replaced section 1 of The Arbitration Act 1975 which provided:-
"If any party to an arbitration agreement to which this section applies ... commences any legal proceedings in any court against any other party to the agreement ... in respect of any matter agreed to be referred any party to the proceedings may ... apply to the court to stay the proceedings; and the court unless satisfied that ... there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

Under the 1950 and 1975 Arbitration Acts there was a well established practice that a defendant's applications for a stay and a plaintiff's application for summary judgment were heard together, and treated as opposite sides of the same coin.

The usefulness of this practice has frequently been recognised judicially, for example by Lord Mustill in Channel Group v. Balfour Beatty Ltd. [1993) AC 334 in a speech with which the other members of the Appellate Committee agreed at page 356:-
"In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under RSC Order 14, to give summary judgment in favour of the plaintiff where the defendant has no arguable defence. If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and to give final judgment for the plaintiff. This jurisdiction, unique so far as I am aware to the law of England, has proved to be very useful in practice, especially in times when interest rates are high, for protecting creditors with valid claims from being forced into an unfavourable settlement by the prospect that they will have to wait until the end of an arbitration in order to collect their money. I believe however that care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome, with the situation in which the defendant is not really raising a dispute at all. It is unnecessary for present purposes to explore the question in depth, since in my opinion the position on the facts of the present case is quite clear, but I would endorse the powerful

warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunals, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts, given by Parker L.J. in Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd. [1990] 1 WLR 153, 158 - 159,and Saville J.in Hayter v. Nelson [1990] 2 Lloyds Rep. 265."

The basis on which this jurisdiction has been exercised is that, in respect of the claim or some part of the claim to which there is no defence, there is no dispute to be referred to arbitration. Thus in one of the leading cases, Eagle Star v. Yuval [1978] 1 Lloyds Rep. 357 Goff LJ (as he then was) stated at page 362 that the first question that the Court had to consider was the application for summary judgment under Order 14, for if indeed there was no genuine dispute it would hardly seem logical to consider whether the alleged dispute should be determined by the court or by an arbitrator.

The crucial questions at issue are the meaning of the word "dispute" in an arbitration agreement, and the effect of section 9 of the 1996 Act in the light of the omission from the new section of the qualification "unless satisfied ... there is not in fact any dispute between the parties with regard to the matter agreed to be referred", which had appeared in its counterpart in the 1975 Act. ("the 1975 qualification")

The plaintiff's case before the judge under Order 14 was that the defendant has no arguable defence to the claim or at least to no more than a very small part of it. However, Clarke J. held that, short of any admission by a defendant, there remained a dispute between the parties which they had agreed to refer to arbitration, even if the defendant had no arguable defence to all or any part of the claim, and that therefore the defendant was entitled to a stay and there was no scope for an Order 14 judgment in the plaintiff's favour. It is against this ruling, reported to [1997] 1 WLR 1268,that the plaintiff presently appeals.

The background to the case is that the plaintiff, Halki Shipping Corporation, is the owner of the Motor Tanker HALKI which was chartered to the defendant Sopex Oils Ltd. under a tanker voyage charterparty dated 20 June 1995 for the carriage of palm oil and coconut oil from various ports in the Far East to various ports in Europe. As it turned out the vessel loaded cargo at five ports in the Far East and discharged at four ports in Europe, and it is the plaintiff's case that the defendant failed to load and discharge the vessel within the lay time provided by the charterparty, with the result that it claims demurrage in the sum of US$ 517,473.96; the claim is thus in essence a claim for liquidated damages for breach of the charterparty. The defendant does not admit liability.
The arbitration clause provided as follows:-

"General average and arbitration to be London, English law to apply. For arbitration the following clause to apply: Any dispute arising from or in connection with this charterparty shall be referred to arbitration in London. The owners and charterers shall each appoint an arbitrator experienced in the shipping business. English law governs this charterparty and all aspects of the arbitration."

On 9 April 1997 the plaintiff issued a specially endorsed writ claiming demurrage, and the defendant countered by seeking an order staying the action under section 9 of the 1996 Act, which, as is common ground, applies in the present case.

In addition to the main point of principle, the defendant by respondent's notice seeks to raise a further issue arising from the fact that in August 1997, after Clarke J. had given judgment, the plaintiff commenced arbitration proceedings pursuant to the arbitration clause, on the footing that the arbitrator had concurrent jurisdiction; the defendant contends that, in consequence, whatever the outcome of the point of principle, the plaintiff has now waived its right to object to the arbitrator's jurisdiction and/or is now estopped from denying such jurisdiction.

On behalf of the respondent, Mr. Richard Waller urged us to decide this point ourselves at the present juncture: however, seeing that it only arose for the first time after the judgment under appeal, and since it turns to a substantial degree on some rather intricate points of construction of the very extensive correspondence exchanged between solicitors since August, we decided to accede to the submission of Mr. Nicholas Hamblen QC on behalf of the plaintiff that it was more appropriate that the point should be remitted to the judge.

The submissions in outline

Mr. Hamblen submitted that the critical question is what is meant by "dispute", which, as here, and as in most arbitration clauses, is under Section 9 the "matter which under the agreement is to be referred to arbitration". Relying on the decision of the House of Lords in Nova (Jersey) v. Kammgarn [1977] 1 WLR 713, and on a number of subsequent Court of Appeal decisions, he submitted that it is settled by well established and binding authority that "dispute" means a genuine or real dispute, and that a claim which is indisputable because there is no arguable defence does not create a dispute at all. It follows, he submitted, that claims to which there is no arguable defence are outwith the scope of section 9, and are therefore properly the subject matter of court proceedings under Order 14, notwithstanding the omission from Section 9 of the 1975 qualification.

Mr. Waller on the other hand submitted that "dispute" means any disputed claim, and therefore covers any claim which is not admitted as due and payable, thus leaving no scope whatsoever for court proceedings under Order 14 save where the defendant has made a positive admission. He relied primarily on a decision of Saville J.,(as he then was), in Hayter v. Nelson [1990] 2 Lloyds Rep. 265, which he

portrayed as a landmark decision; in that case it was held that the word "dispute" in an arbitration clause should be given its ordinary meaning, and was not confined to cases where it could not then and there be determined whether one party or the other was in the right, so that the fact that a person has no arguable grounds for disputing something does not mean in ordinary language that he is not disputing it. Mr. Waller noted that this decision had been followed in subsequent cases at first instance, and submitted that it was also in line with the decision of the Court of Appeal in Ellerine v . Klinger [1982] 1 WLR 1375.

So far as section 9 itself is concerned, Mr. Waller submitted that the omission of the in the 1975 qualification was crucial, since, as he contended, it was the basis of the Order 14 jurisdiction prior to 1996; and he relied on the terms of paragraph 55 of the report of the Departmental Advisory Committee (DAC) under the chairmanship of Saville LJ which it is common ground is relevant to the construction of the Act, and which stated as follows in explanation of section 9:- "The Arbitration Act 1975 contained a further ground for refusing a stay namely where the court was satisfied that ´ *there was not in fact any dispute between the parties with regard to the matter agreed to be referred.'* These words do not appear in the New York Convention and in our view are confusing and unnecessary, for the reasons given in Hayter v. Nelson."

The Authorities

In Nova (Jersey Knit) v. Kammgarn Spinnerei (Supra) a partnership agreement between the English and German companies contained an arbitration clause providing for arbitration in Germany under German law. The German company dishonoured a number of bills of exchange which they had given to the English company, whereupon the English company commenced an action in England claiming payment of the bills. The German company sought a stay of the action, which was refused by the House of Lords (Lords Wilberforce, Dilhorne, Fraser of Tulleybelton and Russell of Killowen, Lord Salmon dissenting) on two grounds namely:-

(i) on the evidence of German law the arbitration agreement did not extend to the claims on the bills of exchange: and

(ii) there was no dispute between the parties with regard to the matters agreed to be referred within section 1(1) of the Arbitration Act 1975, and accordingly there was no jurisdiction to stay the court proceedings.

In the leading judgment Lord Wilberforce, having dealt with the first (and presently irrelevant) point, stated at p.718 that it was sufficient to enable the English company to succeed, but that he would nonetheless deal with the second point, where he took it to be clear law that unliquidated cross-claims cannot be relied upon by way of set off against a claim on a bill of exchange.

Having considered a number of cases where the cross-claim was for an amount which was both ascertained and liquidated, he held that the amount claimed was certainly neither ascertained nor liquidated, with the result that "there would seem to be no basis for denying the appellant's claim that, as regards the bills, there is no dispute". He concluded with a reference to "the established rule that unliquidated claims must be the subject of a cross-action and cannot be used to create a ´dispute' on a bill of exchange".

Viscount Dilhorne said that he agreed with Lord Wilberforce's speech entirely, as did Lord Fraser of Tullybelton, though the latter then proceeded to deliver a speech which focused mainly on the first point.

Lord Russell of Killowen did not deal expressly with the second point, and Lord Salmon dissented.

In Ellis v. Wates Construction [1978] 1 Lloyd Rep. 33 the Court of Appeal (Lord Denning MR, Lawton and Bridge LJJ) considered an arbitration clause in a large building contract. Lord Denning stated as follows at p.35:-
"There is a general arbitration clause. Any dispute or difference arising on the matter is to go arbitration. It seems to me that if a case comes before the Court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the Court is able, on an application of this kind, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration. The defendants cannot insist on the whole going to arbitration by simply saying that there is a difference or a dispute about it. If the Court sees that there is a sum which is indisputably due, then the Court can give judgment for that sum and let the rest go to arbitration, as indeed the Master did here. So much for the point of procedure."

Bridge L.J. stated as follows at p.36:-
"The question to be asked is: is it established beyond reasonable doubt by the evidence before the Court that at least £x is presently due from the defendant to the plaintiff? If it is, then judgment should be given for the plaintiff for that sum, whatever x may be, and in a case where, as here, there is an arbitration clause, the remainder in dispute should go to arbitration. The reason why arbitration should not be extended to cover the area of the £x is indeed because there is no issue, or difference, referable to arbitration in respect of that amount."

Lawton L.J. concurred, and said that in order to avoid the injustice to sub-contractors in building contracts (such as the plaintiffs in that case), where arbitrations may drag on and on and where cash flow is held up, a robust approach to the Order 14 jurisdiction was appropriate.

That decision was of course in the case of a domestic arbitration, where the court had an open discretion under section 4 of the Arbitration Act 1950 to grant a stay, but in the Fuohsan Maru [1978] 1 Lloyds Rep.24 the Court of Appeal (Lord Denning MR, Browne and Geoffrey Lane L.J.J.) held that it laid down the correct principle in cases under the 1975 Act, though they disagreed as to the application of the principle to the facts then in issue.

In Sethia Ltd. v. India Trading Corporation [1986] 1 WLR 1398 the Court of Appeal considered counter applications for an Order 14 judgment and a stay in a contract governed by the 1975 Act.

Kerr L.J., giving the leading judgment with which Ralph Gibson L.J. and Sir Denis Buckley agreed, stated as follows at p.1401:-
"The submissions of both parties have proceeded on the basis that the summonses under Order 14 and section 1 are the reverse sides of the same coin, and we have been referred to *Mustill & Body, Commercial Arbitration* (1982), pp. 90-92. Without expressing any concluded view on everything which is stated there, it seems to me that the position can be summarised as follows. If a point of law is raised on behalf of the defendants, which the court feels able to consider without reference to contested facts simply on the submissions of the parties, then it is now settled that in applications for summary judgment under Order 14 the court will do so in order to see whether there is any substance in the proposed defence. If it concludes that, although arguable, the point is bad, then it will give judgment for the plaintiffs. This course will also be adopted where there is a counter-application for a stay of the action. If section 1 of the Act of 1975 applies, then the court is not thereby precluded from considering whether there is any arguable defence to the plaintiffs' claim. If the court concludes that the plaintiffs are clearly right in law then it will still give judgment for the plaintiffs. In the same breath, as it were, it will then have decided that in reality there was not in fact any dispute between the parties. If the court is satisfied that the plaintiffs are clearly right in law, and that the defendants have no arguable defence, then it will not avail the defendants to have raised a pointy of law which the court can see is in fact bad. In those circumstances the defendants cannot be heard to say that there was a dispute to be referred to arbitration. But if the court concludes that the plaintiffs are not clearly entitled to judgment because the case raises problems which should be argued and considered fully, then it will give leave to defend, and is therefore then bound to refer the matter to arbitration under section 1 of the Act of 1975."

The relevant passage in the current (1989) edition of Mustill and Boyd on the Law Practice of Commercial Arbitration in England is as follows at page 123 under a general heading "Disputes and Differences":-
"A genuine dispute

Theoretical problems of some difficulty may arise where the defendant does put forward an answer to the claim, but the claimant asserts that the answer does not raise a genuine dispute Such an assertion may take two forms. First, where it is said that the defendant does not believe what he is saying, and it merely looking for an expedient to avoid or postpone payment. Second, where the defence is put forward with apparent good faith, but can nevertheless be seen to have no substance. Plainly, it may be difficult in certain instances to be sure into which of these categories a defence can properly be assigned.

When dealing with defences of this kind, three questions may arise -

1. Does the arbitrator have jurisdiction to entertain the claim, and to make a valid award in respect of it?

2. Must the Court grant a stay in respect of any action brought in respect of the claim, if the matter falls within section 1 of the 1975 Act, and may it grant a stay if it is within section 4(1) of the 1950 Act?

3. If an action is brought in respect of the claim, should the Court grant summary judgment for the amount claimed?

Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the Court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the Court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed. The correctness of this approach is not self-evident. Moreover, in all but the simplest of cases the Court will be required not merely to inspect the defence, but to enquire into it; a process which may, in matters of any complexity, take hours or even days. When carrying out the enquiry, the Court acts upon affidavits rather than oral evidence. The defendant might well object that this kind of trial in miniature by the Court is not something for which he bargained, when making an express contract to leave his rights to the sole adjudication of an arbitrator.

Whatever the logical merits of this view, the law is quite clearly established to the contrary. Where the claimant contends that the defence has no real substance, the Court habitually brings on for hearing at the same time the application by the

claimant for summary judgment, and the cross-application by the defendant for a stay, it being taken for granted that the success of one application determines the fate of the other."

The proposition in the first sentence of the second paragraph is supported by a footnote, stating that "this proposition must now be treated as firmly and finally recognised by Nova (Jersey) ."

In the M Eregli [1981] 3 AER 344 Kerr J., having cited as authority Nova (Jersey) , Ellis v. Wates , and the Fuohsam Maru , held that the legal position was clear, and that the fact that arbitration proceedings are pending between parties is clearly not in itself any ground for preventing the courts from becoming seized of the same dispute in an action: that the current practice was for claims which are covered by an arbitration clause, but which are said to be indisputable, are frequently put forward in an arbitration, and then also pursued concurrently by an attempt to obtain summary judgment in the courts; and that a claimant can, and in his (Kerr J.'s) view should be able to, obtain an order for payment in such cases by either means, the co-existence of both avenues towards a speedy payment of an amount which is indisputably due being well recognised.

However in Ellerine Bros. Ltd. v. Klinger [1982] 1 WLR 1375, which also concerned an arbitration clause under the 1975 Act, the Court of Appeal (Templeman, Watkins and Fox LJJ) held, in the words of Templeman L.J. giving the leading judgment, that there was a dispute until the defendant admitted that a sum is due and payable; he continued at p.1381:-
"Again by the light of nature, it seems to me that section 1(1) is not limited either in content or in subject matter, that if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say ´I don't agree'. If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation."

In support of this conclusion Templeman L.J. cited another passage from Kerr J.'s judgment in the M. Eregli at p.350 as follows:-
"Where an arbitration clause contains a time limit barring all claims unless an arbitrator is appointed within the limited time, it seems to be that the time limit can only be ignored on the ground that there is no dispute between the parties if the claim has been admitted to be due and payable. Such admission would, in effect, amount to an agreement to pay the claim, and there would then clearly be no further basis for referring it to arbitration or treating it as time-barred if no arbitrator is appointed. But if, as here, a claim is made and is neither admitted nor disputed, but simply ignored, then I think that the time limit clearly applies and

that the claimant is obliged (subject to any possible extension of time) to appoint an arbitrator within the limited time."

I now come to Hayter v. Nelson (supra) which is the lynch pin of Mr. Waller's argument. This was an application for summary judgment, countered by an application for a stay under the 1975 Act: the arbitration clause provided that "any differences arising out of the agreement which cannot be settled amicably shall be referred to arbitration", and Saville J, assumed for the purposes of his judgment that the word differences and the word disputes bore the same meaning.

Saville J. opened his analysis by referring to "some cases (where) the suggestion seems to be made that if it can be shown that a claim under a contract is indisputable i.e. a claim that cannot be resisted on either the facts or the law, then there is no dispute". He then proceeded to cite the passage quoted above from Bridge L.J.'s judgment in Ellis v. Wates , and said that to the extent that such observations are intended to define what is or is not a dispute within the meaning of an arbitration clause, he was unable to agree, because they seemed to be in conflict with Ellerine v. Klinger . He then proceeded as follows:-
"The proposition must be that if a claim is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected - as indeed they were rejected by Mr. Justice Kerr (as he then was) in The M.Eregli,[1981] 2 Lloyds Rep. 169, in terms approved by Lords Justices Templeman and Fox in Ellerine v. Klinger (sup.). As Lord Justice Templeman put it (at p. 1383):-

There is a dispute until the defendant admits that the sum is due and payable.

In my judgment in this context neither the word "disputes" nor the word "differences" is confined to cases where it cannot then and t her be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

In my view this ordinary meaning of the word "disputes" or the word "differences" should be given to those words in arbitration clauses. It is sometimes suggested that since arbitrations provide great scope for a defendant to delay paying sums which are indisputably due, the Court should endeavour to avoid that consequence by construing these words in arbitration clauses so as to exclude all such cases, but to my mind there are at least three answers to such suggestions.

In the first place the assumption is made that arbitrations are necessarily slow processes, but whatever the position in the past, I cannot accept that as a general or universal truth today. As Mr. Justice Robert Goff (as he then was) pointed out in The Kostas Melas [1981] 1 Lloyds Rep. 18, arbitrators have ways and means (in particular by making interim awards) of proceeding as quickly as the Courts - indeed in that particular case quicker than any Court could have acted. If a claimant can persuade the arbitral tribunal that in truth there is no defence to his claim (ex hypothesi not on the face of it a difficult task if the claim is truly indisputable) then there is no good reason why that tribunal cannot resolve the dispute in his favour without any delay at all.

In the second place, and perhaps more importantly, it must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the Courts, their disputes should be resolved by a private tribunal. Even assuming that this tribunal is likely to be slower or otherwise less efficient than the Courts, that bargain remains - and I know of no general principle of English law to suggest that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can be simply put on one side and ignored.

In the third place, if the Courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator's very function is to decide whether or not there is a good defence to the claimant's claims - in other words, whether or not the claim is in truth indisputable. Again, to my mind, whatever the position in the past, when the Courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with the basic principles of the English law of freedom of contract and indeed International Conventions) is that there is no good reason why the Courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them.

For these reasons I am satisfied that the present proceedings are in respect of a matter agreed by the parties to be referred within the meaning of s.1(1) of the Arbitration Act, 1975. A difference exists between them in respect of their rights and obligations arising out of the agreement to which the arbitration clause refers."

Saville J. then considered the origins of the key phrase in the 1975 Act, in a passage which echoes the reasoning of Mustill and Boyd in the first of the two paragraphs quoted above:-
"There seems little doubt that the phrase ´or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred' was inserted into the 1924 Act by later amendment as a result of a recommendation by the MacKinnin Committee on The Law of Arbitration whose re port was presented to Parliament in March 1927 - see Russell on Arbitration, 12th Ed. (1931) at p. 519. The recommendation in question is to be found in par. 434 of this Report (Cmd. 28817) in the following terms:

´Our attention has been called to a point that arises under the Arbitration Clauses (Protocol) Act 1924. Section 1 of that Act in relation to a submission to which the Protocol applies deprives the English Court of any discretion as regards granting a stay of an action. It is said that cases have already not infrequently arisen, where (e.g.) a writ has been issued claiming the price of goods sold and delivered. The defendant has applied to stay the action on the grounds that the contract of sale contains an arbitration clause, without being able or condescending, to indicate any reason why he should not pay for the goods, or the existence of any dispute to be decided by arbitration. It seems absurd that in such a case the English Court must stay the action, and we suggest that the Act might at any rate provide that the court shall stay the action if satisfied that there is a real dispute to be determined by arbitration. Nor would such a provision appear to be inconsistent with the protocol.'

I have not been able to find any report of the cases to which the Committee referred, so that it is not possible to examine the grounds on which a stay was ordered in these cases. On the face of it, if indeed the applicant for a stay could not or did not indicate ´the existence of any dispute to be decided by arbitration' then the claims made in the legal proceedings could hardly be ´in respect of any matter agreed to be referred' within the meaning of the 1924 Act, so no question of a stay could arise at all, since (under an ordinary arbitration clause) it is only disputes (or differences) that the parties have agreed to refer. What therefore the Committee may have had in mind (though this is speculation) were cases where there was a dispute (or difference) within the meaning of the arbitration clause, so that the legal proceedings were ´in respect of a matter agreed to be referred', but where the party disputing the claim put forward no good grounds for doing so. In such cases, as the Committee put it, there was no ´real dispute' in the sense of there being nothing disputable about the claim.

The words inserted into the 1924 Act are, as a matter of pure construction, very difficult to understand. On their face the words appear to indicate that there can be a matter agreed to be referred even though there is not in fact any dispute between the parties - but as I have already pointed out, if there is in fact no dispute between

the parties then there is very likely indeed to be nothing agreed to be referred, since it is only disputes (or differences) that the parties have agreed to refer. In the end I have concluded that this apparent absurdity can only be resolved by treating the word ´dispute' in this context as indeed meaning something different from the word used in ordinary arbitration clauses, so that reading the phrase as a whole the words ´there is not in fact any dispute' mean ´there is not in fact anything disputable'. To my mind this reading alone fits with the recommendation made by the Committee and the fact that it was the problem identified by the Committee which Parliament, as it would appear, was intending to resolve when adding the phrase under consideration to the 1924 Act by the amendment made in 1930. There are to my mind no good grounds for suggesting that the words used in the 1975 Act were inserted for any different purpose; and accordingly it seems to me that the same meaning must be given to them."

Finally Saville J. had to address the Nova (Jersey) case which he explained as follows:-
"The reasoning of the House of Lords was in the context of considering the appellants' second argument, that there was not in fact any dispute, within the meaning of s.1 of the 1975 Act - see, for example, the speech of Lord Wilberforce at p.718. Thus although the speeches themselves do not seek to distinguish between the meaning of the word "dispute" in that Act, and its meaning in what in the light of the first holding was necessarily a hypothetical (but unformulated) arbitration clause, I read them as referring to the former, rather than the latter. If this is not the correct approach, then it is difficult to see how the Court of Appeal decision in Ellerine v. Klinger(sup) can stand."

I should note at this stage that it seems that Nova (Jersey) was not cited in Ellerine v. Klinger ; indeed the only one of the earlier cases there referred to was the M Eregli .

Subsequently, Colman J. followed Ellerine v. Klinger in Acada Chemicals v. Empresa Nacional [1994] 1 Lloyds Rep. 428, and Clarke J. followed Hayter v. Nelson in Hume v. AA Mutual [1996] LRLR 19.

Mr. Waller also relied on a decision of Phillips J. (as he then was) in the Ever Splendor [1988] 1 Lloyds Rep. 245 which concerned the Centrocon arbitration clause which specifically refers to "any claims": Phillips J. held that the clause applied to any claim unless the respondent had made a binding admission that such claim was valid. It does not seem to me, however, that this case is of great assistance, in view of the form of the Centrocon clauses, and in any event Phillips J. also held that if there was an arguable defence, he could decline to stay the action under the 1975 Act and give judgment under Order 14.

Finally in the John C Helmsing 1990 2 Lloyds Rep. 290 Bingham LJ, with whom Nourse LJ and Sir George Waller agreed, consideredHayter v. Nelson in the context of the earlier cases and of the statements in Mustill and Boyd , and concluded at p.296 that if the matter was free of authority he would be much impressed by Saville J.'s arguments of logic and principle, but that there was a body of authority on the other side: he then said that the question did not need to be resolved in that case, but observed (prophetically) that "a case may well arise in which this divergency in the authorities may have to be resolved".

The judgment under appeal (1997) 1 WLR 1268.

Clarke J. carefully considered all the authorities cited above, concentrating first on Hayter v . Nelson which he said was regarded as the leading case on the point in the last ten years or so, and which he himself had followed in Hume v. AA Mutual . He then noted that Saville J. had followed Ellerine v. Klinger , and said that that case was of considerable importance, while Nova (Jersey) , might have been obiter. He then turned to the passage quoted above from Bridge L.J. in Ellis v. Wates , and said that this was obiter also, and in any event in conflict with Ellerine v. Klinger. He then returned to Ellerine v. Klinger , and said that it was binding Court of Appeal authority for the proposition that where a party simply does nothing there is a dispute which the claimant is both entitled and bound to refer to arbitration. Finally he referred to two further considerations which led to the same conclusion namely:-
(i) The paragraph in Mustill and Boyd first quoted above;
(ii) The changes made by the 1996 Act and the DAC report on which he stated as follows:-
"The removal of the words which were in section 1(1) of the Act of 1975 means that, whereas before the court could give judgment under RSC, Ord. 14, now it cannot because it must grant a stay. The correct approach is now that suggested by *Mustill and Boyd* and described as the logical approach, namely to leave to the arbitrators that which it was agreed should be referred to them without interference from the courts. That appears to me to be consistent with the underlying philosophy of the Act of 1996.

Finally, I turn to the report of the Departmental Advisory Committee on the Arbitration Bill, which I think both sides agree is a relevant aid to construction of the Act. Paragraph 55 of that report reads:

´The Arbitration Act 1975 contained a further ground for refusing a stay, namely where the court was satisfied that *"there was not in fact any dispute between the parties with regard to the matter agreed to be referred"*. These words do not appear in the New York Convention and in our view are confusing and unnecessary, for the reasons given in Hayter v. Nelson.'

It is not clear (at least to me) what that paragraph means. However, I do not think that it can possibly mean that the Act intended to remove from arbitrators jurisdiction which they were held in Hayter v. Nelson to have. The removal of the words must have been intended to have some effect because they provided the rationale of the second part of that decision and were the basis upon which the court had jurisdiction under RSC Ord. 14. It seems to me that, when the departmental advisory committee report said that the words were unnecessary, it must have meant that there was no need for the court to have jurisdiction since as Saville J. said in the third of the three general points referred to above, courts should not be doing what the parties have agreed should be done by the chosen tribunal and, as his first point made clear, arbitrators have ample powers to proceed without delay, as for example by making interim awards."

Analysis and Conclusions

I propose to approach the important and difficult issues which arise in two stages, considering first what is the meaning of the word "dispute" in an arbitration agreement in the light of the authorities and as it stood prior to the enactment of the 1996 Act; and secondly, in the light of the answer to the first question, considering the impact of section 9.

On the first question the sheet anchor of Mr. Hamblen's argument is Nova (Jersey), which he submitted is binding authority in favour of his interpretation, and consistent with the other Court of Appeal cases, other then Ellerine v. Klinger , which he submits Nova (Jersey)overrides.

Mr. Waller attacked this standpoint on a number of grounds.

First, he submitted, in line with the view of Clarke J. in the present case, that Nova (Jersey) was obiter, seeing it was unnecessary to the decision which had already been resolved on the first point. I am unable to accept this submission, which seems to me at odds with the very well established and fundamental principle that "if more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi" (Halsbury's Laws of England 4th Edition Volume 26 paragraph 573 and the cases there cited including the leading authority of Jacobs v. LCC [1950] AC 361).

Secondly he submitted that it was not part of the ratio of the majority, since although it clearly formed part of the decisions of Lord Wilberforce and Viscount Dilhorne, it should not be treated as part of Lord Fraser's ratio, since Lord Fraser concentrated in the main body of his judgment on the first issue; this seems to me to overlook Lord Fraser's unequivocal expression of entire agreement with Lord Wilberforce's judgment.

Thirdly he relied on the contrast drawn by Saville J. in Hayter v. Nelson between Lord Wilberforce's interpretation of the word "dispute" on the one hand, and its meaning in an arbitration clause on the other. This is a question of critical importance, since a thread runs all through Mr. Waller's argument that this distinction is fundamental to the proper resolution of the present case.

I am unable to accept the validity of this distinction between the supposedly different meanings of the simple English word "dispute" seeing that Lord Wilberforce addressed it in general terms, with no hint whatsoever of such a very subtle contrast, which forms the only possible basis for side-tracking his decision.

Moreover, and most importantly, this conclusion is in line with the other Court of Appeal authorities cited above other than Ellerine v. Klinger , and I would direct particular attention to the quotation from Bridge L.J.'s judgment in Ellis v. Wates , which to my mind was part and parcel of his ratio, and fully in line with the other two judgments in that case.

I am therefore satisfied that Nova (Jersey) is binding authority in favour of Mr. Hamblen's construction, and that the footnote in Mustill and Boyd is correct.

That leaves Ellerine v. Klinger as the only discordant voice, and as Saville J. himself recognised in Hayter v. Nelson , on the interpretation I give to Nova (Jersey) , Ellerine v. Klinger cannot stand. It is noteworthy that neither Nova (Jersey) nor any of the preceding Court of Appeal authorities were cited in Ellerine v. Klinger .

I now turn to consider Hayter v. Nelson itself, which Mr. Waller portrays as having discerned and expounded judicially for the first time the essential meaning of the word "dispute" in an arbitration agreement, in contrast to its meaning in the 1975 Act. If I may be permitted a slightly flippant comment in a long judgment, Mr. Waller's perception of Hayter v. Nelson is reminiscent of Alexander Pope's vision of Sir Isaac Newton in his famous epitaph:-
"Nature and Nature's laws lay hid in night,
God said "let Newton be" and all was light."

The core of the first passage quoted above is that if Mr. Hamblen's construction of "dispute" is right, then it must follow that a claimant cannot refer an indisputable claim to arbitration, and that an arbitrator purporting to make an award in favour of a claimant advancing such a claim would have no jurisdiction to do so. This is undoubtedly a very powerful argument, and is, as Mr. Hamblen accepted, undoubtedly correct at any rate in theory. However, as the authorities cited above show, and as demonstrated by innumerable cases over the past 70 years, it has never inhibited concurrent arbitration and court proceedings in practice. In other words, the law took a very pragmatic view, whatever the theoretical objections.

Saville J. then proceeded to consider the suggestion that, since arbitrations provide great scope for a defendant to delay paying sums which are indisputably due, the court should endeavour to avoid that consequence by construing these words in arbitration clauses so as to exclude all such cases.

To that he provided three answers. First, that any assumption that arbitrations were necessarily slow processes could no longer stand, and that, particularly in view of the arbitrator's power to make interim awards, there is no good reason why the arbitration tribunal cannot resolve the dispute without any undue delay. I have no doubt that arbitration procedures have grown increasingly efficient as the years have gone by, but it does not to my mind follow that the Order 14 procedure has now outlived its usefulness. This was certainly not the view expressed subsequently by Lord Mustill in Channel Tunnel v. Balfour Beatty (supra), and the keenness on the part of the plaintiffs to pursue their indisputable claims through the courts under Order 14 speaks for itself. Furthermore the power to grant interim awards is no new phenomenon, having existed since 1934.

Secondly, Saville J. laid stress on the importance of the fact that by their arbitration clause the parties have made an agreement that their dispute should be resolved by a private tribunal. This is manifestly a very important consideration, and was echoed by Lord Mustill in the same passage from his speech in Channel Tunnel v. Balfour Beatty , but that did not prevent him from endorsing the value of the Order 14 procedure, while saying that it should be limited to cases where the defendant "is not really raising a dispute at all" (emphasis added to a word which I interpret as equivalent to "seriously" or "genuinely").

Saville J.'s third answer was that the court should not be doing what the parties have agreed should be done by the private tribunal in deciding whether or not the claim is disputable. That is another way of saying that there should not be parallel jurisdictions, which, as I have already noted, has been hitherto regarded as permissible and indeed valuable.

I do not therefore, with all respect, find those three answers entirely convincing.

Later, Saville J. developed his theme that the word "dispute" in the 1975 Act has a different meaning from that word when used in ordinary arbitration clauses. For the reasons I have given, I do not think that is consistent with Nova (Jersey); furthermore, and in any event, it would surely be most extraordinary that the legislature in 1924 and 1975, when enacting provisions specifically directed to arbitration agreements, should have attached some special (and as Mr. Waller would have it) artificial meaning to the word, different from that used in the agreements themselves which the legislation was regulating.

I now turn to the 1996 Act itself, leaving aside for the moment paragraph 55 of the DAC report.

Mr. Hamblen's submission was, first, that the "matter which under the agreement is to be referred to arbitration" must signify the dispute referred to in the arbitration agreement itself, and that nothing in section 9 undermines the meaning of that word as upheld by the House of Lords in Nova (Jersey) . Secondly, while recognizing the significance of the removal of the 1975 qualification, he submitted that, if Parliament had intended to make such a fundamental change in the law by removing the well established and much hallowed Order 14 jurisdiction, they would surely have done so much more explicitly, making it clear what was being done.

He recognized that on his construction the arbitrators would have no jurisdiction over indisputable claims in theory, but submitted that this consideration is of no more practical significance than it has been hitherto, for the reasons explained earlier in this judgment.

Mr. Waller on the other hand submitted that the removal of those words is critical, and can only have been directed to the abolition of the Order 14 jurisdiction.

He supported that proposition on a number of individual grounds each of which I propose to consider:-
(i) The language , by reference to the ordinary meaning of the word "dispute" as reflected in Hayter v. Nelson . For the reasons I have already given I do not find Hayter v. Nelson 's analysis on that point convincing, and I consider Mr. Hamblen is right in submitting that prima facie the word must be construed in the Section 9 context as bearing the meaning authoritatively established in Nova (Jersey) .
(ii) The contractual context , for which purpose he relies on a clause in the charterparty in this particular case, which refers to the charterers being under an obligation to settle the "undisputed amount" of demurrage within 60 days, which he contrasts with an "indisputable" amount. I do not find this distinction carries him very far in the solution of the question of principle.
(iii) Commercial sense and practicality . In his oral argument Mr. Waller placed this at the forefront of his case, submitting that his construction was workable in practice, whereas Mr. Hamblen's was unworkable seeing that the plaintiff would have to decide at the outset whether the court or the arbitrators had jurisdiction, thus confronting him with a perilous dilemma, particularly where there is a time-bar for arbitration. I fully recognize the force of this point, but for the reasons I have given earlier in this judgment, I consider it to be a theoretical rather than a practical objection, and one which has not caused difficulty throughout the long period when it has been universally accepted that there existed a parallel jurisdiction, which has been regularly invoked.

(iv) Authority. I have already dealt with the authorities on which Mr. Waller relied.
(v) Construction of the 1975 Act itself . Mr. Waller submitted that a distinction was to be drawn between what he described as the "precondition" in section 1(1) (viz "that legal proceedings had been issued in respect of any matter agreed to be referred"): and what he described as the "exception or proviso", namely the 1975 qualification. Thus, he said, the court would only have come to consider the proviso after it had already decided that the defendant had a prima facie right to a stay; now that the inserted words had been omitted, the right to a stay was absolute.

This was an impressive argument, but in my judgment it founders once it is accepted, as I have held, that in section 1 of the 1975 Act the matter agreed to be referred (i.e. the dispute) has the same meaning as "any dispute" in the qualification, from which of course it follows that under the 1975 Act the precondition would not have been satisfied where the claim was indisputable.
(vi) Policy.Here Mr. Waller relied on paragraph 55 of the DAC report and made the following submission which I quote verbatim from his skeleton argument.
"(a) By the time the Departmental Advisory Committee ("DAC") were drafting Section 9 of the 1996 Act the source of the court's jurisdiction to grant summary judgment had been identified in Hayter v. Nelson as the words ´ *there is not in fact any dispute between the parties with regard to the matter agreed to be referred* ' in section 1(1) of the Arbitration Act 1975 ("the 1975 Act"). The DAC stated in terms that these words were not re-enacted in the 1996 Act for the reasons given in Hayter v. Nelson . The very case therefore which identified the closing words of section 1(1) of the 1975 Act as the source of the court's jurisdiction was at the forefront of the draftsmen's minds when they enacted Section 9 of the 1996 Act. It is respectfully submitted that the deliberate omission of these words was therefore clearly designed to remove the court's jurisdiction.

(b) Moreover, ´the reasons given in Hayter v. Nelson ' can only refer to the general observations made by Saville J. as to the efficacy of the arbitral process and the importance of holding the parties to their agreement to arbitrate. Again this reference is only consistent with an intention to remove the court's jurisdiction as opposed t o that of the arbitrators. It is respectfully submitted that to redefine the meaning of the word "dispute" in the manner suggested by the plaintiffs would be to circumvent the clear intention of Parliament."

This again was a powerful argument, and one which causes me considerable anxiety, since undoubtedly one seeks an explanation for the omission of the crucial phrase.

Paragraph 55 states that "these words are ... confusing and unnecessary, for the reasons given in Hayter v. Nelson".

No doubt the word "confusing" echoed the final paragraph of the second passage quoted above from Hayter v. Nelson , where Saville J. stated that he found the words "very difficult to understand"; this comment however seems to relate to their formulation rather than their substance.

How then do we interpret the statement that these words are "unnecessary"? Mr. Waller, of course, would construe that as meaning not only that the words themselves are unnecessary, but also that the parallel procedure itself under Order 14 is unnecessary. This seems to me to put a gloss on the actual, and no doubt carefully considered, phraseology. After anxious consideration, I do not think that paragraph 55 taken as a whole is anything like forthright enough to bear the weight of the radical interpretation Mr. Waller seeks to place upon it. In my judgment, if the DAC had intended to carry through such a revolutionary alteration in the law, with such serious consequences on very well established procedures in arbitration cases, they would have spelt it out explicitly, with a full explanation and a detailed justification of the change, so that Parliament was fully apprised of its significance.

This they have not done, and I am therefore not persuaded, despite Mr. Waller's exceptionally able arguments, that Parliament, in enacting section 9 without the 1975 qualification, effected,(sub silentio) an abolition of the existing Order 14 practice.

For all these reasons I would allow this appeal.

LORD JUSTICE HENRY: In this appeal ship-owners wish to apply under Order 14 for summary judgment against the charterers in respect of their claim for liquidated damages for demurrage. There was an arbitration agreement between the parties, and the charterers successfully applied to Clarke J to stay those proceedings, on the basis, in the words of Section 9(1) of the Arbitration Act, 1996, that they, the charterers, are "a party to an arbitration agreement" and that these "legal proceedings are brought in respect of a matter which under the agreement is to be referred to arbitration".

The " matter" which under the arbitration agreement is to be referred to arbitration is the ship-owner's demurrage claim, as it is (or so the charterers contend) " a dispute arising from or in connection with the charterparty " (see additional Clause 9 of the charterparty).

The charterers having asked for a stay, it is then for the plaintiff shipowners to demonstrate that no such dispute arises in this case. The charterers say that it is clear that there is such a dispute. They were not admitting liability and (at the of the hearing before Clarke J) their solicitors had written a letter setting out " some

examples " of the areas in dispute, while making it clear that those areas " do not constitute a comprehensive list of our client's counterclaims or exceptions/deductions of delay time ". The shipowners calculated that those points only raised a defence to " 6.51 of the 33.38 days demurrage ", leaving demurrage totalled at US dollars 416,175 not specifically challenged. Since that hearing, we are told that the charterers have now delivered a " comprehensive defence " which on their calculation challenges all but approximately US dollars 180,000 of the demurrage claim, and further denies that that residual sum is due and payable because of various cross claims made in that pleading. But I ignore those factual matters for present purposes. First, the judge did not find it necessary to rule on the strength of the factual material before him. Second, as to the subsequent events, no leave has been given to introduce such evidence before us. Accordingly, I proceed on the basis that what we have to consider is whether there is a dispute within the meaning of the arbitration clause when the charterers refuse to admit and refuse to pay the amount claimed.

If I had to decide this matter untroubled by previous authority construing both the statutory framework governing international arbitrations prior to and since the 1996 Arbitration Act and/or the construction of individual arbitration agreements, I would unhesitatingly conclude that there was a dispute as to the entirety of the sum claimed, and that the proceedings should be stayed and referred to arbitration.

My reasoning would be that, by their arbitration clause referring all disputes to arbitration, the parties were, without qualification, agreeing on a form of dispute resolution alternative to that provided by the Courts. And, as arbitration procedures make their own provision for the possibility of obtaining prompt interim awards for the minimum sum plainly due, I would not be immediately impressed by a submission that I should construe "dispute" with so artificial a narrowness as to be restricted to such disputes (as to liability or quantum) as are found by the Court to merit the grant of leave to defend - after a contested hearing for summary judgment under Order 14, which often takes hours and sometimes takes days (for an example of that narrow interpretation see *Ellis Mechanical Services Ltd -v- Wates Construction Ltd* , decided in 1976 and reported in [1978] 1 Lloyds Law Reports 33). To put it another way, when the parties have chosen arbitration for their dispute resolution, I would not (if unconstrained by statute or authority) interpret their choice as being restricted to referring only those disputes that cannot be resolved by the courts' summary judgment procedures. I would have been persuaded by the reasoning first of Clarke J in this case, and second to be found in Mustill & Boyd, Commercial Arbitration 2nd Edition at 123. Clarke J at 1271G of his judgment (reported at [1997] 1 WLR at 1268 said this:
"Mr Waller submitted that the purpose of the arbitration clause was to submit to arbitration all disputes arising from or in connection with the charterparty. He submitted that those will include any claim by one party to which the other party refuses to admit or does not pay. Thus, for example, the owners might make a claim for freight which the charterers refuse to pay only because they wish to make

a cross-claim for damages to cargo but to which they had no defence. The parties contemplated that the arbitrators would have jurisdiction to make an award for freight. The parties cannot, he submitted, have intended that the arbitrators would have no jurisdiction to make an award for freight in those circumstances. Indeed arbitrators have been making awards for freight in such circumstances over many years.

Unassisted by authority I would accept Mr Waller's submissions. It appears to me that there is indeed here a dispute relating to demurrage, just as there would be a dispute relating to freight in the above example. It seems to me to make no commercial sense to hold that the parties intended that the arbitrators should have jurisdiction over those parts of either party's claim in respect of which the other party has an arguable defence but not otherwise. It makes more sense to hold that the parties intended that the arbitrator should have jurisdiction over all the claims which either party refused to pay. Thus it was contemplated that all such claims should be determined by private arbitration before commercial men and not by the courts.

Mr Hamblen recognised that the logic of his argument is that the arbitrators have no jurisdiction to make an award in respect of an indisputable part of the claim. He also accepted that they have often made such awards in similar circumstances in the past, but he said that the problem does not arise and will not arise in practice because parties do not take the point that the arbitrators have no jurisdiction on the ground that their defence is hopeless. In my judgment, that is or would not be a satisfactory state of affairs. It seems to me to be almost inconceivable that the parties to a contract of this kind intended to confer the kind of limited jurisdiction upon the arbitrators which Mr Hamblen's submissions would involve, if they were right."

Next there is the passage from Mustill & Boyd. Though I have given the reference to the 2nd Edition, forensic archaeologists may be interested to note that the passage to be quoted was in the same form in the 1st Edition, which stated the law as at 1st July 1982. Dealing with non-domestic arbitration agreements, the editors say:
"Whatever might be the position as regards a defence with is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled on by the arbitrator, not the Court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the Court pre-empts the sole jurisdiction of the arbitrator can

therefore by justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed. The correctness of this approach is not self-evident. Moreover, in all but the simplest of cases the Court will be required not merely to inspect the defence, but to enquire into it; a process which may, in matters of any complexity, take hours or even days. When carrying out the enquiry, the Courts acts upon affidavits rather than oral evidence. The defendant might well object that this kind of trial in miniature by the Court is not something for which he bargained, when making an express contract to leave his rights to the sole adjudication of an arbitrator."

But whether that course is open to me depends on the statutory framework and the case law arising from it. As the law stood in 1982 and 1989, the editors continued:
"Whatever the logical merits of this view, the law is quite clearly established to the contrary."

The footnote supporting that proposition for both the 1st and 2nd Editions of the work read:
"This proposition must now be treated as firmly and finally recognised by *Nova (Jersey) Knit Limited -v- Kammgarn Spinnerei GmbH*[1977] 1 Lloyds Report 463, [1977] 1 WLR 913 and the Gunstein case, supra".

The footnote to the 1st Edition continued:
"It has, we believe, represented the practice of the Court for decades."

At that time what I will be referring to as the 1930 amendment had been law for 50 years, and it only ceased to be part of our law with the Arbitration Act, 1996. Clarke J found that both that amendment and its excision in the Arbitration Act, 1996 radically altered the legal position. I agree. This appeal in my judgment turns on the significance of the repeal by the Arbitration Act, 1996 of one of the grounds for refusing a stay of legal proceedings where there was an arbitration agreement, namely where the Court was satisfied that
"there was not in fact any dispute between the parties with regard to the matters agreed to be referred" (see Section 1 of the Arbitration Act 1975).

This ground for imposing a stay was inserted at the end of Section 1 of the Arbitration Clauses (Protocol) Act, 1924 (which subsequently became Section 1 of the 1975 Act) by Section 8 of the Arbitration (Foreign Awards) Act, 1930. The ground had not appeared in either of the foundation conventions, the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, or in the League of Nations Protocol of 24th September, 1923. I will refer to that amendment to the Act as the 1930 amendment.

Lord Justice Hirst has quoted what Mr Justice Saville told us in *Hayter -v- Nelson* as to the genesis of this addition to the Convention grounds in the

MacKinnon Committee Report (Cmnd 2817), and I do not need to repeat that citation. I understand the Report on the working of the Act to complain that the courts were having to accept that there was a dispute on a " matter" referred to arbitration and so (where the arbitration agreement was not " null and void, inoperative or incapable of being performed ") " the English Court must stay the action ", even in cases where there was no " real dispute ". The complaint therefore was that the definition of "dispute" used by the English courts had been too wide, and should be restricted to cases where the court is satisfied that there was " a real dispute to be determined by the arbitration ". The 1930 amendment did not attempt to restrict the parties' power to give the widest possible meaning to "dispute" in their arbitration agreement, but provided that the Court shall not stay legal proceedings (however widely "dispute" has been defined) if satisfied that " there is not in fact any dispute between the parties ". So after the 1930 amendment, logically it would only come into play when there was a "dispute" between the parties within the meaning of the arbitration clause, but the plaintiff, seeking to resist the stay, could satisfy the court that there was not in fact any dispute (ie nothing disputable) between the parties. This view is supported by the conclusions of Mr Justice Saville in *Hayter -v- Nelson* [1990] 2 Lloyds Law Reports that:

i) in that case there was a dispute between the parties as to the rights and obligations arising out of the agreement containing the arbitration clause (ibid at 269, first column);
ii) in the 1930 amendment requiring the Court to refuse a stay where satisfied that " there is not in fact any dispute between the parties with regard to the matter agreed to be referred ", the word "dispute" had to be given a different (ie more restricted) meaning from the word used in ordinary arbitration clauses: it must be read as meaning " there is not in fact anything disputable ".

Mr Hamblen QC for the appellants challenged both of those conclusions. His case was that neither the introduction of the MacKinnon-inspired provision changed the law in 1930 nor did the 1996 excision of those words alter things: the words were and always had been superfluous, and what mattered was the meaning of the "disputes" in context of the arbitration agreement, as the speech of Lord Wilberforce in *Nova (Jersey) Knit Limited -v- Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 showed. He contended that the ratio of that decision was that the denial or rejection of an indisputable claim could not create a dispute under the arbitration agreement.

I would extremely reluctant to hold that neither the 1930 amendment nor its repeal in 1996 affected the law, as it had always been superfluous. First, its genesis contradicts that view. Second, the presumption is that Parliament does nothing in vain. Third, where Parliament means to clarify without altering the meaning it has intended to give to a provision, a formula such as the introductory words " for the avoidance of doubt " is used. There is nothing here to indicate that a mere clarification

was intended. Fourth, and most significantly, the scheme of the amendment was such that the plaintiff in the action, resisting the stay, would give pride of place to the formulation " no dispute in fact " as it appeared in the statute and he would be likely to urge a narrow construction of those words on the basis that the mischief the statute aimed at was the alleged opportunity for delay afforded by the arbitration process, and so seek a purposive and restrictive interpretation of what constituted a " dispute in fact ". Such considerations would be impermissible if the court were construing the bare word "dispute" in an arbitration agreement in an Act based on an international Convention. I am in agreement with Lord Justice Swinton Thomas that there is a real and significant difference between construing the unqualified words "dispute" in an arbitration agreement, and the qualification imposed by " in fact no dispute " contained in the 1930 amendment. Mr Justice Clarke was in my view right to describe the fact that the 1930 amendment was not re-enacted in the 1996 Act as being
"a key difference because it radically alters the position as it was before and, save in very limited circumstances, leaves all disputes within the arbitration clause to be determined by the agreed tribunal." (1274E)

and to say:
"The removal of the words must have been intended to have some effect because they provided the rationale of that decision and were the basis upon which the court had jurisdiction under RSC Order 14."

Accordingly, I reject Mr Hamblen's submission that both the 1930 amendment and its repeal counted for nothing. By that amendment Parliament were introducing a significant restriction in the power of the court to grant a stay. I agree with Mr Waller's submission that the 1930 amendment was the source of the Court's jurisdiction to grant summary judgment in cases where there was a dispute under the arbitration agreement, but inquiry by the Court under the 1930 amendment into whether or not there was anything disputable had shown that there was not. I note Lord Mustill's observation in *Channel Group -v- Balfour Beatty Limited* (supra at 356) that such a parallel jurisdiction is " unique so far as I am aware to the law of England " - might this be because other Convention countries have not altered the Convention by a like amendment to the Convention?

I have given my reasons for stating why I consider the 1930 amendment to have been legally significant. I also consider its repeal to have equal legal significance.

The Arbitration Act, 1996 is:
"an Act to restate an improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes."

Part 1 deals with arbitration pursuant to an arbitration agreement and Section 1 provides:
"1 The provisions of this Part are founded on the following principles, and shall be construed accordingly -

a) the object of arbitration is to gain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
c) in matters governed by this Part, the court should not intervene except as provided by this Part."

Section 9 deals with the stay of legal proceedings, the relevant parts have already been set out in these judgments. I refer to the first paragraph of this judgment to show how the charterers qualify to apply for a stay of legal proceedings under Section 9(1). Once the Court is satisfied that they are so qualified, ie that there is such a dispute, then under Section 9(4):
"The Court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

This arbitration agreement is none of those things.

I take Section 1 in general and Section 1b) in particular as emphasising the importance of the fact that the parties have chosen an alternative form of dispute resolution, namely arbitration, and should not be limited in that preference unless " such safeguards are necessary in the public interest ". Though similar provisions were not in force in 1930, had they been in force the 1930 amendment to the Act would have been so justified on those grounds if Parliament regarded the Order 14 safeguards against a meritless defendant playing for time as being necessary in the public interest. The parallel Order 14 jurisdiction has, as the judicial comments show, regularly been justified on those grounds up to and including Lord Mustill's comments in the Channel Group case in 1993. But in that speech Lord Mustill balanced those comments by endorsing
"the powerful warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunal, and the international policy exemplified in the English legislation that this consent should be honoured by the courts, given by Parker LJ in *Home & Overseas Insurance Company Limited -v- Mentor Insurance Company UK Limited* [1990] 1 WLR 153, 158-159 and Saville J in *Hayter -v- Nelson* [1990] 2 Lloyds Reports 265."

When I consider the excision of the 1930 amendment from Section 9(4) of the 1996 Act against the background of the general principles set out in Section 1 of that Act, and Lord Mustill's powerful endorsement quoted above, I conclude that the intention of the 1996 Act was to exclude the Order 14 jurisdiction based on an

investigation of what was in fact disputable as contained in the 1930 amendment. Equally, I take the excision of the 1930 amendment as showing that Parliament does not consider that the safeguards against arbitral delay that Order 14 provides are today necessary in the public interest. As Mr Justice Saville said in *Hayter -v- Nelson*(ibid at 268, column 2):
"... the assumption is made that arbitrations are necessarily slow processes, but whatever the position in the past, I cannot accept that as a general or universal truth today. As Mr Justice Robert Goff (as he then was) pointed out in the *Kostas Melos* [1981] 1 Lloyds Law Reports 18, arbitrators have ways and means (in particular by making interim awards) of proceeding as quickly as the courts - indeed in that case quicker than any court could have acted."

I would not have required the assistance of Parliamentary material to have reached that conclusion as to the fundamental importance of the 1930 amendment and its excision in 1996. But we have been shown the report on Clause 9 (now Section 9) of the Department Advisory Committee on Arbitration Law chaired by Lord Justice Saville. Under the heading "Clause 9: Stay of Legal Proceedings" we find:
"50 We have proposed a number of changes to the present statutory position (Section 4(1) of the 1950 Act and Section 1 of the 1975 Act) having in mind Article 8 of the model law, our treaty obligations and other considerations.

...

54 In this Clause we have made a stay mandatory unless the Court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. This is the language of the model law and of course of the New York Convention on the recognition and enforcement of foreign arbitral awards, presently to be found in the Arbitration Act, 1975.

55 The Arbitration Act, 1975 contained a further ground for refusing a stay, namely where the Court was satisfied that ´there was not in fact any dispute between the parties with regard to the matter to be referred'. These words do not appear in the New York Convention and in our view are confusing and unnecessary for the reasons given in *Hayter -v- Nelson* [1990] 2 Lloyds Reports 265."

First, I take comfort from the clear statement that the repealed 1930 amendment had contained " a <u>further</u> ground for refusing a stay ". That supports the conclusion I have already reached, namely that that ground was additional to the Section 9(1) ground for refusing a stay, namely that the legal proceedings have <u>not</u> been brought in respect of " a matter which under the agreement is to be referred to arbitration " (in this case a " dispute arising from or in connection with the charterparty "). That sentence is clearly inconsistent with Mr Hamblen's submission that the Section 30 amendment was superfluous.

Second, like Lord Justice Hirst I can see that the epithet " confusing" can be justified by Mr Justice Saville's finding that
"the words inserted into the 1924 Act are, as a matter of pure construction, very difficult to understand."

But I confess initially to have found the concept that the 1930 amendment was " unnecessary" to be Delphic in a way befitting only that Oracle. I had been unable to see where in *Hayter -v- Nelson* Saville J found the 1930 amendment to be unnecessary. Indeed, as is shown by the opening words of the paragraph already relied on, he found that their purpose was to introduce the " further ground for refusing a stay ", namely to treat
"the word ´dispute' in this context as indeed meaning something different from the word used in ordinary arbitration clauses, so that reading the phrase as a whole the words ´there is not in fact any dispute' means ´there is not in fact anything disputable'". (see *Hayter*supra 270 column 1)

Those words were necessary to achieve that purpose.

But ultimately I am persuaded by the meaning Clarke J attached to " unnecessary":
"It seems to me that, when the Departmental Advisory Committee Report said the words were unnecessary, it must have meant there was no need for the court to have jurisdiction since as Saville J said in the third of the three general points referred to above, courts should not be doing what the parties have agreed should be done by the chosen tribunal and, as his first point made clear, arbitrators have ample powers to proceed without delay as for example in making interim awards."

But even if Clarke J were wrong in that, it would still not in my judgment, for the reasons given above, support Mr Hamblen's contention that both the 1930 amendment and its excision in 1996 were because it was "superfluous".

With the excision of the 1930 amendment went the authority of the cases that had founded themselves on it. The most important of these is, of course, *Nova (Jersey) Knit Limited -v- Kammgarn Spinnerei GmbH* [1977] 1 WLR 713. The passage at 718B makes it perfectly clear that their Lordships were founding their decision on the 1930 amendment:
"It remains however open to the appellants to show, the onus being upon them, that ´there is not in fact any dispute between the parties with regard to the matter agreed to be referred.' If they succeed in this, the stay will be refused."

In *Hayter*, Mr Justice Saville having pointed to those words said this:
"The reasoning of the House of Lords was in the context of considering the appellants' second argument, that there was not in fact any dispute within the meaning of Section 1 of the 1975 Act - see for example the speech of Lord

Wilberforce at p 466 column 1, p 718B of the reports. Thus although the speeches themselves do not seek to distinguish between the meaning of the word ´dispute' in that Act, and its meaning in what in the light of the first holding was a necessarily hypothetical (but unformulated) arbitration clause I read them as referring to the former rather than the latter."

Thus the speeches are based on the meaning of the word "dispute" in the 1930 amendment rather than the meaning of that word in the arbitration clause.

Similar considerations apply to the decision in the case of *Ellis Mechanical Services Limited -v- Wates Construction Limited* [1978] 1 Lloyds Law Reports 33. That case dealt with judgment under Order 14 for what was " indisputably due " as Mr Justice Saville said after his famous example of the argument over who won the University Boat Race:
"Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view entail that there was therefore never any dispute between them."

And the purpose of the 1930 amendment was the source of the restricted meaning of "dispute": " There is not in fact anything disputable ". Therefore, in the *Ellis* case, the Court were in fact considering the words of the 1930 amendment. This can be further demonstrated by the consideration of that authority by the Court in the *Fuohsan Maru* [1978] 1 Lloyds Law Reports 24, which makes it clear that the conclusion that the sum found to be " indisputably due " had been arrived at by the Order 14 decision of the Court as being a sum as to which " there is not in fact any dispute ". So that case is comparable with the *Nova* case in that the Court there too reached its result by construction of the 1930 amendment.

What the words " there is not in fact any dispute " meant in the 1930 amendment is now history, and no longer a relevant question to be asked. In my judgment Mr Justice Clarke was right to follow the line of authority from the *M Eregli* [1981] 3 All England 344 to*Ellerine Bros (Pty) Limited -v- Klinger* [1982] 1 WLR 1375 which focused on the meaning of dispute in the arbitration agreement. As he put it at page 1277B of the report of this case at first instance:
"In *Ellerine Bros (Pty) Ltd -v- Klinger* [1982] 1 WLR 1375 the Court of Appeal was also considering a question of construction of an arbitration agreement, in which it was agreed that all disputes or difference whatsoever should be referred to arbitration. The plaintiffs claimed an account. The defendants had simply done nothing. The Court of Appeal expressly followed the decision in the *M Eregli*[1981] 3 All England 344, held that silence did not mean consent and that, as Kerr J said, until the defendant admits that a sum is due and payable there is a dispute within the meaning of the arbitration clause. Even in such a case I can see an argument for saying that a claimant would be entitled to an award if the respondent then refused to pay. But, however that may be, the *Ellerine* case is

authority for the proposition that where a party simply does nothing there is a dispute which the claimant is both entitled and bound to refer to arbitration. It follows that there is binding Court of Appeal authority in favour of the defendant's case on construction of the clause. It is true that the *Nova (Jersey) Knit* case [1977] 1 WLR 713 was not directly referred to the Court of Appeal in that case, but it is expressly referred to by Kerr J in the *M Eregli* so that it cannot possibly be held that it was overlooked or that the *Ellerine Bros* case was decided per incuriam. Both Kerr and Saville JJ regarded the second point in the *Nova (Jersey) Knit* case as depending on the meaning of the final words of Section 1(1) of the Act of 1975 and not upon the true construction of the contract. It may well be that the Court of Appeal did the same. In these circumstances the correct approach for a judge at first instance is to follow the reasoning of the Court of Appeal, so far as construction of the contract is concerned."

I agree with that, and that decision is equally binding on this Court. It follows that in my judgment Mr Justice Clarke was right, and I would dismiss this appeal. By one of those quirks of the forensic process, Clarke J's judgment was not analysed in any depth at the hearing of this appeal. In studying it for the purpose of this judgment, I have come increasingly to admire it and to welcome its assistance in understanding a legal point deceptively simply to state, but one which I have found elusive.

LORD JUSTICE SWINTON THOMAS: In answering the question whether there is a relevant dispute to be referred to arbitration together with the grant of a stay of the legal proceedings which have been commenced, on the facts of this case, it is helpful to refer very briefly to the history of the relationship between Arbitration proceedings and Court proceedings in English law.

Section 1(1) of the Arbitration Clauses Protocol Act, 1924, provided:

“Notwithstanding anything in the Arbitration Act, 1889, if any party to a submission made in pursuance of an agreement to which the said protocol applies, or any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, shall make an order staying the proceedings.”

The MacKinnon Committee Report of 1927 at paragraph 43 reads:

“Our attention has been called to a point that arises under the Arbitration Clauses (Protocol) Act, 1924. Section 1 of that Act in relation to a submission to which the

Protocol applies deprives the English Court of any discretion as regards to granting the stay of an action. It is said that cases have already not infrequently arisen where (e.g.) a writ has been issued claiming the price of good sold and delivered. The Defendant has applied to stay the arbitration on the ground that the contract of sale contains an arbitration clause, but without being able, or condescending, to indicate any reason why he should not pay for the goods, or the existence of any dispute to be decided by arbitration. It seems absurd that in such a case the English Court must stay the action, and we suggest that the Act might at any rate provide that the Court should stay the action if satisfied that there is a real dispute to be determined by arbitration."

The Report uses the words "a real dispute".

Section 1(1) of the Arbitration Clauses Protocol Act, 1924, was then amended by Section 8 of the Arbitration (Foreign Awards) Act, 1930, to incorporate the words "there is not in fact any dispute between the parties with the respect to the matters agreed to be referred." Those words were carried through into the 1950 Act and the 1975 Act and are central to the issue that arises in this case.

Section 1(1) of the Arbitration Act, 1975, provides:

"If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings, or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperable or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

Clause 9 of the charter party in the present case is in common form:

"General average and arbitration to be London, English law to apply. For arbitration the following clause to apply: any dispute arising from or in connection with this Charter Party shall be referred to arbitration in London. The owners and charterers shall each appoint an arbitrator experienced in the shipping business. English law governs this Charter Party and all aspects of the arbitration."

The Plaintiffs issued a writ claiming demurrage. The Defendants sought an order staying the action under Section 9 of the Arbitration Act, 1996 to which I will refer later. The Plaintiff's case was that the Defendants had no arguable defence to the claim. The Defendant had failed to pay the amount of the demurrage claimed and

claimed that demurrage. The Defendants have refused to pay and do not admit that they are liable. Accordingly the issue arose as to whether there was "a dispute between the parties", entitling the Defendants to a stay under Section 9.

The words used in Clause 9 of the charter party in relation to a referral to arbitration were "any dispute". The words in Section 1(1) of the 1975 Act are: "There is not in fact any dispute between the parties". To the layman it might appear that there is little if any difference between those words. However the legislature saw fit to draft Section 1 using the phrase "in fact no dispute". The legislature did not use the words "there is no dispute" and consequently a meaning must be given to those words and the Courts have done so, although there is no general agreement as to what they mean. The distinction between the two phrases "any dispute" and "not in fact any dispute" is of central importance in understanding what underlies the cases that preceded the 1996 Act. To a large extent as a matter of policy to ensure that English law provided a speedy remedy by way of Order 14 proceedings for claimants who made out a plain case for recovery, and to prevent debtors who had no defence to the claim using arbitration as a delaying tactic, the words "in fact no dispute" as opposed to "no dispute" have from time to time been interpreted by the Courts as meaning "no genuine dispute", "no real dispute", "a case to which there is no defence" "there is no arguable defence", and later a case to which there is no answer as a matter of law or as a matter of fact, that is to say that the sum claimed "is indisputably due". The approach of the Courts has on occasions been similar to that adopted by them in Order 14 Proceedings in cases where there is no arbitration clause. In *Channel Group v. Balfour Beaty* [1993] A.C. 334 Lord Mustill said at page 356:

"In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the Court under R.S.C. Ord. 14 to give summary judgment in favour of the Plaintiff where the Defendant has no arguable defence."
We were told in the course of this case that parties are much more ready to seek and Arbitrators more ready to grant Interim Awards than they were in the past with the result, so it is said, that any policy considerations no longer exist or, if they do, they are much less pressing than they were in the past.

The question that arises on this appeal is as to whether, in a case such as the present, there can be said to be a dispute between the parties when the alleged debtor has refused to pay the amount claimed and denied that there is any sum due and owing without condescending to detail by way of defence.

The case for the Appellants, put very shortly, is that before there can be a dispute capable of being referred to the Arbitrator there must be an arguable case for disputing the claim, and if the defence put forward is unsustainable then there is no dispute or put another way, no "real" or "genuine" dispute. It is said that the

Plaintiff's claim is indisputable. It is of importance, to my mind, that the clause in the agreement makes no reference to a real or genuine dispute, or any reference to whether or not the claim is indisputable, but refers only to "any dispute". The Respondents submit that if the Defendants to a claim refuse to pay then there is in any ordinary language a dispute and that word includes any claim which is not admitted. They stress, rightly in my view, that the parties themselves have agreed that matters in issue between should be referred to arbitration as opposed to being adjudicated upon by the Courts. Further they rely on the provisions of Section 9 of the Arbitration Act, 1996.

The words "dispute" and, "in fact any dispute" have been considered by the courts in a number of cases.

In *Ellerine Bros. V. Klinger* [1982] 1 WLR 1375 the relevant clause in the contract was in these terms:

"All disputes or differences whatsoever which shall at any time hereafter arise between the parties hereto or any of them..... shall be referred to a single Arbitrator."

In dealing with the facts of the case Templeman, L.J. said at page 1378:

"So far as the evidence goes, all was silent for nearly two years and then the plaintiff woke up and they wrote to Mr. Klinger on September 4, 1980, saying: 'We do not appear to have received any statements of account or payment in respect of 'Gold'..... could we have a report from you please.

The silence continued and they wrote a reminder on December 11, 1980. There was then an oral request by one of the representatives of the Plaintiffs who happened to see Mr. Klinger. Another reminder was sent on January 8, 1981, drawing attention to the clause in the agreement which cast on him the duties of keeping account and making reports and asking for an urgent reply. The Plaintiffs received back on January 19, 1981, a perfectly polite but perfectly useless letter from Mr. Klinger's secretary saying that unfortunately Mr. Klinger was in the United States and would not be returning to London until the middle of the month and that the Plaintiffs might rest assured that their letters would be brought to his attention as soon as possible. Nothing of course happened. A reminder was sent on February 11, 1981, and a further apology was received from the Secretary on March 2, 1981.

Finally, the Plaintiffs lost patience and March 24, 1981, their Solicitors wrote to Mr. Klinger's Solicitors giving an ultimatum saying:

Unless we receive a full and proper account together with payment of all sums due, within the course of the next 7 days, proceedings will be instituted without further notice or delay.

The reply to that, of course, was that the Defendants Solicitor would take instructions. On April 3 the Plaintiff's issued a writ, served by post on April 7. That writ, after reciting the agreement, alleged Mr. Klinger had duly distributed and exploited the form, although the Plaintiff's could not give particulars until after discovery.

Subsequently the Defendant, Mr. Klinger, took out a summons asking for the proceedings be stayed pending arbitration. The Judge stayed the proceedings and the Plaintiff's appealed."

At page 1380 Templeman, L.J. said:

"Section 1(1) of the Arbitration Act, 1975, only applies, as indeed it expressly says it only applies, if an action is brought claiming in respect of any matter agreed to be referred to arbitration. What is said is that all the Plaintiffs were doing was seeking an order to which they were entitled under the terms of the agreement - they were entitled to an account, there can be no dispute about that- and therefore the writ that they issued did not constitute legal proceedings ' in respect of any matter agreed to be referred' at the date when the writ was issued and the last phrase of the sub-Section, which enables the Court to continue the action if 'there is not in fact any dispute between the parties with regard to the matter agreed to be referred' does not avail the Defendant, as it must again be supported by 'a matter agreed to be referred' and which was the proper subject of arbitration on the date of the writ. If a dispute arose between the date of the writ and the date of the hearing by the Court, nevertheless there was no relevant dispute, because the relevant time is the date when the writ was issued.

That submission by the light of nature and without reference to authority, would produce an awkward result. It would mean that if, in the present case, for example there was no dispute and all the Plaintiffs were asking for was for the Defendant to do what he is admittedly bound to do, mainly to furnish an account, then notwithstanding that there were hidden behind the application for an account all kinds of embryonic questions which were bound to arise and which were the proper subject of arbitration, then the arbitration clause would fail to have effect and the Court would be entitled to continue to hear the action, notwithstanding that the real grievances between the parties fell fairly and squarely within the mischief of the arbitration clause. This would put a premium on Plaintiffs issuing proceedings without waiting to hear from the Defendant or without drawing reference to matters which were almost bound to be in dispute. Again by the light of nature, it seems to me that Section 1(1) is not limited either in content or subject

matter; that if letters are written by a Plaintiff making some request or some demand and the Defendant does not reply, then there is a dispute. It is not necessary for a dispute to arise, that the Defendant should write back and say: "I don't agree". If, on analysis, what the Plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the Applicant is entitled to insist on arbitration instead of litigation."

That statement by Templeman, L.J., with whom Fox, L.J. agreed, could not be clearer and amply covers the facts of the present case. It is on all fours with the present case and is binding upon us.

Templeman, L.J. then cited with approval a decision of Kerr, J., (as he then was) in *Tradax International S.A. v. Cerrahogullari T.A.S. the M. Eregli* [1981] 3 All E.R. 344, to which I will refer later.

Mr. Hamblen, Q.C., submits that the decision in *Ellerine* was reached per incuriam because the Court did not consider the case of *Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei G.m.b.H.* [1977] 1 W.L.R. 713. In my view that submission is unsustainable. *Nova (Jersey)*was considered at length by Kerr, J. in *Tradax* and in the light of the quotations from *Tradax* in *Ellerine* it is inconceivable that *Nova (Jersey)* was overlooked by Templeman, L.J. and Fox, L.J. in *Ellerine*. The answer to the submission is that, rightly in my view, the Court considered the *Nova (Jersey)* case to be irrelevant to the issue that they were deciding.

In *Nova (Jersey)*, by virtue of a partnership agreement made in 1970 and an assignment made in 1973 an English company and a German company became partners; the former was to supply the latter with certain machinery to be used in Germany in partnership operations. It was agreed that all disputes arising out of the partnership relationship should be decided by an Arbitration Tribunal in Germany provided for in a separate agreement. In 1972 the English company sold the machinery to the German company receiving in return 24 Bills of Exchange payable on different dates between March 1973 and December 1975. After 6 of them had been honoured the German company refused further payments alleging that Bills had been obtained by fraud. The partnership and the German company commenced arbitration proceedings in Germany. In 1974 the English company commenced an action in England claiming payment of the Bills. The German company having applied to have this action stayed, Bristow, J. refused a stay. The Court of Appeal reversed his decision.

Allowing the appeal, the House of Lords held that the arbitration agreement did not extend to the claims on the Bills of Exchange. It is of fundamental importance that the claims in that case were on Bills of Exchange. It was also held that there was

no dispute between the parties in regard to the matter agreed to be referred within Section 1(1) of the Arbitration Act, 1975.

At page 720 Lord Wilberforce said:

“In my opinion the conclusion must be reached that the Arbitration Clause - even on the assumptions I have stated above - does not extend to cover the Appellants’ claims on the Bills. This is sufficient to enable the Appellants to succeed.

I shall deal, however, with the second point. I take it to be clear law that unliquidated cross claims cannot be relied upon by way of extinguishing set off against a claim on a Bill of Exchange..... The amount claimed here in respect of machines is certainly neither ascertained nor liquidated, and the claim in respect of mismanagement is one for a wholly unrelated tort, so that there would seem to be no basis for denying the Appellants’ that, as regards to the Bills, there is no dispute.”

Although it is true that Lord Wilberforce in that passage, as Mr. Hamblen naturally stressed, used the words “no dispute” he was considering those words as he himself said at the outset of his speech in the context of Section 1 of the 1975 Act, that is to say that there was in fact no dispute, and he found in that case that there was in fact no dispute in relation to the Bills of Exchange. That that is the correct interpretation of the speech of Lord Wilberforce was the very clear view of Kerr, J. In *Tradax* when he said at page 349:

“Next, in *Nova (Jersey)* ..... the House of Lords, in effect, reached the same conclusion in relation to an arbitration clause which was subject to Section 1 of the Arbitration Act, 1975 by holding as part of the ratio that in relation to certain unpaid Bills of Exchange there was ‘not in fact any dispute between the parties with regard to the matter agreed to be referred’, and that the arbitration clause had no application to claims under the Bills.”

Lord Wilberforce had said at page 718:

“There is no doubt that the relevant arbitration agreement is not a domestic arbitration agreement so that, prima facia, section 1(1) applies and a stay is mandatory. It remains however open to the appellants to show, the onus being upon them, that ‘there is not in fact any dispute between the parties with regard to the matter agreed to be referred.’ If they succeed in this, the stay will be refused. Either way, no discretion enters in the matter and the, unknown, merits of the respondents or demerits of the appellants are irrelevant.”

Ellis Mechanical Services Ltd. v. Wates Construction Ltd. [1978] 1 L.L.R. 33 concerned an arbitration clause in a building contract. Lord Denning said at page 35:

"There is a point on the contract which I might mention upon this. There is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. It seems to me that if a case comes before the Court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the Court is able, on an application of this kind, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration. The Defendants cannot insist on the whole going to arbitration by simply saying that there is a difference or dispute about it. If the Court sees that there is a sum which is indisputably due then the Court can give judgment for that sum and let the rest go to arbitration, as indeed the Master did here."

Bridge, L.J. said at page 37:

"To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the Court that at least £X is presently due from the Defendant to the Plaintiff? If it is, the judgment should be given to the Plaintiff for that sum, whatever X may be, and in a case where, as here, there is an arbitration clause, the remainder in dispute should go to arbitration. The reason why arbitration should not be extended to cover the area of the £X is indeed because there is no issue, or difference, referable to arbitration in respect of that amount."

Although the case was not decided on that point it related to a domestic arbitration in which the Court has a discretion whether or not to stay the proceedings under Section 4 of the 1950 Act. The Court found that the sum claimed was "indisputably due" and did not consider the distinction between the words "dispute", and "in fact any dispute".

That issue was specifically addressed by Saville, J. in *Hayter v. Nelson* [1990] 2 L.L.R. 265.

At page 267 he said:

"In some cases the suggestion seems to be made that if it was shown that a claim under the contract is indisputable, i.e. a claim that simply cannot be resisted on either the facts or the law, then there is no dispute or difference within the meaning of the arbitration clause in that contract."

He went on to consider *Ellis v Wates* and *Ellerine v Klinger*. He said on page 268:

"In my judgment in this context neither the words 'dispute' nor the word 'differences' is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore any dispute between them.

In my view this ordinary meaning of the word 'disputes' or the word 'differences' should be given to those words in arbitrational causes. It is sometimes suggested that since arbitrations provide great scope for the defendant to delay paying sums which are indisputably due, the court should endeavour to avoid the consequences by construing those words in arbitrational clauses so as to exclude all such cases but to my mind there are at least three answers to such suggestion."

Saville, J. then went on to point out that in the present day arbitrations are not necessarily slow processes, that the parties have agreed to arbitrate, and that if the courts decide whether or not the claim is disputable they are doing precisely what the parties have agreed should be done by arbitration. He went on to point out that a submission that a claim was indisputable involved reading the words 'there is not in fact any dispute between the parties' as meaning that there is not in fact any defence to the claim which are not the words used in the arbitration clause.

Mr. Waller submitted that if Mr. Hamblen's argument as to the meaning of a dispute is correct then an Arbitrator would have no jurisdiction to make an award, either interim or final, in respect of which a Defendant had no arguable defence. For example, an Arbitrator would have no jurisdiction to make an award in respect of a claim for freight. Furthermore, as an additional absurdity, if an entire claim was submitted to arbitration, the Arbitrator would have no power to make an award on those parts of the claim in respect of which there was no arguable defence or no real or genuine dispute, but to make an award in respect of which there was a genuine dispute but in respect of which the Defendant's argument failed. This argument seems to me to be compelling, and Mr Hamblen had no real answer to it save to say that it would be unlikely to arise in practice. I have serious doubts about that proposition when applied to a defendant who is anxious to delay payment for as long as possible.

This point was dealt with by Kerr, J. in *Tradax* at page 350 where he said:

"The fallacy in the plaintiff's argument can be seen at once if one considers what would have been the position if the Plaintiff's had in fact purported to appoint Mr.

Barclay as their Arbitrator within the time limit of nine months. They could clearly have done so, and indeed any Commercial Lawyer or business man would say that is what they should have done under the clause to enforce their claim. Arbitrators are appointed every day by claimants, who believe, rightly or wrongly, that their claim is indisputable. However, on the plaintiff's own argument, Mr. Barclay would have had no jurisdiction, since there was then, as they now say, no 'dispute' to which the arbitration clause could have applied. In my view this argument is obviously unsustainable."

The judgment of Kerr, J. in *Tradax* was approved by Phillips J in the *The Ever Splendour* [1988] 1 L.R. 290, by Colman, J. in *Acadia Chemicals v. Empress Nacional* [1994] 1 Lloyds Rep. 428, and by Clarke, J. in *Hume v O.O. Mutual International Insurance Co. Limited* [1996] L.R. 19, and in the present case.

In *Hayter v Nelson* Saville, J. said in relation to this point:

"The proposition must be that if a claim is indisputable then it cannot form the subject of a 'dispute' or 'difference' within the meaning of an arbitrational clause. If this is so, then it must follow that the claimant cannot refer an indisputable claim to arbitration under such a clause; and that an Arbitrator purporting to make an award in favour of the claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference reparable to arbitration. To my mind such propositions have only to be stated to be rejected - as indeed they were rejected by Mr. Justice Kerr in *The M. Eregli* [1981] 2 L.R. 169 in terms approved by Lords Justices Templeman and Fox in *Ellerine v Klinger* ."

In my view, following those cases, Mr Waller's submission is correct, and in the words of Templeman, L.J. in *Ellerine v Klinger* there is a dispute once money is claimed unless and until the Defendants admit that the sum is due and payable. The cases relied on by Mr. Hamblen to the opposite effect resulted from the particular interpretation that the Courts have placed on the words in Section 1 of the 1975 Act and its predecessors to which I have referred. In my judgment if a party has refused to pay a sum which is claimed or has denied that it is owing then in the ordinary use of the English language there is a dispute between the parties.

I turn, then, to Section 9 of the Arbitration Act 1996, which provides:

Section 9(1): "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counter claim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the

other parties to the proceedings) apply to the Court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

(3) An application may be made by a person before taking the appropriate procedural steps (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On application under this section the Court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

The important distinction between Section 9 of the 1996 Act and Section (1)(1) of the 1975 Act is the omission of the words 'that there is not in fact any dispute between the parties with regard to the matter agreed to be referred'. According the Court no longer has to consider whether there is in fact any dispute between the parties but only where there is a dispute with the arbitration clause of the agreement, and the cases which turn on that distinction are now irrelevant. Mr Hamblen submits that this amendment to the law of arbitration has made no difference in substance but is merely a simplification of the law and the Court still has to resolve, when asked to do so, an issue as to whether, under the arbitration clause in the contract, there is a dispute between the parties. He submits that this issue must be resolved in accordance with the authorities prior to 1996, in particular *Nova (Jersey)* .

Mr. Waller submits that section 9 of the 1996 Act was enacted to make it plain in the light of the pre-existing cases that, save as otherwise provided in the Section itself, a party is entitled to a stay of the proceedings unless the Court concludes that the action is not brought in respect of the matter which, under the agreement, is referred to arbitration or under sub section (4). Accordingly, the problem which arose in this case and in other cases in resolving the distinction between 'a dispute' in the arbitration clause of the contract, and "in fact a dispute between the parties" in Section 1 of the 1975 Act has been resolved, and the court must grant a stay in any case in which the sum claimed is not admitted. Mr Hamblen submits that if that was the intention of Parliament one would have expected it to have been spelt out clearly and explicitly.

The Departmental Advisory Committee on Arbitration Law in their Report on the Arbitration Bill reported in February, 1996, in relation to Clause (as it then was) 9 at paragraph 55:

“The Arbitration Act, 1975, contained a further ground for refusing a stay, namely, where the Court was satisfied that ‘there was not in fact any dispute between the parties with regard to the matter agreed to be referred.

These words do not appear in the New York Convention and in our view are confusing and unnecessary for the reasons given in *Hayter v Nelson* [1990] 2 L.R. 265.”

In his judgment in this case, Clarke J said at page 1278:

“It is not clear (at least to me) what that paragraph means.”

I understand, of course, why the Judge said what he did. However, one cannot overlook the fact that the Chairman of the Departmental Advisory Committee was Saville, L.J. (as he had by then become) who decided *Hayter v Nelson* . It is absolutely clear to my mind that paragraph 55 of the Report was a shorthand cross-reference to the judgment in *Hayter v Nelson* and the clearest possible indication that the intent was to incorporate the ratio decidendi of that case into Section 9. In my view, the alteration to the words of Section 1 of the 1975 Act to those contained in Section 9 of the 1996 Act can only make sense if construed in that way, and I would so construe them. Accordingly I would uphold Mr. Waller’s submission in relation to Section 9.

For those reasons, I would dismiss this appeal.
Order: Appeal dismissed with costs; no order as to costs in the application; application for leave to appeal to House of Lords granted on counsel's undertaking not to pursue arbitration action.

(Order not part of the judgment of the court)

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