CA on appeal from High Court (Mr Justice Moore-Bick) before Potter LJ; Mummery LJ. 22nd April 1997.

LORD JUSTICE POTTER:

INTRODUCTION.

This is an appeal from the order of Moore-Bick J. dated 10th May 1996 granting to the Respondent Plaintiffs ("the plaintiffs") an extension of time in which to commence arbitration proceedings in respect of claims identified in that order pursuant to S.27 of the Arbitration Act 1950 . The judge refused leave to appeal but, on 19th June 1996, Staughton LJ gave leave, observing that in his view the only arguable point was that the length of the extension of time ordered was outside any reasonable exercise of the judge's discretion.

THE BACKGROUND TO THE DISPUTES .

The disputes between the parties arise out of the carriage by the vessel "DIMITROS" of a cargo of bagged fishmeal from Chimbote, Peru to Beihai and Huangpu in China in 1992. The "DIMITROS" is a bulk carrier owned by Analogous Marine Company Limited ("the owners"). It was time chartered by the owners to the plaintiffs, a South African company, on the New York Produce Exchange form. The charter contained a London Arbitration clause which made no provision for the time in which arbitration was to be commenced. The plaintiffs sub-chartered the vessel to the Appellant Defendants ("the defendants") on a Gencon form of charter dated 29th April 1992. The sub-charter contained an Arbitration Clause (clause 27) which provided: *"That should any dispute arise between Owners and Charterers, the matter in dispute shall be referred to two persons in London, in accordance with Arbitration Act 1950 as amended from time to time... One to be appointed by each of the parties hereto with power to such arbitrators to appoint an umpire. Any claim to be within 12 months of final discharge"*.

The cargo was loaded into the vessel between 13th and 15th May 1992 and a number of Bills of Lading issued.

Fishmeal is an unstable and dangerous product which is liable spontaneously to overheat and combust unless treated effectively with an anti-oxidant. The fishmeal was purchased from Peruvian shippers by a company in the Luckmate Commodities Trading Group, which is based in Hong Kong. The cargo was on-sold to receivers in China.

During the course of the voyage to Beihai, signs of overheating were discovered by the crew on 20th June 1992. On 23rd June, the owners informed the plaintiffs who passed on that message to the defendants, placing them: "*On notice for any/all claims for damage to cargo/vessel as well as delays incurred due to the above*".

The plaintiffs appointed a surveyor who attended at Beihai throughout the discharge of part of the cargo there. The vessel then diverted to Hong Kong to obtain further supplies of carbon dioxide in order to control the heating in the remaining hatches, before discharging the remainder of the cargo at Huangpu, where the plaintiffs' surveyor also attended. The defendants did not send their own surveyor to either port, simply receiving the reports of the plaintiffs' surveyor, most of which were copied to them.

Final discharge was not completed until 7th November 1992. The total laytime of 33 days allowed for in the sub-charter for loading and discharging was exceeded by some 41 days.

On 4th August 1992 the owners began an arbitration against the plaintiffs referring to arbitration all claims arising under the head charter.

On 8th February 1993, the plaintiffs in turn commenced sub- arbitration proceedings against the defendants. At that stage the plaintiffs took a decision to keep the reference as limited as possible, appointing their arbitrator simply to deal with the claims for demurrage. The reason was that, at that stage, no claims had been advanced by the owners in respect of the heating of the cargo and the demurrage dispute appeared to be centred on the true construction of clause 25 of the sub-charter, without the need to become embroiled in any wider issues concerning the heating of the cargo. The appointments in the head and sub- arbitrations were both upon LMAA terms, pursuant to which the arbitrators have power to consolidate the arbitrations or order that they be heard together.

On 2nd April 1993, the defendants served a letter of Defence and Counterclaim to the plaintiffs' claim for demurrage. It alleged that all the delay had been caused by the overheating of the cargo, which they contended was caused by improper and negligent stowing of the cargo. They also alleged that the vessel was unseaworthy. They pleaded that the cargo had been properly treated with anti-oxidant in accordance with IMO specifications (i.e. the IMDG Code) and, on that basis, relied on the principle of Res ipsa loquitur. In support of that plea they relied on certificates issued by SGS at the port of loading to show that the cargo had been loaded in the proper condition.

When the owners served Points of Claim in the head arbitration on 30th June 1993 they alleged breach of charterparty by loading dangerous cargo. However, their claim was initially limited to a claim for unpaid hire and costs and expenses directly incurred by the owners as a result of the overheating cargo, and no claim was made against the plaintiffs in respect of cargo damage.

Points of Defence and Counterclaim in the head arbitration were served by plaintiffs on 20th September 1993.

In February 1994 the owners' solicitors advised the plaintiffs of proceedings which had been issued in Hong Kong against them at the suit of the holders of the bills of lading in respect of the loss of and damage to the fishmeal by heating and fire. A number of receivers had joined in that action and total sums involved in the claims amounted to more than US $4 million. The owners stated their intention to include in the arbitration the claim for an indemnity against any liability they might be held to have incurred to cargo interests.

When the owners advised the plaintiffs of their intention to pursue a claim in the head arbitration for indemnity against cargo claims, the plaintiffs did not at once seek to pass on the claim to the defendants. During 1994, they were

apparently considering with their solicitors and insurers the appropriate course to take in relation to that claim. I shall turn to their reasons for such inaction shortly. Eventually, in late 1994/early 1995, the plaintiffs decided that they would pursue such a claim against the sub-charterers and, in February 1995, their solicitors wrote to the sub-charterers' solicitors advising them that a Reply and Defence to Counterclaim in the arbitration would be prepared which would include a claim for such indemnity.

On 6th April 1995 the sub-charterers solicitors wrote drawing attention to clause 27 of the charterparty and observing that it "*effectively precludes your clients from bringing an indemnity claim or, indeed, any further claim against ours. We also reserve our clients' position in respect of the delay occasioned by your clients' sporadic pursuit of the existing claim, the Points of Defence having been served in May 1993 and nothing having been heard from you since then.*"

In circumstances to which, again, I shall turn below, the warning contained in that letter did not galvanise the plaintiffs immediately to pursue their new claim. It was a further four months before they served a Reply and Defence to Counterclaim in the sub-arbitration, and a further two months passed before an application was made for an extension of time under S.27 of the Arbitration Act.

Before Moore-Bick J., there was an issue as to whether, on its true construction, clause 27 required that all claims be made in arbitration, as opposed to simply by notice, within 12 months. That issue was resolved in favour of the defendants and is not the subject of appeal. Effectively, the sole issue on this appeal is whether, in granting the plaintiffs' an extension of some 23 months as he did, the judge exceeded any reasonable exercise of discretion in that respect, having regard to the analysis and observations of the Court of Appeal in ***Irish Agricultural Wholesale Society Limited -v- Partenreederei: M.S. "EURO TRADER" (The "EURO TRADER")*** [1987] 1 Lloyd's Rep. 418.

THE REASONS FOR THE DELAY .

The affidavit of the plaintiffs' solicitor, Mr. Dearing, explains how the 12-month time bar applicable in this case was first overlooked. It appears that the system within his firm's office for logging time-bars and drawing their imminent expiration to the attention of partners and case-handlers broke down, though for no reason which can be satisfactorily explained. The time bar was notified to the person in the office who kept the log and, in the ordinary way, Mr. Dearing or the case-handler would have expected to receive a reminder on or about 15th October 1993. However, neither recalls receiving one. The time-bar passed and no one was aware of the fact. That being so, no one had occasion to re-visit the matter until some subsequent occurrence brought it again to their attention.

At that stage, it seems neither party was anxious to pursue the arbitration with alacrity. On the plaintiffs' side, 1994 passed with no more being done than the giving of "general consideration" to the claim. It was not until January 1995, i.e. 14 months from the expiry of the limitation period, that the matter came up for serious review. However, at that stage, Mr. Knight, a solicitor now assisting Mr. Dearing, was asked to look at the file for the first time in order to address two outstanding matters, namely how to respond to the owners' request for cooperation in resisting the claims being brought in Hong Kong and whether or not to speed up the arbitration against the sub-charterers and to pursue the claim for indemnity. He apparently examined the file but failed to observe that there was a time limit in the charterparty. He simply initiated a letter dated 10th February 1995 in which the defendants were informed that the plaintiffs would be serving a pleading in the sub-arbitration which included a new indemnity claim. This evoked a response in the form of the defendants' solicitors' letter of 6th April 1995 earlier quoted, in which they relied on clause 27 of the sub-charter.

For reasons which the judge regarded as "*not perhaps fully explained*" but which appear to have involved a further misunderstanding within the office, the plaintiffs' solicitors incurred a yet further period of 4 months delay before incorporating the new claim in a Reply and Defence Counterclaim served on 8th August 1995.

On 21st August 1995 the defendants' solicitors sought an explanation as to the cause for the delay and the Section 27 application was finally issued on 3rd October 1995.

THE JUDGMENT OF MOORE-BICK J .

In granting the application, the judge gave a long and careful judgment in which he considered in detail the various arguments which had been advanced before him.

He began by reminding himself that the principles which governed the exercise of the court's discretion under Section 27 were authoritatively laid down by Brandon LJ. in the "***Aspen Trader***" [1981] 1 Lloyd's Rep. 273 at 279, subsequently approved by the House of Lords in ***Comdel Commodities Limited -v- Siporex Trade S.A. [No. 2]*** [1991] 1 AC 148 at 166. They are of course that:

(1) The words "undue hardship" in S.27 are not to 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 out of proportion to such 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.

In reviewing the period of the delay, the Judge described the 21-month period between the expiry of the time-bar and the putting forward of the claims in the sub-arbitration in August 1995 as a lengthy period on any view. However, he

proceeded to look at it more closely to see why the delay had occurred and how culpable or otherwise that delay was. The first period he identified for consideration was the 14-month period between the expiry of the time-bar and the January 1995 reconsideration. The judge said that he felt "*unable to regard that period ... as grave or significant default on the part of the charterers*".

He reached that view after careful consideration of the facts and of the observations of Brandon LJ in the Aspen Trader at p.280 concerning negligent failure to appreciate what is a time limit under a charterparty and the effect of mistakes in a solicitors office. Proceeding to the further 3-month period which elapsed before the defendants' solicitors' letter of 6th April he said: "*I regard the default at that stage as being of a more serious nature*"

As to the further 4 months period between the sub-charterers' solicitors' letter of 6th April 1995 and the service of the Reply in August 1995 the judge stated: *"I have to say that I regard this particular period of delay as involving considerable fault on the part of the charterers."*

In that respect he referred to the passage of the judgment of Kerr LJ in ***the Euro Trader*** (at 423) when he said: *"What is quite clear on the authorities cited in the notes to the passages on p.180 [of Mustill and Boyd] which I have set out is that as soon as the time point is taken, alarm bells should be heard to ring for those on the side of the cargo, and they must then act accordingly. If they still fail to do so, then I see nothing wrong with the judge's conclusion that the delay becomes 'culpable to a high degree', in the sense that it is likely to have very serious consequences in the context of S.27. It does not follow, of course, that further delay thereafter will always tip the balance, because everything must be looked at in the round. But it is bound to be regarded as point of great importance*".

In relation to the total post-alarm bell delay up to the issue of the summons in October 1995, the Judge stated, in what may be regarded as a key section of his judgment: *"Mr. Milligan [for the defendants] relied understandably on that authority in support of his submission that here there is very significant delay of a very serious nature between the receipt of the letter of 6th April and the attempt first to take any steps in relation to the arbitration in August, and then subsequently issuing the present summons in October 1995. In my judgment he was right to categorise the delay at this stage and under those circumstances as being very serious, but I also accept Mr. Persey's argument [for the plaintiffs] that it would not be right for me to conclude the matter against his clients at that point without considering all the other matters which would ordinarily fall to be considered, including the matter of prejudice. I turn therefore to consider the other aspects of the case*".

He went on to deal with the amount at stake and the submission of Mr. Milligan that the claims were bound to fail and therefore should be given little weight. In this respect he felt unable to reach a conclusion, in the light of the pleadings in the head arbitration and the sub-arbitration and the limited evidence before him, that the claim could not succeed.

He then considered the further argument of Mr. Milligan in relation to the question of hardship that, if the charterers were unsuccessful in their application, they would have a claim over against their solicitors which would negate any question of hardship (c.p. the decision of Webster J in the ***"BIONA"*** [1991] 2 Lloyd's Rep. 121). The judge accepted that, in an appropriate case, it would be right to have regard to the fact that the applicant may have a claim over against his solicitors but stated:

"I am conscious that in this case, as in others, it is likely to be more difficult for the applicant to pursue a secondary claim of that nature, and in this case, in my judgment the charterer would suffer some hardship arising out of the fact that they would inevitably lose the services of their present solicitors who have been closely involved in this case, both in this country and more importantly in the Far East, since the discharge of the vessel.

Although it is a factor which I am satisfied I can and should take into account, it is for these reasons not one to which I feel able to attach a great deal of weight in this case."

The judge then dealt with the two specific matters of prejudice raised by the sub-charterers, first in relation to the possible obtaining of evidence in China and, secondly in relation to obtaining evidence in Peru and pursuing other parties there. As to the Chinese evidence, he said: *"The sub-charterers were kept fully informed by the charterers of the progress of events in the discharging ports in China and were invited to send representatives to examine the cargo. They chose not to avail themselves of that opportunity; but more importantly, they accept that the charterers, who were represented and who did instruct surveyors to examine the cargo at the discharging ports, were effectively protecting their interests and that it is unlikely that further evidence would have been obtained if the proceedings against them had been commenced within the limitation period. One has to remember that the sub- charterers could not have complained if the arbitration had been begun against them in November 1993 after the vessel had left both her discharging ports. By that time one suspects that the opportunity to obtain further valuable evidence had been lost, and Mr. Milligan, very properly in my view did not press that part of the sub-charterers' case*".

As to the Peruvian evidence, two sub-heads of prejudice were raised by the defendants, namely that as a result of the delay they could no longer obtain evidence as to the nature of the equipment installed in the relevant processing plants for treating the cargo with antioxidant; nor could they obtain evidence about the particular circumstances in which the fishmeal was handled and stored before it was placed on the vessel. Mr. Milligan submitted that both of these matters went to the efficiency of the treatment at the plant where the antioxidant process was carried out. The judge dealt with these arguments as follows: *"Although I accept it is possible that further investigation could have been carried out had the matter been raised at an earlier stage, I am not satisfied that a great deal of prejudice has been suffered in that regard. As far as the processing plants are concerned, it seems to me that it should still be possible, if the sub-charterers wanted to pursue this avenue of enquiry, to find out from the processors who are still in business what equipment they were operating at the time and when it was installed. That seems to me to require a different form of enquiry from that which might be necessary in relation to identifying particular parcels of goods and how they were handled and stored between leaving the*

factory and loading of the vessel. As far as the latter type of evidence is concerned, I think it quite likely (and there is no indication to the contrary) that by expiry of the time limit in November 1993, much of it would have been lost in any event. In the circumstances, I am not satisfied that the sub-charterers have suffered significant prejudice in either of these respects".

Finally, the judge held that although there had been "*very significant delay*", much of it of a culpable and serious nature, there had been no significant prejudice to the sub-charterers. He said that, although the delay had been lengthy, on the face of it he was satisfied that a good part of that was due to the fact that neither party wished to pursue the arbitration in London with great alacrity. He ended his judgment as follows: *"In the absence of significant prejudice to the sub-charterers, two factors in particular ultimately persuade me that I should give an extension of time in this rather unusual case. One is the magnitude of the claim - some $4 million or so. The other is the fact that the issues which will have to be investigated in relation to this claim have already substantially been raised in the arbitration by the sub-charterers themselves. Taking those matters into account, and taking into account all the other factors to which I have referred, I am satisfied on balance that it would be undue hardship for these applicants if they were prevented from pursuing a claim of this magnitude under these particular circumstances; and therefore, for those reasons, I hold that time should be extended in this case*".

DISCUSSION.

I have quoted at sufficient length from the judgment of Moore-Bick J to demonstrate that, in approaching his task, he directed himself impeccably as to the appropriate law and systematically proceeded to apply it to the various arguments which were presented to him.

It is accepted by both sides that applications of this kind are pre-eminently cases for the decision of the Commercial Court Judge who hears them. Thus, a difficult task faces any appellant from such a decision, particularly when the subject of such a careful and comprehensive judgment. As Megaw LJ stated in ***Cast Shipping Limited -v- Tradax Export S.A. [The "Hellas In Eternity"]*** [1979] 2 Lloyd's Rep 280 at 281: *"The position of this Court on an appeal of this nature is that, if it is satisfied that the learned Judge who exercised his discretion below has failed to take into account some material matter which he ought to have taken into account in the exercise of his discretion, or has taken into account some material matter which he ought not to have taken into account, then this Court would review the whole question, applying the correct principles as to what matters were to be taken into account and what were not to be taken into account, and arrive at its own conclusion. But further than that, if, even though it was impossible to say that the learned Judge had attached undue weight to any particular factor or had failed to attach due weight to any particular factor, nevertheless, if this Court looking at the matter as a whole, concluded that the learned Judge's exercise of discretion was clearly wrong, it would be the duty of this Court to interfere. It is not, however, enough for that purpose that this Court merely should be left under the impression that it might have exercised the discretion differently if it had been dealing with the matter at first instance*."

In attempting to discharge the burden upon him, Mr. Milligan was unable to persuade me that the Judge failed to take into account any material matter which he should have taken into account or that he left out of account any of the arguments pressed upon him. Nor did the Judge do other than quote correctly from the relevant authorities, applying them to the facts and arguments before him. The thrust of Mr. Milligan's submissions was that, looking at the matter as a whole, and having regard to the length and seriousness of the delay and the apparent weakness of the plaintiffs' claims for indemnity, the decision should properly only have gone one way, in favour of the defendants. He invited the Court to conclude that the exercise of the Judge's discretion was clearly wrong and should thus be overturned. Mr. Milligan particularly emphasised the following

(1) The initial limitation of the plaintiffs' claim to the question of demurrage, which was a conscious decision to restrict the ambit of their claim and to see how things developed in the head arbitration.

(2) The 6 month post-alarm bell delay between 6th April 1995, when the defendants' solicitors expressly referred the plaintiffs' solicitors to the time-bar clause, and 3rd October 1995 when the S.27 application was eventually issued. Mr. Milligan submitted that it was inexcusable when measured against the yardstick of any previously reported decision.

(3) The fact that the Judge did not find a positive absence of prejudice, but simply characterised any prejudice suffered as "not significant".

(4) The fact that, if the S.27 application were refused, there would be a claim in negligence against the solicitors. Mr. Milligan suggested that any countervailing prejudice to the plaintiffs in losing their services was in effect illusory.

(5) He submitted that the Judge was wrong to treat the size of the claim as effectively a $4 million claim. He pointed out that all but $600,000 depended upon the causation of the damage to the cargo, and that, if the cargo was in fact dangerous, then the receivers would fail in their claims in the head arbitration against the owners and there would be no adverse claim to pass on down the line. On the other hand, said Mr. Milligan, the only basis on which the claims could succeed against the owners and, similarly against the plaintiffs was that the damage was caused by bad stowage. In this connection he pointed out that, on the evidence of the plaintiffs' own expert, it was most unlikely that bad stowage was a factor in the damage caused. Further, that under the terms of the sub-charter, it was the plaintiffs and not the defendants who were liable for stowage.

The fact remains, however, that all these submissions were made to the Judge, and, taken individually, the consideration he gave and the conclusion he reached in relation to each cannot reasonably be faulted.

In reality, the beginning and end of Mr. Milligan's submissions was that, in the light of the continuing and serious delay after alarm bells started ringing, the Judge was clearly wrong in the conclusion he reached, particularly in the light of the strictures on such periods of delay in the Euro Trader.

After careful consideration of Mr. Milligan's arguments, I conclude that they fail. Early in his judgment, and before the various passages which I have quoted, the Judge took a preliminary look at the matter "*in the round*", when he stated that there was much force in the argument of Mr. Persey that the plaintiff charterers *"in this case wish to raise claims for an indemnity or damages in an arbitration that is already on foot, and moreover wish to raise claims which arise out of facts and matters which have already been put in issue in the arbitration by the sub-charterers. In those circumstances, he submits that it would be very hard on his clients if they were unable to advance their own case, based on matters which have already been put in issue by the sub-charterers in the way that I have indicated ...*"

He went on: *"I think there is also force in the argument made by Mr. Milligan QC that the approach that a party would adopt in relation to obtaining evidence of the condition of the cargo at the time of the loading as a claimant putting forward an allegation that the damage was really caused by want of proper care of those on board the ship is somewhat different from that which he would adopt as a defendant to a claim for something of the order of $4 million. That difference, however, is something which in my judgment one can properly consider in the context of assessing what degree of prejudice has been suffered in this case by the sub-charterers as a result of the delay in commencing proceedings*"

Eventually, of course, he concluded that no substantial prejudice had in fact been suffered. As I have already outlined, he had by then considered in detail the various stages of the overall delay and the degree to which they should be regarded as culpable, carefully weighing each. With the relevant passages from the Euro Trader in mind, he made clear his view that there had been significant delay of a very serious nature after the alarm bell sounded on 6th April 1994, holding that it was a matter of great importance, but not one which of necessity tipped the balance in the defendants' favour when the case was looked at in the round.

CONCLUSION.

I find no error for which the Judge can properly be criticised. I am inclined to agree with Mr. Milligan that, taken at first blush, and having regard solely to the delay involved, the plaintiffs were fortunate in the outcome of their application. Indeed, I note that, following judgment, in the exchanges concerning consequential orders and leave to appeal which appear in the transcript, the Judge observed to Mr. Persey that he had "won by a whisker". I would go so far as to say that the Judge's decision operated at the borders of the latitude to be afforded to an applicant guilty of delay in cases of this kind. However, in the final analysis, I consider that the Judge was right to attach great weight to the fact that, in expanding their claims, the plaintiffs were seeking to rely on matters which had already been put in issue in the arbitration by the defendants and I do not think it right to interfere with the order which he made.

I would dismiss the appeal.

LORD JUSTICE MUMMERY: I agree.

ORDER: Appeal dismissed with costs; leave to appeal to the House of Lords refused.

MR I MILLIGAN QC with MR N JACOBS (Instructed by Messrs Clyde & Co, London EC3M 1JP) appeared on behalf of the Appellant
MR K ROKISON QC with MR L PERSEY (Instructed by Messrs Ince & Co, London EC3R 5EN) appeared on behalf of the Respondent