

If this is correct, it seems an unsatisfactory way of determining a date of default. However, I do not think that it is correct. The contract requires notice to be given actually or notionally on or before July 10. The proviso contained in cl. 10(b) does not operate to extend the time for the giving of the notice. It only provides that a notice which is actually given later is ante-dated to and is deemed to have been given earlier on or before July 10. It follows that the default takes place on July 10 whether the reason is a failure actually to deliver a notice of appropriation by this date or a failure notionally to do so.

So far as the 39.2 tonne parcel is concerned, Mr. Rix has a further point. He draws attention to the fact that on July 12 the buyers offered to accept the notice of appropriation in respect of this parcel "if together with the documents you present full proof that this appropriation is a contractual one". He goes on to submit that the documents were not available before about July 26, and argues that it was only when these documents had become available and were not accompanied by the required proof that there was a default. I do not think that this is right. At most the buyers accepted the notice conditionally. The condition was never fulfilled and in consequence there was never any acceptance. It follows that for this parcel the date of default is also July 10.

For these reasons I answer the question of law by holding that on the facts found and the true construction of the contract the sellers are liable to the buyers in damages for non-fulfilment of the contract and that the date on which the market price must be ascertained for the purposes of calculating damages is July 10. I uphold the award in par. 20 of the special case.

CHANCERY DIVISION

Oct. 4, 5 and 6, 1977

ROUSSEL-UCLAF

v.

G. D. SEARLE & CO. LTD.
AND G. D. SEARLE & CO.

Before Mr. Justice GRAHAM

Arbitration — Stay of proceedings — Plaintiff granted exclusive licence to market diisopyramide base throughout the world except U.S.A. — Defendants introduced diisopyramide phosphates into U.K. — Whether infringement of U.K. patent — Whether defendants had taken a step in the action — Whether action ought to be stayed — Arbitration Act, 1975, s. 1.

In May, 1955, S., an employee of the second defendants, synthesized a life-saving drugs organic compound called diisopyramide base, and the number SE7031 was applied to it. In December, 1961, S. made a number of derivatives and in particular, diisopyramide phosphate which was given the number SC13957.

On Feb. 3, 1964, the plaintiffs and the second defendants entered into an agreement which, by cl. 1, gave the plaintiffs the option to take an exclusive licence throughout the world except in the United States and territories under its jurisdiction and control, to use the base compound SE7031. Clause 12 provided inter alia:

Any claim or controversy between the parties . . . in connection with this Option agreement or the breach thereof, which cannot be settled satisfactorily by correspondence or mutual conference shall be determined by arbitration . . .

The plaintiffs exercised the option on Dec. 7, 1966.

The plaintiffs marketed SE7031 under the name "Rythmodan" in various countries including the United Kingdom. The second defendants sold SC13957 under the name "Norpace". The first defendants were a wholly owned subsidiary of the second defendants and performed the function of selling and distributing the second defendants' products throughout the U.K.

In 1973, the second defendants considered that the plaintiffs' exclusivity extended to SE7031 but did not cover the phosphate "Norpace" and advised the plaintiffs that Norpace would be launched outside the U.S.

The plaintiffs brought proceedings for the infringement of the U.K. patent under which they claimed they had exclusive rights to prevent the importation of the phosphate. The first defendants resisted the proceedings, and the plaintiffs' application for an interdict was refused.

On Jan. 20, 1977, the second defendants entered an unconditional appearance to a writ dated

Aug. 16, 1976, issued by the plaintiffs, but only served on the first defendants. On the same day, both defendants gave formal notification to stay the proceedings, and by a summons dated Feb. 17, 1977, applied for an order that all further proceedings in the action be stayed pursuant to s. 1 of the Arbitration Act, 1975, or under the inherent jurisdiction of the Court on the ground that the plaintiffs and defendants had, by an agreement dated Feb. 3, 1964, agreed to refer to arbitration the matter in respect of which the action was brought.

The plaintiffs argued that the first defendants had disqualified themselves from asking for a stay since their action in resisting the injunction amounted to a step in the action within the meaning of s. 1 of the 1975 Act.

Held, by Ch.D. (GRAHAM, J.), that (1) the disadvantages to the defendants, following a refusal of a stay, in that the defendants would be liable to incur considerable extra expense if in addition to fighting arbitration proceedings they also had to fight a patent action, clearly outweighed the advantages of the plaintiffs, if it was granted (see p. 229, col. 2; p. 230, col. 1);

The *Atlantic Star*, [1973] 2 Lloyd's Rep. 197, applied.

(2) apart from the Arbitration Act, 1975, in the exercise of the inherent jurisdiction, a stay of the action against both defendants ought to be granted and there was no difference between their respective positions which would justify the action being allowed to continue against one of them separately but not against the other (see p. 230, col. 1);

(3) there was no reason why the words "claiming through or under" in s. 1 of the 1975 Act, should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming a right to sell patented articles which it had obtained from and been ordered to sell by its parent (see p. 231, col. 1); and the defendants and their actions were so closely related on the facts in this case that it would be right to hold that the subsidiary could establish it was within the purview of the arbitration clause, on the basis that it was "claiming through or under" the parent to do what in fact it was doing (see p. 231, col. 1);

(4) in the circumstances of the present case, the first defendants had not taken any step in the action such as to debar them from relief by way of stay (see p. 232, col. 1); and since the statute was contemplating some positive act by way of offence on the part of the defendants, rather than merely parrying a blow by the plaintiff, particularly where the attack consisted in asking for an interlocutory injunction, the defendants were entitled to a stay under s. 1 of the 1975 Act (see p. 231, col. 2);

Pitchers Ltd. v. Plaza (Queensbury) Ltd., [1940] 1 All E.R. 151 and *Zalynoff v. Hammond*, [1898] 2 Ch. 92, considered.

Judgment for the defendants.

The following cases were referred to in the judgment:

Atlantic Star, The, (H.L.) [1973] 2 Lloyd's Rep. 197; [1974] A.C. 436;

Bonnia v. Neame, [1910] 1 Ch. 732;

Pitchers Ltd. v. Plaza (Queensbury) Ltd., (C.A.) (1940) 1 All E.R. 151;

Zalynoff v. Hammond, [1898] 2 Ch. 92.

This was a summons by the first and second defendants, G.D. Searle & Co. Ltd., and G. D. Searle & Co. (an American Corporation) asking for an order that all further proceedings in the action be stayed pursuant to s. 1 of the Arbitration Act, 1975, or under the inherent jurisdiction of the Court on the grounds that the plaintiffs, Roussel-Uclaf, a French company, and the second defendants had by an agreement in writing dated Feb. 3, 1964, agreed to refer to arbitration the matter in respect of which the action was brought.

Mr. H. Lang Laddie (instructed by Messrs. McKenna & Co.) for the applicant defendants; Mr. William Aldous, Q.C., and Mr. Anthony Watson (instructed by Messrs. Herbert Smith & Co.) for the respondent plaintiffs.

The further facts are stated in the judgment of Mr. Justice Graham.

Judgment was reserved.

Friday Oct. 14, 1977

JUDGMENT

Mr. Justice GRAHAM: By these proceedings, the defendants G.D. Searle & Co., Ltd. and G.D. Searle & Co. ask for an order that all further proceedings in the action be stayed pursuant to s. 1 of the Arbitration Act, 1975, or under the inherent jurisdiction of the Court, on the grounds that the plaintiffs and defendants had, by an agreement in writing dated Feb. 3, 1964, agreed to refer to arbitration the matters in respect of which the action is brought. The first defendant is a wholly-owned English subsidiary of the second defendant, which is an American Corporation.

The matter relates to a series of new life-saving drugs which are basically, to give the correct chemical name, (omega)-amino-2-pyridyl-alkanamide derivatives which have the general formula set out in the description and claims of the specification of the letters patent No. 948,860. The second defendants are

the patentees of the basic United States invention on which the British letters patent are based, and I will hereafter call them "Searle (US)". The English company is really the representative and selling arm of the United States company in this country, and I will hereinafter refer to it as "Searle (UK)".

The dispute arises as follows, as will be seen from the evidence and in particular the affidavit of Mr. Mallows dated Feb. 17, 1977. Searle (US), the American company, is engaged, inter alia, in the manufacture of pharmaceutical preparations. It sells its products throughout the world, in some cases through the agency of wholly-owned local subsidiaries, as in the case here of Searle (UK).

Searle (UK) performs the functions of selling and distributing products of Searle (US) throughout the United Kingdom and there are a number of licence agreements between Searle (US) and Searle (UK) relating to the sale and distribution of these patented products in the United Kingdom. There have already been interlocutory proceedings between the plaintiffs and the defendants in the action, and from the evidence it will be seen that in May, 1955, an employee of Searle (US), Mr. Sause, synthesised the organic compound above referred to, which for brevity has been called "diisopyramide base". The number SE7031 was applied to that compound and it was found to have valuable therapeutic properties, and in particular it was excellent in the suppression of irregular heart activities. The evidence in the interlocutory proceedings showed in fact that it is a life-saving drug.

In December, 1961, Mr. Sause made a number of derivatives of the diisopyramide base and in particular synthesised a phosphate which has been called "diisopyramide phosphate" and to which the number SC13957 has been attributed. These and a large number of pharmaceutical preparations of the same type were protected by Searle (US) in America and elsewhere by patent applications. In fact patents have been obtained in the following countries:

United States	United Kingdom
France	Australia
Belgium	Canada
Germany	South Africa
Singapore	

In 1963, the plaintiffs, who are a French company, and Searle (US) entered into negotiations relating to the licensing of the plaintiffs to manufacture and use the base compound SE7031 outside the U.S.A. As a result of these discussions, an option agreement was entered into between them, but it should be noted that Searle (UK) was not a party to this

agreement. By cl. 1 the option was given to the plaintiffs to take an exclusive licence throughout the whole world except in the U.S.A. and territories under United States jurisdiction and control. After a number of extensions of time the option was exercised on Dec. 7, 1966, by the plaintiffs.

The present proceedings arise as a result of cl. 12 of the option agreement, which reads as follows:

Any claim or controversy between the parties hereto in connection with this OPTION agreement or the breach thereof, which cannot be settled satisfactorily by correspondence or mutual conference shall be determined by arbitration in accordance with the rules of the International Chamber of Commerce.

As a result of this agreement, the plaintiffs have marketed diisopyramide base under the name "Rythmodan" at least in the following countries:

United Kingdom	South Africa
Italy	Belgium
France	Netherlands
Spain	Brazil
Mexico	

Meanwhile Searle (US) and a number of its subsidiaries have sold diisopyramide phosphate under the name of "Norpace". In particular Norpace has been introduced, in addition to the U.S.A., into the following countries:

United Kingdom	Switzerland
Eire	South Africa
Germany	Hong Kong
Malaysia	Australia

There exist letters patent in the United Kingdom, South Africa, Germany and Australia, but not in the other countries just named.

In 1973, Searle (US) again considered the words of the option agreement with the plaintiffs and came to the conclusion that the plaintiffs' rights of exclusivity extended to SE7031 (that is the base), but did not extend to cover the phosphate which Searle were selling under the mark Norpace. As a result, in December, 1973, they informed the plaintiffs that it was their intention to launch Norpace outside the United States as soon as possible. The plaintiffs, on the other hand, have taken the stand that they consider Norpace (that is, the phosphate) to be within the terms of their agreement and that under their exclusive rights they are entitled to keep Norpace out of non-United States markets.

Norpace was introduced into the United Kingdom on July 5, 1976, and subsequent to

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[GRAHAM, J.]

that the plaintiffs warned the defendants that they intended to bring proceedings for the infringement of the United Kingdom patent under which they claim they have exclusive rights to prevent the importation of the phosphate.

It will be appreciated that the plaintiffs' right to sue as exclusive licensees is based on the Patents Act, 1949, s. 63, and in this case it is accepted for present purposes that both the base and the phosphate fall within the words of the claims of the English patent.

The present proceedings were started by writ dated Aug. 16, 1976, against both defendants. The writ was served on the first defendants but not on the second defendants. On Jan. 20, 1977, however, the latter entered unconditional appearance and so, by R.S.C. O. 10, r. 1(3), the writ is deemed to have been duly served upon them on the date of entry of appearance. On the same date both defendants gave formal notice of application to stay the proceedings and on Feb. 17, 1977, the present summons was taken out.

It cannot therefore be successfully argued that any step in the action was taken by the second defendants between entering appearance and the application for stay within the meaning of s. 1(1) of the Arbitration Act, 1975. The position in this respect is different in the case of the first defendants, since the writ was served on the first defendants prior to the notice of proceedings for an interlocutory injunction dated Sept. 10, 1976. The first defendants resisted these proceedings in the normal way by putting in evidence and appearing in Court; and the hearing before me took place in December, 1976, judgment refusing an injunction being given on Dec. 16, 1976.

It is argued by the plaintiffs here that the first defendants by such action have disqualified themselves from being able to ask for a stay under s. 1, their action in so resisting the injunction amounting to a step in the action within the meaning of the section.

Such being the relevant facts for present purposes, it is now necessary to consider the legal position in the light of these facts and the arguments of counsel. Section 1(1) of the Arbitration Act, 1975, reads as follows:

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, inoperative 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.

It is agreed that the present agreement is not a domestic arbitration agreement within the meaning of s. 4(1) of the Arbitration Act, 1950. Section 1(1) of the Arbitration Act, 1975, therefore applies to it.

At this point it may be useful to note that one of the effects of the Arbitration Act, 1975, is to enable a party who has obtained a Convention Award to enforce it and it will be enforced by our Courts, except in those cases where it may be refused in accordance with the provision of s. 5(2).

It is stated in the heading of the 1975 Act that the general object of the Act is to give effect to the ~~National~~ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the intention clearly seems to be that, where the parties have agreed to choose arbitration for deciding their disputes, such disputes shall be so decided. It is interesting in this connection to note the words at the end of s. 1(1) of the Act "shall make an order staying the proceedings", which are mandatory and discretionary.

Reference shows that the 5th report of the Private International Law Committee dealing with the Recognition and Enforcement of Foreign Arbitral Awards dated October, 1976, in par. 7 on p. 4 stated as follows:

British businessmen have long sought by providing for arbitration to avoid the delay, uncertainty and expense which they fear if they are involved in litigation before foreign courts and to a great extent they have succeeded with making international commercial contracts in providing for arbitration in the United Kingdom. Elaborate systems of international commercial arbitration practised in the City of London and in other centres of world trade are largely the result of private enterprise and in order to function smoothly they need legal recognition and this can be insured only by international agreement. Arbitration in international trade can be impeded if national courts are free to ignore arbitral agreements and awards and to assume jurisdiction over matters covered by arbitral agreements.

It may well be that the United Kingdom and the above statements is responsible for the form in which the Arbitration Act, 1975, is drafted.

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From the facts already stated, it will be seen that the dispute mainly depends upon the answer to the question whether the option and licence given by Searle (US) to the plaintiffs is wide enough to include the diisopyramide phosphate compound as well as the amide base compound, there being no argument as to the inclusion of the latter. If the licence does on its proper construction and on the facts as to the constitution of the phosphate include the phosphate, then it is obvious that the plaintiffs, whose licence is in cl. 1 expressed to be "exclusive even to Searle", that is, Searle (US), have a right in countries where patents exist to sue infringers, including Searle (US), in accordance with s. 63. The decision of this question is not the subject of the present proceedings and it is undesirable that I should say anything about it. The licence divides the world into two parts, and runs throughout all countries except the U.S.A. This means that the plaintiffs have rights in some 140 countries of the world, though I understand there is patent protection mainly only in those which are important commercially. Where there is no patent protection, the plaintiffs will only have contractual rights against Searle (US) and will not be able to sue them or others for infringement.

It will thus be seen that, though at this time only the present action for infringement has been started, the plaintiffs, if they are so minded and if a stay is not granted, will be able to start similar actions in other countries which give exclusive licensees the right to sue as in this country. There is therefore, the defendants say, a distinct possibility of a number of patent actions founded on different patents with possible conflicting results, unless the parties are compelled to have the whole matter and for all countries decided in arbitration proceedings.

This, the defendants say, Searle (US) and the plaintiffs agreed by cl. 12 to do, no doubt for the very good reason of avoiding such difficulties. Where the parties have thus chosen their forum they ought, say the defendants, if possible, to be confined to it and not allowed to prosecute other proceedings elsewhere.

It was disputed in argument as to how far estoppel might be effective in respect of preventing the trial of the same or similar issues in several actions and also arbitration proceedings in the event of them running simultaneously. I do not think it is necessary to come to any conclusion on this point, because it was not fully argued and in any event it seems to me that it is beyond question that the duplication of proceedings such as are envisaged is highly undesirable if it can be avoided without hardship to either party. At the

same time, I recognise, as was argued by Mr. Aldous for the plaintiffs, that a plaintiff ought not normally to be deprived of his legal rights or have them curtailed by a stay. It was said that a plaintiff is entitled to choose his forum and to get several kinds of relief in different proceedings if he can; that mere balance of convenience is not enough to justify the grant of a stay; and before granting it the Court must conclude that the continuance of the action would be oppressive or vexatious.

In this connection, Mr. Aldous, in dealing in particular with the inherent jurisdiction of the Court to stay (that is, apart from the Arbitration Act, 1975) and now enshrined in s. 41 of the Judicature Act, 1925, cited a number of cases, including in particular the *Atlantic Star v. Bona Spes* case ([1973] 2 Lloyd's Rep. 197; [1974] A.C. 436). I find this case helpful and in particular the conclusions of Lord Wilberforce on pp. 207 and 464 onwards, where he states that the words "frivolous and vexatious" are to be widely interpreted and that a fair balance must be struck between advantages to the plaintiff and disadvantages to the defendant.

Here it is said the plaintiff in the action will be able to get automatic discovery which he will not be able to get in the arbitration proceedings, which have been started in Sweden pursuant to an application for conciliation and arbitration filed with the International Chamber of Commerce on Dec. 10, 1976. The position in regard to procedure in arbitration proceedings in Sweden is dealt with to some extent in the affidavit of Mr. Staffan-Bergling and it seems that automatic discovery in the sense of English law is not available, but he goes on to point out that assistance may be obtained from the Courts if evidence is not forthcoming voluntarily. (Swedish express) = 400

The present dispute depends to a large extent on the pure question of construction of the licence and discovery would seem to me to be unlikely to be of importance in solving this issue. It would of course be important in assessing the plaintiffs' loss on the assumption that they win, but I find it difficult to think that a Swedish arbitrator would not be able, if necessary, to invite the assistance of the Court to obtain the necessary material from the defendants, even if they were unwilling in the first instance to give it, to enable him to arrive at a proper award of damages. I therefore discount the plaintiffs' argument on this point.

On the other hand, I think the defendants will undoubtedly be liable to incur considerable extra expense both legal and commercial and to have to devote staff to what is commercially unproductive work. In addition to fighting arbitration proceedings they also

I have to fight a patent action in this country. This will be greatly aggravated if the plaintiffs begin patent actions and other actions based on breach of contract in some and possibly a large number of the other 140 countries where this licence runs. In spite of being challenged by Mr. Laddie to do so, the plaintiffs were unwilling to give any undertaking not to start such other actions. In any event however the disadvantages to the defendants following the refusal of a stay seem to me clearly to outweigh the advantages of the plaintiffs if it is granted.

I therefore conclude that, apart altogether from the Arbitration Act, 1975, in the exercise of the inherent jurisdiction a stay of the action against both defendants ought to be granted in this case, and that there is no difference between their respective positions which would justify the action being allowed to continue against one of them separately but not against the other.

Though it is not strictly necessary in view of the above for me to deal with the application on the basis of the Arbitration Act, 1975, I do so shortly, on the assumption that I may be held on appeal to be wrong in my grant of a stay on the basis of the inherent jurisdiction.

The important points here as they emerged in argument are that the section is mandatory as to the grant of a stay if the conditions are fulfilled. The conditions are, first, that the person asking for a stay must be a party to the arbitration agreement or must claim "through or under" such a party, and, secondly, that such person must make his application for a stay "after appearance and before delivery of any pleadings or taking any other steps in the proceedings".

All these conditions are, I find, fulfilled by the second defendants Searle (US) and I would therefore, as I read the section, be bound to grant a stay of the action against them.

Mr. Aldous tried to exclude the grant of such a stay on the basis that, although Searle (US) were named originally as defendants on the writ, they were not served with the writ and nothing was alleged against them in the statement of claim, and presumably therefore that they ought not properly to be regarded as parties to the action. In fact, as already stated, Searle (US) entered an unconditional appearance and therefore under O. 10 the writ must be deemed to have been duly served on them. Even though they were not pursued further in the statement of claim, I do not see how in such circumstances they can possibly not be regarded as properly being parties to the action, and therefore within the contemplation of s. 1 of the 1975 Act.

The question then arises whether Searle (UK)

are in the same or in a different position from Searle (US). As they are a separate company from, although a wholly-owned subsidiary of, their U.S. parent, legally they are a different entity from that parent and cannot be successfully argued to be a party to the arbitration agreement contained in the licence which is expressed to be between the plaintiffs and such parent only.

It seemed to me that it might be possible to say with some force that in an agreement such as the present, covering all countries of the world and, in the framework of modern trading conditions and practices, it was a necessary implication that Searle (US) should be entitled to sell through subsidiaries if, when and where it wanted to do so for tax or other purposes. This point was not however argued and I say no more about it. Can they, Searle (UK), then properly be regarded as "claiming through or under" their parent company, which is a party to the agreement?

There is no decisive authority on this point which covers the present case, although the words seem to have been included in the various Arbitration Acts for some time. On pp. 143 and 144 of Russell on Arbitration, 18th ed., the expression "claiming through or under" is shown to include the instances of an assignee of a contract containing the arbitration claim, of the personal representatives of a deceased party, and of the trustee of a bankrupt. It apparently has been held to exclude the mortgagee of the share in a partnership of a partner in respect of whom the partnership has been determined, because it was said the mortgagee's right to an account was independent of the deed. It was, however, held to include the insurers of a motor vehicle who stood in the shoes of their insured in respect of a policy containing an arbitration clause in relation to which an action was also begun. The action was stayed.

The line between those within and those outside the words has got to be drawn somewhere. Mr. Aldous of course argued the phrase was very narrow in scope and for practical purpose confined to such people as assignees and personal representatives. Mr. Laddie argued for a wider scope, and wide enough at least to cover a wholly owned subsidiary selling on behalf of and by the direct authority and under the control of its parent. Mr. Aldous argued that an entirely independent third party could not claim the benefit of the phrase merely because, for example, as a customer, he had acquired goods from Searle (US) and was thus using or reselling on the market. Searle (UK) is not an independent party, though it is a separate legal entity, in this sense.

Searle (UK) is for all practical purposes Searle (US) in the United Kingdom and is in fact the selling agent of the latter. In the case of *Bonnin v. Neame*, [1910] 1 Ch. 732, a case of a partner and his mortgagee referred to in Russell, it is clear that the arbitration clause was limited to partners and their executors or administrators and did not in fact include the words "claiming through or under". It is not therefore surprising that the point was taken that the case was not really within the corresponding 1889 Arbitration Act then in force, which used the same words "claiming through or under", and that a stay was refused.

The argument does not admit of much elaboration, but I see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to sell patented articles which it has obtained from and been ordered to sell by its parent. Of course, if the arbitration proceedings so decide, it may eventually turn out that the parent company is at fault and not entitled to sell the articles in question at all; and, if so, the subsidiary will be equally at fault. But, if the parent is blameless, it seems only common sense that the subsidiary should be equally blameless. The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is "claiming through or under" the parent to do what it is in fact doing whether ultimately held to be wrongful or not.

There remains the question whether Searle (UK), by its action in resisting the interlocutory proceedings in December, 1976, took a step in the action between the appearance and delivery of pleading. Again, authority on such a point is sparse, but I was referred to *Zalinoff v. Hammond* [1898] 2 Ch. 92, where it was held that the mere filing of affidavits in answer to a motion for a receiver in an action for dissolution of partnership was not a "step in the proceedings" within s. 4 of the Arbitration Act, 1889. The ratio decidendi of the judgment of Mr. Justice Stirling is at the bottom of p. 94 in the following words:

In *Ives & Barker v. Willans*, Lord Justice Lindley said: "The authorities show that a step in the proceedings means something in the nature of an application to the court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings".

It seems to me that the mere filing of affidavits in defence to a motion for a receiver is not in the nature of an application to the court, and consequently not a "step in the proceedings" within the meaning of the section. By such a "step" is meant a substantive step taken by a party. It may be that a very limited application to the court — such as taking out a summons for extension of time — would be enough. That has been so decided in *Ford's Hotel Co. v. Bartlett*. In *Brighton Marine Palace and Pier, Limited v. Woodhouse* before Mr. Justice North the motion was ordered to stand over to the trial, and it does not appear whether affidavits had been filed or not.

The other case, referred to by Mr. Aldous, of some importance is that of *Pitchers Ltd. v. Plaza (Queensbury) Ltd.* (1940) 1 All E.R. 151, where the defendants in answer to a summons made O. 14 for leave to sign final judgment filed an affidavit and claimed they had a defence to the action. On leave being given to sign judgment, the defendants appealed and only then applied for a stay of the action by virtue of the arbitration clause. It was held that the defendants had taken a step in the action when they opposed the summons for leave to sign final judgment before the Master. Lord Justice Goddard, as he then was, also stated at p. 156 that, if the defendants had originally taken out a summons to stay at the same time as opposing leave to sign final judgment, and had then appealed both against the refusal to stay and the signing of final judgment, he ought not to be considered as having taken a step in the action, as he had done all he could to get the action referred. It was, however, emphasised that a defendant who is sued, if he wants an action stayed, ought to take out a substantive application to stay as soon as possible.

Again, the arguments on both sides can be shortly stated, and the decision seems to me somewhat arbitrary. On the whole, I think that the statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction. Such a remedy against a defendant might well be necessary whether the action was ultimately stayed or not, in order to preserve, for example, the property the subject of the action in the meantime; and, as a practical matter, in such a case it would not be of importance whether the application to stay was made before, at the same time, as or after an application for an injunction. Here it is not suggested that the plaintiffs were in any way embarrassed or taken by surprise by the making of the application to

stay at the date at which it was made and I see no reason to penalise Searle (UK) in that respect. I do not think the present case is covered by the authority of *Pitcher's* case and it seems to me that the reasoning of Mr. Justice Stirling in the *Zalnoff* case is more pertinent to the circumstances here where an application for an injunction was being resisted.

I therefore hold, in the circumstances of the present case, that Searle (UK) did not take any step in the action between the date of appearance and delivery of pleading such as to debar them from relief by way of stay. I therefore hold on this second ground also that a stay ought to be granted in respect of the action against both defendants.