



Neutral Citation Number: **[2020] EWHC 1765 (Comm)**

CL-2019-000679

Case No: CL-2019-000679

**IN THE HIGH COURT OF JUSTICE**  
**OF ENGLAND AND WALES**  
**COMMERCIAL COURT**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice,  
Rolls Building  
Fetter Lane,  
London, EC4A 1NL

Date: 3 July 2020

**Before :**

**MRS JUSTICE COCKERILL DBE**

**Between :**

**FIMBANK PLC**

**Claimant**

**- and -**

**KCH SHIPPING CO LTD**

**Defendant**

**Mr Steven Berry Q.C. and Mr Frederick Alliott** (instructed by  
**Campbell Johnston Clark Limited**) for the **Claimant**  
**Mr Simon Rainey Q.C.** (instructed by **Reed Smith LLP**) for the  
**Defendant**

Hearing dates: 10 June 2020  
Sent to Parties: 30 June 2020

## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email**

**and release to Bailii. The date and time for hand-down is deemed to be Friday 3 July 2020 at 10:30am.**

## **Mrs Justice Cockerill :**

### **Introduction**

1. In this matter the Claimant, Fimbank PLC (“the Bank”), applies under section 12 of the Arbitration Act 1996 (“the 1996 Act”) to extend the time for commencing arbitration proceedings against the Respondent (“KCH”).
2. The backdrop is of course the fact that the claim which the bank would wish to make – a damages claim against the carrier for misdelivery of cargo without production of the bills of lading (“Bills”) – concerns bills which were subject to a one year Hague/ Hague-Visby Rules time limit. I am told that the claim is worth some US\$7.3 million; KCH express scepticism about this by reference to another claim advanced in other proceedings by the Bank. That is immaterial for present purposes.
3. What is significant is that the Bank commenced arbitration against the registered owner of the vessel on which the goods had been carried, the M/V GIANT ACE (“the Vessel”) within time as extended via a course of correspondence conducted remotely through the time charterers' solicitors. The registered owner was a Panamanian company called Mirae Wise SA (“MW”) But since then it has become apparent that there was a bareboat charter, between MW and KCH. As demise charterer KCH obviously says it is the carrier, and it has relied on the Hague Rules time bar. Hence the application for an extension of time.
4. The Bank relies on two heads of section 12(3): (a) *“that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time”*, or (b) *“that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question”*.
5. I shall deal first with the facts, including the issue of authority, before turning to each head of application.
6. Before I do so I should note that the arbitration claim form in this matter, which was issued on 5 November 2019, proceeds on the basis of assumptions, without prejudice to the Bank's right to argue to the contrary in subsequent arbitration proceedings, as follows. It is assumed that:
  - i. The bareboat charter is genuine and operative.
  - ii. If it is genuine and operative MW are not estopped from denying that they were the carriers.
  - iii. KCH and not MW granted the extension of time.

- iv. The time bar provision applies to claims in misdelivery.
7. This approach is because it is established that the Court is entitled to determine the section 12 application on the assumption that the time bar in question applies to the claimant's claim, without prejudicing a claimant's right to argue otherwise subsequently: see *The Seki Rolette* [1998] 2 Lloyd's Rep. 638 at 646 (LHC) per Mance J.
8. The decision which follows is made on this basis.
9. I shall deal first with the facts, incorporating as I do conclusions about a number of issues, for example as to authority, which arise as part of the chronology and which then form the backdrop to the consideration of the issues.

## **The Facts**

### *Phase 1: April 2018 – April 2019*

10. As already noted MW is the registered owner of the Vessel. The chain down from MW goes thus:
  - i. KCH were the bareboat charterers of the Vessel. Whether KCH has any link to MW is contentious. Lloyd's List suggests it does. I am told on instructions that this is not correct. Whether or not there was a connection does not much matter. In due course, but not at the outset, Mr Nicholas Mallard of DLA Piper acted for them.
  - ii. Classic Maritime Inc ("Classic") were the time charterers of the Vessel from KCH. They instructed Wikborg Rein and specifically Mr Nicholas Shepherd. He is an extremely experienced shipping solicitor, who has practised in the area for more than 30 years.
  - iii. Trafigura Maritime Logistics Pte Ltd ("Trafigura") were the voyage charterers of the Vessel. They instructed Holman Fenwick Willan LLP ("HFW").
11. The Bills were issued "to order" for and on behalf of the Master for about 85,000MT of coal in bulk ("the Cargo") for carriage from Indonesia to India. The Bank says it came to hold the Bills in the first place as security for monies it lent to the purchaser of the Cargo. The Bills incorporated the voyage charterparty (i.e., that between Classic and Trafigura), which contained a London arbitration clause. The Bills also incorporated the Hague or Hague-Visby Rules, and thus the Article III rule 6 time bar of one year from delivery.
12. The cargo was discharged by the Vessel on 12 and 18 April 2018. It was discharged without the Bills having been presented, but against letters of indemnity issued up the line, so from Classic (to KCH) and

Trafigura (to Classic) and from the buyer, Farlin Energy & Commodities FZE (“Farlin”) (to Trafigura). In the circumstances, the clock was ticking down to a time bar in April 2019, one year from the date of the delivery of the Cargo.

13. The Bank’s lawyers at the time were the Maltese firm Fenech & Fenech (“F&F”). Ms Ann Fenech looked into the claim and did a website search on Equasis. This showed the Vessel’s flag to be Panama and her registered owners to be “*Mirae Wise SA*”. Equasis gave a “c/o” address of another entity “*Korea Line Corp*” in South Korea.
14. Korea Line Corp was separately described as “*Ship manager / Commercial Manager*”. Ms Fenech's evidence (the credibility of which is challenged) is that she did not join the dots between the SA designation of the company and the flag of the vessel and realise that MW was a Panamanian company. She says she saw the Korean ship management company and thought that it was a Korean company. As I have noted that is contentious; but it certainly would not be an unusual situation if a ship management company were related to a registered owner.
15. On 24 January 2019 Ms Fenech sent a letter before action to MW. That letter was addressed to “*Mirae Wise SA*”, and gave an address of “*C/O Korea Line Corp., [...] Seoul, South Korea*”. After having set out details of her client (the Bank), and identified the Bills, Ms Fenech wrote as follows:

“Clients understand that notwithstanding the fact that they are in possession of the original bills of lading, the carrier discharged the cargo covered by these bills of lading to a third party without presentation of bills of lading.

FIMBank plc therefore has a claim against Mirae Wise SA as owners of the MV Giant Ace for the value of these goods”.
16. I accept that this indicates that F&F and hence the Bank had identified MW as the intended Respondent of the Bank’s claim, which was being made against them “*as owners of the M/V Giant Ace*” and also, as the carriers under the Bills.
17. Of course, in truth this letter was misdirected; the appropriate recipient of the claim was KCH. But Ms Fenech did not know about the bareboat charter. Such arrangements are not matters of record. At the same time, anyone who has been involved in such matters for any period of time will know that they are not uncommon.

18. Ms Fenech did not inquire whether there was a bareboat charter. Whether she should have done so or not has been a matter of argument before me. KCH, via counsel's skeleton and via Mr Shepherd, says such an inquiry is standard. The skeleton says that: "*A standard letter of claim to a registered owner will accordingly make that enquiry as a matter of basic prudence*". Mr Shepherd contends (slightly differently) that it is standard operating procedure to check this when negotiating the Club LOI, which is a rather different point. Ms Fenech says one would normally only check this at the outset if there were an inkling that such an arrangement existed, and that she had none. I do not consider that, absent expert evidence, I have the material before me to conclude that Ms Fenech's action at this point was open to criticism.
19. Ms Fenech also sent the letter before claim to Gard, the Vessel's P&I Club. It appears that Gard then sent the letter to Grieg Shipbrokers ("Grieg"), Classic's brokers; who sent it to Classic. This was presumably because Classic and Trafigura down the line had a significant financial interest in the claim, because the claim made directly on the carrier by the Bank would simply pass down the line of charterparties (subject to any applicable contractual defences). Classic were asked: "*Pls check and reply us urgently and let us know C/P chain and each PNI Club*". It was suggested in argument that this was KCH expressly authorising Classic to correspond on KCH's behalf. I do not accept that submission. That simple request to get specific information cannot sensibly be seen as clothing Wikborg Rein with authority to correspond on KCH's behalf.
20. But it was thus that Classic sent the letter to their lawyers, who as luck would have it, were already corresponding with Ms Fenech on behalf of cargo interests in another similar matter. The evidence of Mr Shepherd is that he first received a copy of F&F's letter on 15 February 2019.
21. At this point Mr Shepherd was himself not clear about the contractual chain, as was evident from a email of 18 February 2019. He knew that his clients had a charter with KCH, but he did not know that KCH were demise charterers. He says that at this point he thought that KCH were time charterers and that he had no idea who MW were. Though he may well not have known, and he may well have thought it, in the circumstances (that his client had no direct nexus with MW), unnecessary to check, it seems likely that if he had made an educated guess based on his considerable experience, it would have been that MW were registered owners. But for his purposes, in the light of his contract, KCH were owners.
22. The story therefore starts with two people, each of whom had partial and mistaken information.

23. On receiving this letter Mr Shepherd sent a response up the line. In the course of a fairly lengthy email, expressing some scepticism about the claim – but also seeking documents from KCH, it stated: “*we are already corresponding with Fenech & Fenech on behalf of Classic and the owners of the m/v PARTAGAS in respect of cargo discharged in July 2018.*” This was relied on as a limb in the authority argument as indicating that Mr Shepherd “*was accustomed to corresponding with F&F “on behalf of” another shipowner*”. In my judgment it does no such thing, and gives no support to an argument that Mr Shepherd was at this stage authorised to act for KCH. This statement (i) is not made in relation to the Vessel, and (ii) goes no further than indicating that Mr Shepherd was accustomed to corresponding with F&F “*on behalf of*” another shipowner, as well as Classic, in another case. This lacks any authority from, or a holding out by KCH which could operate to constitute him as KCH’s agent for the purposes of correspondence.
24. Mr Shepherd sent an email to Ms Fenech on 21 February 2019. In that email Mr Shepherd stated as follows:
- “Our clients, Classic Maritime Inc have received from the owners of the m/v GIANT ACE a copy of the attached letter dated 24 January 2019. At the relevant time the vessel was on time charter to Classic and on voyage charter to Trafigura Maritime Logistics Pte Ltd. There are back-to-back LOIs in place between the Korean head owners, Classic and Trafigura.”
25. From here the mutual recriminations start. Mr Shepherd did not name KCH. The Bank says that the phrases “*the owners of the m/v GIANT ACE*” and “*Korean head owners*” were objectively, clear references to MW as carrier, not least because MW was the addressee of F&F’s letter, to which Mr Shepherd directly referred, and the Vessel’s registered owners. Ms Fenech assumed as such and the Bank says reasonably so. The Bank says there was a clear representation that MW was the Owner.
26. The Bank also says that in circumstances where Mr Shepherd unequivocally did know: (i) that KCH was the carrier under the Bills, being at the top of the chain of letters of indemnity (and Classic’s contractual counterparty); and (ii) that the apparent object of the Bank’s claim, per the explicit terms of F&F’s letter before claim, was an entity called MW, identified as “*owners*” and “*carrier*” in that letter, he therefore ought to have known that F&F were barking up the wrong tree.
27. The Bank has also said via Ms Fenech that Mr Shepherd should have checked the ownership of the Vessel upon receipt of her letter, and/or

done some other research (which would surely have immediately borne fruit) as to the identity of MW, particularly in the context of a bill of lading claim against MW as carrier.

28. KCH says that Mr Shepherd's correspondence is perfectly straightforward judged against what he knew and for whom he acted. His evidence is that he thought the addressing to MW was a mistake on the part of Ms Fenech. It says that his use of the term "*Korean head owners*", should have alerted Ms Fenech to the fact that he was not referring to MW, because the "*S.A.*" suffix contained in its name signifies that it is a Panamanian company.
29. Each argument in both directions has, of course, been hotly contested. As for what Mr Shepherd should and should not have done, that is a matter which to an extent follows from the conclusion I reach on whether he was KCH's agent. If he had been KCH's agent the point would be arguable. But since I have concluded that he was not at this stage KCH's agent, I can see no reason why it was incumbent on him to check who MW was; all he needed to know was with whom his clients were in a contractual relationship.
30. What is most important here is what one takes from the letter. In the end I am not persuaded that the letter was a misrepresentation at all. There is no unequivocal communication. The question of who are "*owners*" is one in which confusion not infrequently can arise, given that everyone but one in a charter chain will be owners *vis a vis* someone else. Objectively what was said was that Classic looked up the line to Korean head owners, who were not identified. Nor would I consider that were there a representation, reliance on any representation made by Mr Shepherd would be reasonable, given that Ms Fenech had no reason to consider that he acted for the carriers and did not know exactly where he stood in what could have been an even lengthier chain.
31. This pattern continued as the correspondence between F&F and Wikborg Rein developed. Later on 21 February 2019, Mr Shepherd sent Ms Fenech a further email, which stated materially as follows:

"Can you please clarify whether you have been contacted by the Korean owners of GIANT ACE or their representatives? We understand that the cargo was discharged between 1 and 18 April 2019, so it may be advisable to obtain a time extension from the head owners. We are in correspondence with them but would need a written request from you for such time extension to forward to the Owners for their agreement."



32. Again this was relied on as evidencing authority, or as a holding out. Neither of these suggestions were convincing. This does not represent the existence of or a holding out of authority. And even if it did constitute Mr Shepherd holding himself out, it would be insufficient as a matter of law to clothe Wikborg Rein with such authority.
33. Mr Shepherd sent one further email on 21 February 2019, asking Ms Fenech to forward him a clean message requesting that *“a time extension be granted by the carrier”*, which could be forwarded *“to the Owners and their Club (Gard) to seek the Owners’ agreement”*.
34. As requested, Ms Fenech sent a request to Wikborg Rein for a time extension on 4 March 2019. The request was not couched with any particular precision; it simply said: *“We believe that it is in the interest of all concerned that we be granted an extension [...] up until 1st of July 2018”*.
35. Behind the scenes the discussions then began as to whether an extension of time should be granted, a question on which those down the chain had views. Mr Shepherd contacted KCH asking for confirmation that Wikborg Rein had authorization to agree a time extension with F&F: *“Can Owners please confirm that we are authorised to agree this on their behalf”*. At this point Mr Shepherd plainly did seek authority – but it was a limited authority to agree an extension of time. That authority was duly granted (though not immediately). This is the only authority which I find that Mr Shepherd ever had from KCH.
36. On 8 March 2019 HFW for Trafigura emerged into Ms Fenech's view, saying:
- “1. We are instructed by Trafigura [...] in respect of the above matter.
2. We refer to the recent alleged misdelivery claim [...] that FIMBank plc (the “Bank”) made on 24 January 2019 against owners of MV GIANT ACE (the “Vessel”). The claim was passed on by Mirae Wise SA, the owners of the Vessel, to Classic Maritime Inc Limited (“Classic”) pursuant to the terms of various letters of indemnity. Classic in turn, in 19 February 2019, passed on the Claim to Trafigura, also under the terms of letters of indemnity. [...]
5. [...] Upon arrival at the discharge port, Trafigura received letters of indemnity from Farlin for delivery of the Cargo without presentation of the OBLs and also issued back to back letters of indemnity up the charterparty chain to Classic.

10. [...] In the event that the Bank decides to commence formal proceedings, any claims will be vigorously defended and Trafigura/Head Owners will insist on full disclosure relating to the Bank's financial arrangements [...]"

This document was again relied on by the Claimant as either evidencing a shared misunderstanding, and/or as representations to Ms Fenech, reinforcing the misapprehension. For similar reasons to those given in relation to the Classic correspondence above, I am not attracted by this argument.

37. On 10 March 2019 Mr Shepherd updated as follows:

"We are in dialogue with the Korean head owners and the voyage charterers Trafigura as to the request for a time extension to be granted by the head owners up to and including 1<sup>st</sup> July 2019 for your clients, FIMbank plc to commence proceedings in respect of any claims that they may have under the bills of lading listed in your letter of claim dated 24<sup>th</sup> January 2019."

38. The Bank's case is that all of this fed into and cemented the impression created and confirmed by previous correspondence. Key points made included that in this correspondence all relevant parties are named ("*voyage charterers Trafigura*"; "*your clients, FIMbank plc*") except KCH ("*Korean head owners*"; "*the head owners*"). In addition, F&F's "*letter of claim dated 24<sup>th</sup> January 2019*", which identified MW as the intended Respondent, continued to be cited as the reference point for the Bank's claim.

39. Was Ms Fenech misled by this? It was submitted that there was a misrepresentation and that it caused, contributed to or reinforced Ms Fenech's mistake. It seems to me that this would be to overstate the matter. The reality is that Ms Fenech had formed a view by herself and had sent the letter of claim on that basis. What this correspondence did was essentially passive – it did nothing (or very little, in the form of the word "Korean") to alert her to the fact that she was operating under a misapprehension. Although I entirely understand Mr Shepherd's point about the reference to Korean head owners – namely that he feels that this should have tipped her off – I do accept that the reference to Korean head owners, in circumstances where the one ship company is actually managed by an entity of the beneficial owner, is hardly an uncommon paradigm. The Liberian example which was given by Ms Fenech is one well known to everyone operating in this area. I therefore accept that to Ms Fenech,

without knowledge of the demise charter, her understanding was that Wikborg Rein would seek a time extension from MW.

40. Is any criticism of Mr Shepherd at this point and earlier fair? I do not think it is. Mr Shepherd was acting for a party part way down the chain. The claim between cargo interests and head owners was actually not, strictly speaking, his business. For all the argument about Classic's "financial interest", his clients would certainly hope simply to be passing contractual liability back down the chain. It might even be said, as Mr Rainey QC has done, that Mr Shepherd's conduct has the appearance of going out of his way to be helpful.
41. The reality is that Ms Fenech's misapprehension at this stage had three causes. The first was her initial assessment of the situation, which was wrong, but not unreasonable. The second was what seemed to her to be confirmation of that assessment given by the correspondence; the coincidence to her (with her mind made up) of the ambivalent language in the correspondence she received from parties other than KCH. The third was her own decision not to ask about the existence of a bareboat charter or to press matters any further with MW or Gard. None of these can properly be placed at anyone else's door.
42. Moving on into the extension of time itself, Wikborg Rein obtained agreement in principle to the extension on 14 March 2019, subject only to a general reservation of rights, but Mr Shepherd did not immediately pass this on. This appears to be because he wanted to get Trafigura's signoff and discussions down the chain continued to be contentious, with Trafigura wanting further details of the claim as a *quid pro quo*. Wikborg Rein sent F&F an update on its "*instructions*" from "*Head Owners*" in relation to the time extension on 20 March 2019, again referring to the other parties clearly by name ("*Classic Maritime*"; "*Trafigura*"; "*HFW*"). Mr Shepherd told Ms Fenech that the confirmation from Head Owners was subject to confirmations from Trafigura; this was not actually correct.
43. On the same day Mr Shepherd first discovered that KCH were actually bareboat charterers, when Mr Mallard of DLA Piper made contact acting for "*KCH Shipping, demise charterers of Giant Ace*".
44. F&F sent a chaser in relation to "*owner's time extension*" on 22 March 2019, and stated that if they had to wait much longer "*we therefore have to start making all the preparations necessary to ensure that [...] proceedings do commence in time*". Following a certain amount more pressure down the chain, that extension was agreed all round.
45. On 27 March 2019, Mr Shepherd sent through the terms of the time extension to F&F. That email read materially as follows:

“We now write to confirm that the owners of the m/v GIANT ACE hereby grant FIMbank plc a time extension up to and including 1<sup>st</sup> July 2019 for the commencement of proceedings in respect of claims arising under or pursuant to the bills of lading listed in your letter dated 24<sup>th</sup> January 2019 addressed to Mirae Wise SA (copy attached). Kindly acknowledge this message.”

Separately, we understand that HFW Singapore will be writing to you in the near future on behalf of the voyage charterers Trafigura about the claims that FIMBank have advanced.”

46. This wording originated with Mr Shepherd. It was not a simple transmission of the message which KCH had sent him.
47. Ms Fenech has said that she understood this letter to mean that Mirae Wise had granted the extension. The Bank notes that again KCH are not referred to by name, though every other party is. Ms Fenech argues that the juxtaposition of the phrase “*the owners of the m/v GIANT ACE*” and the identification of the claims arising under the Bills “*listed in your letter [...] addressed to Mirae Wise SA (copy attached)*” demonstrates Mr Shepherd was “*bend[ing] over backwards*” to avoid naming KCH or revealing the existence of a bareboat charter and to “*disguise*” the true position.
48. The Bank says that I should take a very dim view of the fact that Mr Shepherd, now well aware of the position on the bareboat charter, not only did not reveal that information to F&F, but also chose not to change his language in any way to reflect his new knowledge. It says he ought to have known that Ms Fenech was labouring under misapprehension, his previous conduct had contributed to it and he ought in all fairness to have revealed the bareboat charter, and by failing he reconfirmed and re-represented a misrepresentation about the bareboat charter. It was submitted for the Bank that the only inference is Mr Shepherd chose not to do so because he chose not to give anything away. It was submitted that while in relation to the previous “representations” Mr Shepherd was at fault because he ought to have found out who MW was and clarified that he and Ms Fenech were at cross purposes, this letter carries more fault. I was asked to infer that he was unwilling to be completely frank when he ought to have been. The Bank sees this letter as key: as a misrepresentation, made with knowledge of the truth. It says that but for this misrepresentation the problem would not have happened, and hence misrepresentation was causative.

49. Mr Shepherd says that he “*considered “owners” was equivalent to a plain reference to KCH*” and that he did not change his terminology because, from his client’s perspective, KCH remained the “*Head Owners*” of the Vessel, who were responsible for all operational matters. He also says that, at this point, he still remained unaware “*of the identity of Mirae Wise and the fact that it was the Vessel’s registered owner*”.
50. I shall return to consider these submissions below, as this letter is the key document on which one of the arguments, that as to injustice because of conduct of KCH, hangs.
51. HFW sent a further letter to F&F, after the extension had been given to F&F and within the original time limit, on 3 April 2019. That letter stated in material part as follows.

“1. We refer to our letter dated 8 March 2019 [...]

2. Defined terms in this letter have the same meanings given to them in our letter of 8 March 2019.

3. As a preliminary comment, our clients have received, though the LOI chain, notice of your client’s request for an extension of time for its alleged claim against Owners of the Vessel. As we have indicated to our clients’ counterparty in the LOI chain, this is a matter of Owners to agree as they consider appropriate [...]

5. [...] We expect Owners and all other parties in the LOI chain will also look to hold your client liable where your client’s actions are found to be wrongful [...]

6. Given the outstanding concerns in relation to your client’s claim and the extension of time for your client’s claim, it is premature for your client to take any steps against our clients, the Vessel and/or Owners”.

Again it is said for the Bank that this letter continued to contribute to the misapprehension under which Ms Fenech laboured.

52. On about 18 April 2019 the original Hague Rules/Hague-Visby Rules limitation period expired.
53. The Bank says that when all the above correspondence is taken together, not only is it reasonable for Ms Fenech to have reached the conclusion she did – that MW was the carrier and the Bank had obtained an extension of time from MW - it is extremely difficult to

see how she could have reached any alternative view in all the circumstances. That she was unable to do so is attributable to the content of the correspondence which she received, largely though not exclusively from Mr Shepherd of Wikborg Rein, in relation to the time extension. As Mr Berry QC put it in submissions: *“those with a financial interest have, with heavy fault, caused the missing of the time bar.”*

*Phase 2: May 2019 – 30 June 2019*

54. On 6th May 2019 Ms Fenech was contacted by the lawyers acting for KCH (DLA Piper; Mr Nicholas Mallard). An introductory email was followed up by a telephone call between Mr Mallard and Ms Fenech. In that call Mr Mallard, having been asked for whom he was acting, made it clear that there was a demise charterparty in place and that KCH were the demise charterers for whom DLA Piper was acting.
55. It is clear that Ms Fenech was surprised but that she grasped the implications of this information. If the Bills were demise charterers' bills, then the carrier was KCH and the claim would need to be against KCH.
56. It would instinctively seem that the course to be followed was obvious – to protect the position against KCH by one means or another. KCH accordingly say that, after that date, Ms Fenech and/or the Bank ought to have assumed that KCH was the carrier under the Bills, and commenced arbitration against it within the extension period until 1 July 2019. Alternatively she should at least have ascertained from whom the extension had come.
57. But the Bank urges against an overindulgence in hindsight. It points out that Ms Fenech had a problem – if she was to be in a position to commence arbitration against KCH the time extension would have needed to have come from KCH not MW.
58. The issue in her mind was that she understood that MW and not KCH had granted the Bank an extension of time on 27 March 2019. If that was right the original time limit of April 2019 (i.e., that which subsisted before the time extension was granted on 27 March 2019) had expired. She says:

“I knew that I had already obtained an extension of time from Mirae Wise (or so I assumed), given what I had been led to believe by my earlier correspondence with WR and HFW. Importantly, I was also fully aware that the original, unextended deadline for the commencement of proceedings had by this time long since passed. Any claim against KCH was thus, on its face and to my mind, time barred.”

59. Ms Fenech says she did not wish to wake any sleeping dogs. She says that she thought that it was possible that if she did not mention the point the issue might not be taken. Her decision was instead to pursue the arbitration against MW. As she put it “... *given it was not my responsibility to alert any party to possible defences to the Bank’s claim, I declined to ventilate my concerns to DLA Piper (or WR / HFW, for that matter). In the circumstances, I consider that was a reasonable and explicable course of action.*”
60. On that basis it is said that the information came too late. In her mind the extension of time had come from MW; but in fact, the Vessel was under a bareboat charter to KCH at the time, to whom the original unextended deadline must still apply. She therefore did nothing.
61. This is a key issue within the timeline. Having considered the matter carefully, and bearing in mind the caution about hindsight, I find this, despite Mr Berry’s best efforts, unconvincing. In this connection I shall record here that I do not find Ms Fenech’s evidence satisfactory on this, and I accept much but not all of what was urged by KCH.
62. It is hard to follow the logic of Ms Fenech’s evidence. Reduced to basics, she now knew the real claim was against KCH – any claim against MW would inevitably be met (at least) by the argument that they were not the carrier. There was no point in proceeding against MW. Therefore, it seems quite clear that she needed to know what the position was versus KCH. There were two possibilities. Either the extension had been given by MW, in which case the claim against KCH was time barred, or it was given by KCH, in which case she needed to start proceedings against KCH within the period as extended. If it was time barred, the proposition that there was a real chance that any shipowner would miss this point is one which I find it hard to comprehend.
63. I do not however accept that Ms Fenech should have assumed that the extension was granted by KCH. I accept much of what was said for the Bank on this point. In particular it would be perfectly possible for MW to have granted an extension in respect of a claim which it knew to be bad, but which appeared to be being made against it. And in any event, assumption, in the context of bill of lading claims, is the mother of error.
64. What in my view Ms Fenech plainly should have done was, as KCH also argued, to clarify the question as regards the extension. The worst that could have happened would be if KCH said it was an MW extension. But if so Ms Fenech would have known fairly promptly. Waiting was not going to improve matters. If she waited there was no universe in which there would somehow be a good claim against MW.

All that would happen is that she would find out the truth later in an area where delay counts against a party.

65. The idea that there was nothing to be gained by waking the sleeping dog is misconceived. For example, if a section 12 application were needed, she would have put her client in a very good position to seek the exercise of the court's discretion by acting fast. I find it to be an inescapable conclusion that even making allowances for the 20:20 vision of hindsight, the decision which Ms Fenech took was a bad one. It is perhaps understandable, given that the situation was worrying for her, and there is a natural tendency to wish to avert the day of reckoning; but that does not make it a sensible or reasonable decision. What I do accept is that with settlement discussions in the background it may have been reasonable – and indeed sensible – not to push the point quite immediately. But with the time bar as extended looming, it was incumbent on Ms Fenech to do something before then.
66. Meanwhile the Bank had taken action in Singapore. On 17th May 2019 Rajah & Tann for the Bank issued in rem proceedings against the vessel and against the “*Owner and/or Demise Charterer*”. Contemporaneous with this was the negotiation (by Ms. Fenech and Rajah & Tann) of a guarantee covering claims against the “*Owners and/or Demise Charterers*”. I do not place any real weight on this, given the fact that this is a standard wording for such documents.
67. On 25 June 2019, having taken some preliminary but unsuccessful steps towards exploring settlement, Ms Fenech served the notice of arbitration – on the assumptions which are relevant for this hearing, though there is an issue of misnomer hovering – against Mirae Wise. The notice used the “*c/o Korea Line Corp*” address taken from Equasis but also “*c/o DLA Piper Hong Kong Attention Mr Nicholas Mallard*”, who were, as she also knew, KCH’s solicitors.

*Phase 3: 1 July 2019 to date*

68. On 9th July 2019 MW through its lawyers informed the Bank (through Rajah & Tann) that the Bills were not its Bills and asked why the claim had not been commenced against the demise charterers KCH. That made it clear that the Bank had claimed against the wrong party.
69. Rajah & Tann took up the issue of the extension with DLA Piper, who passed on Rajah & Tann’s message to Reed Smith who had taken over as KCH’s lawyers. On 29th July 2019, Reed Smith, now writing on behalf of KCH, informed Rajah & Tann / the Bank that “*your claims are time barred*”.
70. There then followed a puzzling series of exchanges in which Rajah & Tann communicated with Wikborg Rein (acting for Classic) asking for information as to its authority to grant the extension, which



correspondence gives the impression that Rajah & Tann had not been made fully aware of the prior correspondence, and then to Reed Smith asking for details as to the demise charter. This occupied time between July 2019 and October 2019.

71. Both Wikborg Rein and Reed Smith declined to answer, though Reed Smith eventually provided Rajah & Tann with a copy of the demise charterparty on 6th August 2019. Both parties again regarded the other's as being grievously at fault in this period – an argument to which I shall return briefly in the final section of the judgment.

### **The Law: Section 12 of the 1996 Act**

72. Section 12 of the Act provides in material part as follows.

**“12 Power of court to extend time for beginning arbitral proceedings, &c.**

(1)Where an arbitration agreement to refer to future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step—

(a)to begin arbitral proceedings, or

(b)to begin other disputes resolution procedures which must be exhausted before arbitral proceedings can be begun,

the court may by order extend the time for taking that step.

(2)Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.

(3)The court shall make an order only if satisfied –

(a)that the circumstances are such as were outside the reasonable contemplation of the parties when they agree the provision in question, and that it would be just to extend the time, or

(b)that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

(4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by agreement or by a previous order) has expired [...]”.

73. As is well explained by Hamblen J in *SOS v. Inerco Trade* [2010] 2 Lloyd's Rep 345 at [47-8], this section was a deliberate change, introduced because there was a perception that the Courts had interpreted the predecessor section, section 27 of the 1950 Act, overgenerously – thereby interfering with the bargain that the parties had made. He noted by reference to Colman J in *Harbour & General v Environment Agency* [2000] 1 Lloyd's Rep 65 that:

“Section 12 of the Act marked a clear change in the law and practice relating to the extension of time for commencement of an arbitration. Under s.27 of the Arbitration Act 1950 the concept of undue hardship had been given a broad meaning and relatively benevolent application. In contrast:

(1) Section 12 was intended to reflect the underlying philosophy of the Act of party autonomy...

(4) The approach to the construction of s.12 should start from the assumption that when the parties agreed the time bar, they must be taken to have contemplated that if there were any omission to comply with its provisions in not unusual circumstances arising in the ordinary course of business, the claim would be time barred unless the conduct of the other party made it unjust that it should be”.

74. Thus, for example, mere silence by an owner, or a failure to alert the party who needs to comply with the time bar is not enough, as the circumstances of *Harbour* make plain.

75. The approach to section 12 has been summarised thus by Ambrose, Maxwell and Collett in *London Maritime Arbitration* (4<sup>th</sup> ed.): “*The authorities suggest that the test will be extremely difficult to satisfy and an extension will probably only be granted if the circumstances are entirely out of the ordinary*”.

**Section 12(3)(a): circumstances outside the reasonable contemplation of the parties**

76. I deal with this argument first because it involves a consideration of all the circumstances, and thus fits well immediately after the account of the facts.
77. The relevant threshold is that “*the circumstances are such as were outside the reasonable contemplation of the parties when they agreed on the provision in question, and that it would be just to extend the time*”. Paragraph (a) thus imposes a double requirement: (i) circumstances outside reasonable contemplation and (ii) injustice.
78. The effect of the authorities is that, to qualify under section 12(3)(a), the relevant circumstances must both have been (a) outside the reasonable contemplation of the parties when the contract was entered into; and (b) such that, if the parties had contemplated them, they would also have contemplated that the time bar might not apply.
79. In *Haven Insurance v Elephant Insurance* [2018] EWCA Civ 2494 the Court of Appeal endorsed Hamblen J’s view in *SOS* that the first limb “*circumstances outside reasonable contemplation*” contains within it two separate questions for the Court. Haddon-Cave LJ at [35] said:

“There are two relevant questions under the first limb ...: (i) whether there were relevant circumstances beyond the reasonable contemplation of the parties when they agreed the provision; and (ii) if so, whether, if the parties had contemplated them, they would also have contemplated that the time bar might not apply in such circumstances. “Reasonable contemplation” means “not unlikely” to occur”

80. There was an issue before me as to the relevance of mistakes within this analysis. KCH says that mistakes, oversights and negligence by lawyers or case handlers in relation to the missing of the time bar will not constitute a situation beyond the reasonable contemplation of the parties; that sort of reason for missing a time bar is hardly “*not unlikely*” to occur. As it was put by Colman J in *Harbour* at [71]:

“In this connection, it would appear quite impossible to characterize a negligent omission to comply with the time bar, however little delay were involved, as, without more, outside their mutual contemplation. Narrowly overlooking a time bar due to an administrative oversight is far from being so uncommon as to be treated as beyond the parties’ reasonable contemplation. The process of identifying and evaluating in the balance the disparity between the prejudice to the claimant on

the one hand and the degree of fault on his part on the other will not normally be a relevant exercise in determining whether there were circumstances beyond the reasonable contemplation of the parties. The circumstances in question must in each case include those which caused or at least significantly contributed to the claimant's failure to comply with the time bar."

81. A simple negligent omission to comply with a time bar cannot without more be said to be outside the reasonable contemplation of the parties – negligence is within the parties' contemplation and it is not deemed unjust for a party to bear the consequences of its, or its agent's, negligence. The battleground is as to "negligence +"; the Bank submits and *Harbour* as explained in *Haven* at [58] indicates that negligence with more can – if perhaps unusually – amount to circumstances outside the reasonable contemplation.

82. As to the second part of the first limb, in *Harbour* in the Court of Appeal [2000] 1 Lloyd's Rep. 65 at [81], Waller LJ stated that the circumstances must be such that:

"...if they had been drawn to the attention of the parties when they agreed the provision, the parties would at the very least have contemplated that the time bar might not apply – it then being for the court finally to rule as to whether justice required an extension of time to be given."

83. In support of its argument that this was a case which met the hurdle the claimant relied on *Haven*, as analogous. The Court of Appeal summarised the facts which justified this conclusion thus:

"First, that Elephant believed "reasonably if wrongly" that it had 30 days [...] to lodge an appeal. Secondly, that Elephant's belief was in line with "widely accepted" interpretation of article 75 shared by MIB itself. Thirdly, MIB had confirmed in clear terms that: "It has always been the [Committee's] custom and practice to allow 30 days from the date of final minutes". (at [42])"

### *Discussion*

84. The Bank's case under section 12(3)(a) of the Act appears to have been deployed in anticipation of the conclusion I have reached on attribution of the bulk of Mr Shepherd's correspondence to KCH. In

the end, however it was not pursued with great enthusiasm, and rightly not.

85. The case was originally put on the basis of concealment of the bareboat charter and the correspondence. The way it is now put does not rely on concealment of the bareboat charter. Rather it is said that the parties could not have reasonably foreseen, at the time the Bills were first issued, that third parties (i.e., Classic / Wikborg Rein and Trafigura / HFW, parties in the contractual chain other than KCH), with a financial interest in the shape of their LOIs, would contribute to misleading the Bank into wrongly believing that a party other than KCH was liable as the carrier under those Bills.
86. Although this was not said to amount to a case of wilful misleading, that was certainly the way it was put at times in the evidence and in submissions. For the reasons I have already given in relation to the non-authorized correspondence, I do not consider that this is sustainable for that correspondence; the one authorized letter is a matter for the next head.
87. Nor do I accept the submission that this case is analogous to *Haven*. That was a case where not only was there a “reasonable” misunderstanding on the part of the party seeking relief, but that misunderstanding was “widely shared” – and there was a positive practice on the part of the MIB to act on the basis of that shared misunderstanding. In those circumstances one can entirely comprehend why the judge and the Court of Appeal formed the view that the parties at the time the provision was agreed might have contemplated that the time bar might not apply.
88. But this is not a case of a widely shared misunderstanding, or indeed of a practice of treating the situation on the false basis. This is a situation which was, to put it frankly, a muddle. Ms Fenech got off on the wrong foot. Circumstances occurred which meant that she did not dig deeper, or have her faith in her analysis shaken. But I fail to see how this is in overall effect a situation which is materially different to one where a mistake is made.
89. The Claimant argued that *Haven* is authority for the proposition that “negligence +” is enough; since here there was that extra element on top of a mistake, then the right answer should be that the provision applies. It is argued that *Haven* establishes that, though it might be in the contemplation of both parties at the time of agreeing a limitation provision that one of them might miss the time bar as a result of a unilateral mistake, that would not be the case if that party’s mis-appreciation was confirmed or contributed to by innocent misinformation by another party.
90. I do not accept that submission. *Haven* is not saying that in all cases where there is something on top of negligence, the test will be met;

it is saying that without more it certainly will not. That much is quite clear from the passage at [58]:

“It is fair to say that a Court may be very unlikely, in normal circumstances, to grant s.12 relief to a party that has missed an arbitration deadline because of its own negligence because, by definition, the concept of ‘negligent omission’ imports the notion of reasonable foreseeability (or contemplation) of adverse consequences if you fail to act. Equally, it may not be unjust to refuse relief in such circumstances. However, each case depends upon its own particular facts. In my view, Colman J included the words “without more” to indicate this.”

91. It thus follows that where, as here, there is a situation which involves a mistake or negligence and something else, the correct approach is to go back and ask the relevant questions to see if this is one of the unusual cases where despite the existence of a causative mistake or negligence the case nonetheless fits within the requirements of this test.
92. The first of these is: Were the circumstances, viewed overall, outside the reasonable contemplation of the parties when the contract was entered into? To this the answer is no. The circumstances are no more than the mistake, compounded (but not caused) by correspondence with other parties innocently reinforcing that mistake, compounded by a yet further error. Further that final decision was not realistically caused by anything in the correspondence. That situation is not something the parties would not reasonably contemplate. I do not accept that a mistake on top of conduct innocently leading Ms Fenech astray is outside what would be reasonably contemplated. There is no relevant “more” to take this case outside the normal consequences of mistakes.
93. In this connection I do not accept the submission (by reference to the inclusion of negligence in the consideration of discretionary factors at Merkin Arbitration Law paragraph 13.55) that negligence does not come into the equation in considering whether the conditions are satisfied. That appears to be a submission which is contrary to authority, in the form of *Harbour* and *Haven*. I would add that there is another difficulty with this submission; it would suggest that nearly all the factors which could feed into a section 27 analysis would drop out of the analysis of the jurisdictional hurdle, which would tend to reintroduce the section 27 approach by the back door. I seriously doubt that this was intended.
94. Even if, as Mr Berry submitted, one should look at negligence outside of this question, as part of a discretionary exercise, that does not

improve matters because the first part of the picture – the innocent misleading on top of an understandable mistake would itself not, in my judgment, be outside the reasonable contemplation of the parties.

95. The second question is: if the parties had contemplated them, would they also have contemplated that the time bar might not apply? To this also the answer is no. If the parties had contemplated these circumstances doubtless they would have returned different answers. KCH would doubtless have thought this fell well within the ambit of circumstances where the time bar may bring a windfall to the owners. One must bear in mind, as I have noted above, that owners are entitled to stay silent, and if they do so this court will not extend time under section 12. That is because the section is designed to uphold the parties' bargain and not to interfere with it.
96. Had this been a case where the knowledge of the bareboat charter came to Ms Fenech after the expiry of the limitation period as extended and where there was a confusion which resulted from the correspondence of third parties, there would then be a better analogy to the *Haven Insurance* case, where, the relevant misrepresentation which (wrongly) confirmed a pre-existing reasonable mistake on the part of the claimant was the product of a genuine mistake on the part of the third party. But even so there would still be some distance between this case, where there is no misrepresentation, and no "widely held" mistake.
97. Further an extra layer of distinction is added to this case by the fact that Ms Fenech knew nearly two months before the limitation period as extended expired that the real target was not the one she thought she was shooting at. Her actions from that point are a significant part of the relevant circumstances. In reality, time as extended was missed solely because of the deliberate decision of Ms Fenech not to claim against KCH and not to investigate by whom the extension had been given. I consider that both were steps which, in Hamblen J's words in *SOS v Inerco*, were "*steps which the party in question can reasonably be expected to take within the prescribed time*".

**Section 12(3)(b): Respondent's conduct making it unjust not to extend**

98. Under this ground, the relevant threshold is "*that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question*". A claimant must show some positive conduct on the part of a respondent that renders reliance on the time limit unjust.
99. The respondent's behaviour does not have to be the sole or even the predominant cause of the failure to meet the deadline. Precisely how one puts the causation requirement was to some extent in issue. The Bank submitted as long as it can be said in some way to "contribute"

to the failure, that would suffice. This was a point made by reference to *The Lake Michigan* [2009] EWHC 3325 (Comm) [2010] 2 Lloyd's Rep. 141 at [52] where Gross J held that conduct which contributed to a failure to comply with a time limit was sufficient even if it was not the sole cause.

100. KCH pointed to *The Lake Michigan* at [46] where Gross J said: "*Some conduct must be shown that is causative of the failure to comply with the time bar or related to the injustice which would arise if relief is not granted*" and *Thyssen v Calypso* [2000] 2 Lloyd's Rep 243 per Steel J at [25]: "*The threshold question as I see it is whether the claimants can attribute their failure to comply with the time bar to the conduct of the respondents*".
101. On this point I am not persuaded that there is a relevant distinction, certainly for the purposes of this case. There must be some causative nexus, it is plain.
102. It was common ground that there is no need for the respondent's conduct to be wrongful or blameworthy. Unintentional conduct on the part of the respondent may suffice. In this regard the Bank pointed to the facts of *The Lake Michigan*.

#### *Discussion*

103. In large measure this dispute was about whether the various communications of Wikborg Rein can be attributed to KCH. Although KCH argued that if the conduct was attributable, it would nonetheless fail the causation test, I was not attracted by that argument. True it is that Ms Fenech's response was not one I would be likely to commend. But if all the acts in Phase 1 were attributable to KCH, then the reality would be that the waters were muddied by those acts. However, as I have made clear above, I am not persuaded that any of the actions of Mr Shepherd relied on – bar one – are attributable to KCH.
104. The only really helpful documents for the Bank's purpose are that on 6 March 2019, Mr Shepherd asked KCH to confirm "*that we are authorised to agree this [i.e. the time extension] on their behalf*". KCH replied stating that they had "*no objections*" the next day, and confirmed as much on 14 March 2019: "*Owners agree to the issue, on behalf of Owners, of an extension of time from 1 April 2019 up to and including 1 July 2019*". That is plainly a limited request for authority, and a limited grant.
105. Thus Mr Shepherd acted on KCH's behalf in relation to communicating KCH's consent to the time extension on 27 March 2019 but not otherwise. The Bank says that this is enough in the circumstances of the communication which Mr Shepherd sent to convey the extension.



106. The case for the Bank, as set out in Ms Fenech's evidence, is founded on the earlier messages of Mr Shepherd which were not KCH's conduct; Mr Rainey referred to it as a gallimaufry of conduct (a phrase too striking to be ignored). The Bank's case before the hearing thus did not focus on that one authorised email. It relied on all of that body of correspondence, with the maximum textual meaning extracted from each, to reach a conclusion that something done by KCH misled the Bank. Further I should note that while submissions were made on the HFW correspondence there was and can be no case that HFW were acting for KCH. Accordingly in this section of the exercise their letters cannot come into the equation.
107. So one comes down to a single message. So far as that single message is concerned, the position is interesting. I consider that, read alone and in the abstract, it would naturally be taken as referring to different parties, "owners" and "Mirae Wise". The problem is that it does not stand alone. And while the earlier correspondence is not attributable to KCH, the knowledge of what is in it is. So KCH and Mr Shepherd knew that Ms Fenech was talking about MW in her original letter, even if Mr Shepherd, as he says, did not understand who MW was. They knew that they had not told her that the effective owner was in fact KCH. Against this background Mr Shepherd's wording of the key letter granting the extension of time was somewhat unfortunate.
108. One can perhaps understand how, despite his knowledge of the bareboat charter, this may well have come about; Mr Shepherd of course was wearing two hats, and to him KCH were, simply, "Owners". It may well have been entirely instinctive to him to draft in this way; referring to another party by reference to their role *vis a vis* one's client is hardly unusual. But the result of the drafting of the letter against the background was in fact misleading, in this sense: a more literal and less allusive draft would have made all clear, but as it was in fact phrased it said nothing to disturb the misapprehension under which Ms Fenech was labouring.
109. For this reason, the fact that had it been phrased differently it would have opened Ms Fenech's eyes to the issue deals with the question of causation; something was done for KCH which had a causative effect. But that begs the question of what it caused. It did not cause the original time bar to be missed; because if the full facts had been laid out in pellucid fashion Ms Fenech would have known she had an extension from the right person. What it caused was Ms Fenech's being unclear as at 6 May 2019 of from whom that extension was.
110. This then, forms the first part of the background to the question of injustice. There is something which was done by KCH's agent which could in theory engage the section. The question of injustice is one which balances that against all the circumstances.

111. Part of those circumstances is that it might be said that a considerable portion of the causative burden lies with Ms Fenech. Even if it were not the case that she should have enquired as to the existence of a bareboat charter (a question on which, absent proper expert evidence, I remain agnostic):
- i. She would have flushed KCH out earlier if she had taken a less passive approach. The chronology appears to demonstrate her relying on the solicitors of another party to make the running in circumstances where she had little or no information about the contractual chain, but she appears to have taken no steps to chase her original letters and get a response direct, or even to get hold of the charterparty chain, for example by asking Mr Shepherd for a copy of his clients' charterparty.
  - ii. While there was some causative hangover from the impression she had gained in phase 1 by the time phase 2 came around, her conduct in not even enquiring as to whether the extension came from KCH is far more to blame for the ultimate missing of the time bar as extended. As I have indicated, one can empathise with the position in which she found herself. But she did not act prudently, but rather illogically. And bad situations are rarely improved by failing to engage with them.
112. Ultimately there is a balance to be drawn against a background where the missing of the time bar comes down to errors on both sides, and where the authorities indicate that the intention was that the Court should not revert to the broad discretion as exercised under section 27 of the Act.
113. The Bank submitted that even if there was a failure to act skilfully that has to be weighed against the "*heavy fault*" which it posited on the part of KCH via its agent. That way of putting it in a sense provides the answer here; absent heavy fault – and I have found no such heavy fault – that strongly suggests that the correct answer is no extension.
114. It is salient here to consider the *Lake Michigan*, because that was a case where the applicant fell just the right side of the line. The parties had been negotiating for some time, years, with the P&I Club conducting these negotiations for the owners, with full authority. There had been two extensions of time – conveyed by the P&I Club. There had been letters of undertaking. On the penultimate available day for service of an arbitration notice (and against the background of a previous unanswered query, where the answers of the owners to the judge's request for evidence as to what instructions they had given were notably missing), the P&I Club did not disclose that it had no authority to accept service of that notice. Instead it said that it was "*taking instructions with regard to that notice*". Gross J considered that failure to disclose the fact that it lacked instructions was "*inadvertent*" but nonetheless "*misleading*" in the circumstances.

Though the Judge did not “lose sight of [the claimant’s] own responsibility” in the matter, the conduct of the Club as agent for the respondent against this background made it unjust to hold the claimant to the terms of the time bar.

115. The circumstances there seem to me to be much stronger in the Applicant’s favour than they do here. In particular there had been a course of conduct stretching over years between the club as the owners’ representative, including multiple extensions of time and substantive negotiations. Further while Gross J did not find fault as such, and his language remained parliamentary, it is fairly plain from the judgment (in particular at p. 146 col. 2 and p. 150 col. 2) that he found the actions of the owners highly questionable.
116. The circumstances here are far less extreme. Mr Shepherd was a temporary agent for one purpose only. He wore at the same time another hat. As I have noted above it cannot be said on the basis of the evidence I have seen that his contribution to the muddle, though unfortunate, was a deliberate misrepresentation; matters might be otherwise if one could so conclude. The actions of Ms Fenech were at least as culpable as those of the applicant in *Lake Michigan*. I consider that this is not a case where one can properly conclude that that the conduct of KCH makes it unjust to hold the Bank to the strict terms of the provision in question.
117. It follows that neither jurisdictional hurdle is cleared and the application fails.

### **The Court’s Discretion**

118. Finally there is the question of Phase 3 and delay. KCH argues that even if the Bank’s case under section 12 of the 1996 Act is otherwise satisfied the Court should decline to exercise its discretion to grant relief essentially on the ground of delay.
119. In the circumstances this does not arise. Given the nature of the argument and the potential for it to be affected by the exact nature of the conclusions on the jurisdictional hurdles, and the margin by which the relevant hurdle was cleared, it would be artificial to provide an answer on this point.
120. I will therefore confine myself to making a few limited observations. The first is that in relation to this point Mr Berry here puts down a marker. He concedes that on the authorities there remains a role for discretion even if a jurisdictional ground is made out, but reserves the right to argue in another place that those authorities are wrong and there is no such discretion.
121. I would if necessary have found that a discretion remained. That seems to me to be inherent in the drafting of section 12(1) which refers to the fact that the court “may” make an order. Section 12(3)

simply defines the circumstances in which that discretion can arise. Further that reflects the situation which one would expect – it would be surprising, for example, if a party could wait two years before making such an application without being at risk of finding the relief refused.

122. In this case there certainly appears to be material which might well give rise to a refusal to exercise the discretion. There is on the face of it a very long gap between the expiry of the extended limitation period and the taking of any step referable to enabling a claim to be brought in arbitration against KCH. There was an issue as to whether, having focussed on the time lag to the making of this application, it was open to KCH to rely as well or instead on the time lag to commencing an arbitration. That is to some extent a red herring; doing one might well provide a form of excuse for delay in doing the other. On any analysis the Bank did neither until this application was made in November 2019.
123. The reality is that the Bank knew from May 2019 that the right party was KCH. That was confirmed to them in terms on 10 July 2019 by MW and again by KCH on 29 July 2019. The application was made in early November 2019. We are therefore looking at maximum 180 days, minimum around 95 days of delay.
124. The fact that things were going on in Singapore seems a poor excuse. R&T (for the Bank) may from their perspective, have been reasonable to seek to clarify the position as to the origins of the time extension in the weeks that followed the expiry of time; but they may well not have been operating from the basis of an appreciation of the requirements of section 12 of the Act. It also appears that they were unaware of the existence of the demise charter – their email responding to MW's denial that it was the carrier states in terms that *"this allegation has never been raised prior, whether by Owners ... or by any of the other parties in the charter or LOI chain"*, which was plainly not correct. This misapprehension seems to have led to correspondence being conducted in a somewhat intemperate tone, which provoked a fairly petulant set of responses. There is no explanation as to why it took until 31 August 2019 for the extension of time to be raised in the chain of correspondence. There is no explanation for what appears to be a total absence of action between 1 and 30 August 2019. The reason given is that the Bank wished to understand for whom Wikborg Rein had acted in granting the extension; however that could not be material to the position, in the light of the clearly stated position that KCH were demise charterers and the plain fact that no arbitration had been commenced against KCH within the relevant period – even allowing for an extension.
125. While the focus in the authorities is on delay until the issue of the notice of arbitration, rather than the making of the section 12 application, delay in making an application was relevant under

section 27, and there is no reason of logic why it should not be relevant under section 12. The logic of the authorities in the context of notice of arbitration such as *SOS v Inerco*, and *P v Q* [2018] EWHC 1399 (Comm) would seem to apply equally here. Indeed the contrary was realistically not really argued by Mr Berry.

126. While, as he submits, it is true that commencing a section 12 application is a different thing from filing a claim notice, because of the need to investigate whether there is *prima facie* a time bar and the factors which might give rise to jurisdiction, a delay of four months (with little to show for it, and little explanation of why it took so long) would seem to put the Bank in a perilous position. This is perhaps the more so when the evidence suggests that the delay was not down to the need to make such detailed investigations - it was the Bank's own case that "*it was only after Reed Smith's final reply dated 30 September 2019 and WR's reply dated 8 October 2019 ... that the Bank ... prepared this application accordingly.*"
127. Without any better explanation than the inadequate one of exploring in a non-contractual forum matters (who granted the extension) which could perfectly well have been made clear from the horse's mouth in May 2019, I would probably not have been minded to exercise the discretion, even if it had been open to me to do so, unless the case on one of the jurisdictional hurdles had been compelling.