so, to what extent, I think that the argument we have had before us goes beyond that essential minimum, I am expressing no view whatever. In the circumstances, in my judgment this appeal should be allowed and leave to defend should be given.

Sir DAVID CAIRNS: I agree that, neither on the question of whether the owners were entitled to change managers without the consent of the charterers, nor on the question of whether, if the owners were in breach of contract, their breach amounted to a repudiation, can it properly be said that the plaintiffs' case is so clear that the answer to it put forward by the defendants is unarguable. I accordingly agree that the appeal should be allowed and leave to defend given.

COURT OF APPEAL

July 20 and 21, 1977

ASSOCIATED BULK CARRIERS LTD.
v.
KOCH SHIPPING INC.

(THE "FUOHSAN MARU")

Before Lord DENNING, M.R.,[1]
Lord Justice BROWNE and
Lord Justice GEOFFREY LANE

Charter-party (Time) — Stay of action — Wrongful repudiation of charter by charterers — Shipowners claimed unliquidated damages — Whether shipowners entitled to summary judgment under R.S.C., O. 14 — Whether charterers entitled to stay of action — R.S.C., O. 14 — Arbitration Act, 1975, s. 1.

In 1972, the shipowners let their vessel *Fuohsan Maru* on a time charter in the Beepee form to the charterers for five years (one month more or less) from delivery at a hire rate of $2.59 per ton dead weight per month. The vessel was delivered on Aug. 29, 1974, and the redelivery date was therefore July 29, 1979, at the earliest.

The charter provided, inter alia:

> Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration then in force.

The charterers duly operated the vessel and paid the hire regularly but by December, 1976, the tanker market had slumped and the rate for *Fuohsan Maru* had fallen from $2.59 to a little over $1. The charterers "manufactured" claims for the purpose of avoiding payment of the hire and on Apr. 11 sent the following letter to the shipowners:

> Charterers find themselves prevented by owners from employing vessel as intended. There being little prospect of economic alternative employment for the vessel, charterers regret they must treat owners inability to honour their charter obligations as bringing this charter-party to an end. The vessel is redelivered to owners as of the time and date hereof.

On Apr. 22, 1977, the shipowners sent the following reply:

> We much regret you appear intent on forcing yet another repudiation situation — presumably in order to obtain some temporary relief from . . . financial commitments during the delay which will occur before litigation can be completed . . . We call upon you as charterers with a reputation to maintain to earnestly reconsider your attitude.

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[1] Dissenting.

the consent of the defendants, would constitute a breach of the contract contained in the charter-party, and a breach of such a nature that it would entitle the defendants to treat it as putting an end to the remaining obligations under the charter-party: it would, in effect, be, or have the effect of, a fundamental breach of, or breach of a fundamental term in, the contract; and, as the defendants apparently took the view that no change was going to be made in the attitude of the opposite party with regard to change of managers, they were entitled to treat that as being a repudiation, and they did treat it as such.

The plaintiffs have not treated the defendants' repudiation as being something that they, in turn, would accept as putting an end to the contract. They, as they are entitled to do, if there has here been no fundamental breach of contract on their part, have chosen, despite the repudiation of it by the defendants, to treat the contract as still being alive. They therefore have, consistently with that attitude, required the defendants to pay the charter hire which was due on Dec. 1, 1976. The defendants, consistently with their attitude that the contract is at an end, have refused to pay it. The plaintiffs thereupon initiated the proceedings out of which this appeal arises by a writ issued on Dec. 31, 1976, in which they claim the sum of U.S. $128,034.25 and interest pursuant to statute. That is the amount of the charter hire which, if the charter-party is still alive, was due and unpaid. The plaintiffs thereupon sought in the Commercial Court judgment under R.S.C., O. 14.

The matter came before Mr. Justice Parker on Mar. 25 of this year. There was before him an affidavit by M. Louis Marie Honore Bouzols, who is, as I understand it, the president of the defendant corporation, who are a chartering subsidiary of Compagnie Francaise des Petroles. In that affidavit the deponent set out, in substance, as a matter of general shipping knowledge, the important part that the manager plays in relation to a time charter-party. He also gave particulars about the negotiations for the present charter-party, and the negotiations relating to the addendum No. 1. In it he stressed the importance to the defendants of the personality of the managers who were to be employed.

The defendants' defence to the claim, on the basis of which they said that they ought to be given leave to defend under O. 14, was this: On the true construction of the contract, particularly cl. 48, read with addendum No. 1, it was a term of the charter-party (and it seems to have been put, at any rate ultimately, as being an express term of the charter-party) that the vessel should be managed by Colocotronis Ltd. from and after the date of the transfer of ownership of the vessel agreed by the defendants in pursuance of cl. 48 of the charter-party; that that term of the contract involved that, Colocotronis Ltd. having become the managers of the new owners of the vessel, no other managers could, in accordance with the terms of the contract, be appointed without the defendants' consent; and that the appointment, or the purported appointment, of other managers than Colocotronis (London) Ltd. that had been made, resulted in a breach of the contract. They further submitted that that breach of the contract was a fundamental breach (however it is to be expressed) — a breach the effect of which was such that in law they were entitled to treat the contract as being at an end.

This being an appeal under R.S.C., O. 14, the function of this Court is not to decide whether the plaintiffs or the defendants are right on their construction of the contract, or the question whether or not, if there be a breach of contract, it is of a fundamental term. The function of this Court is simply to consider whether, on the material which was before the Judge and is now before this Court, there is something that can fairly be described as "an arguable case", which would provide a defence to the action.

Having regard to the conclusion which I have reached, approaching the matter on that basis, it is desirable that I should make the remainder of this judgment as short as is possible. It is in the circumstances highly undesirable that I should express any view upon the issues that have been argued going further than is necessary for the very limited question which has to be decided in this Court. I therefore, deliberately and advisedly, do not propose even to attempt to set out the arguments which have been involved on one side or the other, but merely to say that in my judgment it would be wrong to hold that there is not here an "arguable" case that there was a term of the charter-party such as is contended for on behalf of the defendants; and, further, to say, on the only other matter which remains in issue, that I do not think it would be right to say that it cannot fairly be argued that a breach of that term would, or might, produce the result that the contract could be treated as having been terminated. But I wish to stress (I hope it is clear from what I have said already) that I am not, and deliberately not, indicating any view that goes one millimetre beyond that; and no one, I am sure, will treat what I have said as indicating any view beyond that which I regard as essential for the decision of this case, namely, that those two matters can, in my judgment, fairly be regarded as being "arguable". Whether, and if

obligations. We call upon you as charterers with a reputation to maintain to earnestly reconsider your attitude.

The charterers replied that there was no question of their giving any further orders. So on Apr. 25, 1977, the shipowners treated the charterers' conduct as a repudiation. They accepted it as of Apr. 25, 1977, and held the charterers liable for all loss or damage arising therefrom.

The shipowners sought redress in the Courts. They had already on Mar. 14, 1977, issued a writ claiming the hire due on Feb. 28, 1977, amounting to $290,182.61. On Mar. 15, 1977, they got a *Mareva* injunction. On May 12, 1977, they applied for summary judgment. The charterers then said they had a counterclaim for wrongful repudiation by the shipowners which exceeded the Feb. 28 hire and they asked for the action to be stayed and for the whole claim and counterclaim to be sent to arbitration. Mr. Justice Kerr rejected the charterers' suggestion. He said that the counterclaim was

> not bona fide, but merely manufactured as a pretext for getting out of the charter party.

So he refused a stay and gave judgment for the February hire. The charterers did not appeal from that judgment. They paid the February hire.

On May 11, 1977, the shipowners issued a writ against the charterers claiming damages for wrongful repudiation of the charter-party. They based it on the hire payable under the charter-party for the remaining 27 months, less the hire obtainable under a time charter for that period as at the date of repudiation. Their claim would come to something approaching, if not exceeding, $4 million. The shipowners applied ex parte for a *Mareva* injunction and got it. They applied again for summary judgment under R.S.C., O. 14. The charterers retorted with a summons to stay under the Arbitration Act, 1975.

The summonses were heard by Mr. Justice Kerr on June 23, 1977. At this stage the charterers admitted that the shipowners were entitled to damages for repudiation. They no longer put forward their manufactured cross-claim for repudiation. So the only issue was what was the proper sum of damages to be awarded to the shipowners?

The Judge made this important finding:

> On the evidence before me it is overwhelmingly probable that the shipowners are entitled to a very substantial sum . . . Mr. Southwell for the charterers has rightly accepted that it is in the highest degree probable that the plaintiffs will recover a substantial amount. To the extent that the charterers have sought to controvert the plaintiffs' evidence as to approximate or minimum amounts to which the shipowners are entitled, I find the charterers' evidence unimpressive — no more impressive than their conduct during the last few months of the charter party . . . The shipowners have all the merits, and I suspect that the defendants have no merits whatsoever and are still trying to stave off the day of reckoning. I have to decide whether they have the law on their side. With reluctance, I have come to the conclusion that they have . . . I must therefore grant the charterers the stay which they ask.

So there is the point. There is beyond doubt a big sum payable as damages by the charterers to the shipowners: but because it cannot be ascertained and put down as a definite figure, the shipowners are to get no judgment for any sum at all. The whole matter must be sent to arbitration, which, as we all know, would mean a long delay. Arbitrators have little control over the speed of the arbitration. It takes a long time to get an appointment; and when that is done, if the creditor wants to avoid payment, he can put off the day of judgment indefinitely — by asking for more time for one thing or another — by saying he is not ready, yet — and even after an award, by asking for a case to be stated — and so forth. It is most regrettable. It means that defaulting parties can get time indefinitely. The solicitors for the shipowner, with all the responsibility which attaches to them as solicitors in the City of London, have put this upon affidavit:

> This is not the first case in which the charterers have adopted unusual tactics in order to rid themselves of financially unfavourable charter commitments. In a number of cases . . . the charterers have terminated the charter and have then used the delay regrettably inherent in arbitration proceedings to negotiate a discounted settlement.

Arbitration Act, 1975

It is against this background that I consider the effect of the Arbitration Act, 1975. It does not apply to domestic arbitration agreements, but only to international arbitration agreements like this one. Under the 1950 Act the Courts have a discretion whether to stay the action or not. The 1975 Act takes away any discretion in the Court. It makes it compulsory to grant a stay when the matter in dispute comes within the Act. The word "shall" is used imperatively. I will read the section in full.

> 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.

The important words for the present purpose are "any matter agreed to be referred", and "there is not in fact any dispute between the parties in regard to the matter agreed to be referred".

Seeing that this is a new Act upon which questions will often arise, I venture to make these suggestions: *First.* The first proposition is illustrated by the first action which I have described in respect of the February, 1976, hire. It is this: When a creditor has a sum certain due to him, as to which there is no dispute, but the debtor seeks to avoid payment by making a set-off or counterclaim as to which there is a dispute, then the Court can give summary judgment under R.S.C., O. 14, for the sum due to the creditor, but it must send the set-off or counterclaim off to arbitration. If the set-off or counterclaim is bona fide and arguable up to or for a certain amount, the Court may stay execution on the judgment for that amount. But in some cases it will not even grant a stay, even when there is an arguable set-off or counterclaim, such as when the claim is on a bill of exchange. See *Nova (Jersey) Knit v. Kammgarn Spinnerei G.m.b.H.* [1977] 1 Lloyd's Rep. 463; [1977] 1 W.L.R. 713 at pp. 469 and 722D-D by Viscount Dilhorne; or for freight, see *Henriksens Rederi A/S v. T.H.Z. Rolimpex*, [1973] 2 Lloyd's Rep. 333; [1974] Q.B. 233, and the recent case of *Aries Tanker Corporation v. Total Transport Ltd.*, [1977] 1 Lloyd's Rep. 334; [1977] 1 W.L.R. 185; or, I would add, for sums due on architects' certificates when they are, by the terms of the contract, expressly or impliedly payable without deduction or further deduction; see *Dawnays Ltd. v. F. G. Minter Ltd.*, [1971] 2 Lloyd's Rep. 192; [1971] 1 W.L.R. 1205, a case in which that construction which this Court put on it met with the approval of Lord Reid and Lord Morris of Borth-y-Gest in the House of Lords in *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd.*, [1974] A.C. 689, at pp. 697D and 703C. (The other Law Lords only differed on the construction of the agreement.)

Second. Take a case where a creditor has an ascertainable sum due to him, such as for work done and materials supplied, but the sum is not exactly quantified. The creditor says that it comes to, say, £1000. The debtor admits that a considerable sum is due, but says that it is no more than £800. Then the Court can give judgment for the £800 and send the balance of £200 to arbitration: because the only matter in dispute then is £200. See *Lazarus v. Smith*, [1908] 2 Q.B. 266, and *Contract Discount Ltd. v. Furlong*, (1948) 64 T.L.R. 201. *Third.* Take the same case of work done and material supplied, and suppose that the debtor admits that a considerable sum is due, but he declines to put a figure on it. The Court should not allow him to obtain any advantage on that account. He should not be allowed to pay nothing. The Court ought to give judgment for such sum as appears to the court to be indisputably due and to refer the balance to arbitration. This is established by the decision of this Court in *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, [1978] 1 Lloyd's Rep. 33 (Note); [1976] 2 B.L.R. 60. I would like to refer to two or three extracts from the judgment in this case because they are particularly apposite here. In my own judgment at p. 35 (post) I said:

> 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 can see that a sum is indisputably due: then 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.

Lord Justice Lawton put it with his usual common sense. He said (at p. 36 post)

> If the main contractor can turn round, as the main contractor has done in this case and say "Well, I don't accept your account; therefore there is a dispute", that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life blood. It seems to me that the administration of justice in our Courts should do all it can to restore that life blood as quickly as possible . . . In my judgment it can be done if the Courts make a robust approach, as the Master did in this case, to the jurisdiction under Order 14.

Lord Justice Bridge (at p. 37 post) said

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, 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.

Fourth. Take a like case where the creditor is entitled to an ascertainable sum due to him, not for work done and materials supplied — but for damages — such as, on a sale of goods, when the buyer refuses to accept the goods, the difference between contract price and market price under s. 50(2) of the 1893 Act. The buyer is clearly liable, but he says that the sellers' calculation is wrong because the market price was different from what the seller alleges. In such a case if the buyer puts forward his own figure of the market price, the seller gets judgment for the admitted damages, and the balance goes to arbitration; because that is the only matter in dispute. If the buyer does not put forward his own figure of the market price, he should not get an advantage on that account. The Court should give judgment for the amount which is indisputably due and send the balance to arbitration. The case is indistinguishable in principle from *Ellis v. Wates.*

On principle therefore, it is my opinion that when the creditor is clearly entitled to substantial damages for breach of contract — and the only question outstanding is how much those damages should be — then if the creditor quantifies them at £1000 and the debtor quantifies them at £800, there is not in fact any dispute between the parties as to the £800, but only as to the £200; so only the £200 need be referred to arbitration. Now suppose that the debtor does not condescend to quantify the damages, but stalls and says he will not, or cannot, calculate the damages. He should not be better off by his evasive action. If he will not give any figure at all or gives a figure which is patently too low, then he cannot complain if the Court itself assesses the figure. In such a situation the Court can and should assess the figure of damages which it considers to be indisputable, and leave the balance as the matter in dispute "which is agreed to be referred". That I think is the consequence of *Ellis v. Wates* properly understood.

Returning to the facts in this case, the shipowners are undoubtedly entitled to damages from the charterer for wrongful repudiation of the charter. The charterer admits it. The only question is the amount. I will not go into all the figures. The shipowners calculate their damages by taking the charter hire at $2.59, and deducting from it the hire obtainable on a time charter for the outstanding time as given by the London Tanker Brokers Pound, that is, $1.01. That gives the damages as over $4 million. The charterers give their own calculation. On the basis of a consent voyage rate they put the rate obtainable at $2.26; on a pure time charter they put it at $1.88. The resulting figure of damages is: in the one calculation $833,564; in the other calculation $1,786,995.57. There are some adjustments to be made for minor claims by the charterers. In addition the charterers put forward all sorts of arguments to reduce the figure — making bricks without straw just as the defendants sought to in *Ellis v. Wates.* I am quite clear that the charterers' lowest figure of damage, $833,564, is patently too low, especially when it is remembered that in December, 1976, the charterers offered that the charter should be cancelled on them paying $1,500,000; and in February, 1977, of $2 million.

In all the circumstances it seems to me that $1,000,000 is indisputably payable by way of damages; and it is only the excess of $3,675,000 which is in dispute. So far as the Arbitration Act, 1975 is concerned, then I would only stay the action in respect of that balance.

Order 14.

Alongside the 1975 Act, there is a parallel problem under O. 14. It is said that judgment can only be given for the whole or part of a claim if it is a "liquidated demand". I agree that that is the case in respect of judgment in default of appearance — see R.S.C., O. 13, r. 1; and in default of pleading, see R.S.C., O. 19, r. 2. But those two rules have a historical origin. They are a survival from the old counts in indebitatus assumpsit. Anything that could be sued for under those counts comes within the description of a "debt or liquidated demand"; see *Lagos v. Grunwaldt,* [1910] 1 K.B. 41, by Lord Justice Farwell. Hence it has invariably been held that a demand on a quantum meruit for money due for work done and material supplied, even though strictly speaking it is unliquidated, is always recoverable as a "debt or liquidated demand". Those words are not, however, to be found in O. 14, r. 1. I see no reason why O. 14 should be confined to cases where the writ is indorsed for a claim for a debt or liquidated demand. It is daily practice to apply O. 14 to claims for a sum for work done and material supplied, and then for judgment to be given for such part of it as it admitted to be

payable; or for such part of it as, on the evidence can be said to be indisputably due. Such is simple justice to the builder who has done the work and ought to be paid. It would be a disgrace to the law if the customer could resist paying anything by simply saying, "There is no certainty that that is the correct figure". Similarly, when there is a sum which can only be ascertained on the taking of an account. If the debtor, who is himself in a position to calculate the amount, admits that something is owing, but he is not sure what it is, the Court can give judgment for such sum as it can say is indisputably due; see *Contract Discount v. Furlong*, (1948) 64 T.L.R. 201. I see no distinction in principle between those cases and the present case. The case of *Moore v. Assignment Courier Ltd.*, [1977] 1 W.L.R. 638, is quite distinguishable because the defendants had put in a defence that went to the whole of the claim. So it did not fall within O. 14. That was the ground of the decision, see p. 641H.

I come back to the words of O. 14, rr. 1 and 3. These make it clear that when the defendant has no defence to a claim or "a particular part" of such a claim, the Court can give such judgment "on that claim or part as may be just". I see no reason why this should not apply to a claim for unliquidated damages, just as it does to a claim on a quantum meruit, or a sum due on account. Take again a contract for the sale of goods when the damages depend on a calculation of the difference between contract price and market price, or a claim under a charter-party for damages for repudiation when the damages depend on a calculation of the difference between the contract rate of hire and the market rate. In such case the market rate may be a matter of dispute or difference, but usually between defined limits. The Court can readily ascertain the minimun figure for which the defendant is liable. It should be able to give judgment accordingly.

Mr. Southwell stressed the words in R.S.C. O. 14, r. 1, "Except as to the amount of damages claimed", and argued that when there was an interlocutory judgment for damages to be assessed, there was never any power to give judgment for part. But I read those words as applying to such part of the damages as to which there is a dispute. It does not apply to that part of the damages which is indisputably due.

Mr. Southwell also argued that a judgment for part of the damages (even the indisputable part) would be in effect a judgment for an interim payment; and the Court would not have power to give such a judgment. It was first introduced, he said, by the Administration of Justice Act, 1969, and it had only been applied to personal injury cases. I cannot accept this argument either. When the Court gives judgment for a sum which is indisputably due, it is not ordering an interim payment properly so called. It is a judgment for a sum which is indisputably due.

Conclusion

Every Judge concerned in this case has felt that there ought to be power to give judgment for the plaintiffs for a substantial sum, but has felt that under the rules there is no power to do it and that we must await an amendment of the rules. This treats the powers of the Courts — in matters of practice and procedure — to be limited by the rules. It is said, "Unless it is found in the rules, there is no power". I do not agree. Long before the Rule Committee was established the Judges had inherent power over all matters of practice and procedure. All the rules were made by them. They retain this power still. As I have often said, the Courts are master of their own procedure and can do what is right even though it is not contained in the rules. Rather than wait for the Rule Committee to act, it seems to be much better for the Courts to do what is necessary as and when the occasion arises. Take this very case. If the shipowners fail to get anything in this case the charterer will once more have succeeded by this latest manoeuvre — by not admitting any figure — in depriving the shipowners of their just claim for years to come. The charterers will be rubbing their hands with joy. At last they have found a good way out of payment. For myself I would not allow this. I would allow the appeal and enter judgment for the sum which on the evidence appears to me to be indisputably due. I would assess it at $1,000,000. I would allow the appeal accordingly.

Lord Justice BROWNE: I wish I could agree with my Lord, but I am afraid I cannot. In my judgment this appeal must be dismissed. Mr. Justice Kerr thought that the plaintiffs have all the merits and I have heard nothing which gives me the slightest reason to doubt that he was right. But I am driven to the conclusion that he was also right in holding that the defendants have the law on their side.

The arbitration clause in the charter-party (cl. 53) provides that:

> Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration there in force . . .

By s. 1(1) of the Arbitration Act, 1975:

> 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.

It is not in dispute that by virtue of s. 1(2) and (4), this arbitration agreement is one to which the section applies. The section is mandatory, and the Court must stay unless the case falls within one of the exceptions in the section; the Court has no discretion to refuse a stay, nor can it impose conditions (e.g. as to payment to the other party or into Court), as Mr. Leggatt concedes.

Where a claim (admittedly within the arbitration agreement) consists of separate identifiable and quantified items, for example, the case put by Mr. Justice Kerr of an admitted claim for freight and a disputed claim for demurrage, the Court would in my view be entitled to hold that there was "not in fact any dispute" as to the admitted item and to refuse a stay in respect of that part of the claim. In *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, [1978] 1 Lloyd's Rep. 33 (Note); [1976] 2 B.L.R. 60, the claim was for a specified sum, and this Court took the view that £x, part of that sum, was "indisputably due"; I think that in such a case also the Court would be entitled to refuse a stay in respect of £x and let the rest go to arbitration. But such cases there is by admission, or can be by a decision of the Court, a quantified sum as to which "there is not in fact any dispute".

In the present case it is plain that the plaintiffs are entitled to heavy damages for breach of contract, but there is no such quantified sum. Mr. Leggatt at various stages in his argument put forward various differing figures as the minimun amount "indisputably due", but in my view it is impossible to say that any definable and quantified part of the plaintiff's claim is "indisputably due". As Mr. Justice Kerr said . . .

> . . . the difficulty of doing it (i.e. putting forward such a minimun figure) in itself demonstrates the difficulty in which the court is placed.

In fact during his final speech Mr. Leggatt put forward a figure lower than the $1,000,000 to which my Lord has referred; he put forward a figure of $833,564. Mr. Justice Kerr held that the issue of liability was res judicata and that there was no issue as to liability in this action. The defendants have now admitted liability, but by virtue of R.S.C., O. 18, r. 13 (4) the amount of damages — that is, the whole claim for damages — is in issue. On the facts of this case, I cannot say that any definable or quantified part of the claim is not in fact in dispute.

I agree with what Mr. Justice Kerr said:

> I cannot possibly conclude that there is no dispute in respect of the matter agreed to be referred. The matter agreed to be referred is any dispute under the charter-party, and there is a dispute as to the plaintiffs' quantum of damages.

Like Mr. Justice Kerr, I reach this conclusion with reluctance, but in my judgment the Court has in this case no choice under s. 1(1) of the 1975 Act but to grant the stay, and I would dismiss the appeal.

The question what would have been the position if the 1975 Act did not apply therefore does not arise, but it was fully argued and I think I should deal with it.

Order 14, r. 1, deals with two situations:—

> (a) where a defendant has no defence to a claim included in the writ or to a particular part of such a claim;
>
> (b) where a defendant has no defence to such a claim or part except as to the amount of any damages claimed.

Corresponding references to the claim or the part of a claim appear in O. 14, rr. 3(1) and 4(3).

In *Lazarus v. Smith*, [1908] 2 K.B. 266, this Court (presumably applying (a)) held that it was right to give judgment under O. 14 for the admitted part of a larger (qualified) debt. In *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, both the total amount claimed and the part of it which this Court held to be "indisputably due" were quantified; the sum for which judgment was given under O. 14 (presumably again under (a)) was retention money forming part of sums certified by the engineers.

But in the present case I think the plaintiffs are in the same difficulty under O. 14 as under s. 1 of the Arbitration Act. It is impossible to identify or quantify any particular part of their claim in respect of which there is no defence or which is "indisputably due".

It seems to me that what the plaintiffs are really doing is to ask the Court to order an interim payment on account of the damages which they expect to recover. In *Moore v. Assignment Courier Ltd.*, [1977] 1 W.L.R. 638, this Court held that there is no inherent power to make such an order. The Court referred to s. 20 of the Administration of Justice Act, 1969, which gave power to the Rule Committee to make rules enabling the Court to make orders requiring interim payments. That power is quite

general, but the only rules so far made under it are O. 29, rr. 9-17, which apply only to claims for damages in respect of death or personal injuries. Although it was held in *Moore's* case that O. 14 did not there apply, I think we are bound by that decision (with which I entirely agree) to hold that we have no power to order an interim payment in the present case.

Even if the 1975 Act did not apply in this case, I should feel bound to hold that the Court has no power to give any judgment or make any order for payment to the plaintiffs of any part of the damages to which they will no doubt ultimately be held to be entitled.

It may be that the Rule Committee will think it right to consider whether there should be any extension of the power to order interim payments on account of damages.

Lord Justice GEOFFREY LANE: (read by Lord Justice BROWNE): The plaintiffs in this case claimed before Mr. Justice Kerr to be entitled to summary judgment under O. 14 against the defendants for damages for breach of a long-term charter-party. The defendants claimed that there was a dispute as to liability and quantum and that under the terms of the charter-party the dispute had to be referred to Arbitration by virtue of s. 1(1) of the Arbitration Act, 1975. The learned Judge had no difficulty in deciding that the defendants had no defence to the claim so far as liability was concerned, and indeed they have since the hearing formally admitted it. It is clear that the defendants, ever since the terms of the charter-party became burdensome to them, have used every subterfuge and device available to them in an attempt to avoid or delay the necessity of paying to the plaintiffs the very large sum by way of damages to which the plaintiffs are undoubtedly entitled. The defendants are devoid of merit and deserve no sympathy.

The plaintiffs submit that in these circumstances the defendants should be ordered at once to pay such portion of the as yet unascertained amount of damages as can properly be described as "indisputably due" and that the proceedings should then be stayed and the remaining question (namely to how much more the plaintiffs are entitled by way of damages) referred to arbitration.

Although the question under R.S.C., O. 14, and that under the Arbitration Act, 1975, are technically separate and distinct, they seem to me to depend in each case upon the same consideration.

Can it be said that this is a proper case under R.S.C., O. 14, for the defendants to be ordered to pay a portion of the claim to the plaintiffs, leaving the balance to be assessed? Such orders are of course made every day in appropriate circumstances; see for example *Lazarus v. Smith*, [1908] 2 K.B. 266. It has however been the practice to confine such an order to cases where the amount ordered to be paid has already been ascertained or is capable of being ascertained by mere calculation without further investigation, or is admittedly due. So far as we have been told the only possible exception has been in the case of claims in quantum meruit which under O. 14 are treated prima facie as a liquidated demand.

We were referred to *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, [1978] 1 Lloyd's Rep. 33 (Note); [1976] 2 B.L.R. 60, a decision of this Court. At pp. 35 and 61 Lord Denning, M.R., is reported as follows:

> 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 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.

Taken at its face value that statement, part of a judgment with which Lord Justice Lawton agreed, would cover the circumstances of the present case. But an examination of the facts in that case shows that the sum claimed by the plaintiffs as being immediately payable to them (£52,437) was retention money retained against them according to the terms of the contract and was payable for work that had already been done. It therefore fulfilled all the necessary conditions for a typical O. 14 payment.

How different the present case is can be judged from the way in which matters have been pleaded and argued. There is in the writ, as amended, no mention of any sum other than the total amount claimed, namely some $4,000,000 and no mention of any sum which is "indisputably due". Apparently no such sum was put before the Judge who was left to make his own calculations to that end if he wished.

Before us, after much prompting from the Court, various figures between about $850,000 and $2 million were suggested, but that is as near as one was taken to the "indisputably due" amount until Mr. Leggatt came to his reply, when the following possibilities were put forward, namely, $833,564 or $1,786,995. That was the first mention which had been made of those particular figures. The defendants had

had no opportunity of considering them or of addressing the Court upon them, and, as I understand it, the Court was being asked somehow to select, on the basis of the two figures, the sum for which it should give judgment under O. 14, staying the action as to the balance and allowing that dispute to go to arbitration. Despite the obvious temptation to decide this question in favour of the wholly meritorious plaintiffs against defendants who have less than no merits, it seems to me quite impossible to do so for two principal reasons.

First, even in circumstances where such an order can properly be made the plaintiff must assert and prove what he alleges to be the figure "indisputably due". However unmeritorious the defendants may be, they are entitled to know the allegation they have to meet at a stage in the proceedings when they are in a position to meet it.

Secondly, quite apart from that narrow ground, the plaintiffs are in truth asking the Court not to give judgment under O. 14 for a specified ascertained sum as to which there can be no legitimate dispute, but to make an interim award on account of future damages so that the plaintiffs shall not be kept out of their money by the procrastination of the defendants. The difficulties which the plaintiffs experienced in trying to particularise the sum claimed were largely due to this.

However desirable it may be that such a power should exist in the hands of the Court, it is not legitimate for the Court to confer the power on itself in purported exercise of its inherent jurisdiction to control its own procedure. So much is clear from s. 20(1) of the Administration of Justice Act, 1969, which reads as follows:

> The power to make rules of court under section 99 of the Judicature Act 1925 and the power to make county court rules under section 102 of the County Courts Act 1959 shall each include power by any such rules to make provision for enabling the court in which any proceedings are pending, in such circumstances as may be specified in the rules, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, either by payment into court or (if the rule so provides) by paying it to another party to the proceedings.

In exercise of that power the Rule Committee provided by O. 29, r. 9 that interim payments may be made in cases involving claims in respect of personal injuries or death. As Lord Justice Megaw pointed out in *Moore v. Assignment Courier Ltd.*, [1977] 1 W.L.R. 638, at p. 645, Parliament by enacting s. 20 of the Administration of Justice Act, 1969, made it clear that the existing powers of the Rule Committee were not wide enough to enable the Committee to authorise interim payments. The relevant existing powers were contained in s. 99 of the Supreme Court of Judicature (Consolidation) Act 1925:

> Rules of court may be made under this Act for the following purposes (a) for regulating and prescribing the procedure . . . and the practice to be followed in the Court of Appeal and the High Court respectively in all causes and matters whatsoever . . .

Thus Parliament in enacting s. 20(1) of the 1969 Act made it clear that the ordering of interim payments is not a matter of mere procedure in which the Court is entitled to do as it thinks fit. The Judge was right in his conclusion.

By the same token, the defendants' claim under s. 1 of the Arbitration Act, 1975, succeeds. Damages are in issue by virtue of O. 18, r. 13. The plaintiffs, as already described, have failed to show that any identifiable or specific part of those damages is not in dispute. That being so the Court has no option but to make an order staying proceedings and allowing the dispute to be put to arbitration in accordance with the relevant clause in the charter-party.

I agree with Lord Justice Browne that the appeal should be dismissed.

NOTE

COURT OF APPEAL

Jan. 16, 19 and 20, 1976

ELLIS MECHANICAL SERVICES LTD.
v.
WATES CONSTRUCTION LTD.

Before Lord DENNING, M.R.,
Lord Justice LAWTON and
Lord Justice BRIDGE

Lord DENNING, M.R.: In this appeal we are concerned with the outcome of a big building project at the old Hendon aerodrome. Two local authorities combined in it. The Greater London Council were to build a large number of dwelling houses for individuals to occupy. The Barnet Council were to build a comprehensive school and other buildings for the use of the community as a whole. Each of those bodies, the Greater London Council and Barnet employed Wates Construction Ltd. as

the main contractors for each of the contracts. Wates Construction Ltd. in their turn, employed as sub-contractors Ellis Mechanical Services Ltd. Ellis's were to provide the heating system and all the mechanical services which were required for both the two contracts. The main contract, between the GLC and Wates, was for an estimated sum of £9½ million. That was granted in June, 1970. The sub-contract with regard to that, by Wates to Ellis's, was for over £1 million.

The work went forward; but then, for reasons that we do not know, on Feb. 22, 1974, the Wates and GLC contract was determined. It came to an end, each of the two parties saying that the other had repudiated it. That is no concern of Ellis's the sub-contractors, except in so far as it entitled them to be paid. The main contract and the sub-contract were on the usual RIBA form, with some slight variations, but on this main contract being determined, the sub-contractors became entitled to be paid in accordance with cl. 21 of the sub-contract, which I shall read.

It says:

> If for any reason the contractor's employment under the main contract is determined, then the employment of the sub-contractor under this sub-contract shall thereupon also determine and the sub-contractors shall be entitled to be paid.

Then there are four items: (i) the value of the sub-contract works in so far as they had been completed at the date of determination; (ii) the value of the work begun and executed, but not completed; (iii) the value of the unfixed materials on the site, in which the property passed to the employer; and (iv) the cost of materials off-site ordered, for which the sub-contractor had paid or been charged.

So there it is; it is quite plain on cl. 21 that the sub-contractor was entitled to be paid in effect for all the work they had done and all the materials they had there available at the date Feb. 22, 1974.

Ellis's accordingly wanted to be paid by Wates. They had been doing the work hitherto to the order, and under the supervision of the GLC architect. That was provided in the contracts. Certificates had been given by the GLC architects and engineers. When Ellis's wanted payment they went back to the last interim certificate, which was one of Jan. 25, 1974. Looking at that interim certificate, the engineers had certified a sum of getting on for £700,000. Much of it had been paid already, but there had been retained, as against the sub-contractors, a sum of £52,437. That had been retained as against them as retention money according to the retention clauses in the contract. It was retained pending completion, but it was payable for work that had already been done. Ellis's having nothing more definite to go upon at that stage, claimed those retention moneys as being at least the moneys that ought to be paid to them for the work that had been done. But Wates refused to pay that sum, or any sum.

I have no doubt that Wates were arguing their own liability out with the GLC. But eventually further accounts were got out by Ellis's. So much so that, by November, 1974, they worked it out that they were entitled to £187,004.93. Having worked that out they issued a writ for the full amount, or the amount as they worked it out then, that was due to them. They applied for judgment under O. 14. They did not claim the whole of that amount. They realised that arguments might arise about details.

But in support of the claim for judgment under O. 14, Mr. Newman swore that he believed that there was no defence in respect of £52,437—that is the amount that had been retained. He said that there was no defence to that, and they were ready to refer the balance to arbitration. They were ready to go to arbitration as to any excess amount, but they felt that they ought to be paid that £52,437.

They came before the Master. The Master thought that that was right. He gave Ellis's judgment for the £52,437 and gave Wates leave to defend as to the balance, but said that by consent it was to go to arbitration.

From that order of the Master, Wates appealed to Mr. Justice Kilner-Brown. The Judge was evidently in two minds about it, but he thought that perhaps there were points to be taken on the accounts, and it was not altogether clear that the £52,000 was really owing. At all events, he thought that the whole thing should be dealt with in the arbitration. So he allowed the appeal from the Master and set aside that judgment for £52,000. He referred the whole matter to arbitration. Now there is an appeal to this Court.

There is a point of procedure which arises at the beginning. Ellis's thought that they could not appeal against what was virtually an unconditional leave to defend. So in their notice of appeal they asked for an order that if the action were stayed it should only be stayed on condition that Wates paid £52,437. I would like to say at once that, as a matter of procedure, an appeal is competent from the decision of Mr. Justice Kilner-Brown. I think that we ought either to allow an amendment or have a notice of appeal put in, so as to enable this Court, if it thinks right, to give judgment for such an amount as is undoubtedly due, and let the remainder go on to arbitration.

unliquidated damages for wrongful repudiation of the charter by the charterers, and granting a stay of action pursuant to s. 1(1) of the Arbitration Act, 1975, since there was a dispute as to the quantum of damages and this was a "matter agreed to be referred."

Mr. A. P. Leggatt, Q.C., and Mr. Roger Buckley (instructed by Messrs. Ince & Co.) for the plaintiff appellant shipowners; Mr. Richard Southwell, Q.C., and Mr. Brian Davenport (instructed by Messrs. Coward Chance) for the defendant respondent charterers.

The further facts are stated in the judgment of Lord Denning, M.R.

Judgment was reserved.

Monday, Aug. 1, 1977

JUDGMENT

Lord DENNING M.R.: The *Fuohsan Maru* is a Japanese motor vessel. She is a big bulk carrier and can carry 105,000 long tons of oil or of ore. She is owned by a Japanese company and time chartered for a long period to Associated Bulk Carriers Ltd., whom I will call the shipowners.

In 1972, they let her on a time charter on the Beepee time form to Koch Marine Inc. for five years (one month more or less) from delivery. The charter hire was $2.59 cents per ton dead weight per month. She was delivered to Koch Marine on Aug. 29, 1974. So under the time charter she could be redelivered at the earliest on July 29, 1979.

There was a printed clause which said:

> This Charter shall be construed and the relations between the parties determined in accordance with the law of England. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter.

But there was a typewritten clause which said

> Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London Pursuant to the laws relating to arbitration then in force.

Presumably the typewritten clause takes precedence over the printed clause.

From August 1974, Koch Marine duly operated the vessel and paid the charter hire regularly every month for nearly two and a half years. But by that time the tanker market had slumped to the bottom. By December 1976, the rate for this vessel had fallen from $2.59 to a little more than $1. So, Koch Marine sought by every possible device to get out of the charter. They did it by making claims which the Judge described as "manufactured" for the purpose of avoiding payment of the hire. In December 1976, and January 1977, they made deductions from the monthly hire — alleging that the master had neglected to clean the holds. Then on Mar. 3, 1977, when she was in the U.S. Gulf, they said they intended to send her in ballast through the Suez Canal to the Persian Gulf and there load a full cargo of 105,000 tons of crude oil and to carry it back through the Suez Canal and deliver it in the Mediterranean. This was a spurious suggestion. She could not conceivably carry that cargo through the Suez Canal. The maximum draught through the Suez was 37 ft., and this 105,000 tons of cargo would require a draught of 51 ft. The vessel would, as the Judge suggested, need "wings" to carry her through the canal. When the shipowners pointed this out, Koch Marine changed the orders and said that they intended to send her to Port Walcott in Australia to load a cargo of ore and carry it, via the Cape of Good Hope, to Eleusis in Greece and there unload. But that too was a spurious suggestion manufactured by the charterers and formed another pretext for not paying. The shipowners found out that no one at Port Walcott had heard of any such shipment; and that there were no facilities for discharging ore at Eleusis. The charterers followed it up with an impudent claim; they said the shipowners were at fault. On Apr. 11, 1977, they sent this telex to the shipowners:

> Charterers find themselves prevented by owners from employing vessel as intended. There being little prospect of economic alternative employment for the vessel, charterers regret they must treat owners inability to honour their charter obligations as bringing this charterparty to an end. The vessel is redelivered to owners as of the time and date hereof.

By that telex the real object of the charterers became plain. They were not going to pay any more of the hire and were making what seems to be the outrageous suggestion that the shipowners were at fault.

The shipowners, on Apr. 22, 1977, made this dignified reply:

> We much regret you appear intent on forcing yet another repudiation situation — presumably in order to obtain some temporary relief from monthly financial commitments during the delay which will occur before litigation can be completed. We do not believe that your legal advisers can be supporting your present stance and thus you are acting in complete disregard of your legal

The charterers replied that there was no question of their giving any further orders and on Apr. 25, 1977, the shipowners treated the charterers' conduct as a repudiation and held them liable for all loss or damage arising therefrom.

On May 12 the shipowners obtained summary judgment in respect of hire due on Feb. 28, 1977, which the charterers have since paid.

On May 11, the shipowners issued a writ against the charterers claiming damages for wrongful repudiation of the charter, and obtained a *Mareva* injunction. The shipowners then applied for summary judgment under R.S.C., O. 14, but the charterers applied by summons for a stay of the action under the Arbitration Act, 1975, s. 1.

Held, by KERR, J. that there was a dispute in respect of "a matter agreed to be referred" within s. 1 of the Arbitration Act, 1975, and the charterers were entitled to a stay.

On appeal by the shipowners:

Held, by C.A. (BROWNE and GEOFFREY LANE, L. JJ., Lord DENNING, M.R., dissenting), that (1) in the present case it was plain that the shipowners were entitled to heavy damages for breach of contract but there was no such quantified sum (*see* p. 31, col. 1); and although the charterers had now admitted liability, the whole claim for damages was in issue (*see* p. 31, cols. 1 and 2); and on the facts of the case it could not be said that any definable or quantified part of the claim was not in fact in dispute and it was impossible to identify or quantify any particular part of the claim in respect of which there was no defence or which was undisputably due (*see* p. 31, col. 2; p. 32, col. 2);

Ellis Mechanical Services Ltd. v. Wates Construction Ltd., [1978] 1 Lloyd's Rep. 33 (Note), distinguished.

(2) the shipowners were in truth asking the Court to make an interim payment on account of the damages they expected to recover so that they would not be kept out of their money by the procrastination of the charterers (*see* p. 31, col. 2; p. 33, col. 1); and although it might be desirable that such a power should exist in the hands of the Court it was not legitimate for the Court to confer the power on itself in purported exercise of its inherent jurisdiction to control its own procedure (*see* p. 32, col. 1; p. 33, col. 1);

Moore v. Assignment Courier Ltd., [1977] 1 W.L.R. 638, applied.

(3) the learned Judge was right in holding that he could not possibly conclude that there was no dispute in respect of the matter agreed to be referred (*see* p. 31, col. 2); the matter agreed to be referred was any dispute under the charter-party and there was a dispute as to the shipowners' quantum of damages (*see* p. 31, col. 2); and under s. 1(1) of the Arbitration Act 1975, the Court had, in this case, no choice but to grant the stay (*see* p. 31, col. 2; p. 33, col. 2).

Appeal dismissed.

Per Lord DENNING, M.R. (at p. 27): . . . There is beyond doubt a big sum payable as damages by the charterers to the shipowners: but because it cannot be ascertained and put down as a definite figure, the shipowners are to get no judgment for any sum at all. The whole matter must be sent to arbitration, which as we all know, would mean a long delay. Arbitrators have little control over the speed of the arbitration . . . It is most regrettable. It means that defaulting parties can get time indefinitely . . .

(at p. 30): Every Judge concerned in this case has felt that there ought to be power to give judgment for the [shipowners] for a substantial sum, but has felt that under the rules there is no power to do it and that we must await an amendment of the rules. This treats the powers of the Courts — in matters of practice and procedure — to be limited by the rules . . . I do not agree. Long before the Rule Committee was established the Judges had inherent power over all matters of practice and procedure . . . They retain this power still . . . Rather than wait for the Rule Committee to act, it seems to be much better for the Courts to do what is necessary as and when the occasion arises . . .

The following cases were referred to in the judgments:

Aries Tanker Corporation v. Total Transport Ltd., *(The Aries)*, (H.L.) [1977] 1 Lloyd's Rep. 334; [1977] 1 W.L.R. 185;

Contract Discount v. Furlong, (1948) 64 T.L.R. 201.

Dawnays Ltd. v. F.G. Minter Ltd. (C.A.) [1971] 2 Lloyd's Rep. 192; [1971] 1 W.L.R. 1205;

Ellis Mechanical Services Ltd. v. Wates Construction Ltd., [1978] 1 Lloyd's Rep. 33, (Note); [1976] 2 B.L.R. 60;

Henriksens Rederi A/S v. T.H.Z. Rolimpex *(The Brede)*, (C.A.) [1973] 2 Lloyd's Rep. 333; [1974] Q.B. 233;

Lagos v. Grunwaldt, [1910] 1 K.B. 41;

Lazarus v. Smith, [1908] 2 K.B. 266;

Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd., (H.L.) [1974] A.C. 689;

Moore v. Assignment Courier Ltd., (C.A.) [1977] 1 W.L.R. 638;

Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei G.m.b.H., (H.L.) [1977] 1 Lloyd's Rep. 463; [1977] 1 W.L.R. 713.

This was an appeal by the plaintiff shipowners, Associated Bulk Carriers Ltd., from the decision of Mr. Justice Kerr, given in favour of the defendant charterers, Koch Shipping Inc., and holding in effect that the shipowners were not entitled to summary judgment under R.S.C., O. 14, in respect of

so, to what extent, I think that the argument we have had before us goes beyond that essential minimum, I am expressing no view whatever. In the circumstances, in my judgment this appeal should be allowed and leave to defend should be given.

Sir DAVID CAIRNS: I agree that, neither on the question of whether the owners were entitled to change managers without the consent of the charterers, nor on the question of whether, if the owners were in breach of contract, their breach amounted to a repudiation, can it properly be said that the plaintiffs' case is so clear that the answer to it put forward by the defendants is unarguable. I accordingly agree that the appeal should be allowed and leave to defend given.

COURT OF APPEAL

July 20 and 21, 1977

ASSOCIATED BULK CARRIERS LTD.
v.
KOCH SHIPPING INC.

(THE "FUOHSAN MARU")

Before Lord DENNING, M.R.,[1]
Lord Justice BROWNE and
Lord Justice GEOFFREY LANE

Charter-party (Time) — Stay of action — Wrongful repudiation of charter by charterers — Shipowners claimed unliquidated damages — Whether shipowners entitled to summary judgment under R.S.C., O. 14 — Whether charterers entitled to stay of action — R.S.C., O. 14 — Arbitration Act, 1975, s. 1.

In 1972, the shipowners let their vessel *Fuohsan Maru* on a time charter in the Beepee form to the charterers for five years (one month more or less) from delivery at a hire rate of $2.59 per ton dead weight per month. The vessel was delivered on Aug. 29, 1974, and the redelivery date was therefore July 29, 1979, at the earliest.

The charter provided, inter alia:

> Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration then in force.

The charterers duly operated the vessel and paid the hire regularly but by December, 1976, the tanker market had slumped and the rate for *Fuohsan Maru* had fallen from $2.59 to a little over $1. The charterers "manufactured" claims for the purpose of avoiding payment of the hire and on Apr. 11 sent the following letter to the shipowners:

> Charterers find themselves prevented by owners from employing vessel as intended. There being little prospect of economic alternative employment for the vessel, charterers regret they must treat owners inability to honour their charter obligations as bringing this charter-party to an end. The vessel is redelivered to owners as of the time and date hereof.

On Apr. 22, 1977, the shipowners sent the following reply:

> We much regret you appear intent on forcing yet another repudiation situation — presumably in order to obtain some temporary relief from . . . financial commitments during the delay which will occur before litigation can be completed . . . We call upon you as charterers with a reputation to maintain to earnestly reconsider your attitude.

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[1] Dissenting.

the consent of the defendants, would constitute a breach of the contract contained in the charter-party, and a breach of such a nature that it would entitle the defendants to treat it as putting an end to the remaining obligations under the charter-party: it would, in effect, be, or have the effect of, a fundamental breach of, or breach of a fundamental term in, the contract; and, as the defendants apparently took the view that no change was going to be made in the attitude of the opposite party with regard to change of managers, they were entitled to treat that as being a repudiation, and they did treat it as such.

The plaintiffs have not treated the defendants' repudiation as being something that they, in turn, would accept as putting an end to the contract. They, as they are entitled to do, if there has here been no fundamental breach of contract on their part, have chosen, despite the repudiation of it by the defendants, to treat the contract as still being alive. They therefore have, consistently with that attitude, required the defendants to pay the charter hire which was due on Dec. 1, 1976. The defendants, consistently with their attitude that the contract is at an end, have refused to pay it. The plaintiffs thereupon initiated the proceedings out of which this appeal arises by a writ issued on Dec. 31, 1976, in which they claim the sum of U.S. $128,034.25 and interest pursuant to statute. That is the amount of the charter hire which, if the charter-party is still alive, was due and unpaid. The plaintiffs thereupon sought in the Commercial Court judgment under R.S.C., O. 14.

The matter came before Mr. Justice Parker on Mar. 25 of this year. There was before him an affidavit by M. Louis Marie Honore Bouzols, who is, as I understand it, the president of the defendant corporation, who are a chartering subsidiary of Compagnie Francaise des Petroles. In that affidavit the deponent set out, in substance, as a matter of general shipping knowledge, the important part that the manager plays in relation to a time charter-party. He also gave particulars about the negotiations for the present charter-party, and the negotiations relating to the addendum No. 1. In it he stressed the importance to the defendants of the personality of the managers who were to be employed.

The defendants' defence to the claim, on the basis of which they said that they ought to be given leave to defend under O. 14, was this: On the true construction of the contract, particularly cl. 48, read with addendum No. 1, it was a term of the charter-party (and it seems to have been put, at any rate ultimately, as being an express term of the charter-party) that the vessel should be managed by Colocotronis Ltd. from and after the date of the transfer of ownership of the vessel agreed by the defendants in pursuance of cl. 48 of the charter-party; that that term of the contract involved that, Colocotronis Ltd. having become the managers of the new owners of the vessel, no other managers could, in accordance with the terms of the contract, be appointed without the defendants' consent; and that the appointment, or the purported appointment, of other managers than Colocotronis (London) Ltd. that had been made, resulted in a breach of the contract. They further submitted that that breach of the contract was a fundamental breach (however it is to be expressed) — a breach the effect of which was such that in law they were entitled to treat the contract as being at an end.

This being an appeal under R.S.C., O. 14, the function of this Court is not to decide whether the plaintiffs or the defendants are right on their construction of the contract, or the question whether or not, if there be a breach of contract, it is of a fundamental term. The function of this Court is simply to consider whether, on the material which was before the Judge and is now before this Court, there is something that can fairly be described as "an arguable case", which would provide a defence to the action.

Having regard to the conclusion which I have reached, approaching the matter on that basis, it is desirable that I should make the remainder of this judgment as short as is possible. It is in the circumstances highly undesirable that I should express any view upon the issues that have been argued going further than is necessary for the very limited question which has to be decided in this Court. I therefore, deliberately and advisedly, do not propose even to attempt to set out the arguments which have been involved on one side or the other, but merely to say that in my judgment it would be wrong to hold that there is not here an "arguable" case that there was a term of the charter-party such as is contended for on behalf of the defendants; and, further, to say, on the only other matter which remains in issue, that I do not think it would be right to say that it cannot fairly be argued that a breach of that term would, or might, produce the result that the contract could be treated as having been terminated. But I wish to stress (I hope it is clear from what I have said already) that I am not, and deliberately not, indicating any view that goes one millimetre beyond that; and no one, I am sure, will treat what I have said as indicating any view beyond that which I regard as essential for the decision of this case, namely, that those two matters can, in my judgment, fairly be regarded as being "arguable". Whether, and if

obligations. We call upon you as charterers with a reputation to maintain to earnestly reconsider your attitude.

The charterers replied that there was no question of their giving any further orders. So on Apr. 25, 1977, the shipowners treated the charterers' conduct as a repudiation. They accepted it as of Apr. 25, 1977, and held the charterers liable for all loss or damage arising therefrom.

The shipowners sought redress in the Courts. They had already on Mar. 14, 1977, issued a writ claiming the hire due on Feb. 28, 1977, amounting to $290,182.61. On Mar. 15, 1977, they got a *Mareva* injunction. On May 12, 1977, they applied for summary judgment. The charterers then said they had a counterclaim for wrongful repudiation by the shipowners which exceeded the Feb. 28 hire and they asked for the action to be stayed and for the whole claim and counterclaim to be sent to arbitration. Mr. Justice Kerr rejected the charterers' suggestion. He said that the counterclaim was

> not bona fide, but merely manufactured as a pretext for getting out of the charter party.

So he refused a stay and gave judgment for the February hire. The charterers did not appeal from that judgment. They paid the February hire.

On May 11, 1977, the shipowners issued a writ against the charterers claiming damages for wrongful repudiation of the charter-party. They based it on the hire payable under the charter-party for the remaining 27 months, less the hire obtainable under a time charter for that period as at the date of repudiation. Their claim would come to something approaching, if not exceeding, $4 million. The shipowners applied ex parte for a *Mareva* injunction and got it. They applied again for summary judgment under R.S.C., O. 14. The charterers retorted with a summons to stay under the Arbitration Act, 1975.

The summonses were heard by Mr. Justice Kerr on June 23, 1977. At this stage the charterers admitted that the shipowners were entitled to damages for repudiation. They no longer put forward their manufactured cross-claim for repudiation. So the only issue was what was the proper sum of damages to be awarded to the shipowners?

The Judge made this important finding:

> On the evidence before me it is overwhelmingly probable that the shipowners are entitled to a very substantial sum . . . Mr. Southwell for the charterers has rightly accepted that it is in the highest degree probable that the plaintiffs will recover a substantial amount. To the extent that the charterers have sought to controvert the plaintiffs' evidence as to approximate or minimum amounts to which the shipowners are entitled, I find the charterers' evidence unimpressive — no more impressive than their conduct during the last few months of the charter party . . . The shipowners have all the merits, and I suspect that the defendants have no merits whatsoever and are still trying to stave off the day of reckoning. I have to decide whether they have the law on their side. With reluctance, I have come to the conclusion that they have . . . I must therefore grant the charterers the stay which they ask.

So there is the point. There is beyond doubt a big sum payable as damages by the charterers to the shipowners: but because it cannot be ascertained and put down as a definite figure, the shipowners are to get no judgment for any sum at all. The whole matter must be sent to arbitration, which, as we all know, would mean a long delay. Arbitrators have little control over the speed of the arbitration. It takes a long time to get an appointment; and when that is done, if the creditor wants to avoid payment, he can put off the day of judgment indefinitely — by asking for more time for one thing or another — by saying he is not ready, yet — and even after an award, by asking for a case to be stated — and so forth. It is most regrettable. It means that defaulting parties can get time indefinitely. The solicitors for the shipowner, with all the responsibility which attaches to them as solicitors in the City of London, have put this upon affidavit:

> This is not the first case in which the charterers have adopted unusual tactics in order to rid themselves of financially unfavourable charter commitments. In a number of cases . . . the charterers have terminated the charter and have then used the delay regrettably inherent in arbitration proceedings to negotiate a discounted settlement.

Arbitration Act, 1975

It is against this background that I consider the effect of the Arbitration Act, 1975. It does not apply to domestic arbitration agreements, but only to international arbitration agreements like this one. Under the 1950 Act the Courts have a discretion whether to stay the action or not. The 1975 Act takes away any discretion in the Court. It makes it compulsory to grant a stay when the matter in dispute comes within the Act. The word "shall" is used imperatively. I will read the section in full.

> 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.

The important words for the present purpose are "any matter agreed to be referred", and "there is not in fact any dispute between the parties in regard to the matter agreed to be referred".

Seeing that this is a new Act upon which questions will often arise, I venture to make these suggestions: *First*. The first proposition is illustrated by the first action which I have described in respect of the February, 1976, hire. It is this: When a creditor has a sum certain due to him, as to which there is no dispute, but the debtor seeks to avoid payment by making a set-off or counterclaim as to which there is a dispute, then the Court can give summary judgment under R.S.C., O. 14, for the sum due to the creditor, but it must send the set-off or counterclaim off to arbitration. If the set-off or counterclaim is bona fide and arguable up to or for a certain amount, the Court may stay execution on the judgment for that amount. But in some cases it will not even grant a stay, even when there is an arguable set-off or counterclaim, such as when the claim is on a bill of exchange. See *Nova (Jersey) Knit v. Kammgarn Spinnerei G.m.b.H.* [1977] 1 Lloyd's Rep. 463; [1977] 1 W.L.R. 713 at pp. 469 and 722D-D by Viscount Dilhorne; or for freight, see *Henriksens Rederi A/S v. T.H.Z. Rolimpex*, [1973] 2 Lloyd's Rep. 333; [1974] Q.B. 233, and the recent case of *Aries Tanker Corporation v. Total Transport Ltd.*, [1977] 1 Lloyd's Rep. 334; [1977] 1 W.L.R. 185: or, I would add, for sums due on architects' certificates when they are, by the terms of the contract, expressly or impliedly payable without deduction or further deduction; see *Dawnays Ltd. v. F. G. Minter Ltd.*, [1971] 2 Lloyd's Rep. 192; [1971] 1 W.L.R. 1205, a case in which that construction which this Court put on it met with the approval of Lord Reid and Lord Morris of Borth-y-Gest in the House of Lords in *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd.*, [1974] A.C. 689, at pp. 697D and 703C. (The other Law Lords only differed on the construction of the agreement.)

Second. Take a case where a creditor has an ascertainable sum due to him, such as for work done and materials supplied, but the sum is not exactly quantified. The creditor says that it comes to, say, £1000. The debtor admits that a considerable sum is due, but says that it is no more than £800. Then the Court can give judgment for the £800 and send the balance of £200 to arbitration: because the only matter in dispute then is £200. See *Lazarus v. Smith*, [1908] 2 Q.B. 266, and *Contract Discount Ltd. v. Fierlong*, (1948) 64 T.L.R. 201. *Third*. Take the same case of work done and material supplied, and suppose that the debtor admits that a considerable sum is due, but he declines to put a figure on it. The Court should not allow him to obtain any advantage on that account. He should not be allowed to pay nothing. The Court ought to give judgment for such sum as appears to the court to be indisputably due and to refer the balance to arbitration. This is established by the decision of this Court in *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, [1978] 1 Lloyd's Rep. 33 (Note); [1976] 2 B.L.R. 60. I would like to refer to two or three extracts from the judgment in this case because they are particularly apposite here. In my own judgment at p. 35 (post) I said:

> 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 can see that a sum is indisputably due: then 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.

Lord Justice Lawton put it with his usual common sense. He said (at p. 36 post)

> If the main contractor can turn round, as the main contractor has done in this case and say "Well, I don't accept your account; therefore there is a dispute", that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life blood. It seems to me that the administration of justice in our Courts should do all it can to restore that life blood as quickly as possible . . . In my judgment it can be done if the Courts make a robust approach, as the Master did in this case, to the jurisdiction under Order 14.

Lord Justice Bridge (at p. 37 post) said

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, 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.

Fourth. Take a like case where the creditor is entitled to an ascertainable sum due to him, not for work done and materials supplied — but for damages — such as, on a sale of goods, when the buyer refuses to accept the goods, the difference between contract price and market price under s. 50(2) of the 1893 Act. The buyer is clearly liable, but he says that the sellers' calculation is wrong because the market price was different from what the seller alleges. In such a case if the buyer puts forward his own figure of the market price, the seller gets judgment for the admitted damages, and the balance goes to arbitration; because that is the only matter in dispute. If the buyer does not put forward his own figure of the market price, he should not get an advantage on that account. The Court should give judgment for the amount which is indisputably due and send the balance to arbitration. The case is indistinguishable in principle from *Ellis v. Wates.*

On principle therefore, it is my opinion that when the creditor is clearly entitled to substantial damages for breach of contract — and the only question outstanding is how much those damages should be — then if the creditor quantifies them at £1000 and the debtor quantifies them at £800, there is not in fact any dispute between the parties as to the £800, but only as to the £200; so only the £200 need be referred to arbitration. Now suppose that the debtor does not condescend to quantify the damages, but stalls and says he will not, or cannot, calculate the damages. He should not be better off by his evasive action. If he will not give any figure at all or gives a figure which is patently too low, then he cannot complain if the Court itself assesses the figure. In such a situation the Court can and should assess the figure of damages which it considers to be indisputable, and leave the balance as the matter in dispute "which is agreed to be referred". That I think is the consequence of *Ellis v. Wates* properly understood.

Returning to the facts in this case, the shipowners are undoubtedly entitled to damages from the charterer for wrongful repudiation of the charter. The charterer admits it. The only question is the amount. I will not go into all the figures. The shipowners calculate their damages by taking the charter hire at $2.59, and deducting from it the hire obtainable on a time charter for the outstanding time as given by the London Tanker Brokers Pound, that is, $1.01. That gives the damages as over $4 million. The charterers give their own calculation. On the basis of a consent voyage rate they put the rate obtainable at $2.26; on a pure time charter they put it at $1.88. The resulting figure of damages is: in the one calculation $833,564; in the other calculation $1,786,995.57. There are some adjustments to be made for minor claims by the charterers. In addition the charterers put forward all sorts of arguments to reduce the figure — making bricks without straw just as the defendants sought to in *Ellis v. Wates.* I am quite clear that the charterers' lowest figure of damage, $833,564, is patently too low, especially when it is remembered that in December, 1976, the charterers offered that the charter should be cancelled on them paying $1,500,000; and in February, 1977, of $2 million.

In all the circumstances it seems to me that $1,000,000 is indisputably payable by way of damages; and it is only the excess of $3,675,000 which is in dispute. So far as the Arbitration Act, 1975 is concerned, then I would only stay the action in respect of that balance.

Order 14.

Alongside the 1975 Act, there is a parallel problem under O. 14. It is said that judgment can only be given for the whole or part of a claim if it is a "liquidated demand". I agree that that is the case in respect of judgment in default of appearance — see R.S.C., O. 13, r. 1; and in default of pleading, see R.S.C., O. 19, r. 2. But those two rules have a historical origin. They are a survival from the old counts in indebitatus assumpsit. Anything that could be sued for under those counts comes within the description of a "debt or liquidated demand"; see *Lagos v. Grunwaldt,* [1910] 1 K.B. 41, by Lord Justice Farwell. Hence it has invariably been held that a demand on a quantum meruit for money due for work done and material supplied, even though strictly speaking it is unliquidated, is always recoverable as a "debt or liquidated demand". Those words are not, however, to be found in O. 14, r. 1. I see no reason why O. 14 should be confined to cases where the writ is indorsed for a claim for a debt or liquidated demand. It is daily practice to apply O. 14 to claims for a sum for work done and material supplied, and then for judgment to be given for such part of it as it admitted to be

payable; or for such part of it as, on the evidence can be said to be indisputably due. Such is simple justice to the builder who has done the work and ought to be paid. It would be a disgrace to the law if the customer could resist paying anything by simply saying, "There is no certainty that that is the correct figure". Similarly, when there is a sum which can only be ascertained on the taking of an account. If the debtor, who is himself in a position to calculate the amount, admits that something is owing, but he is not sure what it is, the Court can give judgment for such sum as it can say is indisputably due; see *Contract Discount v. Furlong*, (1948) 64 T.L.R. 201. I see no distinction in principle between those cases and the present case. The case of *Moore v. Assignment Courier Ltd.*, [1977] 1 W.L.R. 638, is quite distinguishable because the defendants had put in a defence that went to the whole of the claim. So it did not fall within O. 14. That was the ground of the decision, see p. 641H.

I come back to the words of O. 14, rr. 1 and 3. These make it clear that when the defendant has no defence to a claim or "a particular part" of such a claim, the Court can give such judgment "on that claim or part as may be just". I see no reason why this should not apply to a claim for unliquidated damages, just as it does to a claim on a quantum meruit, or a sum due on account. Take again a contract for the sale of goods when the damages depend on a calculation of the difference between contract price and market price, or a claim under a charter-party for damages for repudiation when the damages depend on a calculation of the difference between the contract rate of hire and the market rate. In such case the market rate may be a matter of dispute or difference, but usually between defined limits. The Court can readily ascertain the minimun figure for which the defendant is liable. It should be able to give judgment accordingly.

Mr. Southwell stressed the words in R.S.C. O. 14, r. 1, "Except as to the amount of damages claimed", and argued that when there was an interlocutory judgment for damages to be assessed, there was never any power to give judgment for part. But I read those words as applying to such part of the damages as to which there is a dispute. It does not apply to that part of the damages which is indisputably due.

Mr. Southwell also argued that a judgment for part of the damages (even the indisputable part) would be in effect a judgment for an interim payment; and the Court would not have power to give such a judgment. It was first introduced, he said, by the Administration of Justice Act, 1969, and it had only been applied to personal injury cases. I cannot accept this argument either. When the Court gives judgment for a sum which is indisputably due, it is not ordering an interim payment properly so called. It is a judgment for a sum which is indisputably due.

Conclusion

Every Judge concerned in this case has felt that there ought to be power to give judgment for the plaintiffs for a substantial sum, but has felt that under the rules there is no power to do it, and that we must await an amendment of the rules. This treats the powers of the Courts — in matters of practice and procedure — to be limited by the rules. It is said, "Unless it is found in the rules, there is no power". I do not agree. Long before the Rule Committee was established the Judges had inherent power over all matters of practice and procedure. All the rules were made by them. They retain this power still. As I have often said, the Courts are master of their own procedure and can do what is right even though it is not contained in the rules. Rather than wait for the Rule Committee to act, it seems to be much better for the Courts to do what is necessary as and when the occasion arises. Take this very case. If the shipowners fail to get anything in this case the charterer will once more have succeeded by this latest manoeuvre — by not admitting any figure — in depriving the shipowners of their just claim for years to come. The charterers will be rubbing their hands with joy. At last they have found a good way out of payment. For myself I would not allow this. I would allow the appeal and enter judgment for the sum which on the evidence appears to me to be indisputably due. I would assess it at $1,000,000. I would allow the appeal accordingly.

Lord Justice BROWNE: I wish I could agree with my Lord, but I am afraid I cannot. In my judgment this appeal must be dismissed. Mr. Justice Kerr thought that the plaintiffs have all the merits and I have heard nothing which gives me the slightest reason to doubt that he was right. But I am driven to the conclusion that he was also right in holding that the defendants have the law on their side.

The arbitration clause in the charter-party (cl. 53) provides that:

> Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration there in force . . .

By s. 1(1) of the Arbitration Act, 1975:

> 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.

It is not in dispute that by virtue of s. 1(2) and (4), this arbitration agreement is one to which the section applies. The section is mandatory, and the Court must stay unless the case falls within one of the exceptions in the section; the Court has no discretion to refuse a stay, nor can it impose conditions (e.g. as to payment to the other party or into Court), as Mr. Leggatt concedes.

Where a claim (admittedly within the arbitration agreement) consists of separate identifiable and quantified items, for example, the case put by Mr. Justice Kerr of an admitted claim for freight and a disputed claim for demurrage, the Court would in my view be entitled to hold that there was "not in fact any dispute" as to the admitted item and to refuse a stay in respect of that part of the claim. In *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, [1978] 1 Lloyd's Rep. 33 (Note); [1976] 2 B.L.R. 60, the claim was for a specified sum, and this Court took the view that £x, part of that sum, was "indisputably due"; I think that in such a case also the Court would be entitled to refuse a stay in respect of £x and let the rest go to arbitration. But such cases there is by admission, or can be by a decision of the Court, a quantified sum as to which "there is not in fact any dispute".

In the present case it is plain that the plaintiffs are entitled to heavy damages for breach of contract, but there is no such quantified sum. Mr. Leggatt at various stages in his argument put forward various differing figures as the minimun amount "indisputably due", but in my view it is impossible to say that any definable and quantified part of the plaintiff's claim is "indisputably due". As Mr. Justice Kerr said . . .

> . . . the difficulty of doing it (i.e. putting forward such a minimun figure) in itself demonstrates the difficulty in which the court is placed.

In fact during his final speech Mr. Leggatt put forward a figure lower than the $1,000,000 to which my Lord has referred; he put forward a figure of $833,564. Mr. Justice Kerr held that the issue of liability was res judicata and that there was no issue as to liability in this action. The defendants have now admitted liability, but by virtue of R.S.C., O. 18, r. 13 (4) the amount of damages — that is, the whole claim for damages — is in issue. On the facts of this case, I cannot say that any definable or quantified part of the claim is not in fact in dispute.

I agree with what Mr. Justice Kerr said:

> I cannot possibly conclude that there is no dispute in respect of the matter agreed to be referred. The matter agreed to be referred is any dispute under the charter-party, and there is a dispute as to the plaintiffs' quantum of damages.

Like Mr. Justice Kerr, I reach this conclusion with reluctance, but in my judgment the Court has in this case no choice under s. 1(1) of the 1975 Act but to grant the stay, and I would dismiss the appeal.

The question what would have been the position if the 1975 Act did not apply therefore does not arise, but it was fully argued and I think I should deal with it.

Order 14, r. 1, deals with two situations:—

> (a) where a defendant has no defence to a claim included in the writ or to a particular part of such a claim;
>
> (b) where a defendant has no defence to such a claim or part except as to the amount of any damages claimed.

Corresponding references to the claim or the part of a claim appear in O. 14, rr. 3(1) and 4(3).

In *Lazarus v. Smith*, [1908] 2 K.B. 266, this Court (presumably applying (a)) held that it was right to give judgment under O. 14 for the admitted part of a larger (qualified) debt. In *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, both the total amount claimed and the part of it which this Court held to be "indisputably due" were quantified; the sum for which judgment was given under O. 14 (presumably again under (a)) was retention money forming part of sums certified by the engineers.

But in the present case I think the plaintiffs are in the same difficulty under O. 14 as under s. 1 of the Arbitration Act. It is impossible to identify or quantify any particular part of their claim in respect of which there is no defence or which is "indisputably due".

It seems to me that what the plaintiffs are really doing is to ask the Court to order an interim payment on account of the damages which they expect to recover. In *Moore v. Assignment Courier Ltd.*, [1977] 1 W.L.R. 638, this Court held that there is no inherent power to make such an order. The Court referred to s. 20 of the Administration of Justice Act, 1969, which gave power to the Rule Committee to make rules enabling the Court to make orders requiring interim payments. That power is quite

general, but the only rules so far made under it are O. 29, rr. 9-17, which apply only to claims for damages in respect of death or personal injuries. Although it was held in *Moore's* case that O. 14 did not there apply, I think we are bound by that decision (with which I entirely agree) to hold that we have no power to order an interim payment in the present case.

Even if the 1975 Act did not apply in this case, I should feel bound to hold that the Court has no power to give any judgment or make any order for payment to the plaintiffs of any part of the damages to which they will no doubt ultimately be held to be entitled.

It may be that the Rule Committee will think it right to consider whether there should be any extension of the power to order interim payments on account of damages.

Lord Justice GEOFFREY LANE: (read by Lord Justice BROWNE): The plaintiffs in this case claimed before Mr. Justice Kerr to be entitled to summary judgment under O. 14 against the defendants for damages for breach of a long-term charter-party. The defendants claimed that there was a dispute as to liability and quantum and that under the terms of the charter-party the dispute had to be referred to Arbitration by virtue of s. 1(1) of the Arbitration Act, 1975. The learned Judge had no difficulty in deciding that the defendants had no defence to the claim so far as liability was concerned, and indeed they have since the hearing formally admitted it. It is clear that the defendants, ever since the terms of the charter-party became burdensome to them, have used every subterfuge and device available to them in an attempt to avoid or delay the necessity of paying to the plaintiffs the very large sum by way of damages to which the plaintiffs are undoubtedly entitled. The defendants are devoid of merit and deserve no sympathy.

The plaintiffs submit that in these circumstances the defendants should be ordered at once to pay such portion of the as yet unascertained amount of damages as can properly be described as "indisputably due" and that the proceedings should then be stayed and the remaining question (namely to how much more the plaintiffs are entitled by way of damages) referred to arbitration.

Although the question under R.S.C., O. 14, and that under the Arbitration Act, 1975, are technically separate and distinct, they seem to me to depend in each case upon the same consideration.

Can it be said that this is a proper case under R.S.C., O. 14, for the defendants to be ordered to pay a portion of the claim to the plaintiffs, leaving the balance to be assessed? Such orders are of course made every day in appropriate circumstances; see for example *Lazarus v. Smith*, [1908] 2 K.B. 266. It has however been the practice to confine such an order to cases where the amount ordered to be paid has already been ascertained or is capable of being ascertained by mere calculation without further investigation, or is admittedly due. So far as we have been told the only possible exception has been in the case of claims in quantum meruit which under O. 14 are treated prima facie as a liquidated demand.

We were referred to *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, [1978] 1 Lloyd's Rep. 33 (Note); [1976] 2 B.L.R. 60, a decision of this Court. At pp. 35 and 61 Lord Denning, M.R., is reported as follows:

> 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 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.

Taken at its face value that statement, part of a judgment with which Lord Justice Lawton agreed, would cover the circumstances of the present case. But an examination of the facts in that case shows that the sum claimed by the plaintiffs as being immediately payable to them (£52,437) was retention money retained against them according to the terms of the contract and was payable for work that had already been done. It therefore fulfilled all the necessary conditions for a typical O. 14 payment.

How different the present case is can be judged from the way in which matters have been pleaded and argued. There is in the writ, as amended, no mention of any sum other than the total amount claimed, namely some $4,000,000 and no mention of any sum which is "indisputably due". Apparently no such sum was put before the Judge who was left to make his own calculations to that end if he wished.

Before us, after much prompting from the Court, various figures between about $850,000 and $2 million were suggested, but that is as near as one was taken to the "indisputably due" amount until Mr. Leggatt came to his reply, when the following possibilities were put forward, namely, $833,564 or $1,786,995. That was the first mention which had been made of those particular figures. The defendants had

had no opportunity of considering them or of addressing the Court upon them, and, as I understand it, the Court was being asked somehow to select, on the basis of the two figures, the sum for which it should give judgment under O. 14, staying the action as to the balance and allowing that dispute to go to arbitration. Despite the obvious temptation to decide this question in favour of the wholly meritorious plaintiffs against defendants who have less than no merits, it seems to me quite impossible to do so for two principal reasons.

First, even in circumstances where such an order can properly be made the plaintiff must assert and prove what he alleges to be the figure "indisputably due". However unmeritorious the defendants may be, they are entitled to know the allegation they have to meet at a stage in the proceedings when they are in a position to meet it.

Secondly, quite apart from that narrow ground, the plaintiffs are in truth asking the Court not to give judgment under O. 14 for a specified ascertained sum as to which there can be no legitimate dispute, but to make an interim award on account of future damages so that the plaintiffs shall not be kept out of their money by the procrastination of the defendants. The difficulties which the plaintiffs experienced in trying to particularise the sum claimed were largely due to this.

However desirable it may be that such a power should exist in the hands of the Court, it is not legitimate for the Court to confer the power on itself in purported exercise of its inherent jurisdiction to control its own procedure. So much is clear from s. 20(1) of the Administration of Justice Act, 1969, which reads as follows:

> The power to make rules of court under section 99 of the Judicature Act 1925 and the power to make county court rules under section 102 of the County Courts Act 1959 shall each include power by any such rules to make provision for enabling the court in which any proceedings are pending, in such circumstances as may be specified in the rules, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, either by payment into court or (if the rule so provides) by paying it to another party to the proceedings.

In exercise of that power the Rule Committee provided by O. 29, r. 9 that interim payments may be made in cases involving claims in respect of personal injuries or death. As Lord Justice Megaw pointed out in *Moore v. Assignment Courier Ltd.*, [1977] 1 W.L.R. 638, at p. 645, Parliament by enacting s. 20 of the Administration of Justice Act, 1969, made it clear that the existing powers of the Rule Committee were not wide enough to enable the Committee to authorise interim payments. The relevant existing powers were contained in s. 99 of the Supreme Court of Judicature (Consolidation) Act 1925:

> Rules of court may be made under this Act for the following purposes (a) for regulating and prescribing the procedure . . . and the practice to be followed in the Court of Appeal and the High Court respectively in all causes and matters whatsoever . . .

Thus Parliament in enacting s. 20(1) of the 1969 Act made it clear that the ordering of interim payments is not a matter of mere procedure in which the Court is entitled to do as it thinks fit. The Judge was right in his conclusion.

By the same token, the defendants' claim under s. 1 of the Arbitration Act, 1975, succeeds. Damages are in issue by virtue of O. 18, r. 13. The plaintiffs, as already described, have failed to show that any identifiable or specific part of those damages is not in dispute. That being so the Court has no option but to make an order staying proceedings and allowing the dispute to be put to arbitration in accordance with the relevant clause in the charter-party.

I agree with Lord Justice Browne that the appeal should be dismissed.

NOTE

COURT OF APPEAL

Jan. 16, 19 and 20, 1976

ELLIS MECHANICAL SERVICES LTD.
v.
WATES CONSTRUCTION LTD.

Before Lord DENNING, M.R.,
Lord Justice LAWTON and
Lord Justice BRIDGE

Lord DENNING, M.R.: In this appeal we are concerned with the outcome of a big building project at the old Hendon aerodrome. Two local authorities combined in it. The Greater London Council were to build a large number of dwelling houses for individuals to occupy. The Barnet Council were to build a comprehensive school and other buildings for the use of the community as a whole. Each of those bodies, the Greater London Council and Barnet employed Wates Construction Ltd. as

the main contractors for each of the contracts. Wates Construction Ltd. in their turn, employed as sub-contractors Ellis Mechanical Services Ltd. Ellis's were to provide the heating system and all the mechanical services which were required for both the two contracts. The main contract, between the GLC and Wates, was for an estimated sum of £9½ million. That was granted in June, 1970. The sub-contract with regard to that, by Wates to Ellis's, was for over £1 million.

The work went forward; but then, for reasons that we do not know, on Feb. 22, 1974, the Wates and GLC contract was determined. It came to an end, each of the two parties saying that the other had repudiated it. That is no concern of Ellis's the sub-contractors, except in so far as it entitled them to be paid. The main contract and the sub-contract were on the usual RIBA form, with some slight variations, but on this main contract being determined, the sub-contractors became entitled to be paid in accordance with cl. 21 of the sub-contract, which I shall read.

It says:

> If for any reason the contractor's employment under the main contract is determined, then the employment of the sub-contractor under this sub-contract shall thereupon also determine and the sub-contractors shall be entitled to be paid.

Then there are four items: (i) the value of the sub-contract works in so far as they had been completed at the date of determination: (ii) the value of the work begun and executed, but not completed; (iii) the value of the unfixed materials on the site, in which the property passed to the employer; and (iv) the cost of materials off-site ordered, for which the sub-contractor had paid or been charged.

So there it is; it is quite plain on cl. 21 that the sub-contractor was entitled to be paid in effect for all the work they had done and all the materials they had there available at the date Feb. 22, 1974.

Ellis's accordingly wanted to be paid by Wates. They had been doing the work hitherto to the order, and under the supervision of the GLC architect. That was provided in the contracts. Certificates had been given by the GLC architects and engineers. When Ellis's wanted payment they went back to the last interim certificate, which was one of Jan. 25, 1974. Looking at that interim certificate, the engineers had certified a sum of getting on for £700,000. Much of it had been paid already, but there had been retained, as against the sub-contractors, a sum of £52,437. That had been retained as against them as retention money according to the retention clauses in the contract. It was retained pending completion, but it was payable for work that had already been done. Ellis's having nothing more definite to go upon at that stage, claimed those retention moneys as being at least the moneys that ought to be paid to them for the work that had been done. But Wates refused to pay that sum, or any sum.

I have no doubt that Wates were arguing their own liability out with the GLC. But eventually further accounts were got out by Ellis's. So much so that, by November, 1974, they worked it out that they were entitled to £187,004.93. Having worked that out they issued a writ for the full amount, or the amount as they worked it out then, that was due to them. They applied for judgment under O. 14. They did not claim the whole of that amount. They realised that arguments might arise about details.

But in support of the claim for judgment under O. 14, Mr. Newman swore that he believed that there was no defence in respect of £52,437—that is the amount that had been retained. He said that there was no defence to that, and they were ready to refer the balance to arbitration. They were ready to go to arbitration as to any excess amount, but they felt that they ought to be paid that £52,437.

They came before the Master. The Master thought that that was right. He gave Ellis's judgment for the £52,437 and gave Wates leave to defend as to the balance, but said that by consent it was to go to arbitration.

From that order of the Master, Wates appealed to Mr. Justice Kilner-Brown. The Judge was evidently in two minds about it, but he thought that perhaps there were points to be taken on the accounts, and it was not altogether clear that the £52,000 was really owing. At all events, he thought that the whole thing should be dealt with in the arbitration. So he allowed the appeal from the Master and set aside that judgment for £52,000. He referred the whole matter to arbitration. Now there is an appeal to this Court.

There is a point of procedure which arises at the beginning. Ellis's thought that they could not appeal against what was virtually an unconditional leave to defend. So in their notice of appeal they asked for an order that if the action were stayed it should only be stayed on condition that Wates paid £52,437. I would like to say at once that, as a matter of procedure, an appeal is competent from the decision of Mr. Justice Kilner-Brown. I think that we ought either to allow an amendment or have a notice of appeal put in, so as to enable this Court, if it thinks right, to give judgment for such an amount as is undoubtedly due, and let the remainder go on to arbitration.

ASSOCIATED BULK CARRIER _td v KOCH SHIPPING Inc

1 August 1977 *Court of Appeal*

Lord Denning MR, Browne and Geoffrey Lane LJJ

The plaintiffs had chartered a large bulk carrier and in 1972 they let her on a time charter to the defendants. The defendants took delivery in August 1974 but because the tanker market had slumped they tried to avoid payment of the hire rate for the vessel. Ultimately on 11 April 1977 they declared that the charterparty was at an end. The plaintiffs in due course accepted that as a repudiation by the defendants.

The plaintiffs issued a writ on 11 May 1977 claiming damages for wrongful repudiation of the charterparty and eventually sought summary judgment for the amount of their claim. The defendants applied for an order that the proceedings should be stayed pursuant to the Arbitration Act 1975. The charterparty had contained the following provisions:

> 'This charter shall be construed and the relations between the parties determined in accordance with the law of England. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter.
>
> Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration then in force.'

The defendants admitted that the plaintiffs were entitled to damages for repudiation.

Kerr J had held that the proceedings should be stayed and he also dismissed the plaintiffs' application for summary judgment. The plaintiffs appealed against the dismissal and against the stay which had been ordered.

HELD: dismissing the appeals (Lord Denning MR dissenting)

1. There was a dispute as to the damages to which the plaintiffs were entitled and since it could not be said that there was no definable or quantified part of the plaintiffs' claim which was not in fact in dispute, and there being no discretion under the Arbitration Act 1975, the proceedings had to be stayed.

2. There was no provision under Order 14 of the Rules of the Supreme Court which entitled a court to make an order requiring a payment on account of damages for breach of contract where the damages were in dispute so that the plaintiffs would not in any event have been entitled to any judgment.

per Geoffrey Lane LJ

It has been the practice to confine such an order to cases where the amount ordered to be paid has already been ascertained or is capable of being ascertained by mere calculation without further investigation, or is admittedly due. So far as we have been told the only possible exception has been in the case of claims in quantum meruit which under Order 14 are treated [illegible] as a liquidated claim.

Andrew Leggatt QC and R Buckley appeared for the appellant plaintiffs, instructed by [illegible] and Co.
Richard Southwell QC and Brian Davenport appeared for the respondent defendants, instructed by Coward Chance.

Commentary

This case is included in the Building Law Reports because of its general interest (and not because it is the first case known to the Editors in which the Court of Appeal has referred to a case included in these Reports). It is of interest, first, because it highlights and clarifies limitations on a court's power to give summary judgment under Order 14. In this instance the claim was one for damages for breach of contract. The same limitations presumably affect an arbitrator's power to make an interim award, in circumstances akin to an application for summary judgment, where an arbitrator has only the powers which would be available to a court (see on the extent of an arbitrator's powers *Chandris v Isbrandtsen Moller Co* [1951] 1 KB 240).

Order 14 rule 1(1) of the Rules of the Supreme Court states:

> 'Where in an action to which this rule applies a Statement of Claim has been served on a defendant and that defendant has entered an appearance in the action, the Plaintiff may, on the ground that the Defendant has no defence to a claim included in the Writ, or to a particular part of such claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that Defendant.'

Damages are generally deemed to be 'in issue' since Order 18 rule 13(4) states:

> 'Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.'

A defendant therefore does not usually set out in his pleadings any specific objections that he may have to the quantification of the plaintiff's claim. Similarly, it is not in practice generally necessary when resisting an application for summary judgment under Order 14, to attack every figure put forward by the plaintiff either because the defendant's case of liability is strong or because the plaintiff's case can be met by selective attack.

In this context the majority of the Court of Appeal appears to consider that summary judgment may be given in a claim for damages for breach of contract but only where, to quote Geoffrey Lane LJ:

> 'the amount ordered to be paid has already been ascertained or is capable of being ascertained by mere calculation without further investigation, or is admittedly due.'

In our submission there may be no distinction in law between claims for damages for breach of contract and claims under the terms of a contract which are in substance the same (for example some of the claims 'for direct loss and/or expense' admissible under the Standard Form of Building Contract). Provision made for such claims is a matter of convenience and agreement so as to avoid the necessity for claims for damages for breach of contract being made. They are not however claims for liquidated or ascer-

tained sums (when a certificate has been issued or wh[illegible] agreement has been reached with the employer on the amount or that a certificate should be issued for a given amount).

In practice, therefore, the words 'capable of being ascertained by mere calculation' may be important if an application for summary judgment for a 'claim' is being considered. If, for example, a contractor has a claim for prolongation costs incurred, because of lack of information, and that claim is good in principle because a given extension of time has been granted on that account (and has not been challenged by the employer) he may be able to recover those costs in a summary manner if a weekly or other periodic amount has also been agreed by or on behalf of the employer in respect of prolongation, or can otherwise be ascertained so as to be beyond question. In such circumstances part of the claim, at least, might be 'capable of being ascertained by mere calculation'. Such a course would not however be open to a contractor if any part of the calculation was challenged. Thus, if the employer had good grounds to question the extension of time that had been granted or if he could point to some element in the costs which might well be wrongly included a court might be left in doubt as to what sum was due 'without further investigation' and the contractor's claim would then not succeed.

It may be that new Rules of the Supreme Court will be brought into operation which will close this apparent gap in procedure.

The case also puts *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 60 into perspective. *Ellis's* case was a decision which applied long established principles that there was 'no dispute' referable to arbitration arising out of a mere refusal to pay a sum which would otherwise be due (see for example *London & North Western Railway v Jones* [1915] 2 KB 35) or arising out of an assertion that the claim should be investigated, unsupported by evidence that the plaintiff's calculations might be wrong. On the other hand the plaintiff has to convince the court that 'It can be said with certainty that £x is due' (per Lord Denning at 2 BLR 62) and that it 'established beyond reasonable doubt by evidence before the court that at least £x is presently due from the defendant to the plaintiff' (per Bridge LJ at 2 BLR 65).

The decision illustrates the application of Section 1(1) of the Arbitration Act 1975. Section 1 applies to 'any agreement which is not a domestic arbitration agreement'. Sub section (4) defines a 'domestic arbitration' agreement as:

> 'An arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and which neither –
>
> (a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom; nor
>
> (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom
>
> is a party at the time that proceedings are commenced.'

There are therefore a number of hurdles which have to be surmounted before a plaintiff can break loose from the application of section 1(1). First there is the negative test – the agreement does not provide for arbitration outside the United Kingdom. Even if it provides arbitration within the United Kingdom it will not be a 'domestic arbitration agreement' if one of the parties is *either* an individual who is a national of *or* habitually resident in any State other than the United Kingdom, *or* a company which is incorporated in *or* whose effective management and control is exercised outside the United Kingdom. So, for example, an agreement with a citizen of Iran (or the Irish Republic) will fall within the Act even though it may provide for arbitration within the United Kingdom. Equally an agreement made not merely with a foreign company (*ie* one incorporated outside the United Kingdom) but with a United Kingdom company which is managed and controlled from a place outside the United Kingdom, will fall outside the definition. Finally, it appears that it may not be enough to establish that the agreement was 'a domestic arbitration agreement' at the time when it was made for subsection (4) refers to 'the time the proceedings are commenced' so that if during the life of the agreement the central management and control of a United Kingdom company passes from the United Kingdom, it seems that the agreement no longer is a 'domestic arbitration agreement'. With so much business in the construction industry being concerned with work overseas, the provisions of the Act could have a far reaching (and even unexpected) effect.

This is particularly so, for, as the case shows, the court has no discretion to decide whether or not to stay the proceedings (unlike the discretion given by section 4 of the Arbitration Act 1950) once it has been established that proceedings have been commenced in respect of the matter agreed to be referred (provided that the usual conditions are satisfied). Since, as Lord Denning MR pointed out in the judgment in this case (and in *Ellis Mechanical Services Ltd v Wates*) arbitration can lead to long delays, careful consideration should therefore be given to the question as to whether there ought to be any provision at all for arbitration in agreements to which the 1975 Act might apply (and indeed the 1950 Act), or whether it would not be better simply to require both parties to submit to the jurisdiction of the English Courts (questions of sovereign immunity aside). Alternatively, the arbitration agreement might provide for the arbitration to be conducted in accordance with, for example, the Rules of Conciliation and Arbitration of the International Chamber of Commerce, with the applicable law or laws both of procedure and substance being set out in the agreement (and again chosen with great care).

Lastly, Lord Denning's views will no doubt be read with interest although they do not of course form part of the *ratio decidendi* of this case. His aside (at page 25) about the majority of the House of Lords in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689; 1 BLR 73 only differing from the minority on the question of the construction of the agreement somewhat under-states what the majority said about the reasoning which formed the basis of Lord Denning's judgment in *Dawnays Ltd v F G Minter Ltd* [1971] 1 WLR 1205; 1 BLR 16 and subsequent cases. As Lord Morris of Borth-y-Gest (who was in the minority in *Gilbert-Ash*) himself said in *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197 at 199:

> 'The decision in [Gilbert-Ash] was given on July 20 1973. By a majority *Dawnays' case* was overruled. What has been regarded as the principle of Dawnays' *case* met with general disapproval.'

ASSOCIATED BULK CARRIERS Ltd v KOCH SHIPPING Inc

1 August 1977 — *Court of Appeal*

Lord Denning MR, Browne and Geoffrey Lane LJJ

LORD DENNING MR: The *FUOHSAN MARU* is a Japanese motor vessel. She is a big bulk carrier and can carry 105,000 long tons of oil or of ore. She is owned by a Japanese company and time-chartered for a long period to Associated Bulk Carriers Ltd whom I will call the shipowners.

In 1972 they let her on a time charter on the Beepeetime form to Koch Marine Incorporated for five years (one month more or less) from delivery. The charter hire was $2.59 cents per ton dead weight per month. She was delivered to Koch Marine on 29 August 1974. So under the time charter she could be redelivered at the earliest on 29 July 1979.

There was a printed clause which said:

> 'This charter shall be construed and the relations between the parties determined in accordance with the law of England. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of Charter.'

But there was a typewritten clause which said:

> 'Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration then in force.'

Presumably the typewritten clause takes precedence over the printed clause.

From August 1974 Koch Marine duly operated the vessel and paid the charter hire regularly every month for nearly 2½ years. But by that time the tanker market had slumped to the bottom. By December 1976 the rate for this vessel had fallen from $2.59 to a little more than $1. So Koch Marine sought by every possible device to get out of the charter. They did it by making claims which the judge described as 'manufactured' for the purpose of avoiding payment of the hire. In December 1976 and January 1977 they made deductions from the monthly hire alleging that the master had neglected to clean the holds. Then on 3 March 1977, when she was in the US Gulf, they said they intended to send her in ballast through the Suez Canal to the Persian Gulf and there load a full cargo of 105,000 tons of crude oil and to carry it back through the Suez Canal and deliver it in the Mediterranean. This was a spurious suggestion. She could not conceivably carry that cargo through the Suez Canal. The maximum draught through the Suez was 37 feet, and this 105,000 tons of cargo would require a draught of 51 feet. The vessel would, as the judge suggested, need 'wings' to carry her through the Canal. When the shipowners pointed this out, Koch Marine changed their orders and said that they intended to send her to Port Walcott in Australia and load a cargo of ore and carry it via the Cape of Good Hope to Eleusis in Greece and there unload. But that too was a spurious suggestion manufactured by the charterers and formed another pretext for not paying. The shipowners found out that no one at Port Walcott had heard of any such shipment; and that there were no facilities for discharging ore at Eleusis. The charterers followed it up with an impudent claim; they said the shipowners were at fault. On 11 April 1977 they sent this telex to the shipowners:

> 'Charterers find themselves prevented by owners from employing vessel as intended. There being little prospect of economic alternative employment for the vessel, charterers regret they must treat owners inability to honour their charter obligations as bringing this charterparty to an end. The vessel is redelivered to the owners as of the time and date hereof.'

By that telex the real object of the charterers became plain. They were not going to pay any more of the hire and were making what seems to be the outrageous suggestion that the shipowners were at fault.

The shipowners on 22 April 1977, made this dignified reply:

> 'We much regret you appear intent on forcing yet another repudiation situation – presumably in order to obtain some temporary relief from monthly financial commitments during the delay which will occur before litigation can be completed. We do not believe that your legal advisers can be supporting your present stance and thus you are acting in complete disregard of your legal obligations. We call upon you as charterers with a reputation to maintain to earnestly reconsider your attitude.'

The charterers replied that there was no question of their giving any further orders. So on 25 April 1977, the shipowners treated the charterers' conduct as a repudiation. They accepted it as of 25 April 1977, and held the charterers liable for all loss or damage arising therefrom.

The shipowners sought redress in the courts. They had already on 14 March 1977, issued a writ claiming the hire due on 28 February 1977, amounting to $290,182.61. On 15 March 1977, they got a *Mareva* injunction. On 12 May 1977, they applied for summary judgment. The charterers then said they had a counterclaim for wrongful repudiation by the shipowners which exceeded the 28 February hire and they asked for the action to be stayed and for the whole claim and counterclaim to be sent to arbitration. Kerr J rejected the charterers' suggestion. He said that the counterclaim was 'not *bona fide*, but merely manufactured as a pretext for getting out of the charterparty'. So he refused a stay and gave judgment for the February hire. The charterers did not appeal from that judgment. They paid the February hire.

On 11 May 1977, the shipowners issued a writ against the charterers claiming damages for wrongful repudiation of the charterparty. They based it on the hire payable under the charterparty for the remaining 27 months, less the hire obtainable under a time charter for that period as at the date of repudiation. Their claim would come to something approaching, if not exceeding, $4 million. The shipowners applied *ex parte* for a *Mareva* injunc-

tion and got it. They applied again for summary judgment under Order 14. The charterers retorted with a summons to stay under the Arbitration Act 1975.

The summonses were heard by Kerr J on 23 June 1977. At this stage the charterers admitted that the shipowners were entitled to damages for repudiation. They no longer put forward their manufactured cross-claim for repudiation. So the only issue was what was the proper sum of damages to be awarded to the shipowners?

The judge made this important finding:

> 'On the evidence before me it is overwhelmingly probable that the shipowners are entitled to a very substantial sum . . . Mr Southwell for the charterers has rightly accepted that it is in the highest degree probable that the plaintiffs will recover a substantial amount. To the extent that the charterers have sought to controvert the plaintiffs' evidence as to approximate or minimum amounts to which the shipowners are entitled, I find the charterers' evidence unimpressive – no more impressive than their conduct during the last few months of the charterparty . . . The shipowners have all the merits, and I suspect that the defendants have no merits whatsoever and are still trying to stave off the day of reckoning. I have to decide whether they have the law on their side. With reluctance, I have come to the conclusion that they have . . . I must therefore grant the charterers the stay which they ask.'

So there is the point. There is beyond doubt a big sum payable as damages by the charterers to the shipowners: but because it cannot be ascertained and put down as a definite figure, the shipowners are to get no judgment for any sum at all. The whole matter must be sent to arbitration, which, as we all know, would mean a long delay. Arbitrators have little control over the speed of the arbitration. It takes a long time to get an appointment; and when that is done, if the creditor wants to avoid payment, he can put off the day of judgment indefinitely – by asking for more time for one thing or another – by saying he is not ready yet – and even after an award, by asking for a case to be stated – and so forth. It is most regrettable. It means that defaulting parties can get time indefinitely. The solicitors for the shipowner, with all the responsibility which attaches to them as solicitors in the City of London, have put this upon affidavit:

> 'This is not the first case in which the charterers have adopted unusual tactics in order to rid themselves of financially unfavourable charter commitments. In a number of cases . . . the charterers have terminated the charter and have then used the delay regrettably inherent in arbitration proceedings to negotiate a discounted settlement.'

Arbitration Act 1975

It is against this background that I consider the effect of the Arbitration Act 1975. It does not apply to domestic arbitration agreements, but only to international arbitration agreements like this one. Under the 1950 Act the courts have a discretion whether to stay the action or not. The 1975 Act takes away any discretion in the court. It makes it compulsory to grant a stay when the matter in dispute comes within the Act. The word 'shall' is used imperatively. I will read the section in full:

> '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.'

The important words for the present purpose are 'any matter agreed to be referred', and 'there is not in fact any dispute between the parties in regard to the matter agreed to be referred'.

Seeing that this is a new Act upon which questions will often arise, I venture to make these suggestions: *First.* The first proposition is illustrated by the first action which I have described in respect of the February 1976 hire. It is this: When a creditor has a sum certain due to him – as to which there is no dispute – but the debtor seeks to avoid payment by making a set-off or counterclaim as to which there is a dispute, then the court can give summary judgment under Order 14 for the sum due to the creditor, but it must send the set-off or counterclaim off to arbitration. If the set-off or counterclaim is *bona fide* and arguable up to or for a certain amount, the court may stay execution on the judgment for that amount. But in some cases it will not even grant a stay, even when there is an arguable set-off or counterclaim, such as when the claim is on a bill of exchange. See *Nova (Jersey) Knit v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 at page 722 by Viscount Dilhorne; or for freight, see *Henriksens Rederi v THZ Rolimpex* [1974] QB 233, and the recent case of *Aries Tanker Corporation v Total Transport Ltd* [1977] 1 WLR 185: or, I would add, for sums due on architect's certificates when they are, by the terms of the contract, expressly or impliedly payable without deduction or further deduction; see *Dawnays v Minter* [1971] 1 WLR 1205 – a case in which the construction which this court put on it met with the approval of Lord Reid and Lord Morris of Borth-y-Gest in the House of Lords in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689, at pages 679D and 703C. (The other Law Lords only differed on the construction of the agreement.)

Second. Take a case where a creditor has an ascertainable sum due to him – such as for work done and materials supplied – but the sum is not exactly quantified. The creditor says that it comes to, say, £1,000. The debtor admits that a considerable sum is due, but says that it is no more than £800. Then the court can give judgment for the £800 and send the balance of £200 to arbitration: because the only matter in dispute then is £200. See *Lascelles v Smith* [1906] 2 KB 208, and *Contract Discount Ltd v Furlong* (1948) 64 TLR 201. *Third.* Take the same case [illegible] and material

supplied, and suppose that the debtor admits that a considerable sum is due, but he declines to put a figure on it. The court should not allow him to obtain any advantage on that account. He should not be allowed to pay nothing. The court ought to give judgment for such sum as appears to the court to be indisputably due and to refer the balance to arbitration. This is established by the decision of this court in *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 60. As it is not reported generally, I would like to refer to two or three extracts from the judgment in this case because they are particularly apposite here. In my own judgment I said:

> '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 can see that a sum is indisputably due: then 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.'

Lawton LJ put it with his usual common sense. He said:

> 'If the main contractor can turn round, as the main contractor has done in this case and say "Well, I don't accept your account; therefore there is a dispute", that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life blood. It seems to me that the administration of justice in our courts should do all it can to restore that life blood as quickly as possible . . . In my judgment it can be done if the courts make a robust approach, as the Master did in this case, to the jurisdiction under Order 14.'

Bridge LJ said:

> '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, 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.'

Fourth. Take a like case where the creditor is entitled to an ascertainable sum due to him – not for work done and materials supplied – but for damages – such as, on a sale of goods, when the buyer refuses to accept the goods, the difference between contract price and market price under Section 50(2) of the 1893 Act. The buyer is clearly liable, but he says that the sellers' [illegible] the market price was different from what the

seller alleges. In such a case if the buyer puts forward his own figure of the market price, the seller gets judgment for the admitted damages, and the balance goes to arbitration; because that is the only matter in dispute. If the buyer does not put forward his own figure of the market price, he should not get an advantage on that account. The court should give judgment for the amount which is indisputably due and send the balance to arbitration. The case is indistinguishable in principle from *Ellis v Wates*.

On principle therefore, it is my opinion that when the creditor is clearly entitled to substantial damages for breach of contract – and the only question outstanding is how much those damages should be – then if the creditor quantifies them at £1,000 and the debtor quantifies them at £800, there is not in fact any dispute between the parties as to the £800, but only as to the £200; so only the £200 need be referred to arbitration. Now suppose that the debtor does not condescend to quantify the damages, but stalls and says he will not, or cannot, calculate the damages. He should not be better off by his evasive action. If he will not give any figure at all or gives a figure which is patently too low, then he cannot complain if the court itself assesses the figure. In such a situation the court can and should assess the figure of damages which it considers to be indisputable, and leave the balance as the matter in dispute 'which is agreed to be referred'. That I think is the consequence of *Ellis v Wates* properly understood.

Returning to the facts in this case the shipowners are undoubtedly entitled to damages from the charterer for wrongful repudiation of the charter. The charterer admits it. The only question is the amount. I will not go into all the figures. The shipowners calculate their damages by taking the charter hire at $2.59, and deducting from it the hire obtainable on a time charter for the outstanding time as given by the London Tanker Brokers' Pound, that is, $1.01. That gives the damages as over $4 million. The charterers give their own calculation. On the basis of a consent voyage rate they put the rate obtainable at $2.26; on a pure time charter they put it at $1.88. The resulting figure of damages is: in the one calculation $833,564; in the other calculation $1,786,995.57. There are some adjustments to be made for minor claims by the charterers. In addition the charterers put forward all sorts of arguments to reduce the fi[illegible] making bricks without straw just as the defendants sought to in *Ellis v Wates*. I am quite clear that the charterers' lowest figure of damage, $833,564, is patently too low, especially when it is remembered that in December 1976 the charterers offered that the charter should be cancelled on them paying $1,500,000; and in February 1977 of $2 million.

In all the circumstances it seems to me that $1 million is indisputably payable by way of damages; and it is only the excess of $3,675,000 which is in dispute. So far as the Arbitration Act 1975 is concerned, then I would only stay the action in respect of that balance.

Order 14

Alongside the 1975 Act, there is a parallel problem under Order 14. It is said that judgment can only be given for the whole or part of a claim if it is a 'liquidated demand'. I agree that that is the case in respect of judg[illegible] appearance (see Order 13, rule 1; and in default of

pleading, see Order 19, rule 2. But those two rules have a historical origin. They are a survival from the old counts in *indebitatus assumpsit*. Anything that could be sued for under those counts comes within the description of a 'debt or liquidated demand'; see *Lagos v Grunwaldt* [1910] 1 KB 41, by Farwell LJ. Hence it has invariably been held that a demand on a *quantum meruit* for money due for work done and material supplied, even though strictly speaking it is unliquidated, is always recoverable as a 'debt or liquidated demand'. Those words are not, however, to be found in Order 14, rule 1. I see no reason why Order 14 should be confined to cases where the writ is indorsed for a claim for a debt or liquidated demand. It is daily practice to apply Order 14 to claims for a sum for work done and material supplied, and then for judgment to be given for such part of it as it admitted to be payable; or for such part of it as, on the evidence can be said to be indisputably due. Such is simple justice to the builder who has done the work and ought to be paid. It would be a disgrace to the law if the customer could resist paying anything by simply saying, 'There is no certainty that that is the correct figure'. Similarly, when there is a sum which can only be ascertained on the taking of an account. If the debtor, who is himself in a position to calculate the amount, admits that something is owing, but he is not sure what it is, the court can give judgment for such sum as it can say is indisputably due; see *Contract Discount v Furlong* [1948] 64 TLR 201. I see no distinction in principle between those cases and the present case. The case of *Moore v Assignment Courier Ltd* [1977] 1 WLR 638 is quite distinguishable because the defendants had put in a defence that went to the whole of the claim. So it did not fall within Order 14. That was the ground of the decision, see page 641H.

I come back to the words of Order 14, rules 1 and 3. These make it clear that when the defendant has no defence to a claim or 'a particular part' of such a claim, the court can give such judgment 'on that claim or part as may be just'. I see no reason why this should not apply to a claim for unliquidated damages, just as it does to a claim on a *quantum meruit*, or a sum due on account. Take again a contract for the sale of goods when the damages depend on a calculation of the difference between contract price and market price, or a claim under a charterparty for damages for repudiation when the damages depend on a calculation of the difference between the contract rate of hire and the market rate. In such case the market rate may be a matter of dispute or difference, but usually between defined limits. The court can readily ascertain the minimum figure for which the defendant is liable. It should be able to give judgment accordingly.

Mr Southwell stressed the words in Order 14, rule 1, 'Except as to the amount of damages claimed', and argued that when there was an interlocutory judgment for damages to be assessed, there was never any power to give judgment for part. But I read those words as applying to such part of the damages as to which there is a dispute. It does not apply to that part of the damages which is indisputably due.

Mr Southwell also argued that a judgment for part of the damages (even the indisputable part) would be in effect a judgment for an interim payment; and the court would not have power to give such a judgment. It was first introduced, he said, by the Administration of Justice Act 1969, and it had only been applied to personal injury cases. I cannot accept this argument either. When the court gives judgment for a sum which is indisputably due, it is not ordering an interim payment properly so called. It is a judgment for a sum which is indisputably due.

Conclusion

Every judge concerned in this case has felt that there ought to be power to give judgment for the plaintiffs for a substantial sum, but has felt that under the rules there is no power to do it, and that we must await an amendment of the rules. This treats the powers of the courts – in matters of practice and procedure – to be limited by the rules. It is said, 'Unless it is found in the rules, there is no power'. I do not agree. Long before the Rule Committee was established the judges had inherent power over all matters of practice and procedure. All the rules were made by them. They retain this power still. As I have often said, the courts are master of their own procedure and can do what is right even though it is not contained in the rules. Rather than wait for the Rule Committee to act, it seems to be much better for the courts to do what is necessary as and when the occasion arises. Take this very case. If the shipowners fail to get anything in this case the charterer will once more have succeeded by this latest manoeuvre – by not admitting any figure – in depriving the shipowners of their just claim for years to come. The charterers will be rubbing their hands with joy. At last they have found a good way out of payment. For myself I would not allow this. I would allow the appeal and enter judgment for the sum which on the evidence appears to me to be indisputably due. I would assess it at $1 million.

I would allow the appeal accordingly.

BROWNE LJ: I wish I could agree with my Lord, but I am afraid I cannot. In my judgment this appeal must be dismissed. Kerr J thought that the plaintiffs have all the merits and I have heard nothing which gives me the slightest reason to doubt that he was right. But I am driven to the conclusion that he was also right in holding that the defendants have the law on their side.

The arbitration clause in the Charterparty (clause 53) provides that:

> 'Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration there in force . . .'

By section 1(1) of the Arbitration Act 1975:

> '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.'

It is not in dispute that by virtue of section 1(2) and (4) this arbitration agreement is one to which this section applies. The section is mandatory, and the court must stay unless the case falls within one of the exceptions in the section; the court has no discretion to refuse a stay, nor can it impose conditions (eg as to payment to the other party or into court), as Mr Leggatt concedes.

Where a claim (admittedly within the arbitration agreement) consists of separate identifiable and quantified items – for example, the case put by Kerr J of an admitted claim for freight and a disputed claim for demurrage – the court would in my view be entitled to hold that there was 'not in fact any dispute' as to the admitted item and to refuse a stay in respect of that part of the claim. In *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 60 the claim was for a specified sum, and this court took the view that £X, part of that sum, was 'indisputably due'; I think that in such a case also the court would be entitled to refuse a stay in respect of £X and let the rest go to arbitration. For in such cases there is by admission, or can be by a decision of the court, a quantified sum as to which 'there is not in fact any dispute'.

In the present case it is plain that the plaintiffs are entitled to heavy damages for breach of contract, but there is no such quantified sum. Mr Leggatt at various stages in his argument put forward various differing figures as the minimum amount 'indisputably due', but in my view it is impossible to say that any definable and quantified part of the plaintiffs' claim is 'indisputably due'. As Kerr J said, 'the difficulty of doing it (ie putting forward such a minimum figure) in itself demonstrates the difficulty in which the court is placed'. In fact during his final speech Mr Leggatt put forward a figure lower than the $1 million to which my Lord has referred; he put forward a figure of $833,564. Kerr J held that the issue of liability was *res judicata* and that there was no issue as to liability in this action. The defendants have now admitted liability, but by virtue of Order 18, rule 13(4) the amount of damages – that is, the whole claim for damages – is in issue. On the facts of this case, I cannot say that any definable or quantified part of the claim is not in fact in dispute.

I agree with what Kerr J said:

> 'I cannot possibly conclude that there is no dispute in respect of the matter agreed to be referred. The matter agreed to be referred is any dispute under the Charterparty, and there is a dispute as to the plaintiffs' *quantum* of damages.'

Like Kerr J, I reach this conclusion with reluctance, but in my judgment the court has in this case no choice under section 1(1) of the 1975 Act but to grant the stay, and I would dismiss the appeal.

The question what would have been the position if the 1975 Act did not apply therefore does not arise, but it was fully argued and I think I should deal with it.

Order 14, rule 1 deals with two situations:

> (a) where a defendant has no defence to a claim included in the writ [illegible]
>
> (b) where a defendant has no defence to such a claim or part except as to the amount of any damages claimed.

Corresponding references to the claim or the part of a claim appear in Order 14, rules 3(1) and 4(3).

In *Lazarus v Smith* [1908] 2 KB 266, this court (presumably applying (a)) held that it was right to give judgment under Order 14 for the admitted part of a larger (quantified) debt. In *Ellis Mechanical Services Ltd v Wates Construction Ltd* both the total amount claimed and the part of it which this court held to be 'indisputably due' were quantified; the sum for which judgment was given under Order 14 (presumably again under (a)) was retention money forming part of sums certified by the engineers.

But in the present case I think the plaintiffs are in the same difficulty under Order 14 as under section 1 of the Arbitration Act. It is impossible to identify or quantify any particular part of their claim in respect of which there is no defence or which is 'indisputably due'.

It seems to me that what the plaintiffs are really doing is to ask the court to order an interim payment on account of the damages which they expect to recover. In *Moore v Assignment Courier Ltd* [1977] 1 WLR 638, this court held that there is no inherent power to make such an order. The court referred to section 20 of the Administration of Justice Act, 1969 which gave power to the Rule Committee to make rules enabling the court to make orders requiring interim payments. That power is quite general, but the only rules so far made under it are Order 29, rules 9 – 17, which apply only to claims for damages in respect of death or personal injuries. Although it was held in *Moore's* case that Order 14 did not there apply, I think we are bound by that decision (with which I entirely agree) to hold that we have no power to order an interim payment in the present case.

Even if the 1975 Act did not apply in this case, I should feel bound to hold that the court has no power to give any judgment or make any order for payment to the plaintiffs of any part of the damages to which they will no doubt ultimately be held to be entitled.

It may be that the Rule Committee will think it right to consider whether there should be any extension of the power to order interim payments on account of damages.

GEOFFREY LANE LJ (read by Browne LJ): The plaintiffs in this case claimed before Kerr J to be entitled to summary judgment under Order 14 against the defendants for damages for breach of a long-term charterparty. The defendants claimed that there was a dispute as to liability and *quantum* and that under the terms of the charterparty the dispute had to be referred to Arbitration by virtue of section 1(1) of the Arbitration Act 1975. The learned judge had no difficulty in deciding that the defendants had no defence to the claim so far as liability was concerned, and indeed they have since the hearing formally admitted it. It is clear that the defendants, ever since the terms of the charterparty became burdensome to them, have used every subterfuge and device available to them in an attempt to avoid or delay the necessity of paying to the plaintiffs the very large sum by way of damages to which the plaintiffs are undoubtedly entitled. The defendants are devoid

The plaintiffs submit that in these circumstances the defendants should be ordered at once to pay such portion of the as yet unascertained amount of damages as can properly be described as 'indisputably due' and that the proceedings should then be stayed and the remaining question (namely to how much more the plaintiffs are entitled by way of damages) referred to arbitration.

Although the question under RSC Order 14 and that under the Arbitration Act 1975 are technically separate and distinct, they seem to me to depend in each case upon the same consideration.

Can it be said that this is a proper case under Order 14 for the defendants to be ordered to pay a portion of the claim to the plaintiffs, leaving the balance to be assessed? Such orders are of course made every day in appropriate circumstances; see for example *Lazarus v Smith* [1908] 2 KB 266. It has however been the practice to confine such an order to cases where the amount ordered to be paid has already been ascertained or is capable of being ascertained by mere calculation without further investigation, or is admittedly due. So far as we have been told the only possible exception has been in the case of claims in *quantum meruit* which under Order 14 are treated *prima facie* as a liquidated demand.

We were referred to *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 60, a decision of this court. At page 61 Lord Denning MR is reported as follows:

> '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 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.'

Taken at its face value that statement, part of a judgment with which Lawton LJ agreed, would cover the circumstances of the present case. But an examination of the facts in that case shows that the sum claimed by the plaintiffs as being immediately payable to them (£52,437) was retention money retained against them according to the terms of the contract and was payable for work that had already been done. It therefore fulfilled all the necessary conditions for a typical Order 14 payment.

How different the present case is can be judged from the way in which matters have been pleaded and argued. There is in the writ as amended no mention of any sum other than the total amount claimed, namely some $4 million, and no mention of any sum which is 'indisputably due'. Apparently no such sum was put before the judge who was left to make his own calculations to that end if he wished.

Before us, after much prompting from the court, various figures between about $850,000 and $2 million were suggested, but that is as near as one was taken to the 'indisputably due' amount until Mr Leggatt came to his reply, when the following possibilities were put forward, namely, $833,564 or $[illegible]6,[illegible]. That was the first mention which had been made of those particular [illegible]ures. The defendants had had no opportunity of considering them or of addressing the court upon them, and, as I understand it, the court was being asked somehow to select, on the basis of the two figures, the sum for which it should give judgment under Order 14, staying the action as to the balance and allowing that dispute to go to arbitration. Despite the obvious temptation to decide this question in favour of the wholly meritorious plaintiffs against defendants who have less than no merits, it seems to me quite impossible to do so for two principal reasons.

First, even in circumstances where such an order can properly be made the plaintiff must assert and prove what he alleges to be the figure 'indisputably due'. However unmeritorious the defendants may be, they are entitled to know the allegation they have to meet at a stage in the proceedings when they are in a position to meet it.

Secondly, quite apart from that narrow ground, the plaintiffs are in truth asking the court not to give judgment under Order 14 for a specified ascertained sum as to which there can be no legitimate dispute, but to make an interim award on account of future damages so that the plaintiffs shall not be kept out of their money by the procrastination of the defendants. The difficulties which the plaintiffs experienced in trying to particularise the sum claimed were largely due to this.

However desirable it may be that such a power should exist in the hands of the court, it is not legitimate for the court to confer the power on itself in purported exercise of its inherent jurisdiction to control its own procedure. So much is clear from section 20(1) of the Administration of Justice Act 1969 which reads as follows:

> 'The power to make rules of court under section 99 of the Judicature Act 1925 and the power to make county court rules under section 102 of the County Courts Act 1959 shall each include power by any such rules to make provision for enabling the court in which any proceedings are pending, in such circumstances as may be specified in the rules, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, either by payment into court or (if the rule so provides) by paying it to another party to the proceedings.'

In exercise of that power the Rule Committee provided by Order 29(9) that interim payments may be made in cases involving claims in respect of personal injuries or death. As Megaw LJ pointed out in *Moore v Assignment Courier Ltd* [1977] 1 WLR 638, at 645, Parliament by enacting section 20 of the Administration of Justice Act 1969 made it clear that the existing powers of the Rule Committee were not wide enough to enable the Committee to authorise interim payments. The relevant existing powers were contained in section 99 of the Supreme Court of Judicature (Consolidation) Act 1925:

> 'Rules of court may be made under this Act for the following purposes (a) for regulating and prescribing the procedure . . . and the practice to be followed in the Court of Appeal and the High Court respectively in all causes and matters whatsoever . . .'

unliquidated damages for wrongful repudiation of the charter by the charterers, and granting a stay of action pursuant to s. 1(1) of the Arbitration Act, 1975, since there was a dispute as to the quantum of damages and this was a "matter agreed to be referred."

Mr. A. P. Leggatt, Q.C., and Mr. Roger Buckley (instructed by Messrs. Ince & Co.) for the plaintiff appellant shipowners; Mr. Richard Southwell, Q.C., and Mr. Brian Davenport (instructed by Messrs. Coward Chance) for the defendant respondent charterers.

The further facts are stated in the judgment of Lord Denning, M.R.

Judgment was reserved.

Monday, Aug. 1, 1977

JUDGMENT

Lord DENNING M.R.: The *Fuohsan Maru* is a Japanese motor vessel. She is a big bulk carrier and can carry 105,000 long tons of oil or of ore. She is owned by a Japanese company and time chartered for a long period to Associated Bulk Carriers Ltd., whom I will call the shipowners.

In 1972, they let her on a time charter on the Beepee time form to Koch Marine Inc. for five years (one month more or less) from delivery. The charter hire was $2.59 cents per ton dead weight per month. She was delivered to Koch Marine on Aug. 29, 1974. So under the time charter she could be redelivered at the earliest on July 29, 1979.

There was a printed clause which said:

> This Charter shall be construed and the relations between the parties determined in accordance with the law of England. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter.

But there was a typewritten clause which said

> Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London Pursuant to the laws relating to arbitration then in force.

Presumably the typewritten clause takes precedence over the printed clause.

From August 1974, Koch Marine duly operated the vessel and paid the charter hire regularly every month for nearly two and a half years. But by that time the tanker market had slumped to the bottom. By December 1976, the rate for this vessel had fallen from $2.59 to a little more than $1. So, Koch Marine sought by every possible device to get out of the charter. They did it by making claims which the Judge described as "manufactured" for the purpose of avoiding payment of the hire. In December 1976, and January 1977, they made deductions from the monthly hire — alleging that the master had neglected to clean the holds. Then on Mar. 3, 1977, when she was in the U.S. Gulf, they said they intended to send her in ballast through the Suez Canal to the Persian Gulf and there load a full cargo of 105,000 tons of crude oil and to carry it back through the Suez Canal and deliver it in the Mediterranean. This was a spurious suggestion. She could not conceivably carry that cargo through the Suez Canal. The maximum draught through the Suez was 37 ft., and this 105,000 tons of cargo would require a draught of 51 ft. The vessel would, as the Judge suggested, need "wings" to carry her through the canal. When the shipowners pointed this out, Koch Marine changed the orders and said that they intended to send her to Port Walcott in Australia to load a cargo of ore and carry it, via the Cape of Good Hope, to Eleusis in Greece and there unload. But that too was a spurious suggestion manufactured by the charterers and formed another pretext for not paying. The shipowners found out that no one at Port Walcott had heard of any such shipment; and that there were no facilities for discharging ore at Eleusis. The charterers followed it up with an impudent claim; they said the shipowners were at fault. On Apr. 11, 1977, they sent this telex to the shipowners:

> Charterers find themselves prevented by owners from employing vessel as intended. There being little prospect of economic alternative employment for the vessel, charterers regret they must treat owners inability to honour their charter obligations as bringing this charterparty to an end. The vessel is redelivered to owners as of the time and date hereof.

By that telex the real object of the charterers became plain. They were not going to pay any more of the hire and were making what seems to be the outrageous suggestion that the shipowners were at fault.

The shipowners, on Apr. 22, 1977, made this dignified reply:

> We much regret you appear intent on forcing yet another repudiation situation — presumably in order to obtain some temporary relief from monthly financial commitments during the delay which will occur before litigation can be completed. We do not believe that your legal advisers can be supporting your present stance and thus you are acting in complete disregard of your legal

The charterers replied that there was no question of their giving any further orders and on Apr. 25, 1977, the shipowners treated the charterers' conduct as a repudiation and held them liable for all loss or damage arising therefrom.

On May 12 the shipowners obtained summary judgment in respect of hire due on Feb. 28, 1977, which the charterers have since paid.

On May 11, the shipowners issued a writ against the charterers claiming damages for wrongful repudiation of the charter, and obtained a *Mareva* injunction. The shipowners then applied for summary judgment under R.S.C., O. 14, but the charterers applied by summons for a stay of the action under the Arbitration Act, 1975, s. 1.

Held, by KERR, J. that there was a dispute in respect of "a matter agreed to be referred" within s. 1 of the Arbitration Act, 1975, and the charterers were entitled to a stay.

On appeal by the shipowners:

Held, by C.A. (BROWNE and GEOFFREY LANE, L. JJ., Lord DENNING, M.R., dissenting), that (1) in the present case it was plain that the shipowners were entitled to heavy damages for breach of contract but there was no such quantified sum (*see* p. 31, col. 1); and although the charterers had now admitted liability, the whole claim for damages was in issue (*see* p. 31, cols. 1 and 2); and on the facts of the case it could not be said that any definable or quantified part of the claim was not in fact in dispute and it was impossible to identify or quantify any particular part of the claim in respect of which there was no defence or which was undisputably due (*see* p. 31, col. 2; p. 32, col. 2);

Ellis Mechanical Services Ltd. v. Wates Construction Ltd., [1978] 1 Lloyd's Rep. 33 (Note), distinguished.

(2) the shipowners were in truth asking the Court to make an interim payment on account of the damages they expected to recover so that they would not be kept out of their money by the procrastination of the charterers (*see* p. 31, col. 2; p. 33, col. 1); and although it might be desirable that such a power should exist in the hands of the Court it was not legitimate for the Court to confer the power on itself in purported exercise of its inherent jurisdiction to control its own procedure (*see* p. 32, col. 1; p. 33, col. 1);

Moore v. Assignment Courier Ltd., [1977] 1 W.L.R. 638, applied.

(3) the learned Judge was right in holding that he could not possibly conclude that there was no dispute in respect of the matter agreed to be referred (*see* p. 31, col. 2); the matter agreed to be referred was any dispute under the charter-party and there was a dispute as to the shipowners' quantum of damages (*see* p. 31, col. 2); and under s. 1(1) of the Arbitration Act 1975, the Court had, in this case, no choice but to grant the stay (*see* p. 31, col. 2; p. 33, col. 2).

Appeal dismissed.

Per Lord DENNING, M.R. (at p. 27): . . . There is beyond doubt a big sum payable as damages by the charterers to the shipowners: but because it cannot be ascertained and put down as a definite figure, the shipowners are to get no judgment for any sum at all. The whole matter must be sent to arbitration, which as we all know, would mean a long delay. Arbitrators have little control over the speed of the arbitration . . . It is most regrettable. It means that defaulting parties can get time indefinitely . . .

(at p. 30): Every Judge concerned in this case has felt that there ought to be power to give judgment for the [shipowners] for a substantial sum, but has felt that under the rules there is no power to do it and that we must await an amendment of the rules. This treats the powers of the Courts — in matters of practice and procedure — to be limited by the rules . . . I do not agree. Long before the Rule Committee was established the Judges had inherent power over all matters of practice and procedure . . . They retain this power still . . . Rather than wait for the Rule Committee to act, it seems to be much better for the Courts to do what is necessary as and when the occasion arises . . .

The following cases were referred to in the judgments:

Aries Tanker Corporation v. Total Transport Ltd., *(The Aries)*, (H.L.) [1977] 1 Lloyd's Rep. 334; [1977] 1 W.L.R. 185;

Contract Discount v. Furlong, (1948) 64 T.L.R. 201.

Dawnays Ltd. v. F.G. Minter Ltd. (C.A.) [1971] 2 Lloyd's Rep. 192; [1971] 1 W.L.R. 1205;

Ellis Mechanical Services Ltd. v. Wates Construction Ltd., [1978] 1 Lloyd's Rep. 33, (Note); [1976] 2 B.L.R. 60;

Henriksens Rederi A/S v. T.H.Z. Rolimpex *(The Brede)*, (C.A.) [1973] 2 Lloyd's Rep. 333; [1974] Q.B. 233;

Lagos v. Grunwaldt, [1910] 1 K.B. 41;

Lazarus v. Smith, [1908] 2 K.B. 266;

Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd., (H.L.) [1974] A.C. 689;

Moore v. Assignment Courier Ltd., (C.A.) [1977] 1 W.L.R. 638;

Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei G.m.b.H., (H.L.) [1977] 1 Lloyd's Rep. 463; [1977] 1 W.L.R. 713.

This was an appeal by the plaintiff shipowners, Associated Bulk Carriers Ltd., from the decision of Mr. Justice Kerr, given in favour of the defendant charterers, Koch Shipping Inc., and holding in effect that the shipowners were not entitled to summary judgment under R.S.C., O. 14, in respect of

so, to what extent, I think that the argument we have had before us goes beyond that essential minimum, I am expressing no view whatever. In the circumstances, in my judgment this appeal should be allowed and leave to defend should be given.

Sir DAVID CAIRNS: I agree that, neither on the question of whether the owners were entitled to change managers without the consent of the charterers, nor on the question of whether, if the owners were in breach of contract, their breach amounted to a repudiation, can it properly be said that the plaintiffs' case is so clear that the answer to it put forward by the defendants is unarguable. I accordingly agree that the appeal should be allowed and leave to defend given.

COURT OF APPEAL

July 20 and 21, 1977

ASSOCIATED BULK CARRIERS LTD.
v.
KOCH SHIPPING INC.

(THE "FUOHSAN MARU")

Before Lord DENNING, M.R.,[1]
Lord Justice BROWNE and
Lord Justice GEOFFREY LANE

Charter-party (Time) — Stay of action — Wrongful repudiation of charter by charterers — Shipowners claimed unliquidated damages — Whether shipowners entitled to summary judgment under R.S.C., O. 14 — Whether charterers entitled to stay of action — R.S.C., O. 14 — Arbitration Act, 1975, s. 1.

In 1972, the shipowners let their vessel *Fuohsan Maru* on a time charter in the Beepee form to the charterers for five years (one month more or less) from delivery at a hire rate of $2.59 per ton dead weight per month. The vessel was delivered on Aug. 29, 1974, and the redelivery date was therefore July 29, 1979, at the earliest.

The charter provided, inter alia:

> Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration then in force.

The charterers duly operated the vessel and paid the hire regularly but by December, 1976, the tanker market had slumped and the rate for *Fuohsan Maru* had fallen from $2.59 to a little over $1. The charterers "manufactured" claims for the purpose of avoiding payment of the hire and on Apr. 11 sent the following letter to the shipowners:

> Charterers find themselves prevented by owners from employing vessel as intended. There being little prospect of economic alternative employment for the vessel, charterers regret they must treat owners inability to honour their charter obligations as bringing this charter-party to an end. The vessel is redelivered to owners as of the time and date hereof.

On Apr. 22, 1977, the shipowners sent the following reply:

> We much regret you appear intent on forcing yet another repudiation situation — presumably in order to obtain some temporary relief from . . . financial commitments during the delay which will occur before litigation can be completed . . . We call upon you as charterers with a reputation to maintain to earnestly reconsider your attitude.

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[1] Deceased.

the consent of the defendants, would constitute a breach of the contract contained in the charter-party, and a breach of such a nature that it would entitle the defendants to treat it as putting an end to the remaining obligations under the charter-party: it would, in effect, be, or have the effect of, a fundamental breach of, or breach of a fundamental term in, the contract; and, as the defendants apparently took the view that no change was going to be made in the attitude of the opposite party with regard to change of managers, they were entitled to treat that as being a repudiation, and they did treat it as such.

The plaintiffs have not treated the defendants' repudiation as being something that they, in turn, would accept as putting an end to the contract. They, as they are entitled to do, if there has here been no fundamental breach of contract on their part, have chosen, despite the repudiation of it by the defendants, to treat the contract as still being alive. They therefore have, consistently with that attitude, required the defendants to pay the charter hire which was due on Dec. 1, 1976. The defendants, consistently with their attitude that the contract is at an end, have refused to pay it. The plaintiffs thereupon initiated the proceedings out of which this appeal arises by a writ issued on Dec. 31, 1976, in which they claim the sum of U.S. $128,034.25 and interest pursuant to statute. That is the amount of the charter hire which, if the charter-party is still alive, was due and unpaid. The plaintiffs thereupon sought in the Commercial Court judgment under R.S.C., O. 14.

The matter came before Mr. Justice Parker on Mar. 25 of this year. There was before him an affidavit by M. Louis Marie Honore Bouzols, who is, as I understand it, the president of the defendant corporation, who are a chartering subsidiary of Compagnie Francaise des Petroles. In that affidavit the deponent set out, in substance, as a matter of general shipping knowledge, the important part that the manager plays in relation to a time charter-party. He also gave particulars about the negotiations for the present charter-party, and the negotiations relating to the addendum No. 1. In it he stressed the importance to the defendants of the personality of the managers who were to be employed.

The defendants' defence to the claim, on the basis of which they said that they ought to be given leave to defend under O. 14, was this: On the true construction of the contract, particularly cl. 48, read with addendum No. 1, it was a term of the charter-party (and it seems to have been put, at any rate ultimately, as being an express term of the charter-party) that the vessel should be managed by Colocotronis Ltd. from and after the date of the transfer of ownership of the vessel agreed by the defendants in pursuance of cl. 48 of the charter-party; that that term of the contract involved that, Colocotronis Ltd. having become the managers of the new owners of the vessel, no other managers could, in accordance with the terms of the contract, be appointed without the defendants' consent; and that the appointment, or the purported appointment, of other managers than Colocotronis (London) Ltd. that had been made, resulted in a breach of the contract. They further submitted that that breach of the contract was a fundamental breach (however it is to be expressed) — a breach the effect of which was such that in law they were entitled to treat the contract as being at an end.

This being an appeal under R.S.C., O. 14, the function of this Court is not to decide whether the plaintiffs or the defendants are right on their construction of the contract, or the question whether or not, if there be a breach of contract, it is of a fundamental term. The function of this Court is simply to consider whether, on the material which was before the Judge and is now before this Court, there is something that can fairly be described as "an arguable case", which would provide a defence to the action.

Having regard to the conclusion which I have reached, approaching the matter on that basis, it is desirable that I should make the remainder of this judgment as short as is possible. It is in the circumstances highly undesirable that I should express any view upon the issues that have been argued going further than is necessary for the very limited question which has to be decided in this Court. I therefore, deliberately and advisedly, do not propose even to attempt to set out the arguments which have been involved on one side or the other, but merely to say that in my judgment it would be wrong to hold that there is not here an "arguable" case that there was a term of the charter-party such as is contended for on behalf of the defendants; and, further, to say, on the only other matter which remains in issue, that I do not think it would be right to say that it cannot fairly be argued that a breach of that term would, or might, produce the result that the contract could be treated as having been terminated. But I wish to stress (I hope it is clear from what I have said already) that I am not, and deliberately not, indicating any view that goes one millimetre beyond that; and no one, I am sure, will treat what I have said as indicating any view beyond that which I regard as essential for the decision of this case, namely, that those two matters can, in my judgment, fairly be regarded as being "arguable". Whether, and if

obligations. We call upon you as charterers with a reputation to maintain to earnestly reconsider your attitude.

The charterers replied that there was no question of their giving any further orders. So on Apr. 25, 1977, the shipowners treated the charterers' conduct as a repudiation. They accepted it as of Apr. 25, 1977, and held the charterers liable for all loss or damage arising therefrom.

The shipowners sought redress in the Courts. They had already on Mar. 14, 1977, issued a writ claiming the hire due on Feb. 28, 1977, amounting to $290,182.61. On Mar. 15, 1977, they got a *Mareva* injunction. On May 12, 1977, they applied for summary judgment. The charterers then said they had a counterclaim for wrongful repudiation by the shipowners which exceeded the Feb. 28 hire and they asked for the action to be stayed and for the whole claim and counterclaim to be sent to arbitration. Mr. Justice Kerr rejected the charterers' suggestion. He said that the counterclaim was

> not bona fide, but merely manufactured as a pretext for getting out of the charter party.

So he refused a stay and gave judgment for the February hire. The charterers did not appeal from that judgment. They paid the February hire.

On May 11, 1977, the shipowners issued a writ against the charterers claiming damages for wrongful repudiation of the charter-party. They based it on the hire payable under the charter-party for the remaining 27 months, less the hire obtainable under a time charter for that period as at the date of repudiation. Their claim would come to something approaching, if not exceeding, $4 million. The shipowners applied ex parte for a *Mareva* injunction and got it. They applied again for summary judgment under R.S.C., O. 14. The charterers retorted with a summons to stay under the Arbitration Act, 1975.

The summonses were heard by Mr. Justice Kerr on June 23, 1977. At this stage the charterers admitted that the shipowners were entitled to damages for repudiation. They no longer put forward their manufactured cross-claim for repudiation. So the only issue was what was the proper sum of damages to be awarded to the shipowners?

The Judge made this important finding:

> On the evidence before me it is overwhelmingly probable that the shipowners are entitled to a very substantial sum . . . Mr. Southwell for the charterers has rightly accepted that it is in the highest degree probable that the plaintiffs will recover a substantial amount. To the extent that the charterers have sought to controvert the plaintiffs' evidence as to approximate or minimum amounts to which the shipowners are entitled, I find the charterers' evidence unimpressive — no more impressive than their conduct during the last few months of the charter party . . . The shipowners have all the merits, and I suspect that the defendants have no merits whatsoever and are still trying to stave off the day of reckoning. I have to decide whether they have the law on their side. With reluctance, I have come to the conclusion that they have . . . I must therefore grant the charterers the stay which they ask.

So there is the point. There is beyond doubt a big sum payable as damages by the charterers to the shipowners: but because it cannot be ascertained and put down as a definite figure, the shipowners are to get no judgment for any sum at all. The whole matter must be sent to arbitration, which, as we all know, would mean a long delay. Arbitrators have little control over the speed of the arbitration. It takes a long time to get an appointment; and when that is done, if the creditor wants to avoid payment, he can put off the day of judgment indefinitely — by asking for more time for one thing or another — by saying he is not ready, yet — and even after an award, by asking for a case to be stated — and so forth. It is most regrettable. It means that defaulting parties can get time indefinitely. The solicitors for the shipowner, with all the responsibility which attaches to them as solicitors in the City of London, have put this upon affidavit:

> This is not the first case in which the charterers have adopted unusual tactics in order to rid themselves of financially unfavourable charter commitments. In a number of cases . . . the charterers have terminated the charter and have then used the delay regrettably inherent in arbitration proceedings to negotiate a discounted settlement.

Arbitration Act, 1975

It is against this background that I consider the effect of the Arbitration Act, 1975. It does not apply to domestic arbitration agreements, but only to international arbitration agreements like this one. Under the 1950 Act the Courts have a discretion whether to stay the action or not. The 1975 Act takes away any discretion in the Court. It makes it compulsory to grant a stay when the matter in dispute comes within the Act. The word "shall" is used imperatively. I will read the section in full.

> 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.

The important words for the present purpose are "any matter agreed to be referred", and "there is not in fact any dispute between the parties in regard to the matter agreed to be referred".

Seeing that this is a new Act upon which questions will often arise, I venture to make these suggestions: *First.* The first proposition is illustrated by the first action which I have described in respect of the February, 1976, hire. It is this: When a creditor has a sum certain due to him, as to which there is no dispute, but the debtor seeks to avoid payment by making a set-off or counterclaim as to which there is a dispute, then the Court can give summary judgment under R.S.C., O. 14, for the sum due to the creditor, but it must send the set-off or counterclaim off to arbitration. If the set-off or counterclaim is bona fide and arguable up to or for a certain amount, the Court may stay execution on the judgment for that amount. But in some cases it will not even grant a stay, even when there is an arguable set-off or counterclaim, such as when the claim is on a bill of exchange. See *Nova (Jersey) Knit v. Kammgarn Spinnerei G.m.b.H.* [1977] 1 Lloyd's Rep. 463; [1977] 1 W.L.R. 713 at pp. 469 and 722D-D by Viscount Dilhorne; or for freight, see *Henriksens Rederi A/S v. T.H.Z. Rolimpex*, [1973] 2 Lloyd's Rep. 333; [1974] Q.B. 233, and the recent case of *Aries Tanker Corporation v. Total Transport Ltd.*, [1977] 1 Lloyd's Rep. 334; [1977] 1 W.L.R. 185: or, I would add, for sums due on architects' certificates when they are, by the terms of the contract, expressly or impliedly payable without deduction or further deduction; see *Dawnays Ltd. v. F. G. Minter Ltd.*, [1971] 2 Lloyd's Rep. 192; [1971] 1 W.L.R. 1205, a case in which that construction which this Court put on it met with the approval of Lord Reid and Lord Morris of Borth-y-Gest in the House of Lords in *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd.*, [1974] A.C. 689, at pp. 697D and 703C. (The other Law Lords only differed on the construction of the agreement.)

Second. Take a case where a creditor has an ascertainable sum due to him, such as for work done and materials supplied, but the sum is not exactly quantified. The creditor says that it comes to, say, £1000. The debtor admits that a considerable sum is due, but says that it is no more than £800. Then the Court can give judgment for the £800 and send the balance of £200 to arbitration: because the only matter in dispute then is £200. See *Lazarus v. Smith*, [1908] 2 Q.B. 266, and *Contract Discount Ltd. v. Furlong*, (1948) 64 T.L.R. 201. *Third.* Take the same case of work done and material supplied, and suppose that the debtor admits that a considerable sum is due, but he declines to put a figure on it. The Court should not allow him to obtain any advantage on that account. He should not be allowed to pay nothing. The Court ought to give judgment for such sum as appears to the court to be indisputably due and to refer the balance to arbitration. This is established by the decision of this Court in *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, [1978] 1 Lloyd's Rep. 33 (Note); [1976] 2 B.L.R. 60. I would like to refer to two or three extracts from the judgment in this case because they are particularly apposite here. In my own judgment at p. 35 (post) I said:

> 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 can see that a sum is indisputably due: then 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.

Lord Justice Lawton put it with his usual common sense. He said (at p. 36 post)

> If the main contractor can turn round, as the main contractor has done in this case and say "Well, I don't accept your account; therefore there is a dispute", that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life blood. It seems to me that the administration of justice in our Courts should do all it can to restore that life blood as quickly as possible . . . In my judgment it can be done if the Courts make a robust approach, as the Master did in this case, to the jurisdiction under Order 14.

Lord Justice Bridge (at p. 37 post) said

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, 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.

Fourth. Take a like case where the creditor is entitled to an ascertainable sum due to him, not for work done and materials supplied — but for damages — such as, on a sale of goods, when the buyer refuses to accept the goods, the difference between contract price and market price under s. 50(2) of the 1893 Act. The buyer is clearly liable, but he says that the sellers' calculation is wrong because the market price was different from what the seller alleges. In such a case if the buyer puts forward his own figure of the market price, the seller gets judgment for the admitted damages, and the balance goes to arbitration; because that is the only matter in dispute. If the buyer does not put forward his own figure of the market price, he should not get an advantage on that account. The Court should give judgment for the amount which is indisputably due and send the balance to arbitration. The case is indistinguishable in principle from *Ellis v. Wates.*

On principle therefore, it is my opinion that when the creditor is clearly entitled to substantial damages for breach of contract — and the only question outstanding is how much those damages should be — then if the creditor quantifies them at £1000 and the debtor quantifies them at £800, there is not in fact any dispute between the parties as to the £800, but only as to the £200; so only the £200 need be referred to arbitration. Now suppose that the debtor does not condescend to quantify the damages, but stalls and says he will not, or cannot, calculate the damages. He should not be better off by his evasive action. If he will not give any figure at all or gives a figure which is patently too low, then he cannot complain if the Court itself assesses the figure. In such a situation the Court can and should assess the figure of damages which it considers to be indisputable, and leave the balance as the matter in dispute "which is agreed to be referred". That I think is the consequence of *Ellis v. Wates* properly understood.

Returning to the facts in this case, the shipowners are undoubtedly entitled to damages from the charterer for wrongful repudiation of the charter. The charterer admits it. The only question is the amount. I will not go into all the figures. The shipowners calculate their damages by taking the charter hire at $2.59, and deducting from it the hire obtainable on a time charter for the outstanding time as given by the London Tanker Brokers Pound, that is, $1.01. That gives the damages as over $4 million. The charterers give their own calculation. On the basis of a consent voyage rate they put the rate obtainable at $2.26; on a pure time charter they put it at $1.88. The resulting figure of damages is: in the one calculation $833,564; in the other calculation $1,786,995.57. There are some adjustments to be made for minor claims by the charterers. In addition the charterers put forward all sorts of arguments to reduce the figure — making bricks without straw just as the defendants sought to in *Ellis v. Wates.* I am quite clear that the charterers' lowest figure of damage, $833,564, is patently too low, especially when it is remembered that in December, 1976, the charterers offered that the charter should be cancelled on them paying $1,500,000; and in February, 1977, of $2 million.

In all the circumstances it seems to me that $1,000,000 is indisputably payable by way of damages; and it is only the excess of $3,675,000 which is in dispute. So far as the Arbitration Act, 1975 is concerned, then I would only stay the action in respect of that balance.

Order 14.

Alongside the 1975 Act, there is a parallel problem under O. 14. It is said that judgment can only be given for the whole or part of a claim if it is a "liquidated demand". I agree that that is the case in respect of judgment in default of appearance — see R.S.C., O. 13, r. 1; and in default of pleading, see R.S.C., O. 19, r. 2. But those two rules have a historical origin. They are a survival from the old counts in indebitatus assumpsit. Anything that could be sued for under those counts comes within the description of a "debt or liquidated demand"; see *Lagos v. Grunwaldt,* [1910] 1 K.B. 41, by Lord Justice Farwell. Hence it has invariably been held that a demand on a quantum meruit for money due for work done and material supplied, even though strictly speaking it is unliquidated, is always recoverable as a "debt or liquidated demand". Those words are not, however, to be found in O. 14, r. 1. I see no reason why O. 14 should be confined to cases where the writ is indorsed for a claim for a debt or liquidated demand. It is daily practice to apply O. 14 to claims for a sum for work done and material supplied, and then for judgment to be given for such part of it as it admitted to be

payable; or for such part of it as, on the evidence can be said to be indisputably due. Such is simple justice to the builder who has done the work and ought to be paid. It would be a disgrace to the law if the customer could resist paying anything by simply saying, "There is no certainty that that is the correct figure". Similarly, when there is a sum which can only be ascertained on the taking of an account. If the debtor, who is himself in a position to calculate the amount, admits that something is owing, but he is not sure what it is, the Court can give judgment for such sum as it can say is indisputably due; see *Contract Discount v. Furlong*, (1948) 64 T.L.R. 201. I see no distinction in principle between those cases and the present case. The case of *Moore v. Assignment Courier Ltd.*, [1977] 1 W.L.R. 638, is quite distinguishable because the defendants had put in a defence that went to the whole of the claim. So it did not fall within O. 14. That was the ground of the decision, see p. 641H.

I come back to the words of O. 14, rr. 1 and 3. These make it clear that when the defendant has no defence to a claim or "a particular part" of such a claim, the Court can give such judgment "on that claim or part as may be just". I see no reason why this should not apply to a claim for unliquidated damages, just as it does to a claim on a quantum meruit, or a sum due on account. Take again a contract for the sale of goods when the damages depend on a calculation of the difference between contract price and market price, or a claim under a charter-party for damages for repudiation when the damages depend on a calculation of the difference between the contract rate of hire and the market rate. In such case the market rate may be a matter of dispute or difference, but usually between defined limits. The Court can readily ascertain the minimun figure for which the defendant is liable. It should be able to give judgment accordingly.

Mr. Southwell stressed the words in R.S.C. O. 14, r. 1, "Except as to the amount of damages claimed", and argued that when there was an interlocutory judgment for damages to be assessed, there was never any power to give judgment for part. But I read those words as applying to such part of the damages as to which there is a dispute. It does not apply to that part of the damages which is indisputably due.

Mr. Southwell also argued that a judgment for part of the damages (even the indisputable part) would be in effect a judgment for an interim payment; and the Court would not have power to give such a judgment. It was first introduced, he said, by the Administration of Justice Act, 1969, and it had only been applied to personal injury cases. I cannot accept this argument either. When the Court gives judgment for a sum which is indisputably due, it is not ordering an interim payment properly so called. It is a judgment for a sum which is indisputably due.

Conclusion

Every Judge concerned in this case has felt that there ought to be power to give judgment for the plaintiffs for a substantial sum, but has felt that under the rules there is no power to do it, and that we must await an amendment of the rules. This treats the powers of the Courts — in matters of practice and procedure — to be limited by the rules. It is said, "Unless it is found in the rules, there is no power". I do not agree. Long before the Rule Committee was established the Judges had inherent power over all matters of practice and procedure. All the rules were made by them. They retain this power still. As I have often said, the Courts are master of their own procedure and can do what is right even though it is not contained in the rules. Rather than wait for the Rule Committee to act, it seems to be much better for the Courts to do what is necessary as and when the occasion arises. Take this very case. If the shipowners fail to get anything in this case the charterer will once more have succeeded by this latest manoeuvre — by not admitting any figure — in depriving the shipowners of their just claim for years to come. The charterers will be rubbing their hands with joy. At last they have found a good way out of payment. For myself I would not allow this. I would allow the appeal and enter judgment for the sum which on the evidence appears to me to be indisputably due. I would assess it at $1,000,000. I would allow the appeal accordingly.

Lord Justice BROWNE: I wish I could agree with my Lord, but I am afraid I cannot. In my judgment this appeal must be dismissed. Mr. Justice Kerr thought that the plaintiffs have all the merits and I have heard nothing which gives me the slightest reason to doubt that he was right. But I am driven to the conclusion that he was also right in holding that the defendants have the law on their side.

The arbitration clause in the charter-party (cl. 53) provides that:

> Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration there in force . . .

By s. 1(1) of the Arbitration Act, 1975:

> 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.

It is not in dispute that by virtue of s. 1(2) and (4), this arbitration agreement is one to which the section applies. The section is mandatory, and the Court must stay unless the case falls within one of the exceptions in the section; the Court has no discretion to refuse a stay, nor can it impose conditions (e.g. as to payment to the other party or into Court), as Mr. Leggatt concedes.

Where a claim (admittedly within the arbitration agreement) consists of separate identifiable and quantified items, for example, the case put by Mr. Justice Kerr of an admitted claim for freight and a disputed claim for demurrage, the Court would in my view be entitled to hold that there was "not in fact any dispute" as to the admitted item and to refuse a stay in respect of that part of the claim. In *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, [1978] 1 Lloyd's Rep. 33 (Note); [1976] 2 B.L.R. 60, the claim was for a specified sum, and this Court took the view that £x, part of that sum, was "indisputably due"; I think that in such a case also the Court would be entitled to refuse a stay in respect of £x and let the rest go to arbitration. But such cases there is by admission, or can be by a decision of the Court, a quantified sum as to which "there is not in fact any dispute".

In the present case it is plain that the plaintiffs are entitled to heavy damages for breach of contract, but there is no such quantified sum. Mr. Leggatt at various stages in his argument put forward various differing figures as the minimun amount "indisputably due", but in my view it is impossible to say that any definable and quantified part of the plaintiff's claim is "indisputably due". As Mr. Justice Kerr said . . .

> . . . the difficulty of doing it (i.e. putting forward such a minimun figure) in itself demonstrates the difficulty in which the court is placed.

In fact during his final speech Mr. Leggatt put forward a figure lower than the $1,000,000 to which my Lord has referred; he put forward a figure of $833,564. Mr. Justice Kerr held that the issue of liability was res judicata and that there was no issue as to liability in this action. The defendants have now admitted liability, but by virtue of R.S.C., O. 18, r. 13 (4) the amount of damages — that is, the whole claim for damages — is in issue. On the facts of this case, I cannot say that any definable or quantified part of the claim is not in fact in dispute.

I agree with what Mr. Justice Kerr said:

> I cannot possibly conclude that there is no dispute in respect of the matter agreed to be referred. The matter agreed to be referred is any dispute under the charter-party, and there is a dispute as to the plaintiffs' quantum of damages.

Like Mr. Justice Kerr, I reach this conclusion with reluctance, but in my judgment the Court has in this case no choice under s. 1(1) of the 1975 Act but to grant the stay, and I would dismiss the appeal.

The question what would have been the position if the 1975 Act did not apply therefore does not arise, but it was fully argued and I think I should deal with it.

Order 14, r. 1, deals with two situations:—

> (a) where a defendant has no defence to a claim included in the writ or to a particular part of such a claim;
>
> (b) where a defendant has no defence to such a claim or part except as to the amount of any damages claimed.

Corresponding references to the claim or the part of a claim appear in O. 14, rr. 3(1) and 4(3).

In *Lazarus v. Smith*, [1908] 2 K.B. 266, this Court (presumably applying (a)) held that it was right to give judgment under O. 14 for the admitted part of a larger (qualified) debt. In *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, both the total amount claimed and the part of it which this Court held to be "indisputably due" were quantified; the sum for which judgment was given under O. 14 (presumably again under (a)) was retention money forming part of sums certified by the engineers.

But in the present case I think the plaintiffs are in the same difficulty under O. 14 as under s. 1 of the Arbitration Act. It is impossible to identify or quantify any particular part of their claim in respect of which there is no defence or which is "indisputably due".

It seems to me that what the plaintiffs are really doing is to ask the Court to order an interim payment on account of the damages which they expect to recover. In *Moore v. Assignment Courier Ltd.*, [1977] 1 W.L.R. 638, this Court held that there is no inherent power to make such an order. The Court referred to s. 20 of the Administration of Justice Act, 1969, which gave power to the Rule Committee to make rules enabling the Court to make orders requiring interim payments. That power is quite

general, but the only rules so far made under it are O. 29, rr. 9-17, which apply only to claims for damages in respect of death or personal injuries. Although it was held in *Moore's* case that O. 14 did not there apply, I think we are bound by that decision (with which I entirely agree) to hold that we have no power to order an interim payment in the present case.

Even if the 1975 Act did not apply in this case, I should feel bound to hold that the Court has no power to give any judgment or make any order for payment to the plaintiffs of any part of the damages to which they will no doubt ultimately be held to be entitled.

It may be that the Rule Committee will think it right to consider whether there should be any extension of the power to order interim payments on account of damages.

Lord Justice GEOFFREY LANE: (read by Lord Justice BROWNE): The plaintiffs in this case claimed before Mr. Justice Kerr to be entitled to summary judgment under O. 14 against the defendants for damages for breach of a long-term charter-party. The defendants claimed that there was a dispute as to liability and quantum and that under the terms of the charter-party the dispute had to be referred to Arbitration by virtue of s. 1(1) of the Arbitration Act, 1975. The learned Judge had no difficulty in deciding that the defendants had no defence to the claim so far as liability was concerned, and indeed they have since the hearing formally admitted it. It is clear that the defendants, ever since the terms of the charter-party became burdensome to them, have used every subterfuge and device available to them in an attempt to avoid or delay the necessity of paying to the plaintiffs the very large sum by way of damages to which the plaintiffs are undoubtedly entitled. The defendants are devoid of merit and deserve no sympathy.

The plaintiffs submit that in these circumstances the defendants should be ordered at once to pay such portion of the as yet unascertained amount of damages as can properly be described as "indisputably due" and that the proceedings should then be stayed and the remaining question (namely to how much more the plaintiffs are entitled by way of damages) referred to arbitration.

Although the question under R.S.C., O. 14, and that under the Arbitration Act, 1975, are technically separate and distinct, they seem to me to depend in each case upon the same consideration.

Can it be said that this is a proper case under R.S.C., O. 14, for the defendants to be ordered to pay a portion of the claim to the plaintiffs, leaving the balance to be assessed? Such orders are of course made every day in appropriate circumstances; see for example *Lazarus v. Smith*, [1908] 2 K.B. 266. It has however been the practice to confine such an order to cases where the amount ordered to be paid has already been ascertained or is capable of being ascertained by mere calculation without further investigation, or is admittedly due. So far as we have been told the only possible exception has been in the case of claims in quantum meruit which under O. 14 are treated prima facie as a liquidated demand.

We were referred to *Ellis Mechanical Services Ltd. v. Wates Construction Ltd.*, [1978] 1 Lloyd's Rep. 33 (Note); [1976] 2 B.L.R. 60, a decision of this Court. At pp. 35 and 61 Lord Denning, M.R., is reported as follows:

> 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 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.

Taken at its face value that statement, part of a judgment with which Lord Justice Lawton agreed, would cover the circumstances of the present case. But an examination of the facts in that case shows that the sum claimed by the plaintiffs as being immediately payable to them (£52,437) was retention money retained against them according to the terms of the contract and was payable for work that had already been done. It therefore fulfilled all the necessary conditions for a typical O. 14 payment.

How different the present case is can be judged from the way in which matters have been pleaded and argued. There is in the writ, as amended, no mention of any sum other than the total amount claimed, namely some $4,000,000 and no mention of any sum which is "indisputably due". Apparently no such sum was put before the Judge who was left to make his own calculations to that end if he wished.

Before us, after much prompting from the Court, various figures between about $850,000 and $2 million were suggested, but that is as near as one was taken to the "indisputably due" amount until Mr. Leggatt came to his reply, when the following possibilities were put forward, namely, $833,564 or $1,786,995. That was the first mention which had been made of those particular figures. The defendants had

had no opportunity of considering them or of addressing the Court upon them, and, as I understand it, the Court was being asked somehow to select, on the basis of the two figures, the sum for which it should give judgment under O. 14, staying the action as to the balance and allowing that dispute to go to arbitration. Despite the obvious temptation to decide this question in favour of the wholly meritorious plaintiffs against defendants who have less than no merits, it seems to me quite impossible to do so for two principal reasons.

First, even in circumstances where such an order can properly be made the plaintiff must assert and prove what he alleges to be the figure "indisputably due". However unmeritorious the defendants may be, they are entitled to know the allegation they have to meet at a stage in the proceedings when they are in a position to meet it.

Secondly, quite apart from that narrow ground, the plaintiffs are in truth asking the Court not to give judgment under O. 14 for a specified ascertained sum as to which there can be no legitimate dispute, but to make an interim award on account of future damages so that the plaintiffs shall not be kept out of their money by the procrastination of the defendants. The difficulties which the plaintiffs experienced in trying to particularise the sum claimed were largely due to this.

However desirable it may be that such a power should exist in the hands of the Court, it is not legitimate for the Court to confer the power on itself in purported exercise of its inherent jurisdiction to control its own procedure. So much is clear from s. 20(1) of the Administration of Justice Act, 1969, which reads as follows:

> The power to make rules of court under section 99 of the Judicature Act 1925 and the power to make county court rules under section 102 of the County Courts Act 1959 shall each include power by any such rules to make provision for enabling the court in which any proceedings are pending, in such circumstances as may be specified in the rules, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, either by payment into court or (if the rule so provides) by paying it to another party to the proceedings.

In exercise of that power the Rule Committee provided by O. 29, r. 9 that interim payments may be made in cases involving claims in respect of personal injuries or death. As Lord Justice Megaw pointed out in *Moore v. Assignment Courier Ltd.*, [1977] 1 W.L.R. 638, at p. 645, Parliament by enacting s. 20 of the Administration of Justice Act, 1969, made it clear that the existing powers of the Rule Committee were not wide enough to enable the Committee to authorise interim payments. The relevant existing powers were contained in s. 99 of the Supreme Court of Judicature (Consolidation) Act 1925:

> Rules of court may be made under this Act for the following purposes (a) for regulating and prescribing the procedure . . . and the practice to be followed in the Court of Appeal and the High Court respectively in all causes and matters whatsoever . . .

Thus Parliament in enacting s. 20(1) of the 1969 Act made it clear that the ordering of interim payments is not a matter of mere procedure in which the Court is entitled to do as it thinks fit. The Judge was right in his conclusion.

By the same token, the defendants' claim under s. 1 of the Arbitration Act, 1975, succeeds. Damages are in issue by virtue of O. 18, r. 13. The plaintiffs, as already described, have failed to show that any identifiable or specific part of those damages is not in dispute. That being so the Court has no option but to make an order staying proceedings and allowing the dispute to be put to arbitration in accordance with the relevant clause in the charter-party.

I agree with Lord Justice Browne that the appeal should be dismissed.

NOTE

COURT OF APPEAL

Jan. 16, 19 and 20, 1976

ELLIS MECHANICAL SERVICES LTD.
v.
WATES CONSTRUCTION LTD.

Before Lord DENNING, M.R.,
Lord Justice LAWTON and
Lord Justice BRIDGE

Lord DENNING, M.R.: In this appeal we are concerned with the outcome of a big building project at the old Hendon aerodrome. Two local authorities combined in it. The Greater London Council were to build a large number of dwelling houses for individuals to occupy. The Barnet Council were to build a comprehensive school and other buildings for the use of the community as a whole. Each of those bodies, the Greater London Council and Barnet employed Wates Construction Ltd. as

the main contractors for each of the contracts. Wates Construction Ltd. in their turn, employed as sub-contractors Ellis Mechanical Services Ltd. Ellis's were to provide the heating system and all the mechanical services which were required for both the two contracts. The main contract, between the GLC and Wates, was for an estimated sum of £9½ million. That was granted in June, 1970. The sub-contract with regard to that, by Wates to Ellis's, was for over £1 million.

The work went forward; but then, for reasons that we do not know, on Feb. 22, 1974, the Wates and GLC contract was determined. It came to an end, each of the two parties saying that the other had repudiated it. That is no concern of Ellis's the sub-contractors, except in so far as it entitled them to be paid. The main contract and the sub-contract were on the usual RIBA form, with some slight variations, but on this main contract being determined, the sub-contractors became entitled to be paid in accordance with cl. 21 of the sub-contract, which I shall read.

It says:

> If for any reason the contractor's employment under the main contract is determined, then the employment of the sub-contractor under this sub-contract shall thereupon also determine and the sub-contractors shall be entitled to be paid.

Then there are four items: (i) the value of the sub-contract works in so far as they had been completed at the date of determination: (ii) the value of the work begun and executed, but not completed; (iii) the value of the unfixed materials on the site, in which the property passed to the employer; and (iv) the cost of materials off-site ordered, for which the sub-contractor had paid or been charged.

So there it is; it is quite plain on cl. 21 that the sub-contractor was entitled to be paid in effect for all the work they had done and all the materials they had there available at the date Feb. 22, 1974.

Ellis's accordingly wanted to be paid by Wates. They had been doing the work hitherto to the order, and under the supervision of the GLC architect. That was provided in the contracts. Certificates had been given by the GLC architects and engineers. When Ellis's wanted payment they went back to the last interim certificate, which was one of Jan. 25, 1974. Looking at that interim certificate, the engineers had certified a sum of getting on for £700,000. Much of it had been paid already, but there had been retained, as against the sub-contractors, a sum of £52,437. That had been retained as against them as retention money according to the retention clauses in the contract. It was retained pending completion, but it was payable for work that had already been done. Ellis's having nothing more definite to go upon at that stage, claimed those retention moneys as being at least the moneys that ought to be paid to them for the work that had been done. But Wates refused to pay that sum, or any sum.

I have no doubt that Wates were arguing their own liability out with the GLC. But eventually further accounts were got out by Ellis's. So much so that, by November, 1974, they worked it out that they were entitled to £187,004.93. Having worked that out they issued a writ for the full amount, or the amount as they worked it out then, that was due to them. They applied for judgment under O. 14. They did not claim the whole of that amount. They realised that arguments might arise about details.

But in support of the claim for judgment under O. 14, Mr. Newman swore that he believed that there was no defence in respect of £52,437—that is the amount that had been retained. He said that there was no defence to that, and they were ready to refer the balance to arbitration. They were ready to go to arbitration as to any excess amount, but they felt that they ought to be paid that £52,437.

They came before the Master. The Master thought that that was right. He gave Ellis's judgment for the £52,437 and gave Wates leave to defend as to the balance, but said that by consent it was to go to arbitration.

From that order of the Master, Wates appealed to Mr. Justice Kilner-Brown. The Judge was evidently in two minds about it, but he thought that perhaps there were points to be taken on the accounts, and it was not altogether clear that the £52,000 was really owing. At all events, he thought that the whole thing should be dealt with in the arbitration. So he allowed the appeal from the Master and set aside that judgment for £52,000. He referred the whole matter to arbitration. Now there is an appeal to this Court.

There is a point of procedure which arises at the beginning. Ellis's thought that they could not appeal against what was virtually an unconditional leave to defend. So in their notice of appeal they asked for an order that if the action were stayed it should only be stayed on condition that Wates paid £52,437. I would like to say at once that, as a matter of procedure, an appeal is competent from the decision of Mr. Justice Kilner-Brown. I think that we ought either to allow an amendment or have a notice of appeal put in, so as to enable this Court, if it thinks right, to give judgment for such an amount as is undoubtedly due, and let the remainder go on to arbitration.

ASSOCIATED BULK CARRIER Ltd v KOCH SHIPPING Inc

1 August 1977 — *Court of Appeal*

Lord Denning MR, Browne and Geoffrey Lane LJJ

The plaintiffs had chartered a large bulk carrier and in 1972 they let her on a time charter to the defendants. The defendants took delivery in August 1974 but because the tanker market had slumped they tried to avoid payment of the hire rate for the vessel. Ultimately on 11 April 1977 they declared that the charterparty was at an end. The plaintiffs in due course accepted that as a repudiation by the defendants.

The plaintiffs issued a writ on 11 May 1977 claiming damages for wrongful repudiation of the charterparty and eventually sought summary judgment for the amount of their claim. The defendants applied for an order that the proceedings should be stayed pursuant to the Arbitration Act 1975. The charterparty had contained the following provisions:

> 'This charter shall be construed and the relations between the parties determined in accordance with the law of England. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter.
>
> Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration then in force.'

The defendants admitted that the plaintiffs were entitled to damages for repudiation.

Kerr J had held that the proceedings should be stayed and he also dismissed the plaintiffs' application for summary judgment. The plaintiffs appealed against the dismissal and against the stay which had been ordered.

HELD: dismissing the appeals (Lord Denning MR dissenting)

1. There was a dispute as to the damages to which the plaintiffs were entitled and since it could not be said that there was no definable or quantified part of the plaintiffs' claim which was not in fact in dispute, and there being no discretion under the Arbitration Act 1975, the proceedings had to be stayed.

2. There was no provision under Order 14 of the Rules of the Supreme Court which entitled a court to make an order requiring a payment on account of damages for breach of contract where the damages were in dispute so that the plaintiffs would not in any event have been entitled to any judgment.

per Geoffrey Lane LJ

It has been the practice to confine such an order to cases where the amount ordered to be paid has already been ascertained or is capable of being ascertained by mere calculation without further investigation, or is admittedly due. So far as we have been told the only possible exception has been in the case of claims in quantum meruit which under Order 14 are treated [illegible] as a liquidated claim.

Andrew Legge QC and R Buckley appeared for the appellant plaintiffs, instructed by [illegible] and Co.
Richard Southwell QC and Brian Davenport appeared for the respondent defendants, instructed by Coward Chance.

Commentary

This case is included in the Building Law Reports because of its general interest (and not because it is the first case known to the Editors in which the Court of Appeal has referred to a case included in these Reports). It is of interest, first, because it highlights and clarifies limitations on a court's power to give summary judgment under Order 14. In this instance the claim was one for damages for breach of contract. The same limitations presumably affect an arbitrator's power to make an interim award, in circumstances akin to an application for summary judgment, where an arbitrator has only the powers which would be available to a court (see on the extent of an arbitrator's powers *Chandris v Isbrandtsen Moller Co* [1951] 1 KB 240).

Order 14 rule 1(1) of the Rules of the Supreme Court states:

> 'Where in an action to which this rule applies a Statement of Claim has been served on a defendant and that defendant has entered an appearance in the action, the Plaintiff may, on the ground that the Defendant has no defence to a claim included in the Writ, or to a particular part of such claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that Defendant.'

Damages are generally deemed to be 'in issue' since Order 18 rule 13(4) states:

> 'Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.'

A defendant therefore does not usually set out in his pleadings any specific objections that he may have to the quantification of the plaintiff's claim. Similarly, it is not in practice generally necessary when resisting an application for summary judgment under Order 14, to attack every figure put forward by the plaintiff either because the defendant's case of liability is strong or because the plaintiff's case can be met by selective attack.

In this context the majority of the Court of Appeal appears to consider that summary judgment may be given in a claim for damages for breach of contract but only where, to quote Geoffrey Lane LJ:

> 'the amount ordered to be paid has already been ascertained or is capable of being ascertained by mere calculation without further investigation, or is admittedly due.'

In our submission there may be no distinction in law between claims for damages for breach of contract and claims under the terms of a contract which are in substance the same (for example some of the claims 'for direct loss and/or expense' admissible under the Standard Form of Building Contract). Provision made for such claims is a matter of convenience and agreement so as to avoid the necessity for claims for damages for breach of contract being made. They are not however claims for liquidated or ascer-

tained sums (when a certificate has been issued or wh[illegible]ement has been reached with the employer on the amount or that a cer[illegible]ate should be issued for a given amount).

In practice, therefore, the words 'capable of being ascertained by mere calculation' may be important if an application for summary judgment for a 'claim' is being considered. If, for example, a contractor has a claim for prolongation costs incurred, because of lack of information, and that claim is good in principle because a given extension of time has been granted on that account (and has not been challenged by the employer) he may be able to recover those costs in a summary manner if a weekly or other periodic amount has also been agreed by or on behalf of the employer in respect of prolongation, or can otherwise be ascertained so as to be beyond question. In such circumstances part of the claim, at least, might be 'capable of being ascertained by mere calculation'. Such a course would not however be open to a contractor if any part of the calculation was challenged. Thus, if the employer had good grounds to question the extension of time that had been granted or if he could point to some element in the costs which might well be wrongly included a court might be left in doubt as to what sum was due 'without further investigation' and the contractor's claim would then not succeed.

It may be that new Rules of the Supreme Court will be brought into operation which will close this apparent gap in procedure.

The case also puts *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 60 into perspective. *Ellis's* case was a decision which applied long established principles that there was 'no dispute' referable to arbitration arising out of a mere refusal to pay a sum which would otherwise be due (see for example *London & North Western Railway v Jones* [1915] 2 KB 35) or arising out of an assertion that the claim should be investigated, unsupported by evidence that the plaintiff's calculations might be wrong. On the other hand the plaintiff has to convince the court that 'It can be said with certainty that £x is due' (per Lord Denning at 2 BLR 62) and that it 'established beyond reasonable doubt by evidence before the court that at least £x is presently due from the defendant to the plaintiff' (per Bridge LJ at 2 BLR 65).

The decision illustrates the application of Section 1(1) of the Arbitration Act 1975. Section 1 applies to 'any agreement which is not a domestic arbitration agreement'. Sub section (4) defines a 'domestic arbitration' agreement as:

> 'An arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and which neither –
>
> (a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom; nor
>
> (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom;
>
> is a party at the time that proceedings are commenced.'

There are therefore a number of hurdles which have to be surmounted before a plaintiff can break loose from the application of section 1(1). First there is the negative test – the agreement does not provide for arbitration outside the United Kingdom. Even if it provides arbitration within the United Kingdom it will not be a 'domestic arbitration agreement' if one of the parties is *either* an individual who is a national of *or* habitually resident in any State other than the United Kingdom, *or* a company which is incorporated in or whose effective management and control is exercised outside the United Kingdom. So, for example, an agreement with a citizen of Iran (or the Irish Republic) will fall within the Act even though it may provide for arbitration within the United Kingdom. Equally an agreement made not merely with a foreign company (*ie* one incorporated outside the United Kingdom) but with a United Kingdom company which is managed and controlled from a place outside the United Kingdom, will fall outside the definition. Finally, it appears that it may not be enough to establish that the agreement was 'a domestic arbitration agreement' at the time when it was made for subsection (4) refers to 'the time the proceedings are commenced' so that if during the life of the agreement the central management and control of a United Kingdom company passes from the United Kingdom, it seems that the agreement no longer is a 'domestic arbitration agreement'. With so much business in the construction industry being concerned with work overseas, the provisions of the Act could have a far reaching (and even unexpected) effect.

This is particularly so, for, as the case shows, the court has no discretion to decide whether or not to stay the proceedings (unlike the discretion given by section 4 of the Arbitration Act 1950) once it has been established that proceedings have been commenced in respect of the matter agreed to be referred (provided that the usual conditions are satisfied). Since, as Lord Denning MR pointed out in the judgment in this case (and in *Ellis Mechanical Services Ltd v Wates*) arbitration can lead to long delays, careful consideration should therefore be given to the question as to whether there ought to be any provision at all for arbitration in agreements to which the 1975 Act might apply (and indeed the 1950 Act), or whether it would not be better simply to require both parties to submit to the jurisdiction of the English Courts (questions of sovereign immunity aside). Alternatively, the arbitration agreement might provide for the arbitration to be conducted in accordance with, for example, the Rules of Conciliation and Arbitration of the International Chamber of Commerce, with the applicable law or laws both of procedure and substance being set out in the agreement (and again chosen with great care).

Lastly, Lord Denning's views will no doubt be read with interest although they do not of course form part of the *ratio decidendi* of this case. His aside (at page 25) about the majority of the House of Lords in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689; 1 BLR 73 only differing from the minority on the question of the construction of the agreement somewhat under-states what the majority said about the reasoning which formed the basis of Lord Denning's judgment in *Dawnays Ltd v F G Minter Ltd* [1971] 1 WLR 1205; 1 BLR 16 and subsequent cases. As Lord Morris of Borth-y-Gest (who was in the minority in *Gilbert-Ash*) himself said in *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197 at 199:

> 'The decision in [Gilbert-Ash] was given on July 20 1973. By a majority *Dawnays' case* was overruled. What has been regarded as the principle of Dawnays' *case* met with general disapproval.'

ASSOCIATED BULK CARRIERS Ltd v KOCH SHIPPING Inc

1 August 1977 *Court of Appeal*

Lord Denning MR, Browne and Geoffrey Lane LJJ

LORD DENNING MR: The *FUOHSAN MARU* is a Japanese motor vessel. She is a big bulk carrier and can carry 105,000 long tons of oil or of ore. She is owned by a Japanese company and time-chartered for a long period to Associated Bulk Carriers Ltd whom I will call the shipowners.

In 1972 they let her on a time charter on the Beepeetime form to Koch Marine Incorporated for five years (one month more or less) from delivery. The charter hire was $2.59 cents per ton dead weight per month. She was delivered to Koch Marine on 29 August 1974. So under the time charter she could be redelivered at the earliest on 29 July 1979.

There was a printed clause which said:

> 'This charter shall be construed and the relations between the parties determined in accordance with the law of England. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of Charter.'

But there was a typewritten clause which said:

> 'Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration then in force.'

Presumably the typewritten clause takes precedence over the printed clause.

From August 1974 Koch Marine duly operated the vessel and paid the charter hire regularly every month for nearly 2½ years. But by that time the tanker market had slumped to the bottom. By December 1976 the rate for this vessel had fallen from $2.59 to a little more than $1. So Koch Marine sought by every possible device to get out of the charter. They did it by making claims which the judge described as 'manufactured' for the purpose of avoiding payment of the hire. In December 1976 and January 1977 they made deductions from the monthly hire alleging that the master had neglected to clean the holds. Then on 3 March 1977, when she was in the US Gulf, they said they intended to send her in ballast through the Suez Canal to the Persian Gulf and there load a full cargo of 105,000 tons of crude oil and to carry it back through the Suez Canal and deliver it in the Mediterranean. This was a spurious suggestion. She could not conceivably carry that cargo through the Suez Canal. The maximum draught through the Suez was 37 feet; and this 105,000 tons of cargo would require a draught of 51 feet. The vessel would, as the judge suggested, need 'wings' to carry her through the Canal. When the shipowners pointed this out, Koch Marine changed its tactics and said that they intended to send her to Port Walcott in Australia and load a cargo of ore and carry it via the Cape of Good Hope to Eleusis in Greece and there unload. But that too was a spurious suggestion manufactured by the charterers and formed another pretext for not paying. The shipowners found out that no one at Port Walcott had heard of any such shipment; and that there were no facilities for discharging ore at Eleusis. The charterers followed it up with an impudent claim; they said the shipowners were at fault. On 11 April 1977 they sent this telex to the shipowners:

> 'Charterers find themselves prevented by owners from employing vessel as intended. There being little prospect of economic alternative employment for the vessel, charterers regret they must treat owners inability to honour their charter obligations as bringing this charterparty to an end. The vessel is redelivered to the owners as of the time and date hereof.'

By that telex the real object of the charterers became plain. They were not going to pay any more of the hire and were making what seems to be the outrageous suggestion that the shipowners were at fault.

The shipowners on 22 April 1977, made this dignified reply:

> 'We much regret you appear intent on forcing yet another repudiation situation – presumably in order to obtain some temporary relief from monthly financial commitments during the delay which will occur before litigation can be completed. We do not believe that your legal advisers can be supporting your present stance and thus you are acting in complete disregard of your legal obligations. We call upon you as charterers with a reputation to maintain to earnestly reconsider your attitude.'

The charterers replied that there was no question of their giving any further orders. So on 25 April 1977, the shipowners treated the charterers' conduct as a repudiation. They accepted it as of 25 April 1977, and held the charterers liable for all loss or damage arising therefrom.

The shipowners sought redress in the courts. They had already on 14 March 1977, issued a writ claiming the hire due on 28 February 1977, amounting to $290,182.61. On 15 March 1977, they got a *Mareva* injunction. On 12 May 1977, they applied for summary judgment. The charterers then said they had a counterclaim for wrongful repudiation by the shipowners which exceeded the 28 February hire and they asked for the action to be stayed and for the whole claim and counterclaim to be sent to arbitration. Kerr J rejected the charterers' suggestion. He said that the counterclaim was 'not *bona fide*, but merely manufactured as a pretext for getting out of the charterparty'. So he refused a stay and gave judgment for the February hire. The charterers did not appeal from that judgment. They paid the February hire.

On 11 May 1977, the shipowners issued a writ against the charterers claiming damages for wrongful repudiation of the charterparty. They based it on the hire payable under the charterparty for the remaining 27 months, less the hire obtainable under a time charter for that period as at the date of repudiation. Their claim would come to something approaching, if not exceeding, $4 million. The shipowners applied *ex parte* for a *Mareva* injunc-

tion and got it. They applied again for summary judgment under Order 14. The charterers retorted with a summons to stay under the Arbitration Act 1975.

The summonses were heard by Kerr J on 23 June 1977. At this stage the charterers admitted that the shipowners were entitled to damages for repudiation. They no longer put forward their manufactured cross-claim for repudiation. So the only issue was what was the proper sum of damages to be awarded to the shipowners?

The judge made this important finding:

> 'On the evidence before me it is overwhelmingly probable that the shipowners are entitled to a very substantial sum . . . Mr Southwell for the charterers has rightly accepted that it is in the highest degree probable that the plaintiffs will recover a substantial amount. To the extent that the charterers have sought to controvert the plaintiffs' evidence as to approximate or minimum amounts to which the shipowners are entitled, I find the charterers' evidence unimpressive – no more impressive than their conduct during the last few months of the charterparty . . . The shipowners have all the merits, and I suspect that the defendants have no merits whatsoever and are still trying to stave off the day of reckoning. I have to decide whether they have the law on their side. With reluctance, I have come to the conclusion that they have . . . I must therefore grant the charterers the stay which they ask.'

So there is the point. There is beyond doubt a big sum payable as damages by the charterers to the shipowners: but because it cannot be ascertained and put down as a definite figure, the shipowners are to get no judgment for any sum at all. The whole matter must be sent to arbitration, which, as we all know, would mean a long delay. Arbitrators have little control over the speed of the arbitration. It takes a long time to get an appointment; and when that is done, if the creditor wants to avoid payment, he can put off the day of judgment indefinitely – by asking for more time for one thing or another – by saying he is not ready yet – and even after an award, by asking for a case to be stated – and so forth. It is most regrettable. It means that defaulting parties can get time indefinitely. The solicitors for the shipowner, with all the responsibility which attaches to them as solicitors in the City of London, have put this upon affidavit:

> 'This is not the first case in which the charterers have adopted unusual tactics in order to rid themselves of financially unfavourable charter commitments. In a number of cases . . . the charterers have terminated the charter and have then used the delay regrettably inherent in arbitration proceedings to negotiate a discounted settlement.'

Arbitration Act 1975

It is against this background that I consider the effect of the Arbitration Act 1975. It does not apply to domestic arbitration agreements, but only to international arbitration agreements like this one. Under the 1950 Act the courts have a discretion whether to stay the action or not. The 1975 Act takes away any discretion in the court. It makes it compulsory to grant a stay when the matter in dispute comes within the Act. The word 'shall' is used imperatively. I will read the section in full:

> '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.'

The important words for the present purpose are 'any matter agreed to be referred', and 'there is not in fact any dispute between the parties in regard to the matter agreed to be referred'.

Seeing that this is a new Act upon which questions will often arise, I venture to make these suggestions: *First.* The first proposition is illustrated by the first action which I have described in respect of the February 1976 hire. It is this: When a creditor has a sum certain due to him – as to which there is no dispute – but the debtor seeks to avoid payment by making a set-off or counterclaim as to which there is a dispute, then the court can give summary judgment under Order 14 for the sum due to the creditor, but it must send the set-off or counterclaim off to arbitration. If the set-off or counterclaim is *bona fide* and arguable up to or for a certain amount, the court may stay execution on the judgment for that amount. But in some cases it will not even grant a stay, even when there is an arguable set-off or counterclaim, such as when the claim is on a bill of exchange. See *Nova (Jersey) Knit v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 at page 722 by Viscount Dilhorne; or for freight, see *Henriksens Rederi v THZ Rolimpex* [1974] QB 233, and the recent case of *Aries Tanker Corporation v Total Transport Ltd* [1977] 1 WLR 185: or, I would add, for sums due on architect's certificates when they are, by the terms of the contract, expressly or impliedly payable without deduction or further deduction; see *Dawnays v Minter* [1971] 1 WLR 1205 – a case in which the construction which this court put on it met with the approval of Lord Reid and Lord Morris of Borth-y-Gest in the House of Lords in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689, at pages 679D and 703C. (The other Law Lords only differed on the construction of the agreement.)

Second. Take a case where a creditor has an ascertainable sum due to him – such as for work done and materials supplied – but the sum is not exactly quantified. The creditor says that it comes to, say, £1,000. The debtor admits that a considerable sum is due, but says that it is no more than £800. Then the court can give judgment for the £800 and send the balance of £200 to arbitration: because the only matter in dispute then is £200. See *Lazarus v Smith* [1908] 2 QB 200, and *Contract Discount Ltd v Furlong* (1948) 64 TLR 201. *Third.* Take the same case [illegible] and material

supplied, and suppose that the debtor admits that a considerable sum is due, but he declines to put a figure on it. The court should not allow him to obtain any advantage on that account. He should not be allowed to pay nothing. The court ought to give judgment for such sum as appears to the court to be indisputably due and to refer the balance to arbitration. This is established by the decision of this court in *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 60. As it is not reported generally, I would like to refer to two or three extracts from the judgment in this case because they are particularly apposite here. In my own judgment I said:

> '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 can see that a sum is indisputably due: then 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.'

Lawton LJ put it with his usual common sense. He said:

> 'If the main contractor can turn round, as the main contractor has done in this case and say "Well, I don't accept your account; therefore there is a dispute", that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life blood. It seems to me that the administration of justice in our courts should do all it can to restore that life blood as quickly as possible . . . In my judgment it can be done if the courts make a robust approach, as the Master did in this case, to the jurisdiction under Order 14.'

Bridge LJ said:

> '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, 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.'

Fourth. Take a like case where the creditor is entitled to an ascertainable sum due to him – not for work done and materials supplied – but for damages – such as, on a sale of goods, when the buyer refuses to accept the goods, the difference between contract price and market price under Section 50(2) of the 1893 Act. The buyer is clearly liable, but he says that the sellers' [illegible] market price was different from what the

seller alleges. In such a case if the buyer puts forward his own figure of the market price, the seller gets judgment for the admitted damages, and the balance goes to arbitration; because that is the only matter in dispute. If the buyer does not put forward his own figure of the market price, he should not get an advantage on that account. The court should give judgment for the amount which is indisputably due and send the balance to arbitration. The case is indistinguishable in principle from *Ellis v Wates*.

On principle therefore, it is my opinion that when the creditor is clearly entitled to substantial damages for breach of contract – and the only question outstanding is how much those damages should be – then if the creditor quantifies them at £1,000 and the debtor quantifies them at £800, there is not in fact any dispute between the parties as to the £800, but only as to the £200; so only the £200 need be referred to arbitration. Now suppose that the debtor does not condescend to quantify the damages, but stalls and says he will not, or cannot, calculate the damages. He should not be better off by his evasive action. If he will not give any figure at all or gives a figure which is patently too low, then he cannot complain if the court itself assesses the figure. In such a situation the court can and should assess the figure of damages which it considers to be indisputable, and leave the balance as the matter in dispute 'which is agreed to be referred'. That I think is the consequence of *Ellis v Wates* properly understood.

Returning to the facts in this case the shipowners are undoubtedly entitled to damages from the charterer for wrongful repudiation of the charter. The charterer admits it. The only question is the amount. I will not go into all the figures. The shipowners calculate their damages by taking the charter hire at $2.59, and deducting from it the hire obtainable on a time charter for the outstanding time as given by the London Tanker Brokers' Pound, that is, $1.01. That gives the damages as over $4 million. The charterers give their own calculation. On the basis of a consent voyage rate they put the rate obtainable at $2.26; on a pure time charter they put it at $1.88. The resulting figure of damages is: in the one calculation $833,564; in the other calculation $1,786,995.57. There are some adjustments to be made for minor claims by the charterers. In addition the charterers put forward all sorts of arguments to reduce the fi[illegible] making bricks without straw just as the defendants sought to in *Ellis v Wates*. I am quite clear that the charterers' lowest figure of damage, $833,564, is patently too low, especially when it is remembered that in December 1976 the charterers offered that the charter should be cancelled on them paying $1,500,000; and in February 1977 of $2 million.

In all the circumstances it seems to me that $1 million is indisputably payable by way of damages; and it is only the excess of $3,675,000 which is in dispute. So far as the Arbitration Act 1975 is concerned, then I would only stay the action in respect of that balance.

Order 14

Alongside the 1975 Act, there is a parallel problem under Order 14. It is said that judgment can only be given for the whole or part of a claim if it is a 'liquidated demand'. I agree that that is the case in respect of judg[illegible] appearance [illegible] Order 13, rule 1; and in default of

pleading, see Order 19, rule 2. But those two rules have an historical origin. They are a survival from the old counts in *indebitatus assumpsit*. Anything that could be sued for under those counts comes within the description of a 'debt or liquidated demand'; see *Lagos v Grunwaldt* [1910] 1 KB 41, by Farwell LJ. Hence it has invariably been held that a demand on a *quantum meruit* for money due for work done and material supplied, even though strictly speaking it is unliquidated, is always recoverable as a 'debt or liquidated demand'. Those words are not, however, to be found in Order 14, rule 1. I see no reason why Order 14 should be confined to cases where the writ is indorsed for a claim for a debt or liquidated demand. It is daily practice to apply Order 14 to claims for a sum for work done and material supplied, and then for judgment to be given for such part of it as it admitted to be payable; or for such part of it as, on the evidence can be said to be indisputably due. Such is simple justice to the builder who has done the work and ought to be paid. It would be a disgrace to the law if the customer could resist paying anything by simply saying, 'There is no certainty that that is the correct figure'. Similarly, when there is a sum which can only be ascertained on the taking of an account. If the debtor, who is himself in a position to calculate the amount, admits that something is owing, but he is not sure what it is, the court can give judgment for such sum as it can say is indisputably due; see *Contract Discount v Furlong* [1948] 64 TLR 201. I see no distinction in principle between those cases and the present case. The case of *Moore v Assignment Courier Ltd* [1977] 1 WLR 638 is quite distinguishable because the defendants had put in a defence that went to the whole of the claim. So it did not fall within Order 14. That was the ground of the decision, see page 641H.

I come back to the words of Order 14, rules 1 and 3. These make it clear that when the defendant has no defence to a claim or 'a particular part' of such a claim, the court can give such judgment 'on that claim or part as may be just'. I see no reason why this should not apply to a claim for unliquidated damages, just as it does to a claim on a *quantum meruit*, or a sum due on account. Take again a contract for the sale of goods when the damages depend on a calculation of the difference between contract price and market price, or a claim under a charterparty for damages for repudiation when the damages depend on a calculation of the difference between the contract rate of hire and the market rate. In such case the market rate may be a matter of dispute or difference, but usually between defined limits. The court can readily ascertain the minimum figure for which the defendant is liable. It should be able to give judgment accordingly.

Mr Southwell stressed the words in Order 14, rule 1, 'Except as to the amount of damages claimed', and argued that when there was an interlocutory judgment for damages to be assessed, there was never any power to give judgment for part. But I read those words as applying to such part of the damages as to which there is a dispute. It does not apply to that part of the damages which is indisputably due.

Mr Southwell also argued that a judgment for part of the damages (even the indisputable part) would be in effect a judgment for an interim payment; and the court would not have power to give such a judgment. It was first introduced, he said, by the Administration of Justice Act 1969, and it had only been applied to personal injury cases. I cannot accept this argument either. When the court gives judgment for a sum which is indisputably due, it is not ordering an interim payment properly so called. It is a judgment for a sum which is indisputably due.

Conclusion

Every judge concerned in this case has felt that there ought to be power to give judgment for the plaintiffs for a substantial sum, but has felt that under the rules there is no power to do it, and that we must await an amendment of the rules. This treats the powers of the courts – in matters of practice and procedure – to be limited by the rules. It is said, 'Unless it is found in the rules, there is no power'. I do not agree. Long before the Rule Committee was established the judges had inherent power over all matters of practice and procedure. All the rules were made by them. They retain this power still. As I have often said, the courts are master of their own procedure and can do what is right even though it is not contained in the rules. Rather than wait for the Rule Committee to act, it seems to be much better for the courts to do what is necessary as and when the occasion arises. Take this very case. If the shipowners fail to get anything in this case the charterer will once more have succeeded by this latest manoeuvre – by not admitting any figure – in depriving the shipowners of their just claim for years to come. The charterers will be rubbing their hands with joy. At last they have found a good way out of payment. For myself I would not allow this. I would allow the appeal and enter judgment for the sum which on the evidence appears to me to be indisputably due. I would assess it at $1 million.

I would allow the appeal accordingly.

BROWNE LJ: I wish I could agree with my Lord, but I am afraid I cannot. In my judgment this appeal must be dismissed. Kerr J thought that the plaintiffs have all the merits and I have heard nothing which gives me the slightest reason to doubt that he was right. But I am driven to the conclusion that he was also right in holding that the defendants have the law on their side.

The arbitration clause in the Charterparty (clause 53) provides that:

> 'Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of London pursuant to the laws relating to arbitration there in force . . .'

By section 1(1) of the Arbitration Act 1975:

> '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.'

It is not in dispute that by virtue of section 1(2) and (4) this arbitration agreement is one to which this section applies. The section is mandatory, and the court must stay unless the case falls within one of the exceptions in the section; the court has no discretion to refuse a stay, nor can it impose conditions (eg as to payment to the other party or into court), as Mr Leggatt concedes.

Where a claim (admittedly within the arbitration agreement) consists of separate identifiable and quantified items – for example, the case put by Kerr J of an admitted claim for freight and a disputed claim for demurrage – the court would in my view be entitled to hold that there was 'not in fact any dispute' as to the admitted item and to refuse a stay in respect of that part of the claim. In *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 60 the claim was for a specified sum, and this court took the view that £X, part of that sum, was 'indisputably due'; I think that in such a case also the court would be entitled to refuse a stay in respect of £X and let the rest go to arbitration. For in such cases there is by admission, or can be by a decision of the court, a quantified sum as to which 'there is not in fact any dispute'.

In the present case it is plain that the plaintiffs are entitled to heavy damages for breach of contract, but there is no such quantified sum. Mr Leggatt at various stages in his argument put forward various differing figures as the minimum amount 'indisputably due', but in my view it is impossible to say that any definable and quantified part of the plaintiffs' claim is 'indisputably due'. As Kerr J said, 'the difficulty of doing it (ie putting forward such a minimum figure) in itself demonstrates the difficulty in which the court is placed'. In fact during his final speech Mr Leggatt put forward a figure lower than the $1 million to which my Lord has referred; he put forward a figure of $833,564. Kerr J held that the issue of liability was *res judicata* and that there was no issue as to liability in this action. The defendants have now admitted liability, but by virtue of Order 18, rule 13(4) the amount of damages – that is, the whole claim for damages – is in issue. On the facts of this case, I cannot say that any definable or quantified part of the claim is not in fact in dispute.

I agree with what Kerr J said:

> 'I cannot possibly conclude that there is no dispute in respect of the matter agreed to be referred. The matter agreed to be referred is any dispute under the Charterparty, and there is a dispute as to the plaintiffs' *quantum* of damages.'

Like Kerr J, I reach this conclusion with reluctance, but in my judgment the court has in this case no choice under section 1(1) of the 1975 Act but to grant the stay, and I would dismiss the appeal.

The question what would have been the position if the 1975 Act did not apply therefore does not arise, but it was fully argued and I think I should deal with it.

Order 14, rule 1 deals with two situations:

> (a) where a defendant has no defence to a claim included in the writ [illegible] such a claim,
>
> (b) where a defendant has no defence to such a claim or part except as to the amount of any damages claimed.

Corresponding references to the claim or the part of a claim appear in Order 14, rules 3(1) and 4(3).

In *Lazarus v Smith* [1908] 2 KB 266, this court (presumably applying (a)) held that it was right to give judgment under Order 14 for the admitted part of a larger (quantified) debt. In *Ellis Mechanical Services Ltd v Wates Construction Ltd* both the total amount claimed and the part of it which this court held to be 'indisputably due' were quantified; the sum for which judgment was given under Order 14 (presumably again under (a)) was retention money forming part of sums certified by the engineers.

But in the present case I think the plaintiffs are in the same difficulty under Order 14 as under section 1 of the Arbitration Act. It is impossible to identify or quantify any particular part of their claim in respect of which there is no defence or which is 'indisputably due'.

It seems to me that what the plaintiffs are really doing is to ask the court to order an interim payment on account of the damages which they expect to recover. In *Moore v Assignment Courier Ltd* [1977] 1 WLR 638, this court held that there is no inherent power to make such an order. The court referred to section 20 of the Administration of Justice Act, 1969 which gave power to the Rule Committee to make rules enabling the court to make orders requiring interim payments. That power is quite general, but the only rules so far made under it are Order 29, rules 9 – 17, which apply only to claims for damages in respect of death or personal injuries. Although it was held in *Moore's* case that Order 14 did not there apply, I think we are bound by that decision (with which I entirely agree) to hold that we have no power to order an interim payment in the present case.

Even if the 1975 Act did not apply in this case, I should feel bound to hold that the court has no power to give any judgment or make any order for payment to the plaintiffs of any part of the damages to which they will no doubt ultimately be held to be entitled.

It may be that the Rule Committee will think it right to consider whether there should be any extension of the power to order interim payments on account of damages.

GEOFFREY LANE LJ (read by Browne LJ): The plaintiffs in this case claimed before Kerr J to be entitled to summary judgment under Order 14 against the defendants for damages for breach of a long-term charterparty. The defendants claimed that there was a dispute as to liability and *quantum* and that under the terms of the charterparty the dispute had to be referred to Arbitration by virtue of section 1(1) of the Arbitration Act 1975. The learned judge had no difficulty in deciding that the defendants had no defence to the claim so far as liability was concerned, and indeed they have since the hearing formally admitted it. It is clear that the defendants, ever since the terms of the charterparty became burdensome to them, have used every subterfuge and device available to them in an attempt to avoid or delay the necessity of paying to the plaintiffs the very large sum by way of damages to which the plaintiffs are undoubtedly entitled. The defendants are devoid

The plaintiffs submit that in these circumstances the defendants should be ordered at once to pay such portion of the as yet unascertained amount of damages as can properly be described as 'indisputably due' and that the proceedings should then be stayed and the remaining question (namely to how much more the plaintiffs are entitled by way of damages) referred to arbitration.

Although the question under RSC Order 14 and that under the Arbitration Act 1975 are technically separate and distinct, they seem to me to depend in each case upon the same consideration.

Can it be said that this is a proper case under Order 14 for the defendants to be ordered to pay a portion of the claim to the plaintiffs, leaving the balance to be assessed? Such orders are of course made every day in appropriate circumstances; see for example *Lazarus v Smith* [1908] 2 KB 266. It has however been the practice to confine such an order to cases where the amount ordered to be paid has already been ascertained or is capable of being ascertained by mere calculation without further investigation, or is admittedly due. So far as we have been told the only possible exception has been in the case of claims in *quantum meruit* which under Order 14 are treated *prima facie* as a liquidated demand.

We were referred to *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 60, a decision of this court. At page 61 Lord Denning MR is reported as follows:

> '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 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.'

Taken at its face value that statement, part of a judgment with which Lawton LJ agreed, would cover the circumstances of the present case. But an examination of the facts in that case shows that the sum claimed by the plaintiffs as being immediately payable to them (£52,437) was retention money retained against them according to the terms of the contract and was payable for work that had already been done. It therefore fulfilled all the necessary conditions for a typical Order 14 payment.

How different the present case is can be judged from the way in which matters have been pleaded and argued. There is in the writ as amended no mention of any sum other than the total amount claimed, namely some $4 million, and no mention of any sum which is 'indisputably due'. Apparently no such sum was put before the judge who was left to make his own calculations to that end if he wished.

Before us, after much prompting from the court, various figures between about $850,000 and $2 million were suggested, but that is as near as one was taken to the 'indisputably due' amount until Mr Leggatt came to his reply, when the following possibilities were put forward, namely, $833,564 or $[illegible]6,[illegible]. That was the first mention which had been made of those particular figures. The defendants had had no opportunity of considering them or of addressing the court upon them, and, as I understand it, the court was being asked somehow to select, on the basis of the two figures, the sum for which it should give judgment under Order 14, staying the action as to the balance and allowing that dispute to go to arbitration. Despite the obvious temptation to decide this question in favour of the wholly meritorious plaintiffs against defendants who have less than no merits, it seems to me quite impossible to do so for two principal reasons.

First, even in circumstances where such an order can properly be made the plaintiff must assert and prove what he alleges to be the figure 'indisputably due'. However unmeritorious the defendants may be, they are entitled to know the allegation they have to meet at a stage in the proceedings when they are in a position to meet it.

Secondly, quite apart from that narrow ground, the plaintiffs are in truth asking the court not to give judgment under Order 14 for a specified ascertained sum as to which there can be no legitimate dispute, but to make an interim award on account of future damages so that the plaintiffs shall not be kept out of their money by the procrastination of the defendants. The difficulties which the plaintiffs experienced in trying to particularise the sum claimed were largely due to this.

However desirable it may be that such a power should exist in the hands of the court, it is not legitimate for the court to confer the power on itself in purported exercise of its inherent jurisdiction to control its own procedure. So much is clear from section 20(1) of the Administration of Justice Act 1969 which reads as follows:

> 'The power to make rules of court under section 99 of the Judicature Act 1925 and the power to make county court rules under section 102 of the County Courts Act 1959 shall each include power by any such rules to make provision for enabling the court in which any proceedings are pending, in such circumstances as may be specified in the rules, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, either by payment into court or (if the rule so provides) by paying it to another party to the proceedings.'

In exercise of that power the Rule Committee provided by Order 29(9) that interim payments may be made in cases involving claims in respect of personal injuries or death. As Megaw LJ pointed out in *Moore v Assignment Courier Ltd* [1977] 1 WLR 638, at 645, Parliament by enacting section 20 of the Administration of Justice Act 1969 made it clear that the existing powers of the Rule Committee were not wide enough to enable the Committee to authorise interim payments. The relevant existing powers were contained in section 99 of the Supreme Court of Judicature (Consolidation) Act 1925:

> 'Rules of court may be made under this Act for the following purposes (a) for regulating and prescribing the procedure . . . and the practice to be followed in the Court of Appeal and the High Court respectively in all causes and matters whatsoever . . .'

Thus Parliament in enacting section 20(1) of the 1969 Act made it clear that the ordering of interim payments is not a matter of mere procedure in which the court is entitled to do as it thinks fit. The judge was right in his conclusion.

By the same token the defendants' claim under section 1 of the Arbitration Act 1975 succeeds. Damages are in issue by virtue of Order 18 rule 13. The plaintiffs as already described have failed to show that any identifiable or specific part of those damages is not in dispute. That being so the court has no option but to make an order staying proceedings and allowing the dispute to be put to arbitration in accordance with the relevant clause in the charterparty.

I agree with Lord Justice Browne, that the appeal should be dismissed.

RADFORD v DEFROBERVILLE and LANGE

28 March 1977 — *Chancery Division*

Oliver J

The plaintiff, who lived in Dorset, was the owner of a large house at 89 Holland Park, London, which was let into flats. The house stood in a large garden and in 1965 the plaintiff decided to sell for building purposes part of the garden which fronted on the highway. Having obtained planning permission for a new house to be built on this plot, he agreed to sell the undeveloped site to the defendant.

The transfer, dated 10 December 1965, contained various covenants by the defendant. In particular, she covenanted to build the new house in accordance with the planning permission and plans first approved by the plaintiff; further, to commence the building as soon as practicable and complete it within two years. If she was unable to complete the building within this time, the plaintiff was given a right of pre-emption, subject to which the defendant might sell elsewhere. The defendant also covenanted forthwith to erect a wall between the two properties, which was to be situated on the land transferred to her, and would become her property. This wall was to be built in accordance with a detailed specification set out in the covenant.

By 1968, neither the wall nor the proposed house had been commenced, but in July of that year a second supplemental agreement under seal was entered into, by which the plaintiff waived the defendant's failure to comply with the covenants of the original transfer and earlier supplemental agreement. He agreed to an extension of time until January 1970, and to absolve the defendant from the restrictions on sale and right of pre-emption. In all other respects, the original covenants were to remain effective and the defendant covenanted to complete the building within the extended period.

In November 1968, the defendant agreed to sell the still undeveloped plot to Miss Lange, the third party, and by the transfer the third party agreed to indemnify the defendant against liability for breaches of the covenants in the original and supplementary agreements between the plaintiff and the defendant. Despite negotiations between the plaintiff and Miss Lange, and the obtaining of a fresh planning permission, no work was carried out on the plot and the dividing wall remained unbuilt.

In April 1973 the plaintiff issued a writ against the defendant which was later amended to include a specific claim for damages for failure to erect the boundary wall as covenanted. The defendant admitted liability but denied that the plaintiff had suffered any damage, and in the meantime obtained judgment in third party proceedings against Miss Lange by virtue of the covenant of indemnity. The plaintiff issued a summons for assessment of damages against the defendant in February 1976.

HELD: (On the plaintiff's claim for damages for failure to erect the boundary wall),

1. An award of damages should put the plaintiff in the same position as [illegible] have been in if the covenant to build the wall had been duly