Lord Macfadyen ; Lord Kingarth; Lord Eassie. Extra Div. Inner House, Court of Session. 18th January 2008

OPINION OF THE COURT, DELIVERED BY LORD MACFADYEN

Introduction

[1] By this petition for judicial review the petitioners seek to set aside an arbitral award. The dispute which was submitted to arbitration arose out of a contract between the petitioners and the first respondents in terms of which the petitioners were to act as managers of a semi-submersible drilling unit owned by the first respondents. A preliminary issue has arisen as to whether the application for setting aside the award was timeously made. That issue was debated before the Lord Ordinary at a first hearing. She held that the application had not been timeously made and therefore by interlocutor dated 29 May 2007 dismissed the petition. The petitioners seek review of that interlocutor.

The arbitration

[2] The parties' contract provided by Clause 9 that: *"if any dispute should arise in connection with the interpretation and fulfilment of this Agreement same shall be decided by arbitration in the City of Edinburgh in accordance with Scottish Law ... ".*

It is accepted by the parties that the arbitration is an international commercial arbitration within the meaning of Article 1 of the UNCITRAL Model Law, and that it follows that the Model Law applies to the arbitration (Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 66).

[3] The parties' dispute was submitted to arbitration under Clause 9 and the second, third and fourth respondents were appointed as arbiters. After sundry procedure the arbiters made an award, expressed in a document entitled "*Note of Reasons, Findings and Order 20"*. The award was sent to the petitioners in electronic form on 15 May 2006. The formal award, signed by the arbiters, was sent to the petitioners under cover of a letter dated 17 May 2006 and received by them on 18 May 2006.

[4] Article 34 of the Model Law provides *inter alia* as follows:

> *"(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.*
>
> *(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award ..."*

[5] It is common ground between the parties that the Model Law leaves the form of an application for setting aside of an award under Article 34 to the domestic law. It is also common ground that in Scotland an application for setting aside takes the form of a petition for judicial review under Chapter 58 of the Rules of the Court of Session ("the Rules").

The application for setting aside

[6] As we have already noted, the petitioners have brought this petition for judicial review as the means of applying for setting aside of the arbiters' award. A question has been raised by the first respondents as to whether the petition constitutes an application which is timeous in terms of Article 34(3). That potentially turns on (a) when the petitioners "received the award", and (b) when the application for setting aside was "made". In the event, although the parties are not in agreement as to whether the award was "received" by the petitioners when the electronic copy of it reached them on 15 May 2006 or only when the formal signed award reached them on 18 May 2006, that does not affect the issue which requires to be determined. That is because the competing contentions as to the date when the application was made are that it was made on 15 August 2006 (the petitioner's contention) and that it was made on 21 August 2006 (the first respondents' contention). If the application was made on the former date, it was timeous whether the award was received by the petitioners on 15 or on 18 May 2006. Conversely, if the application was not made until 21 August, it was out of time, whichever was the date of receipt of the award.

[7] The issue for determination is therefore: when was the application for setting aside made? That requires consideration of the relevant provisions of the Rules and their effect in the particular circumstances in which this petition was brought before the court.

The relevant Rules of Court

[8] Subject to any other provision in the Rules the provisions contained in Chapter 14 apply to a petition presented to the court (Rule 14.1). Rule 14.2 provides *inter alia* as follows:

> *"Subject to any other provision in these Rules, the following applications to the court shall be made by petition presented in the Outer House:-*
>
> *(e) an application to the supervisory jurisdiction of the court.*

Chapter 58 of the Rules applies to the category of application mentioned in Rule 14.2(e) (Rule 58.1(1)). Rule 58.3(1) provides that an application to the supervisory jurisdiction of the court shall be made by petition for judicial review. The effect of these provisions, read together, is that an application to the supervisory jurisdiction of the court is made by petition for judicial review presented in the Outer House.

[9] Rule 14.5(1) provides for the making of the first order in a petition. It provides that on the petition being lodged, the court shall, without a motion being enrolled for that purpose, pronounce an interlocutor for such intimation, service and advertisement as may be necessary. Rule 14.5 does not, however, apply to petitions for judicial review (Rule 58.2). Substitute provision is made by Rule 58.7, which is in the following terms:

"On being lodged, the petition shall, without appearing in the Motion Roll, be presented forthwith to the Lord Ordinary in court or in chambers for —

(a) an order specifying —

(i) such intimation, service and advertisement as may be necessary;

(ii) any documents to be served with the petition;

(iii) a date for the first hearing, ... or

(b) any interim order;

and, having heard counsel or other person having a right of audience, the Lord Ordinary may grant such an order."

The effect of these provisions is that, when a petition for judicial review is lodged, a motion for a first order is enrolled (unlike the procedure in other petitions, where the first order is granted without enrolment of a motion); the petition and the motion (which does not appear on the motion roll) are forthwith presented to the Lord Ordinary; before granting the first order the Lord Ordinary hears counsel for the petitioner; and the first order deals with matters additional to those dealt with in the first order in other petitions, namely the matters mentioned in Rule 58.7(a)(ii) and (iii).

[10] Rule 4.3 regulates the lodging of processes. It provides *inter alia* as follows:

"A process shall be lodged in every cause commenced by summons or petition when —

(b) in the case of a petition, the petition is presented to the Petition Department".

A process comprises (a) an inventory of process; (b) the principal writ; (c) an interlocutor sheet; (d) a motion sheet; and (e) a minute of proceedings (Rule 4.4(1)). These provisions apply to petitions for judicial review.

[11] It is convenient to take note also of the provisions of the Rules regulating the enrolment of motions. Rule 23.2 provides *inter alia* as follows:

"(1) A motion by a party may be —

(b) enrolled in the process in the cause to which it relates in accordance with paragraph (2).

(2) A motion may be enrolled —

(a) by lodging it in Form 23.2 ... at the appropriate department of the Office of Court ...".

These provisions too apply to petitions for judicial review.

The evidence of the circumstances in which the application was made

[12] Before the Lord Ordinary reliance was placed on affidavits sworn by those involved in making and receiving the application. It is convenient, before turning to the parties' respective submissions, to summarise the evidence of those witnesses.

[13] The representative of the petitioners' solicitors who attended at the Petition Department of the Offices of Court was Mrs Claire Dickson. In her affidavit, she makes it clear that she has no actual recollection of the relevant events, and is reliant on written records. These included her court diary. It contains an entry dated Tuesday 15 August 2006 which is in the following terms: *"PET Tor Corporate for Jud Rev - lodge Petition."*

The entry includes a tick, which she explained as meaning that she had completed that task on that date. She states that if the petition had been handed back to her, she would have marked an "X" against the entry, and would have made an entry on another date. Mrs Dickson's records also include her time record, which for 15 August 2006 contains an entry in the following terms: *"Had counsel sign Petition, thereafter lodged and checked counsel's availability for motion."*

She states that had the petition been handed back to her it is likely that the relevant part of that record would have been to the effect that she "tried to lodge Petition", and there would have been an entry on a later date when the petition was lodged (unless that was done on a date when she was not at work - she worked only on Tuesdays, Wednesdays and Thursdays). She interpreted the entry in the time record as indicating that she arranged for counsel to sign the petition (not the counsel - Mr Alastair Clark - who was to appear at the hearing of the motion); that she then lodged the petition and enrolled the relative motion in the Petition Department; that she was probably advised by the clerk there that counsel would require to appear to move the motion; that she probably spoke to the partner dealing with the matter, Mr Michael Simpson, and was asked by him to arrange for Mr Clark to move the motion; and that she then checked his availability, probably ascertaining a range of suitable dates. Mrs Dickson states that there is no further relevant entry in her diary, and interprets that as meaning that the petition was not returned to her, and was accepted [in the Petition Department] in the form in which she presented it on 15 August. She further states that the next relevant entry in her time recording is on 17 August, and is in the following terms: *"Spoke to Christine at Ad Clerks, put entry in A Clark's diary and spoke to Pet Dept about the date."*

She says that that means that she spoke to Christine Ferguson, Mr Clark's senior clerk, about the most suitable day for him, and made an entry in his diary. She would then have told the Petition Department when counsel was available, and thereafter the hearing would have been arranged.

[14] Mr Simpson, in his affidavit, records receiving instructions to raise proceedings for judicial review in relation to the arbiters' award. He instructed Mr Clark to prepare the petition, which he did. On about 11 August 2006, he asked his secretary to engross the petition for lodging, and gave instructions for an inventory of productions to be prepared. He also prepared a motion for a first order. On or before 15 August he handed the petition, inventory

of productions and motion to Mrs Dickson. He says that he is almost certain that he did so on 15 August (a Tuesday), because Mrs Dickson works only on Tuesday, Wednesday and Thursday. Mr Simpson states that on 15 August Mrs Dickson reported that the petition had been lodged and the motion enrolled, and advised him that counsel had to appear to move the motion. Consequently he asked her to check Mr Clark's availability, and the availability of the court, and arrange for Mr Clark to appear on a suitable date. Thereafter, Mrs Dickson advised him that the motion would be heard on 24 August, and he dictated a letter of instruction to Mr Clark. Mr Simpson does not recollect when he dictated that letter, but it is dated 18 August, and was typed by his secretary early on that day. He believes that it was delivered to Mr Clark on Monday 21 August, but by another member of staff, because Mrs Dickson does not work on Mondays. Mr Simpson was in attendance in court on 24 August, when the motion was moved by Mr Clark and granted by Lord Drummond Young.

[15] The third affidavit placed before the Lord Ordinary was sworn by Gavin McLeod who was petitions manager in the Offices of Court. Like Mrs Dickson, he has no actual recollection of the relevant events. He states that the process reveals the petition and a motion for a first order, the date of enrolment being stated as 15 August. He states, however, that there is no way of knowing from the process when the motion was actually enrolled. He expresses himself as happy to accept Mrs Dickson's evidence that it was indeed enrolled on 15 August. Mr McLeod was asked to comment on the contention that the petition was presented on 15 August, in light of the fact that the petition was date-stamped 21 August and the interlocutor granting the motion was dated 24 August. He observes that there is nothing particularly unusual about the lapse of time between presentation and enrolment, on the one hand, and the interlocutor, on the other. In paragraph 6 of his affidavit, he postulates three possibilities to explain the date-stamp on the petition. These are expressed as follows:

> *"(i) I may have seen the Petition on 15 August 2006, advised Mrs Dickson that a hearing would be required, and returned the Petition to her while she arranged a date for the hearing; or (ii) I may have taken the petition on 15 August 2006 and held it in my pending tray with a note stating that I was awaiting a date for the hearing of the motion for the first orders; or (iii) I may have seen it for the first time on 21 August 2006."*

He is unable to say whether one is more likely than the others. He is unable to cast light on the date of the motion, since it was not something that he required to check.

The Lord Ordinary's conclusion

[16] The Lord Ordinary, at paragraph 62 of her Opinion, takes as her starting point what she describes as "two undisputed facts", namely that the court date-stamp on the petition is 21 August 2006, and that the court's computerised Petition Register shows the first entry in relation to the petition on 21 August 2006. She expresses the opinion that these facts raise the presumption *omnia rite acta praesumuntur*, and that accordingly - in the absence of persuasive evidence to the contrary - the staff in the Petition Department formally accepted and processed the petition on that date. The Lord Ordinary went on to consider the three possibilities postulated by Mr McLeod. At paragraph 65 she rejected the first of these. She did so because it was inconsistent with the evidence of Mrs Dickson and Mr Simpson, which she accepted. At paragraph 66, she rejected the third possibility for similar reasons. At paragraph 67, she expressed the following view:

"The remaining possible explanation (the second explanation) appears to me to be the only one which is consistent with the sequence of events outlined in the affidavits and productions."

After further discussion of the evidence, the Lord Ordinary concluded (at paragraph 70):

"It seems to me, on a balance of probabilities, that it was only after [the appropriate hearing] date (24 August 2006) had been arranged that Mr McLeod took the necessary administrative steps (at a time convenient to him, as no-one had mentioned any particular urgency) whereby the petition was 'lodged' in the Court of Session and put into the Court of Session machinery with all the automatic consequences such as the date-stamp, the debit of fee fund dues, the registration of the petition in the Petition Register, the enrolling of the motion for a hearing for a first order, and the placing of the petition before a Lord Ordinary. It appears from the date stamp and the computerised Petition Register that Mr McLeod so dealt with the petition on 21 August 2006. Thus the petition was in my opinion lodged in the Court of Session on 21 August 2006. All that went before comprised preliminary discussions, negotiations and preparations for the ultimate lodging which occurred on 21 August 2006."

The Lord Ordinary therefore held that the application to set aside the arbiter's award was made out of time, and dismissed the petition.

The petitioners' submissions

[17] For the petitioners, Mr Currie submitted that the application to set aside the arbiters' award was made on 15 August 2006. On that date the petition was presented in the Petition Department by the petitioners' solicitors. The petition, on that date, left the possession of the solicitors and was taken into the possession of the court. It was thus lodged on 15 August. No distinction was to be drawn between presentation and lodging of the petition. The Lord Ordinary had failed to distinguish between the actings of the petitioners and their solicitors, on the one hand, and the procedural consequences of those actings, on the other. Instead of focusing on the actings of the petitioners and their solicitors, as she ought to have done, the Lord Ordinary had focussed on the internal arrangements of the Petition Department.

[18] Examining the affidavits, Mr Currie submitted that the weight of the evidence was that the petition was presented in the Petition Department on 15 August. The motion for a first order was enrolled on the same date. That was borne out by the un-contradicted evidence of Mrs Dickson, supported by the evidence of Mr Simpson. Of Mr

McLeod's three possibilities, the first and the third were ruled out if Mrs Dickson's evidence was accepted. The second possibility related to the internal procedure of the Petition Department after the petition left Mrs Dickson's possession. The important point was that the petition passed from the possession of Mrs Dickson to that of the court, without any qualification expressed as to the effect of that occurrence. There was no evidence that Mrs Dickson was told that, although the petition was being taken in by the court, it would be held as if not presented or lodged until some subsequent event occurred. In that situation, what Mr McLeod did with the petition after it was taken in did not bear on the question which the court had to decide. A delay in date-stamping or otherwise processing the petition did not mean that it had not been presented or lodged until those internal procedures were carried out. Mr Currie drew attention to the Lord Ordinary's record of the first respondents' submissions to her, in paragraphs 18 *et seq.* of her Opinion. She set out counsel's outline of the procedure which took place when a petition was lodged:

"... it had to be registered (... now by computer entry in a computerised Petition Register). That registration was the court's acknowledgement that it had accepted the petition. Three matters were entered: (i) details of the relevant petition or application; (ii) the date of the first hearing (which might involve ascertaining the availability of counsel); and (iii) payment of the fee fund dues ..."

(The reference to the date of the first hearing - which is not fixed until a later stage - perhaps ought to be a reference to the date of the hearing of the motion for a first order, but the point is not of importance. The reference to payment of fee fund dues is irrelevant for present purposes, because the petitioners' solicitors had an account to which such dues could be debited by the court.) In paragraph 19 the Lord Ordinary continued with her summary of the first respondents' counsel's account of the procedure which follows the lodging of a petition:

"Once the court was satisfied that a petition had been lodged with the fee fund dues paid, the ensuing procedure was automatic. The petitioners were not required to serve the petition in order to achieve further procedure: the petition would automatically be placed before a Lord Ordinary in chambers with a motion for a first order for intimation, service and the fixing of a first hearing. By contrast, if a petition were not lodged, nothing would happen."

The Lord Ordinary then recorded various situations in which counsel submitted the petition would not be lodged, but since none of them accorded with the evidence before the court, it is not necessary to consider them in detail. In paragraph 20, the Lord Ordinary recorded the following submission:

"The phrase 'On being lodged' [in Rule 58(7)], followed by the various procedural consequences set out in the rule, meant that a petition was not lodged if the various procedural consequences did not follow."

That, Mr Currie submitted, was erroneous. He accepted that there could be circumstances in which an attempt to present or lodge a petition failed, for example if the petition was rejected for want of a signature. But if a petition were rejected, the person attempting to present or lodge it would be aware of that, and thus aware that it had not been presented or lodged.

[19] Mr Currie made reference to, and commented upon, various authorities discussed before the Lord Ordinary. The earliest of these was ***Burgh of Millport, Petitioners*** 1974 SLT (Notes) 23. That was a petition for sequestration presented without the concurrence of the debtor which, in terms of section 13 of the Bankruptcy (Scotland) Act 1913, was competent only within four months of the date of the debtor's notour bankruptcy. The petition was lodged in the petition department on a date prior to the expiry of the four month period, but the first deliverance was not pronounced until a date outwith that period. Lord Keith held that the petition was competent, saying:

"In my opinion the competency of the petition for this purpose is to be judged as at the date of lodging with the petition department. The petitioner has at that stage brought the petition into court, and it is not within his control precisely when it is placed before the Lord Ordinary. It would be unreasonable and inconvenient to hold that a petition which has been lodged in due time is incompetent because circumstances internal to the court prevent it being brought before the Lord Ordinary for a few days".

Mr Currie accepted that that case was distinguishable, but submitted that it was instructive to see the significance which the court attached to the petition leaving the control of the petitioner, and to the unreasonableness of taking into account, in judging whether a time limit had been met, delay after the petition was under the control of the court.

[20] In ***Secretary of State for Trade and Industry v Josolyne*** 1990 SLT (Sh Ct) 48, Sheriff Principal Ireland held that the *tempus inspiciendum* for the purpose of section 7(2) of the Company Directors Disqualification Act 1986, which required that, except with the leave of the court, an application for a disqualification order be made before the end of the period of two years beginning with the day on which the company became insolvent, was the date on which the application was lodged, not the date on which it was served on the respondent. In ***Secretary of State for Trade and Industry v Normand*** 1994 SLT 1249, an application to the Court of Session under the same section, Lord Sutherland held that the application was timeous when the petition was presented within the two year period, although the first order was pronounced after the end of that period. His Lordship pointed out that an ordinary action is not commenced until the summons is served, but continued (at 1251D):

"The position, however, is different in petition procedure. Under that procedure the petition is lodged in court and then in terms of Rule of Court 195 [the predecessor of rule 14.5(1) of the current Rules] the case will automatically be put before a Lord Ordinary in order that a first order may be pronounced. From the moment the petition is lodged the rest of the procedure follows automatically. ... What section 7(2) is concerned with is an application to the court and it is the date of that application that is relevant. In my opinion, there can be no doubt whatever that under the

ordinary meaning of words [the date of] 'an application to the court' must be the date upon which the petition is lodged in court."

In ***Secretary of State for Trade and Industry v Campleman*** 1999 SLT 787, another section 7(2) application, Lord Johnston observed (at 789G): *"... with regard to petitions they are directly under the control of the court from the moment they are presented."*

In ***Ritchie v Dickie*** 1999 SC 593, a case concerned with section 17 of the Bankruptcy (Scotland) Act 1985, which permits recall of a sequestration where appropriate, provided the application for recall is presented within ten weeks after the date of the award of sequestration, Lord Bonomy held (at 597F) that: *"On the basis ... of authority, commonsense and the ordinary meaning of words ... this petition was 'presented' when it was lodged in the petition department."*

[21] ***Superdrug Stores plc v Network Rail Infrastructure Ltd*** 2006 SC 365 was concerned with an application under section 1(1) of the Tenancy of Shops (Scotland) Act 1949. That section provides that the tenant of a shop, when he is given notice of termination of tenancy and is unable to obtain renewal of it on satisfactory terms, may apply to the sheriff for renewal of the tenancy. The application must be made *"not later than the expiry of twenty one days after service of the notice"*. It is unnecessary to go into the details of the facts of the case. The court upheld the soundness of the sheriff principal's formulation of the test of the making of an "application" within the meaning of the section as being "*the presentation of a procedurally valid summons accompanied by the appropriate fee to the sheriff clerk, together with a request, implicit or explicit, that the summons should be processed",* but held that he had erred in holding that presentation of the summons and fee did not carry the necessary implication that the summons was to be processed. The Lord President, while dissenting from the latter aspect of the decision on the basis that on the facts found the sheriff principal was entitled to hold that the test had not been satisfied, nevertheless observed (at paragraph 8):

"*I accept that, if a summary cause summons, having been presented, is left in the hands of officials of the court with a view to it being authenticated, whether by the sheriff clerk or by the sheriff, a court could, and probably should, conclude that an application to the sheriff had been made as from the time when it was so left. That might also be so in circumstances where, albeit the summons is removed an unequivocal request is made to fix a hearing before the sheriff. That is because from that point onwards the person seeking to make the application has taken all the steps which he can take to make that application; delay beyond that point is outwith his control."*

[22] Finally, Mr Currie referred to ***Barnes v St Helens Metropolitan Borough Council*** [2007] 1 WLR 879. While that case turned on consideration of the (English) Limitation Act 1980, section 11(3), and the Civil Procedure Rules, r. 7.2, and concerned whether proceedings were timeously brought when the claim form had been lodged in court one day before expiry of the time limit, but was not issued until after such expiry, Tuckey LJ said (at paragraph 16):

"I approach [the statutory provisions and the rules] by expecting to find the expiry of a limitation period fixed by reference to something which the claimant has to do, rather than something which someone else such as the court has to do. The time at which a claimant 'brings' his claim form to the court with a request that it be issued is something he has to do; the time at which his request is complied with is not because it is done by the court and is something over which he has no real control."

That, Mr Currie submitted, supported his contention that attention should be focussed on what the petitioners and their agents did, rather than on the internal procedures of the court followed through after the petition was in the possession of the Petition Department.

[23] Mr Currie concluded by reiterating that in determining whether a petition had been presented or lodged, attention had to be focussed on the act of the petitioners' solicitors, not on the consequent internal procedure of the court offices. The Lord Ordinary had approached the matter as if the critical events were the date-stamping of the petition and its registration in the petition register. These, however, were not matters within the control of the petitioners or their solicitors. On the contrary, they were events which followed upon the lodging of the petition at an interval which was at the convenience and discretion of the court officials. They were records made for the purpose of acknowledging and recording the occurrence of something that had already happened, namely the presentation or lodging of the petition. Delay in making those records could not delay the fact of presentation or lodging, which occurred when the petition left the control of the petitioners' representative and came under the control of the court. In the present case, the evidence was that the petition left the control of Mrs Dickson on 15 August 2006, and came under the control of Mr McLeod and his staff in the Petition Department on that date. Whatever the reason for the delay in date-stamping the petition and entering it in the petition register may have been, that delay did not postpone the presentation or lodging of the petition. For the purpose of Article 34(3) of the Model Law, therefore, the application to set aside the arbiters' award was timeously made. The reclaiming motion should therefore be allowed.

The first respondents' submissions

[24] For the first respondents, Mr Ferguson began by making the point that the timing of the making of the application to set aside the arbiters' award was within the petitioners' control. The source of their difficulty was that they were not aware, at the time when they sought to lodge the petition, that Article 34(3) imposed a time limit. As a result they did not recognise the urgency of making the application. They did not ask for the petition to be processed immediately. Had they done so, the predicament in which they found themselves would have been avoided. It was accepted that the critical issue was when the application to set the arbitral award aside was made. The application fell to be made by petition for judicial review. The application was made when the

petition was lodged (which, foreshadowing a submission developed later, Mr Ferguson distinguished from "presented"). The issue was therefore: when was the petition lodged? The answer was to be found in the Rules. What was in issue in the present case (unlike the other cases cited) was when a petition to the Court of Session was to be regarded as lodged.

[25] Mr Ferguson formulated his submission thus: a petition for judicial review was lodged when it was presented (i.e. tendered) to the Petition Department on behalf of the would-be petitioner, accompanied by a process and payment (or means of payment) of the appropriate fee fund dues, and was accepted by the Petition Department as being in proper form, all so as to allow it to be presented forthwith to a Lord Ordinary for a first order. Thus, if a petition was presented without a process, it was not lodged. If it was presented without the appropriate fee (or without there being in place machinery for charging the appropriate fee), it was not lodged. If it was not accepted by the clerk in the Petition Department because it was not in proper form, it was not lodged. If, following scrutiny, the petition was accepted as being in proper form, it was registered, given a cause number and date-stamped, and the appropriate fee was debited to the solicitors' account. Acceptance by the Petition Department was what counted. The steps that followed were consequential. Once the petition was lodged, presentation to a Lord Ordinary forthwith for a first order followed automatically. The time within which that happened was not within the petitioner's control. If a petition was not lodged, none of the consequential steps occurred. The distinction between presentation and lodging could be illustrated by comparing two situations: if the petition was accepted by the clerk in the Petition Department as in proper form (and the other conditions, that it be accompanied by a process, and arrangements be in place for paying the fee fund dues, were satisfied), it would have been presented and lodged; if, on the other hand, it was not so accepted, it had been presented, but was not lodged. Acceptance thus was the key to whether a petition had been lodged or not. A petition was not to be regarded as lodged merely because it had been left in the possession of the Petition Department. The test of whether it was lodged was not what the solicitor's representative thought had been done. A petition which bore a date stamp had been lodged. That was the easy way of knowing if a petition had been lodged. The motion form dated 15 August did not indicate when the petition was lodged. A motion could only be enrolled in a subsisting process. If a motion form bearing the date 15 August was included in the process tendered with the petition, the enrolment could only take effect when the petition was lodged. If that was not until 21 August, the enrolment took place on 21 August, notwithstanding the date on the motion form.

[26] In pursuance of the distinction which he sought to draw between presentation of a petition and the lodging of a petition, Mr Ferguson made a number of observations on the cases cited and on the provisions of the Rules. He referred to Maxwell, *Court of Session Practice*, 437-438, where it is said that the petition "*is lodged in the Petition Department and with it the process and any productions*", and that "*A petition is presented to the Court by lodging it ...*". **The *Superdrug*** case turned on the terms of the particular statute and the form of application which that required. The other cases were concerned with a contest between the date of lodging and some subsequent stage of procedure. They did not assist at all in understanding what was meant by "lodging". In ***Burgh of Millport, Petitioners***, where the statutory provision related to petitions presented without the debtor's concurrence, Lord Keith held that the competence of the petition was to be judged by when the petition was "received at the offices of court", which he equated with lodging, but the case was concerned with whether the relevant date was when the petition was received or when the first deliverance was pronounced. It was not concerned to analyse what constituted "lodging". In ***Normand***, the question again was whether the relevant date was the date of lodging or the date of the first order. Lord Sutherland (at 1251) referred to lodging, and the rubric was in error in referring instead to presentation. In ***Campleman***, Lord Johnston's observation at 789G would have been more accurate if he had said that petitions are directly under the control of the court from the moment when they are lodged, rather than presented. In ***Ritchie v Dickie*** the issue was what the statute meant when it referred to presentation. Turning to the Rules, Rule 4.3(b) required the lodging of a process when a petition was "*presented*". That was glossed in the annotations in the *Parliament House Book*, page C47, paragraph 4.3.1, as "*when presented for lodging",* thus recognising that lodging of the petition was something different from, and subsequent to, its presentation. Rules 58.1 and 58.3 referred to "*applications*" to the supervisory jurisdiction, and their being made by petition for judicial review. Rule 58.6(2) required all relevant documents to be lodged with the petition. Rule 58.7 provided that "*On being lodged*" the petition was to be "*presented"* forthwith to the Lord Ordinary for a first order. That was the only use of the word *"presented*" in Rule 58, and plainly related to a stage subsequent to lodging. The need for the appropriate fee to be paid as a part of the process of lodging a petition was to be seen from the Court of Session etc. Fees Order 1997, paragraph 4 and Schedule, paragraph C1 (see also *Parliament House Book*, page C124, paragraph 14.5.8). Nothing would happen to a petition if payment of the fee was not effected.

[27] Turning to the practical application of the Rules, Mr Ferguson submitted that unless various steps which the Rules required to be taken - namely the presentation of the petition, with a process, accompanied by the appropriate fee fund dues, and the acceptance of the petition by the clerk in the Petition Department - were taken, nothing would happen to the petition. Once these things were done, the rest of the procedure followed automatically. Payment of the fee was a formal requirement that formed part of the procedure of lodging the petition, not a mere matter of internal administration. In the present case, payment was made on 21 August 2006. Registration, allocation of a cause number and date-stamping of the petition also took place on 21 August. These things were done because the petition had been scrutinised and accepted as being in proper form. There was no evidence that there had been such scrutiny on 15 August. According to paragraph 4 of Mr McLeod's affidavit, such scrutiny would take place once it was known that counsel was available to move the motion for a first order. The date

stamp and registration on 21 August vouched that the petition was accepted by the court on 21 August (cf ***Superdrug***, per Lord Kirkwood at 382, paragraph 44). To treat the date stamp and date of registration as *prima facie* (albeit rebuttable) evidence of the date of lodging promoted certainty. There was nothing in the evidence in the present case to indicate acceptance by the court earlier than 21 August.

[28] Mr Ferguson accordingly submitted that the reclaiming motion should be refused.

The petitioners' response

[29] In a brief response to Mr Ferguson's submissions, Mr Currie noted that the first respondents' position now was that presentation and lodging of a petition were to be distinguished, and that lodging was required to constitute the making of an application for the purpose of Article 34(3) of the Model Law. He submitted that rule 14.2 was destructive of that position. It provided that certain "applications", including "an application to the supervisory jurisdiction of the court" were to be made by petition "presented" in the Outer House. Secondly, Mr Currie submitted that the first respondents' submissions relied upon an un-argued assumption that lodging of a petition taken in without reservation in the Petition Department was somehow suspended pending scrutiny of the petition. There was no proper basis for any such assumption. It might well be that, as a matter of practice, staff in the Petition Department, in order to be helpful to the petitioner, return to the solicitors a petition which is perceived to be defective in some way (cf *Barnes*, paragraph 19). But that practice does not justify the view that lodging of the petition is suspended, pending such scrutiny. Thirdly, the evidence showed that the motion for a first order was enrolled on 15 August (Mrs Dickson, accepted by Mr McLeod in paragraph 3 of his affidavit). That was only consistent with the petition being lodged on that date. Finally, the authorities cited were useful, in that they showed that when judging whether something had occurred before the expiry of a time limit, attention should ordinarily be focussed on the things done by the party, not on the administrative arrangements of the court.

Discussion

[30] As we have already noted, the issue which requires to be addressed is whether the application to set aside the arbiters' award was made after three months had elapsed from the date on which the party making the application had received the award (Article 34(3) of the Model Law). As we have explained in paragraph [6] above, in the circumstances of the present case, that resolves into the question whether the application was made on 15 August 2006 or on 21 August 2006. It is common ground that the appropriate form for the application was an application to the supervisory jurisdiction of the court, which falls to be made by petition for judicial review under chapter 58 of the Rules. There is no dispute that such an application was made. The issue that we require to resolve is when such an application is "made".

[31] The Rules use two words when referring to the making of applications to the court by petition. These words are "presented" and "lodged". We do not think that the issue we have to decide can be resolved by determining whether those terms are synonymous or distinguishable. It is clear, in particular, that "presented" is used in the Rules in more than one sense. First, at the outset of the Chapter dealing with petitions (Rule 14.1), reference is made to "*a petition presented to the court*". Rules 14.2 and 14.3 distinguish between petitions "presented" in the Outer and Inner Houses of the court. Secondly, in setting out the requirement for the lodging of a process in a cause commenced by petition, Rule 4.3(b) stipulates that that must be done when "the petition is presented to the Petition Department". There is perhaps a discernible difference between presenting in the Inner or Outer House and presenting to the Petition Department, but the difference is a narrow one. The third use of the word "presented" - in Rule 58.7 - is in relation to the laying of the petition before a Lord Ordinary for a first order. That is plainly presentation in a different sense. It may be possible to figure a slight difference in meaning between presenting a petition in the Petition Department and lodging a petition in the Petition Department. Perhaps the former phrase focuses more on what it intended and the latter more on what is achieved. We think, however, that few practitioners would, in ordinary parlance, distinguish between presenting a petition and lodging a petition; and we do not consider that any attempt to make such a distinction would form a safe foundation for resolution of the issue which arises for determination in the present case.

[32] Although none of the cases cited in argument can be said to be directly in point, we do regard some of them as affording guidance on the proper approach to the issue before us. While ***Burgh of Millport, Petitioners*** was concerned with whether a petition for sequestration presented without the debtor's concurrence required merely to be lodged in the petition department before the date of expiry of the statutory period or required to have a first deliverance pronounced before that date, Lord Keith held that lodging was sufficient on the ground that after lodging it was not within the petitioner's control when the petition was placed before the Lord Ordinary for a first deliverance to be pronounced. We take the view that it is relevant to bear in mind similar considerations when reaching a conclusion as to when a petition is to be regarded as lodged or presented, for the purpose of amounting to the making of an application to set aside the arbiters' award (see also ***Campleman***, page 789G, and ***Barnes***, paragraph 16).

[33] The procedure which is followed when a petition is to be presented to the court is that it is brought to the Petition Department by a representative of the solicitors acting for the petitioner. In addition to the principal petition (which must be signed in accordance with the requirements of Rule 4.2(3)), there must be presented a process (Rules 4.3 and 4.4). In the case of a petition for judicial review, there will be presented, as part of the process, a motion sheet containing a completed Form 23.2 setting out the first order sought. There must also be tendered the appropriate fee fund dues, but in practical terms that may be taken for granted in the case of a petition presented by a member of staff of a firm of solicitors that has an account to which the appropriate fee fund dues

may be debited by the court. While we wish to reserve our opinion as to how far the staff of the Petition Department may go in rejecting a petition for want of form or other perceived deficiency, we accept that if the petition were not signed, or were not accompanied by a process, or were not accompanied by a tender of the appropriate fee fund dues (or covered by an account arrangement which permitted the court to debit the appropriate sum), the clerk in the Petition Department would be entitled to reject the petition, by handing it back to the solicitor's representative. If that were done, the petition would have failed to satisfy the conditions which required to be satisfied before it could be lodged. It would therefore not be lodged. According to the evidence, however, that did not happen in the present case.

[34] A number of events normally follow the lodging of a petition. First, it is allocated a cause number, and date-stamped by the clerk in the Petition Department. Secondly, it is entered in the computerised Petition Register. Then, in the case of a petition for judicial review, it is "forthwith" presented to a Lord Ordinary for a first order. These are all events which follow lodging, and can only happen if lodging has already taken place. Thus, the affixing of the date stamp, and the registration, serve as an acknowledgement and record respectively of the fact that the petition has been lodged. They do not serve to bring about the fact that the petition has been lodged. They are, no doubt, evidence that the petition has been lodged, but they are not conclusive evidence of that fact. Still less are they conclusive evidence of the date on which lodging took place. They are no doubt cogent evidence that lodging took place **no later** than the date contained in the date stamp and in the register. But they do not exclude the possibility that lodging took place **before** the date in the stamp and in the register. Nothing can be inferred from the date on which the motion for a first order is brought before a Lord Ordinary. Despite the word "forthwith" in Rule 58.7, there may in practice be a lapse of several days between the date on which the petition is lodged and the date of the first order - that is illustrated by the facts of the present case whether the petition was lodged on 15 or 21 August. The reasons for such delay may be various, but would perhaps include the complexity of any *interim* order sought, and the extent to which, in consequence, those acting for the petitioner wished a particular counsel to move the motion. Equally, nothing turns on the date contained in the motion for a first order, since the form will have been completed before the petition is presented in the Petition Department, and may well not be altered thereafter, even if there is a delay in lodging the petition.

[35] We do not exclude the possibility that the clerk in the Petition Department might take in a petition (and process) from the solicitor's representative while making it clear that the petition would not be regarded as lodged until some other event followed. In the absence, however, of a clear indication to the solicitor's representative that, despite its being taken from her, the petition was not to be regarded as lodged, the natural inference from acceptance by the clerk in the Petition Department of physical possession of the petition is, in our opinion, that the petition has been accepted as lodged. We reject the alternative approach that lodging is deferred until there has been some other overt act of acceptance on the part of the clerk, whether following some form of scrutiny or otherwise. The unqualified acceptance of physical possession of the petition and process is, in our opinion, sufficient to amount to acceptance of the lodging of the petition. The inference that the petition has been lodged will be excluded, in our view, only by outright rejection or a clear statement that physical acceptance is not to amount to lodging. That approach gives proper weight to the consideration that, once the petition is in the physical possession of the court, the petitioner's representative has done all that can be done by the petitioner, and the petition is then under the control of the court. The approach is in accordance with the observations of Lord President Hamilton in ***Superdrug*** at paragraph 8.

[36] On the evidence in the present case the petition was brought to the Petition Department by Mrs Dickson on 15 August 2006. There is no suggestion that the petition was not in proper form. It was accompanied by a process, including the motion for the appropriate first order. The petitioners' solicitors had an appropriate account for payment of the fee fund dues. It appears to have been contemplated that there would be some delay in arranging a date for the hearing of the motion for the first order which would be convenient for the counsel whom the solicitors intended to instruct. There is no suggestion, however, that that constituted a reason for refusing to allow the petition to be lodged, or that Mr McLeod refused to allow it to be lodged on that account. Mr McLeod offers no actual explanation of what occurred. Of the three possibilities which he suggests, the first and third are excluded by Mrs Dickson's evidence. The second possibility, that he put the petition in his pending tray to await a date for the hearing of the motion for the first order, is not, by itself, sufficient to preclude lodging having taken place on 15 August. Even if he did that, it is not clear why it is suggested that it had any bearing on when the petition was lodged. If he had clearly informed Mrs Dickson that the petition would not be treated as lodged until the date for the hearing had been arranged, that might have had the effect that the petition was not lodged until that date was fixed, but there is no suggestion that Mrs Dickson was given such information. In any event, the date for the hearing was arranged by 17 August, and there is nothing in the evidence to explain why the petition was not date-stamped or registered until 21 August. On the evidence, applying the approach which we have identified as appropriate, we are of opinion that the petition was lodged on 15 August.

[37] We therefore hold that the application to set aside the arbiters' award was made within the period permitted by Article 34(3) of the Model Law.

Result

[38] We therefore allow the reclaiming motion, recall the Lord Ordinary's interlocutor of 29 May 2007 and remit to the Lord Ordinary to proceed as accords.

Alt (First Respondents): Ferguson Q.C., McBrearty; Simpson & Marwick
Alt (Second, Third and Fourth Respondents): No appearance.