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QUEEN'S BENCH DIVISION
(ADMIRALTY COURT)

Nov. 4, 24, 25 and 26, 1976

MOSCOW V/O EXPORTKHLEB
v.
HELMVILLE LTD.
(THE "JOCELYNE")

Before Mr. Justice BRANDON

Charter-party (Voyage) — Arbitration clause — Stay of action — Clause stating that all claims barred if arbitrator not appointed by claimant within stated period after delivery of goods — Charter-party to be superseded by bill of lading if bill of lading in specified form — Bill of lading issued but not in specified form — No arbitration clause in bill of lading — Goods damaged — Action brought by charterer against shipowner — Application by shipowner for stay of action — Whether charter-party including arbitration clause still governed relationship between parties.

Arbitration — Appointment of arbitrator — Court's power to extend time for appointment — Factors to be considered — "Undue hardship" — Arbitration Act 1950, s. 27.

By a contract dated Aug. 4 Cook Industries Inc. ("Cook Industries") sold to the plaintiffs a quantity of yellow soya beans f.o.b. various ports including U.S. lakes ports. Shipments were to be made by instalments from September, 1972 to May 1973. By a charter-party dated Sept. 7, 1972, Continental Grain Co. ("Continental Grain") without disclosing that they were acting for the plaintiffs chartered the defendants' vessel *David Marquess of Milford Haven* for a voyage from certain specified U.S. lakes ports including Chicago to certain specified ports in the U.S.S.R. including Leningrad. The charter-party contained a "supersession clause" which stated:—

> It is also mutually agreed that this contract shall be completed and superseded by the signing of Bills of Lading on the same form as in use by regular line steamers from loading port to port of destination, or, if port of destination be one to which there is no regular line of steamers from loading port, this contract shall be superseded by the signing of Bills of Lading in the form customary for such voyages for grain cargoes, which Bills of Lading however shall contain the following clauses.

There followed a number of clauses relating to general average, bunkering and liens. The charter-party also contained the "Centrocon" arbitration clause which stated:

> All disputes from time to time arising out of this contract shall, unless the parties agree forthwith to a single arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic and engaged in the Shipping and or Grain Trades, one to be appointed by each of the parties with power to appoint an umpire. Any claim must be made in writing and Claimant's Arbitrator appointed within three months of final discharge and where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred.

On Nov. 22, 1972, one instalment of the cargo of soya beans was loaded at Chicago on the vessel by Cook Industries who received a bill of lading which they indorsed to the plaintiffs. The vessel arrived at Leningrad. Discharge of the cargo was completed on Jan. 11, 1973. The cargo was found to be in a damaged condition.

On Jan. 4, 1974, the plaintiffs issued a writ in personam claiming damages. On Jan. 8, 1974, they issued a writ against the vessel *Jocelyne*, which was a sister ship of *David Marquess of Milford Haven*. On Feb. 25, 1975, the Admiralty Registrar consolidated the two actions. The defendants applied for the action to be stayed on the ground that it ought to have been referred to arbitration in accordance with the arbitration clause because the charter-party had not been superseded by the bill of lading for that document was not in accordance with the supersession clause, and that the time for appointing an arbitrator, as extended by agreement, expired on Apr. 1, 1974. The plaintiffs admitted that the bill of lading did not accord with that clause, but contended that it constituted a breach of contract which might in certain circumstances give the defendants a remedy in damages, but did not prevent the provisions for supersession from coming into effect.

The plaintiffs cross-applied under the Arbitration Act 1950, s. 27[1] to extend the time for appointing an arbitrator in the event of the defendants' application being successful.

Held, by Q.B. (Adm. Ct.) (BRANDON, J.) that

(A) *As to the defendants' application:* (1) the parties intended that the charter-party should only be superseded by bills of lading, both as to form and as to the clauses to be contained in it, specified in the supersession clause (*see* p. 129, col. 1);

(2) since the bill of lading did not contain the required clauses, the charter-party with its arbitration clause remained the only contract between the parties (*see* p. 129, col. 1);

[1] Which states: "Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the High Court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused and notwithstanding that the time so fixed has expired, may, on such terms as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for the commencement of the arbitration proceedings extend the time for such period as it thinks proper."

(3) the defendants were entitled as of right to the stay of the action (see p. 129, col. 1).

(B) *As to the plaintiffs' cross-application:* since the delay was so long, since the bulk of it was attributable to the plaintiff's fault, and since it had seriously prejudiced the defendants, it was not a case in which the Court should extend the time for appointing an arbitrator on the ground of undue hardship (see p. 133, col. 2).

Liberian Shipping Corporation "Pegasus" v. A. King & Sons Ltd., [1967] 2 Q.B. 86, applied.

Application granted. Cross-application dismissed.

The following cases were referred to in the judgment:

Aristokratis, [1976] 1 Lloyd's Rep. 552;

Liberian Shipping Corporation Pegasus v. A. King & Sons Ltd., (C.A.) [1967] 1 Lloyd's Rep. 303; [1967] 2 Q.B. 86;

N.V. Reederij Amsterdam v. President of India: The *Amstelmolen*, [1960] 2 Lloyd's Rep. 82; (C.A.) [1961] 2 Lloyd's Rep. 1;

Nova Jersey Knit Ltd. v. Kammgarn Spinnerei G.m.b.H., (C.A.) [1976] 2 Lloyd's Rep. 155;

President of India v. Metcalfe Shipping Co.: The *Dunelmia*, [1969] 1 Lloyd's Rep. 32; [1969] 2 Q.B. 123; (C.A.) [1969] 2 Lloyd's Rep. 476; [1970] 1 Q.B. 289;

Simonburn (No. 2), [1973] 2 Lloyd's Rep. 145;

Tradax S.A. v. Volkswagenwerk A.G. [1969] 1 Lloyd's Rep. 494; [1969] 2 Q.B. 599; (C.A.) [1970] 1 Lloyd's Rep. 62; [1970] 1 Q.B. 537;

Unicoopjapan and Marubeni-Iida Co. Ltd., v. Ion Shipping Co., The *Ion*, [1971] 1 Lloyd's Rep. 541.

This was a consolidated action consisting of an action in personam and an action in rem brought by the plaintiffs, Moscow V/O Exportkhleb, against the defendants, Helmville Ltd., concerning a dispute relating to the plaintiffs' cargo of soya beans loaded on the defendants' vessel *David Marquess of Milford Haven* (a sister ship of the *Jocelyne* against which the action in rem was brought) at Chicago and delivered at Leningrad in a damaged condition at the end of 1972. The defendants applied for a stay of proceedings on the ground that the dispute should be referred to arbitration. On Apr. 27, 1976, the plaintiffs applied for the time for appointing an arbitrator to be extended in the event of the defendants' application succeeding.

Mr. Michael Thomas Q.C. and Mr. Christopher S. C. Clarke (instructed by Messrs. Clyde & Co.) for the plaintiffs; Mr. J. S. Hobhouse, Q.C. and Mr. Jonathan Mance (instructed by Messrs. Hill, Dickinson & Co.) for the defendants.

The facts are stated in the judgment of Mr. Justice Brandon.

Judgment was reserved.

Friday, Jan. 14, 1977

JUDGMENT

Mr. Justice BRANDON: This matter concerns a cargo of soya beans carried from Chicago to Leningrad in the British ship *David Marquess of Milford Haven* at the end of 1972.

The owners of the cargo were a company incorporated according to the laws of the U.S.S.R., named Moscow V/O Exportkhleb. The owners of the ship were an English company, Helmville Ltd. The cargo-owners allege that the cargo was damaged during the carriage by reason of the breach of contract or breach of duty of the shipowners, and claim to be entitled to damages from the shipowners on that account. The claim as most recently formulated is for £133,224.53, with interest.

In order to enforce this claim the cargo-owners have begun two actions in this Court. The first action is an action in personam (1974 folio 5) and the second action is an action in rem (1974 folio 20). Those two actions have since been consolidated.

Two applications in the consolidated action are now before the Court. The first application is by the defendant shipowners for a stay of the proceedings on the ground that the dispute to which they relate is one which the parties agreed should be decided by arbitration. The second application is by the plaintiff cargo-owners to extend their time for appointing an arbitrator in the event of the first application succeeding.

The evidence before the Court consists of four affidavits sworn on behalf of the defendants by Mr. Lloyd, an associate partner in Messrs. Hill Dickinson & Company, the solicitors for the defendants, and two affidavits sworn on behalf of the plaintiffs by Mr. Elliot, a partner in Messrs. Clyde & Co., the solicitors for the plaintiffs, together with various documents exhibited to those affidavits and some further letters which were put in by agreement lat

The history of the matter, as I find it, is as follows. By a written contract dated Aug. 4, 1972, ("the sale contract"), a United States company named Cook Industries Inc. ("Cook Industries") agreed to sell to the plaintiffs a large quantity of yellow soya beans. The sale was to be f.o.b. various ports, including United States lakes ports, and shipments were to be made by instalments from September, 1972, to May, 1973.

By a charter-party dated Sept. 7, 1972, ("the charter-party"), a United States company named Continental Grain Co. ("Continental Grain") chartered the defendants' ship *David Marquess of Milford Haven* ("the ship") to carry one instalment of soya beans under the sale contract from certain specified United States lakes ports, including Chicago, to certain specified ports in the U.S.S.R. including Leningrad. Continental Grain, in so chartering the ship, were acting for and on behalf of the plaintiffs, whose obligation it was under the sale contract to provide a ship on board which the instalment concerned could be delivered by the sellers. There was nothing in the terms of the charter-party itself to disclose the fact that Continental Grain were so acting, and the agency was, therefore, so far as the terms of the charter-party itself are concerned at any rate, undisclosed.

In November, 1972, pursuant to the charter-party, the ship proceeded to Chicago and there loaded a cargo of soya beans shipped by Cook Industries as one instalment under the sale contract. On Nov. 22, 1972, loading was completed and a bill of lading in respect of the cargo was issued. It named Cook Industries as shippers and provided for delivery to their order at one of three ports in the U.S.S.R. including Leningrad. It stated the quantity of soya beans shipped as 12,125.732 metric tonnes. It was signed by a United States company, Overseas Freight & Terminal Corporation, and such signature was stated to be for and on behalf of and by the authority of the master.

On Nov. 25, 1972, an invoice in respect of the shipment was issued by Cook Industries, and on Nov. 29, 1972, the plaintiffs received the bill of lading indorsed in blank by Cook Industries, and the invoice.

Leningrad was nominated as the port of discharge under the charter-party, and the ship proceeded to that port. During the voyage she encountered severe weather conditions in the form of snow, ice and gale force winds. On Dec. 27, 1972, she arrived at Leningrad, and on Dec. 29 the discharge of her cargo began. On Jan. 11, 1973, discharge was completed, and on the same day a document described as a statement-notice, recording shortage and damage to cargo, was drawn up and signed by various persons representing various interests. Two survey reports on the cargo, the first dated Jan. 17 and the second Feb. 7, 1973, were subsequently issued.

Shortly before Dec. 21, 1973, Messrs. Clyde & Co. ("Clydes") were instructed by the plaintiffs' Russian underwriters in respect of the claim, and on that date they telexed the London agents for Oceanus, the Bermuda-based Protection and Indemnity Association in which the ship was entered ("the club"), asking for an extension of time until at least Apr. 1, 1974, in order to enable them to investigate the matter. This request was made on the footing that the time limit of one year for claims for loss of or damage to cargo under the Hague Rules applied to the case, and would if not extended expire on Jan. 11, 1974. The claim was stated to be on behalf of cargo underwriters who had settled a claim for U.S. $288,915.79 for salt water damage.

On Jan. 2, 1974, Clydes received from the plaintiffs' underwriters various documents in support of the claim. These were the bill of lading, the invoice, the statement-notice, the two survey reports, a claim bill and a subrogation form. The charter-party, however, was not included. On Jan. 3, 1974, Clydes forwarded copies of these documents to the club's London agents. On the same day Clydes issued a writ in personam for the plaintiffs against the defendants in respect of the claim, the action so begun being 1974 folio 5.

On Jan. 7, 1974, the club's London agents telexed Clydes extending the time for beginning proceedings to Apr. 1, 1974. On Jan. 8, 1974, Clydes issued a further writ in rem for the plaintiffs against the sister ship *Jocelyne* in respect of the same claim, the action so begun being 1974 folio 20.

Neither writ was served for the time being.

On Mar. 20, 1974, Clydes asked the Club's London agents for a further extension of time for commencing proceedings. No reply to this request appears to have been given.

At some time prior to July 15, 1974, Messrs. Hill Dickinson & Co. ("Hill Dickinson") were instructed on behalf of the defendants, and on that date the club's London agents informed Hill Dickinson of the fact, which they had discovered by inquiry, that a writ in respect of the claim had been issued.

In November, 1974, a copy of the charter-

party was for the first time supplied to Clydes by the plaintiffs' underwriters.

On Dec. 31, 1974, the writ in personam was served, and on the Jan. 9, 1975, Hill Dickinson entered an unconditional appearance for the defendants. On Jan. 10, 1975, the writ in rem was renewed on Clydes' ex parte application. On Feb. 11, 1975, the renewed writ in rem was served on the *Jocelyne* and on Feb. 12, 1975, she was arrested in the action. On Feb 13, 1975, Hill Dickinson entered an unconditional appearance for the defendants in that action also, security for the plaintiffs' claim in the sum of £150,000 plus interest and costs was given in the form of a guarantee by the club, and the *Jocelyne* was released from arrest. The guarantee expressly stated that it was given without prejudice to any rights which the defendants might have to set aside or stay the writ and/or proceedings and/or arrest.

On the same day — Feb. 13, 1975 — Hill Dickinson sent a letter to Clydes in which, after referring to the reservation of rights in the guarantee referred to above, they continued:—

> As we explained to you yesterday, it might be that, on a proper interpretation of the documents evidencing the Contract of Carriage, Arbitration has been agreed by the Parties as the means of determining any disputes.
>
> Would you please send us at your earliest convenience full details regarding the Contract of Carriage, particularly in regard to the relationship between your Clients, Continental Grain Company of New York, and Cook Industries Inc., the Shippers named in the Bill of Lading.

On Feb. 19, Clydes wrote to Hill Dickinson, saying that the answer to their question was that the plaintiffs had purchased the cargo from Cook Industries and enclosing further copies of the invoice and bill of lading. This answer did not, however, deal with the point raised about the relationship between the plaintiffs and Continental Grain, the persons named as charterers in the charter-party.

On Feb. 25, 1975, the Admiralty Registrar, on the plaintiffs' application, made an order consolidating the two actions. On Mar. 4, 1975 the plaintiffs served their statement of claim in the consolidated action. On Mar. 21, 1975, the defendants issued their notice of motion asking for a stay on the ground that the charter-party contained a clause providing for arbitration in London of all disputes arising under it. On Mar. 25, 1975, the notice of motion was served on the plaintiffs, the date for hearing being stated in it as Apr. 14, 1975. No affidavit in support of the motion was, however filed or served, and the date for hearing so fixed was subsequently vacated and the hearing adjourned.

On June 30, 1975, Clydes wrote to Hill Dickinson saying that, as they had not heard from them on the matter for some time, they assumed that the defendants had decided not to proceed with their application to stay, and asking for service of the defence in 21 days. On July 7, 1975, Hill Dickinson answered that it was the intention of the defendants to proceed with their application to stay, but that an order for discovery of documents in relation to the application would first be sought. On July 10, Clydes replied pressing for service of the affidavit to be used by the defendants in support of their application. On July 31, 1975, after further correspondence between the solicitors, Mr. Lloyd swore his first affidavit on behalf of the defendants, and a copy of it was served on the plaintiffs. This affidavit was framed to support the motion for a stay or, alternatively, an application for discovery in relation to it.

On Aug. 13, 1975, following service of this affidavit, Clydes had a conference with counsel instructed by them for the plaintiffs. On Oct. 13, 1975, Mr. Elliot of Clydes visited Moscow in order to make further inquiries into the facts relating to the sale contract and the chartering of the ship. In December, 1975, a draft affidavit by Mr. Elliot was prepared, but it was not until March, 1976 that Counsel's approval of it was obtained.

On Mar. 26, 1976, the defendants obtained a new date — Nov. 4, 1976 — for the hearing of their motion to stay. On Apr. 27, 1976, the plaintiffs issued their notice of motion, asking for an extension of time for appointing an arbitrator in the event of the defendants' application to stay succeeding, such cross-application to be heard with the defendants' application on Nov. 4, 1976. On June 23, 1976, Mr. Elliot's first affidavit in support of the plaintiffs' case was sworn and a copy of it served on the defendants. It was framed, firstly, to answer Mr. Lloyd's first affidavit in support of the defendants' application for a stay, and, secondly, to support the plaintiffs' own cross-application for an extension of time.

Subsequently the date fixed for the hearing of the two applications was adjourned, first to Nov. 8 and then to Nov. 24, 1976. By the time of the hearing a number of further affidavits had been sworn on both sides, three more by Mr.

Lloyd for the defendants and one more by Mr. Elbot for the plaintiffs.

The charter-party was on a printed form entitled "Form C. Adopted 1913. Approved Baltimore Berth Grain Charter Party Steamer". It was dated London Sept. 7, 1972, and was made between the defendants as owners of the ship and Continental Grain as charterers. As indicated earlier, Continental Grain, in making the charter-party, were acting as undisclosed agents of the plaintiffs.

The printed form of charter-party had been subjected to numerous typed deletions, additions and amendments, and further had annexed to it four pages of additional clauses. The resulting document is by no means as clear as it might be, but guidance on its interpretation can fortunately be got from *The Amstelmolen*, [1960] 2 Lloyd's Rep. 82, in which Mr. Justice Pearson had to consider another charter-party in similar form (see also *Trodax Export v. Volkswagenwerk A.G.*, [1969] 1 Lloyd's Rep. 494, in which Mr. Justice Megaw followed the views of Mr. Justice Pearson).

The charter-party deals first with the voyage to be performed, the cargo to be carried, and the freight to be paid. It goes on:—

> Captain to call at Charterers' or their Agents' Office, as requested, and to sign Bills of Lading, as presented, without prejudice to this Charter Party.

Later there comes this further provision with regard to bills of lading, which I shall call "the supersession clause":—

> It is also mutually agreed that this contract shall be completed and be superseded by the signing of Bills of Lading on the same form as in use by regular line steamers from loading port to port of destination, or, if port of destination be one to which there is no regular line of steamers from loading port, this contract shall be superseded by the signing of Bills of Lading in the form customary for such voyages for grain cargoes, which Bills of Lading shall however contain the following clauses:—

There follows on the printed form six numbered clauses, each enclosed in inverted commas. Clause 1 contains qualified exceptions to the shipowners' liability, in effect limiting it to liability for loss or damage resulting from want of due diligence by the owners themselves or by the ship's husband or manager. It has been left as printed. Clause 2 begins with a provision for general average to be payable according to York/Antwerp Rules. This has been amended in type by adding the words "in London" after the word "payable", and the date "1950" after the words "York/Antwerp Rules". This provision in cl. 2 is followed by the Jason clause, which has been deleted entirely. Clause 3 incorporates the Harter Act. cl. 4 deals with reception of cargo at the port of discharge, and cl. 5 deals with liberty to coal en route in various circumstances. Clauses 3 and 4 have been deleted entirely. Clause 5 has also been deleted entirely and another provision "Vessel to have the privilege of bunkering en route" substituted. Clause 6 gives a lien on cargo for freight, dead freight, demurrage or average. It has, like cl. 1 been left as printed.

Following these printed clauses in inverted commas, all introduced by the supersession clause which I set out above, come four further printed provisions relating to different topics. The first relates to the cessation of charterers' liability on cargo being shipped; the second to the charterers' rights of assignment; the third to the advancement of cash for disbursements at the port of loading; and the fourth to the payment of commission. The first and second of these provisions have been left as printed, the third has been deleted entirely, and the fourth has been altered by typed amendments.

After these provisions the following words have been inserted in type:—

> Clauses Nos. 7 to 32 inclusive, as attached, to be fully incorporated in this Charter Party. Whenever the word "steamer" appears in this charter it is understood to mean "motor vessel".

Under these typed words come the signatures of the persons authorized to sign the charter-party on behalf of the parties to it.

Two of the four pages annexed to the printed form, as so modified in type, contain a series of additional clauses in type numbered 7 to 32. Clause 32 of these provides:—

> U.S.A. and Canadian Clauses Paramount, New Jason Clause, New Both to Blame Collision clause, P. & I. Bunker Deviation Clause, War Risks Clauses Nos. 1 & 2, Centrocon Strike Clause (Amended) and "Centrocon" Arbitration Clause, as attached, to be fully incorporated in this Charter Party.

The other two annexed pages contain copies, either printed or in type, of the various clauses referred to in cl. 32 above, including the Centrocon arbitration clause which provides:—

> All disputes from time to time arising out of this contract shall, unless the parties agree forthwith to a single Arbitrator, be referred

to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic and engaged in the Shipping and/or Grain Trades, one to be appointed by each of the parties with power to such Arbitrators to appoint an Umpire. Any claim must be made in writing and Claimant's Arbitrator appointed within three months of final discharge and where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred . . .

The bill of lading issued in respect of the cargo was on a printed form entitled "Baltimore Form C Berth Term Bill of Lading". It acknowledges the shipment in apparent good order and condition by Cook Industries on board the ship at Chicago of 12,127.732 metric tonnes of yellow soya beans for delivery at Riga, Leningrad or Klaipeda to their order on payment of freight as agreed, such freight being stated to have been prepaid. It is signed and endorsed on the back in the manner described earlier.

The bill of lading contains seven general clauses, followed by a War Risk clause and a P & I Bunkering clause. Clause 1 of the general clauses incorporates the United States Carriage of Goods by Sea Act, 1936. Clauses 2 and 3 need not be mentioned. Clause 4 contains an exceptions clause the same as that prescribed in the charter-party. Clause 5 begins with a provision that general average is to be payable according to the York/Antwerp Rules 1950, but does not specify any place for such payment. It continues with the Jason clause. Clause 6 provides that, where adjustment of general average is made in accordance with the law and practice of the United States of America, the new Jason clause is to apply. Clause 7 contains the new Both to Blame Collision clause.

With regard to the clauses which follow the seven general clauses, the War Risks clause accords with, but the P & I Bunkering clause differs in wording from, the clauses relating to these two matters specified in cl. 32 of the additional clauses annexed to the charter-party.

The material relating to the plaintiffs' claim which is available at this stage is necessarily limited.

The deck log book of the ship shows that during much of the voyage she experienced conditions of intense cold and frost, and between Dec. 13 and 19, 1972, encountered very heavy weather as a result of which she sustained damage to equipment and structures on deck. This included damage to no. 3 hatch, which was badly set down in the centre. As a result of this damage, when discharge began at Leningrad on Dec. 29, 1972, a crane had to be used to lift no. 3 hatch before it could be opened by the ship's winches.

On Dec. 30, 1972 — the second day of discharge — the master sent a telex to the defendants in which he stated that anticipated water damage to the cargo of soya beans was in the region of 500 tonnes. On Jan. 4, 1973, the master made a protest before a notary public at Leningrad with regard to damage to ship and cargo by bad weather in the Atlantic.

On Jan. 11, 1973, the document called a statement-notice — which is the nature of a cargo outturn report — came into being. It is on a printed form setting out various matters, expressed in both Russian and English, in respect of which information is required to be given. This information has been entered in manuscript and the form has been signed by three persons: a representative of the port, a representative of the custom house, and a representative of Inflot, a state organization of the U.S.S.R., which the defendants conceded, for the purpose of the present proceedings only were acting in this respect as the ship's agents.

As regards the quantity of the cargo, the document states that the bill of lading quantity was 12,125,732 kgs., and the quantity discharged 12,111,860 kgs., making a shortage of 13,872 kgs.

As regards the condition of the cargo on discharge, the document as translated states:—

> According to B/L it should be 12,125,732 kgs. of soya beans, actually it was accepted by the warehouse
>
> 9,968,070 kgs. of sound beans.
>
> 2,143,790 kgs. of wetted, mouldy, rotten beans.

On Jan. 17, what is described as expertise statement no. 22306 (the first survey report) was drawn up. Various persons representing cargo and other interests, but not the defendants, were concerned in it. The cargo is described, according to the translation, as comprising:—

> 1. The conditional high quality beans. 9,968,070 kgs., yellow bulk, consisting of some black moulded beans.
>
> 2. Wetted beans, 2,143,790 kgs., mixed with moulded black beans.

Then, after setting out an analysis of the beans, the report as translated concludes:—

> Taking into consideration the terms of the Contract and the results of the examination of the cargo . . . the present beans do not correspond to the technical terms of the Contract

... to dirt and oil mixture . . . Chloride presence tells of wetting by sea water. Taking into account low quality as well as expenses and loss while working out the cargo, the experts determined the lowering of the quality of the conditional high quality beans, 9,968,070 kgs., at 5.8%, wetted beans, 2,143,790 kgs., 77.1%, from the cost of soya beans in sound condition . . .

On Feb. 7, 1973, the second survey report No. 23-73-19 came into being. This is on a printed form similar to that used by average agents in many ports, and is signed by a Leningrad surveyor. It states that the survey was made at the request of cargo interests and that notice of loss and damage had been given to the shipowner by the statement-notice dated Jan. 11, 1973. The schedule to the report as translated reads:—

According to B/L should be: cargo of soya beans in bulk weight 12,125,732 kgs.

It was discharged from the vessel 12,111,860 kgs. of soybeans.

Shortage against B/L quantity 13,872 kgs.

It was discharged from the vessel 9,968,070 kgs. of soybeans in sound condition depreciated by Experts in view of inferior quality by 5.8%, weight of depreciated cargo 587,148 kgs.

It was discharged from the vessel 2,143,790 kgs. of soybeans damaged by sea water depreciated by Experts by 77.1% in view of inferior quality of damaged cargo. Weight of depreciated cargo 1,652,862 kgs.

Statement of Loss

1. Invoice value of 13,872 kgs. of soybeans short delivered by the vessel.

2. Invoice value of 578,148 kgs. of soybeans depreciated by 100% in view of total loss.

3. Invoice value of 1,652,862 kgs. of soybeans depreciated by 100% in view of total loss.

The report concludes by stating — as is apparent — that it is based on the bill of lading, the statement-notice and the first survey report.

The claim bill, which is undated, but which was one of the documents received by Clydes from the plaintiffs' underwriters on Jan. 3, 1974, and forwarded to the club on Jan. 4, 1974, states the claim in this way:—

9,968,070 kgs. depreciated by 5.8% = 578,148 kgs.

U.S. $129.50 × 578.148 m/t = U.S. $74,870.17

2,143,790 kgs. depreciated by 77.1% = 1,652,862 kgs.

U.S. $129.50 × 1,652.862 m/t = U.S. $214,045.62

Total U.S. $288,915.79

The figure of U.S. $129.50 used in these calculations is the f.o.b. price per metric tonne as stated in the invoice.

Finally, there is the statement of claim of the plaintiffs in the consolidated action served on Mar. 4, 1975. This alleges in par. 4 that, of the 12,111,860 metric tonnes of soya beans actually discharged at Leningrad, 9,968,070 metric tonnes were wetted by sea water and oil and dirtied, and 2,143,790 metric tonnes were badly wetted by sea water and oil and dirtied and were mouldy and rotten. Then in par. 5 the damage is particularized, on the basis of the difference between the sound and damaged arrived values, as U.S. $81,131.51 in respect of the 9968.070 metric tonnes, and U.S. $231,946.12 in respect of the 2143.790 metric tonnes. These sums are in turn converted into sterling at U.S. $2.35 to £1 as £34,524.05 and £98,700.48 respectively, making a total of £133,224.53. These figures for loss in U.S. dollars are somewhat higher than the corresponding figures in the claim bill. The reason for this does not appear from the statement of claim, but it is probably because a sound arrived value higher than the f.o.b. price has been used.

I shall consider first the defendants' application for a stay. With regard to this, the following matters appeared to be common ground:—

(1) Since Continental Grain entered into the charter-party as agents for the plaintiffs, that document was — in the first place at any rate — as between the plaintiffs and the defendants, the contract for the carriage of the cargo. *The President of India v. Metcalfe Shipping Co. Ltd.*, [1969] Lloyd's Rep. 476; [1970] 1 Q.B. 289.

(2) On the true construction of the charter-party, cll. 7 to 32 were incorporated in two ways. They were incorporated, firstly, along with printed cll. 1, 2, 5 and 6 as amended, as terms of the charter-party itself. *The Amstelmolen*, [1961] 2 Lloyd's Rep. 1. They were incorporated secondly, as clauses additional to printed cll. 1, 2, 5 and 6 as amended, and so far as pertinent to a bill of lading contract, in the whole group of clauses to be contained in the bills of lading, the signing of which was contemplated as completing and superseding the charter-party under the supersession clause. Incorporation in this second matter as well as the first, which was contended for by Counsel for the defendants and apparently not disputed by Counsel for the

plaintiffs, was not expressly dealt with in *The Aravelmolen*. In my view, however, it is in accordance with the reasoning and approach of Mr. Justice Pearson in that case (see [1960] 2 Lloyd's Rep. 82).

(3) The effect of cl. 32 was to make the charter-party subject to, among other provisions, the Hague Rules as enacted in the United States Carriage of Goods by Sea Act, 1936, and the Centrocon arbitration clause.

(4) The time limit of three months for appointing an arbitrator prescribed by the Centrocon arbitration clause was invalid under the Hague Rules, and a time limit of one year must be substituted for it. *The Ion*, [1971] 1 Lloyd's Rep. 541.

(5) The defendants' application for a stay was now governed, not by s. 4(1) of the Arbitration Act, 1950, but by s. 1 of the Arbitration Act, 1975, which came into force on Dec. 23, 1975, and must be treated as having retrospective effect. (See *Nova Jersey Knit Ltd. v. Kammgarn Spinnerei GmbH*, [1976] 2 Lloyd's Rep. 155, in which the point about retrospection appears to have been assumed.)

(6) The arbitration agreement in the charter-party was not a domestic agreement within s. 1 of the 1975 Act, because the plaintiffs were a body incorporated in the U.S.S.R. (see s. 1(4)). That being so, on the assumption that the charter-party remained the contract of carriage between the parties, the Court, under s. 1(1), had no discretion in the matter, but was bound to grant a stay.

While these matters were, as I have said, common ground, there was a dispute as to whether the charter-party, which contained the arbitration clause, remained the contract between the parties; or whether it had been superseded, under the supersession clause in the charter-party, by the bill of lading which contained no such clause. For the plaintiffs it was contended that such supersession had taken place, for the defendants that it had not.

The supersession clause provides that the charter-party shall be superseded by bills of lading which, firstly, are in one or other of two specified forms, and, secondly, contain certain specified clauses. With regard to the first matter, the form is to be either that in use by a shipping line running regularly between the port of loading and the port of discharge — if there is one; or, if there is no such line, that customary for grain cargoes on such a voyage. With regard to the second matter, the clauses to be contained are the printed cll. 1, 2, 5 and 6 as amended, and, assuming that the construction of the charter-party in this respect to which I referred earlier is correct, the additional typed cll. 7 to 32, so far as pertinent to a bill of lading contract.

There was a conflict between the parties on the question whether the bill of lading issued in this case complied with the supersession clause with regard to the first matter: namely, its form. According to the defendants' case, there was at the material time a regular shipping line running between Chicago and Leningrad, but the bill of lading issued was not in the form used by that line. It did not, therefore, comply with the supersession clause. According to the plaintiffs' case on the other hand, there was at the material time no such regular line, and the bill of lading issued was in the form customary for grain cargoes on the voyage concerned. It did, therefore, comply with the supersession clause.

If it were necessary to resolve this conflict, I should not find it easy to do so on the evidence available. It seems to me, however, that it is not necessary to do so, because it was in any case conceded for the plaintiffs that the bill of lading issued did not comply with the supersession clause in respect of the second matter: namely, the clauses to be contained in it. In this connection Counsel for the defendants relied on a variety of differences between the clauses which the bill of lading should have contained and those which it in fact contained. He did so, moreover, either on the basis for which he contended primarily, that both cll. 1, 2, 5 and 6 as amended and cll. 7 to 32, so far as pertinent, had to be contained in the bill of lading; or, alternatively, on the basis that only cll. 1, 2, 5 and 6 as amended had to be so contained. On the latter, and to him less favourable basis, he relied on — among other matters — discrepant provisions with regard to general average and bunkering, and the absence of any provision for a lien on cargo. On the former, and to him more favourable basis, he relied on various other matters, including particularly the absence of the arbitration clause itself. Having regard, however, to the concession made — and, in my view, rightly and properly made — by Counsel for the plaintiffs on the matter, I do not think that it is necessary for me to examine and analyse in detail all the various differences, including those referred to above, which it is clear exist.

It having been conceded for the plaintiffs that the bill of lading issued did not comply with the supersession clause as regards the clauses contained in it, the only remaining question is whether, on the true construction of the charter-party, it was necessary that the bill of lading

agreement.

should so comply in order to bring the provisions for supersession into effect. As to this, it was contended for the defendants that it was a condition precedent to the coming into effect of those provisions that the bill of lading issued should both be in the form, and also contain all the clauses, specified in the supersession clause. For the plaintiffs on the other hand, it was contended that, while the failure of a bill of lading issued under the charter-party to comply with the supersession clause in either or both these respects was a breach of contract which might in certain circumstances give the defendants a remedy in damages, it did not prevent the provisions for supersession from coming into effect.

The defendants relied further, in support of their contention, on the earlier provision in the charter-party requiring the master to sign bills of lading as presented "without prejudice to the Charter Party".

On this question of construction, I have no hesitation in preferring the argument for the defendants to that for the plaintiffs. It seems to me clear that the parties intended that the charter-party should only be superseded by bills of lading which satisfied the requirements, both as to form and as to the clauses to be contained, specified in the supersession clause. The bill of lading issued in this case admittedly did not satisfy those requirements so far as the clauses to be contained are concerned. It follows that the charter-party was never superseded but remained, with the arbitration clause contained in it, the only contract between the parties.

The conclusion which I therefore reach, on the basis of the matters referred to earlier as common ground, and the views on the construction of the charter-party which I have expressed, is this: firstly, that the dispute to which the consolidated action relates is a dispute arising under the charter-party; secondly, that it is covered by the arbitration clause contained in that charter-party; and, thirdly, that, in these circumstances, the defendants are entitled as of right to the stay of the action which they seek.

I consider next the cross-application of the plaintiffs for an extension of time under s. 27 of the Arbitration Act 1950. This provides:—

> Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for the commencement of the arbitration proceedings, extend the time for such period as it thinks proper.

The exercise of the power to extend time under this section is a matter of discretion, and guidance with regard to the approach to be followed in exercising such discretion is to be found in *Liberian Shipping Corporation "Pegasus" v. A. King & Sons Ltd.*, [1967] 1 Lloyd's Rep. 303; [1967] 2 Q.B. 86. In that case, a majority of the Court of Appeal — Lord Denning, M.R., and Lord Justice Salmon — disapproved certain earlier decisions of the Divisional Court of the Queen's Bench Division, in which the crucial words of the section, "undue hardship", had been given a narrow meaning, and it had been held that the power to extend time should only be used in a very restricted class of cases.

The guide-lines laid down in the majority judgments in *The Pegasus* Case can, in my view, be summarized as follows:

(1) The words "undue hardship" in s. 27 should not be construed too narrowly.

(2) Undue hardship means excessive hardship and, where the hardship is due to the fault of the claimant, it means hardship the consequences of which are put out of proportion to such a fault.

(3) In deciding whether to extend time or not, the Court should look at all the relevant circumstances of the particular case.

(4) In particular, the following matters should be considered:—

(a) the length of the delay;

(b) the amount at stake;

(c) whether the delay was due to the fault of the claimant or to circumstances outside his control.

(d) if it was due to the fault of the claimant, the degree of such fault;

(e) whether the claimant was misled by the other party;

(f) whether the other party has been prejudiced by the delay, and, if so, the degree of such prejudice.

I was referred also to certain decisions since 1967 in which Judges of first instance have

sought to apply the guide-lines laid down in *The Pegasus* case to the particular facts of the cases before them. These included *The Simonburn (No. 2)*, [1973] 2 Lloyd's Rep. 145 and *The Aristokratis* [1976] 1 Lloyd's Rep. 552. In the former of these cases, Mr. Justice Kerr emphasised the importance of a claimant, who is out of time for commencing arbitration proceedings, making an application for an extension of time was issued on Apr. 27, possible.

I approach the problem which arises in the present case in the light of the authorities mentioned above.

First, as to the length of the delay. The plaintiffs' time for appointing their arbitrator, as extended by agreement, expired on Apr. 1, 1974. Their notice of motion seeking an extension of time was issued on Apr. 27, 1976. The delay at this stage was therefore a little over two years. Since then further delay has occurred in the hearing and determination of the application, as a result of which, if an extension is granted, it must, in order to be effective, be an extension for a period of about two years and 10 months.

Second, as to the amount at stake. The claim, as formulated in the statement of claim in the consolidated action, is for £133,224.53 with interest and costs. The amount at stake is therefore of the order of £150,000 or more.

Third, as to whether the delay was due to the fault of the plaintiffs or to circumstances beyond their control. With regard to this there are two aspects to consider: firstly, why the delay occurred at all, and, secondly, why it continued as long as it did. With regard to the first aspect, the reasons why the delay occurred at all was that the plaintiffs failed to appreciate at an early stage that their claim arose under the charter-party, which contained an arbitration clause, rather than under the bill of lading, which did not. With regard to the second aspect, there were two reasons why the delay continued as long as it did. The first reason was the failure of the plaintiffs, after being put on inquiry by the defendants about the possibility of the dispute being subject to an arbitration agreement, investigating the matter further with reasonable rapidity. The second reason was the failure of the plaintiffs, after it was or should have been apparent to them that the charter-party, with its arbitration clause, was or might well be the relevant contract, to apply for an extension of time under s. 27 promptly. In these circumstances, I do not think that the delay can be attributed to circumstances beyond the control of the plaintiffs. On the contrary, I feel bound to conclude that the delay, as regards both the aspects to which I have referred, was due to fault on their part.

Fourth, as to the degree of fault of the plaintiffs. With regard to this, Counsel for the plaintiffs made various points on their behalf as follows. First, that the belief of the plaintiffs, or rather of their underwriters, that the bill of lading was the relevant contract was reasonable, because that is what the position would have been under Russian law. Second, that it was therefore reasonable for the underwriters, when they instructed Clydes, to include only the bill of lading and not also the charter-party among the documents originally provided. Third, that it was reasonable for Clydes, being so instructed, to issue writs in respect of the plaintiffs' claim. Fourth, that Clydes were not put on inquiry with regard to the charter-party, with the arbitration clause in it, being the relevant contract, until they received Hill Dickinson's letter of Feb. 13, 1975. Fifth, that, following receipt of this letter, Clydes investigated the matter further without unnecessary delay, sending Mr. Elliot to Moscow in October, 1975, in order to obtain all the information possible with regard to it. Sixth, that, in so far as there was a subsequent delay by Clydes in issuing a cross-application for an extension of time, this was excusable in view of the defendants' delay in proceeding with their own application for a stay.

While I do not wish to appear unsympathetic to the plaintiffs and their underwriters, or to their solicitors, I do not consider that the conduct of the case on the plaintiffs' side can be viewed as uncritically as these submissions on their behalf would suggest.

With regard to the first and second points, as to the reasonableness of the plaintiff's belief that the bill of lading was the relevant contract, and the consequent reasonableness of their not including the charter-party in the documents sent to Clydes, I would say two things. Firstly, I am not satisfied, after considering the relevant provisions of the Merchant Shipping Code of the U.S.S.R. (an English version of which was put in evidence) that the bill of lading rather than the charter-party would, under that code, have been the right contract under which to bring the claim. It may be so, but I have doubts about it. Secondly, whatever the position under Russian law may be, there never was any question of the contract of carriage, whether contained in the bill of lading or the charter-party, being governed by that law. In these circumstances, once the underwriters [illegible]

bring a claim against the defendants in England, and to instruct English solicitors to act for them in the matter, the reasonable course, in my view, for them to adopt, would have been to provide Clydes with all the documents relating to the transaction as a whole, including the charter-party and the sale contract, and all the relevant information, including the fact that Continental Grain, in chartering the ship, were acting as agents for the plaintiffs.

Whatever documents the plaintiffs' underwriters sent, however, and whatever information they provided, they should, in my view, have instructed Clydes much earlier in the one year period for claims under the Hague Rules than they did, so as to give Clydes an opportunity to ask for and obtain any further documents or information which they considered it necessary for them to have before deciding on the form of proceedings to be brought. As it was, Clydes were only instructed very shortly before the one year time limit was due to expire, and were obliged to go ahead on the only documents and information then available to them.

It is further to be noted, although I do not know that it made any real difference at that stage, that, after Clydes had committed themselves to commencing the two actions, the plaintiffs' underwriters allowed a further 10 months or so to elapse before finally supplying them belatedly with a copy of the charter-party.

With regard to the fourth point, that Clydes were not put on inquiry until they received Hill Dickinson's letter of Feb. 13, 1975, it is necessary to observe that this letter was written following the service of the writ in personam — which had been issued on Jan. 3, 1974 — on Dec. 31, 1974, and the service of the writ in rem — which had been issued on Jan. 8, 1974, and renewed on Jan. 10, 1975 — on Feb. 12, 1975. Whatever may have been the problems about serving the writ in rem at an earlier date, there was — so far as I am aware — no good reason why the writ in personam should not have been served on the defendants, who are an English company with an address in London, within a short time of its issue. If it had been so served, it is likely that the letter written by Hill Dickinson on Feb. 13, 1975, or something similar to it, would have been written within a short time of such service. Clydes would then have been put on inquiry in relation to the matter of arbitration something like a year earlier than they were. In these circumstances, while it may be true that Clydes were not put on inquiry about the matter of arbitration until they received the letter of Feb. 13, 1975, it was their own unnecessary delay in serving the writ in personam which brought about this result.

With regard to the fifth point, that, following receipt of the letter of Feb. 13, 1975, Clydes investigated the matter further without unnecessary delay, I feel bound to say that a considerable period was allowed to elapse before any effective action was taken. It is no doubt difficult for solicitors to obtain further information quickly from foreign clients in a case of this kind. It seems to me, however, that the matter was not pursued with anything like the urgency which the situation demanded.

With regard to the sixth point, that the subsequent delay in making the application under s. 27 was excused by the defendants' delay in proceeding with their own application, I find this difficult to accept. The result of Mr. Elliot's visit to Moscow in October, 1975, was a recognition by the plaintiffs that they were parties to the charter-party. At that stage, it was or should have been apparent to the plaintiffs, advised as they were, that there was a very real possibility — to put the matter no higher — that the charter-party was the relevant contract, that their claim was subject to the arbitration clause contained in it, and that the time for commencing arbitration proceedings under that clause had long ago expired. In these circumstances it should have been appreciated on the plaintiffs' side that an application for extension of time under s. 27 was necessary, if only as a precaution against the very real possibility to which I have referred, and further that such application should be made as soon as possible. The fact that the defendants were slow in proceeding with their own application for a stay does not seem to me to afford any good reason for the plaintiffs to delay in issuing their application under s. 27.

With regard to the additional delay which occurred between Apr. 27, 1976, when the plaintiffs issued their application under s. 27 and the hearing of both applications, I do not think it would be right to impute any fault to the plaintiffs. There were the usual procedural difficulties in getting a date for hearing which suited all those concerned, due partly to congestion in the Court's list and partly to the commitments of Counsel on either side, and it would be unfair to fix any appreciable measure of blame for these difficulties on either party.

It was not suggested on behalf of the plaintiffs that their delay in appointing an arbitrator was due to their having been misled in any way by the defendants.

It remains to consider whether the defendants have been prejudiced by the plaintiffs' delay in appointing an arbitrator and, if so, how seriously. In doing so, I think that the comparison to be made is that between the situation of the defendants as it would have been if the plaintiffs had appointed their arbitrator by Apr. 1, 1974 — the date of expiry of the agreed extension of time for commencing proceedings — and the situation of the defendants as it would now be if the Court were to grant the plaintiffs' application and extend their time for appointing an arbitrator to, say, Feb. 1, 1977.

There was no evidence before me as to the period which would normally be expected to elapse between the commencement of proceedings under the Centrocon arbitration clause in respect of a claim like that of the plaintiffs and the hearing of the arbitration. I should, however, have thought it probable that the period would be of the order of one year, and in any case not more than two years. I shall therefore work on the basis of a period of one to two years.

On that basis, if arbitration proceedings had been commenced, by the appointment of the plaintiffs' arbitrator, by Apr. 1, 1974, it is probable that the hearing of those proceedings would have begun by some date between Apr. 1, 1975, and Apr. 1, 1976. If, on the other hand, following the grant to the plaintiffs of an extension of time, arbitration proceedings were to be commenced by the Feb. 1, 1977, it is probable that the hearing of those proceedings would begin by some date between Feb. 1, 1978, and Feb. 1, 1978. In the former case, therefore, the hearing would probably have taken place 2¼ to 3¼ years after the end of the material voyage. In the latter case it would probably take place a little over five to a little over six years after it, a difference of about 2¼ years.

Any substantial delay in the hearing of proceedings relating to a civil dispute is prima facie objectionable on the ground that it tends, in most cases at any rate, to make it more difficult for such proceedings to be determined justly. It does not, however, follow from this that, whenever such delay occurs, it will necessarily cause prejudice to the defendants to the claim. There may be cases in which the only, or substantially the only, questions to be decided are questions of law. This may be because either the material facts are agreed, or they are only marginally in dispute, or they can be established satisfactorily from contemporaneous or nearly contemporaneous documentary evidence. There may be other cases in which, because the burden of proving all or most of the material facts is on the plaintiffs, the delay which has occurred is more prejudicial to them than to the defendants, who may even benefit indirectly from it. It follows that, in deciding whether delay in any particular case has been prejudicial to the defendants, it is necessary to consider what are the various issues to be tried, on which party the burden of proof in relation to them lies, and the nature of the evidence which the defendants will or may need to adduce in relation to them.

In the present case, since the only pleading delivered is a statement of claim relying simply on the fact that the cargo was shipped in good order and condition and delivered damaged, it is not possible to be sure, assuming that the plaintiffs' time for commencing arbitration proceedings were to be extended, what all the issues to be tried in the arbitration would be. It seems probable, however, that they would include all or some of the following:—

(1) Whether the damage to cargo by sea water was caused by perils of the sea, or by want of care of cargo, or by unseaworthiness.

(2) Whether the cargo was also damaged during the carriage by contamination with dirt or oil or both.

(3) If so, whether such further damage was caused by want of care of cargo or by unseaworthiness.

(4) If either class of damage was caused by unseaworthiness, whether the defendants exercised due diligence to make the ship seaworthy.

(5) Whether some of the plaintiffs' complaints about the condition of the cargo on discharge are not in reality complaints about the quality of the goods delivered by their sellers under the sale contract.

(6) Whether the damage by sea water was increased by failure of the stevedores to separate damaged cargo properly during discharge.

(7) The quantum of damage.

The burden of proof in respect of some of these issues would be on the defendants. For instance, once damage of any kind during the carriage was proved, the burden would be on the defendants to show that it was caused by an excepted peril; and, if causative unseaworthiness was proved, the burden of proving the exercise of due diligence would again be on the defendants. Moreover, even on issues where the burden of proof would be on the plaintiffs, the defendants would or might well need to call rebutting evidence. To put the matter shortly,

the defendants would probably need to adduce a substantial quantity of evidence over a wide field; and the matters to which such evidence would relate would be matters which occurred over five years and perhaps over six years — or even more as regards the question of due diligence to make seaworthy — before the time when the evidence would be given.

In my opinion, for defendants to be required to adduce evidence of that kind so many years after the event would be bound to cause serious prejudice to them. Material witnesses might be no longer available, and the recollection of those who would be available would inevitably be much impaired. Inquiries which would have been relatively easy to make in 1974 or 1975 might be difficult or impossible to make in 1977 or 1978.

It was argued for the plaintiffs that the defendants would not suffer any substantial prejudice by reason of the delay for three reasons. First, because the defendants had notice that there had been damage to the cargo at the time of discharge. Second, because the defendants had had notice of the plaintiffs' claim, with all the main supporting documents, through the club early in January, 1974. Third, because the plaintiffs had begun proceedings in respect of the claim, albeit the wrong kind of proceedings, before the expiry of the one year period under the Hague Rules.

I do not find any of these arguments convincing. As regards the first point, the defendants must, I think, in view of their admission with regard to Inflot, be treated as having had notice of the contents of the statement-notice dated Jan. 11, 1973. This document, however, is no more than an outturn report, and it states that only 2143.790 metric tonnes of cargo were damaged by sea water, the remaining 9996.070 metric tonnes being described as sound. There is no reference in the document to any claim, and, having regard to the heavy weather encountered and the damage to the ship due to it, the defendants, if they had in fact seen the document — which they did not — would have been justified in treating the damage to cargo as having been caused by perils of the sea, at any rate until some claim to the contrary was put forward.

As regards the second point, it is true that the club had notice of the claim, extending to the whole of the cargo, by early in January, 1974. But giving notice of a claim is not the same thing as commencing appropriate proceedings in respect of it. The defendants were no doubt bound to make limited inquiries into the matter in order to answer Clydes' question whether liability was admitted or denied. But they were not, in my view, bound to make at that stage all the investigations which would become necessary if arbitration proceedings were commenced. On the contrary, they were entitled to see whether such proceedings were commenced within the extended time allowed and, if they were not, to rely on the expiry of the time limit, unless it was further extended by the Court, as a complete defence to the claim.

As to the third point, it is right that writs were issued within the one year time limit under the Hague Rules. But neither was served for nearly a year, and when both were served the defendants took the point, which they were fully entitled to take, that there was an agreement to refer disputes to arbitration and that the proceedings in the Court were therefore inappropriate and should be stayed. The failure to serve either writ earlier illustrates an important difference between arbitrations and actions, which is that when one party commences an arbitration the other party is immediately given formal notice of the fact and the arbitration gets under way at once; whereas, when an action is begun, the whole process may be held up for a year as a result of service of the writ being deferred. On the footing that the defendants were entitled, prima facie at any rate, to have the actions stayed, I do not consider that they were any more bound, after the service of the writs on them than before, to make the full investigations into the claim which they would have had to make if arbitration proceedings had been commenced in time.

The exercise of the Court's discretion under s. 27 is by no means an easy matter. On the one hand it will clearly be a serious hardship to the plaintiffs if the extension of time which they seek is refused and they are therefore barred from pursuing the very substantial claim here involved. On the other hand, if an extension is granted, the arbitration proceedings will be in the upshot begin some 2¾ years later than they should have done; responsibility for some two years of that delay lies with the plaintiffs; and the defendants will, for the reasons which I have given, find themselves seriously prejudiced by reason of it.

Having considered these matters carefully, the conclusion which I have to come to is that, since the delay is so long, since the bulk of it is attributable to the fault of the plaintiffs, and since it has seriously prejudiced the defendants, this is not a case in which the Court should extend the plaintiffs' time on the ground of undue hardship. It follows that the plaintiffs' cross-application fails and must be dismissed.