owners had exercised due diligence to make the vessel seaworthy. Contribution in general average is, therefore irrecoverable from the defendant, and the claim fails.

In my judgment the learned Judge's conclusion is entirely correct and his reasoning impeccable.

[Order: Appeal dismissed with costs. Leave to appeal to the House of Lords refused.]

COURT OF APPEAL

July 1 and 4, 1977

EAGLE STAR INSURANCE CO. LTD.
v.
YUVAL INSURANCE CO. LTD.

Before Lord DENNING, M.R.,
Lord Justice GOFF and
Lord Justice SHAW

Arbitration — Reinsurance — Arbitration clause in treaty of reinsurance — Claim by insurers against reinsurers — Validity of arbitration clause — Whether insurers entitled to summary judgment under R.S.C., O.14 — Whether action should be stayed for reference to arbitration.

The plaintiffs (Eagle) insured big firms of contractors against the risks incurred by them in carrying out the contract works. In 1967, a treaty of reinsurance was made between Eagle and the defendants (Yuval) in respect of contractors' all risk policies.

The brokers' slip containing the terms of agreement, provided inter alia that Yuval were "to cover 7½ per cent quota share, part of an 85 per cent quota share". The slip also contained the words "Sub 100% R/I at 1% our credit", indicating that Yuval were only to take 1 per cent. of the premiums and that this was a "fronting arrangement" in that Yuval were the front people giving their name to the transaction vis-a-vis Eagle, and were legally the reinsurers. The slip further showed that the reinsurance was based on an estimated income of £250,000 as being the income premium expected to be received by Eagle.

The treaty of reinsurance contained an arbitration clause which provided inter alia:

> If any question or dispute shall arise . . . the same shall . . . be referred to . . . Arbitration . . . The Arbitrators and Umpire shall not be bound by the strict rules of law but shall settle any difference referred to them according to an equitable rather than a strictly legal interpretation of the provisions of this Agreement . . . The obtaining of an award . . . shall be a condition precedent to any right of action in respect of any difference falling within the scope thereof.

In July 1969, the treaty of reinsurance was renegotiated, Eagle's retention being increased from 15 per cent. to 42½ per cent. and the shares of the reinsurers being reduced proportionately. Yuval alleged that they were not aware of the renegotiation.

For some years, Eagle submitted reinsurance accounts to Yuval but in 1976, the losses greatly exceeded the income, and Eagle claimed nearly £70,000 was due from Yuval.

On Dec. 3, ignoring the arbitration clause, Eagle issued a writ on which they indorsed a statement of claim. That indorsement was defective and

on Dec. 21, Yuval applied to strike it out. Eagle reissued the statement of claim and took out summons under R.S.C., O.14, for summary judgment against Yuval.

Yuval resisted that summons and applied to stay the proceedings on the ground of the arbitration clause.

Held by Q.B. (Com.Ct.) (PARKER, J.), that (1) since Yuval had taken a step in the action, it was not open to them to apply to have the matter sent to arbitration, and the stay of action would be refused.

(2) there was no real defence to Eagle's action and Eagle were therefore entitled to the full amount claimed.

Judgment for Eagle.

On appeal by Yuval:

Held by C.A. (Lord DENNING, M.R., GOFF and SHAW, L.JJ.), that (1) on the summons under R.S.C., O.14, it would not be right to enter judgment against Yuval in that there were several triable issues (*see* p. 360, col. 1; p. 362, col. 2; p. 363, col. 1); (a) it was open to question whether Eagle could sue Yuval as principals on the treaty of reinsurance when to the knowledge of their brokers Yuval were only front men (*see* p. 360, col. 2; p. 362, col. 2); (b) the effect of the representation about the estimated premium income, which Eagle had stated as £250,000 but in fact had turned out to be £1¼ million (*see* p. 360, col. 2; p. 362, col. 2); and (c) the renegotiation in 1969 which Yuval had said they knew nothing about (*see* p. 360, col. 2; p. 362, col. 2);

(2) on the authorities, in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" had to be one which impliedly affirmed the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration (*see* p. 361, col. 2);

(3) the application by Yuval to strike out the defective statement of claim was not an affirmation of the correctness of the proceedings but a disaffirmation of them and was not a "step in the proceedings" such as to debar them from applying for a stay (*see* p. 361, col. 2; p. 363, col. 2; p. 364, col. 1);

(4) the arbitration clause seemed to be entirely reasonable in that it did not oust the jurisdiction of the Courts but only the technicalities and strict construction (*see* p. 362, col. 1); and the arbitration clause in all its provisions was valid and of full effect including the requirement that the arbitrators should decide on equitable grounds rather than strict legal interpretation (*see* p. 362, col. 1);

(5) the action would be stayed and the matter referred to arbitration in accordance with the arbitration clause (*see* p. 362, col. 1; p. 363, col. 2; p. 364, col. 1);

Appeal allowed.

The following cases were referred to in the judgments:

Czarnikow v. Roth Schmidt & Co., (C.A.) (1922) 12 Ll.L.Rep.195; [1922] 2 K.B.478;

Ford's Hotel v. Bartlett, [1896] A.C.1;

Hodgkinson v. Fernie, (1857) 3 C.B.N.S.189;

Ives & Barker v. Willans, (1894) 2 Ch.478;

Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekgringeen, [1962] 2 Lloyds's Rep. 257;

Parker Gaines & Co. Ltd. v. Turpin, [1918] 1 K.B.355.

This was an appeal by the defendants, Yuval Insurance Co. Ltd. (formerly Yuval Insurance Co. of Israel Ltd.), from the decision of Mr. Justice Parker given in favour of the plaintiffs, Eagle Star Insurance Co. Ltd., and holding in effect that the plaintiffs were entitled to summary judgment under R.S.C., O.14 since the defendants had no defence to the plaintiffs claim for about £70,000 due under a reinsurance treaty between the plaintiffs and defendants, and the defendants were not entitled to a stay of the action so that the matter could be referred to arbitration since they had taken a "step in the proceedings".

Mr. Roger Buckley (instructed by Messrs. Elborne Mitchell & Co.) for the plaintiff respondents; Mr. J. Fox-Andrews, Q.C. and Mr. D. Blunt (instructed by Messrs. Stilgoes) for the defendant appellant.

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

JUDGMENT

Lord DENNING, M.R.: This case arises out of a treaty of reinsurance made in 1967. The principal insurers were the Eagle Star Insurance Co. Ltd. They insured big firms of contractors against the risks incurred by them in carrying out the contract works. Eagle Star received the premiums from the contractors and paid any claims made by the contractors on the policies. But Eagle Star did not want to bear the whole burden themselves. So they "ceded" a proportion of the premiums to other insurance companies on the terms that these other insurance companies would bear a like proportion of the claims.

One of these reinsurers was Yuval Insurance Co. of Israel Ltd. The treaty was negotiated on behalf of Eagle Star by brokers called Pearson, Webb, Springbett Ltd., together with a Mr. Delbourgo whose company Delbourgo Ltd. had an underwriting contract with Eagle Star. He was one of those smart young men who get a lot of business in a short time but leave a lot of troubles behind them. The treaty was negotiated on behalf of Yuval by their London agents Ben-

Zur Ltd. The brokers prepared a slip showing the terms of the agreement. According to this slip Yuval were "to cover 7½ per cent quota share, part of an 85 per cent quota share" of contractors' all risk policies. On the slip under the heading "Information" it said: "Estimated premium income £250,000 for 100%. The slip was signed by Ben-Zur on behalf of Yuval. Below the signature there was a handwritten note: "Sub 100% R/I at 1% our credit". That cryptic little sentence showed that Yuval were only to take a reward of 1 per cent. of the premiums.

The meaning of that slip was this: Eagle Star were to undertake all the primary insurances. They were to retain 15 per cent. of the premiums for their own account and be liable for 15 per cent. of the losses. They were to "cede" the other 85 per cent. to various reinsurers: and of that 85 per cent., Yuval were to bear 7½ per cent., that is receive 7½ per cent. of the premiums and pay 7½ per cent. of the losses. The slip also showed that the reinsurance was based on an estimated premium income of £250,000 as being the income premium expected to be received by Eagle Star.

The important sentence for present purposes is this: "Sub 100% R/I at 1% our credit". Those handwritten words show that this was only a "fronting arrangement". Yuval were only a "front" acting for the real reinsurer. Yuval were to receive the small commission of 1 per cent. for so acting.

This case thus brings to our notice the existence in the insurance market of "fronting arrangements". The Yuval company were the front people giving their name to the transaction, vis-a-vis Eagle Star. Yuval were legally the reinsurers. But the real principals to the reinsurance were a company called Bastion Ltd. It was run by Mr. Delbourgo. It was a company of little substance. It was to receive the premiums in regard to this 7½ per cent. quota share and to pay the claims. As between Bastion and Yuval, Bastion was the company truly responsible. All that Yuval got out of being a "front" was 1 per cent. — a very small sum.

That was the nature of the agreement as evidenced on the slip. The treaty of reinsurance itself was not executed until Dec. 6, 1967. The parties were Eagle Star and Yuval. It was in a common form familiar to the reinsurance market. It was signed on behalf of Eagle Star by their reinsurance manager. It was signed on behalf of Yuval by Mr. Jenkins who was then the manager of Ben-Zur. It contained an arbitration clause in these words:

> If any question or dispute shall arise . . . the same shall . . . be referred to the Arbitration of two Arbitrators . . . The said Arbitrators shall appoint an Umpire . . . The said Arbitrators and Umpire shall be executive officers of Insurance or Reinsurance Companies and the seat of the Court of Arbitration shall be in London . . . The Arbitrators and Umpire shall not be bound by the strict rules of law but shall settle any difference referred to them according to an equitable rather than a strictly legal interpretation of the provisions of this Agreement and the referendum shall be subject to the provisions of the Arbitration Act 1950 or any statutory modification thereof for the time being in force. The obtaining of an award in accordance with this Article shall be a condition precedent to any right of action in respect of any difference falling within the scope thereof.

I will come back to that clause later.

To proceed with the story. As long ago as 1967 this treaty of reinsurance was made, but unfortunately that smart young man Mr. Delbourgo seems to have entered into so much business that the premium income, instead of conforming to the estimate of £250,000, went up to £1,750,000. That meant, of course, that the reinsurers would get more premiums — but also they might be faced with very heavy losses. This difference was so great that Eagle Star ought to have warned the reinsurers about it. But they never did so.

The view of the insurance market on such a matter is shown by a decision in an arbitration in another case given on Jan. 14, 1976 which was shown to us. The arbitrators were Mr. Addison, the general manager of Sun Alliance, and Mr. Corbett, a director of the Excess Insurance Co. Ltd. They said in their report:

> We consider that [the insurers] had a duty to inform [the reinsurers] immediately of any material alteration in the estimate of premiums . . . Whatever may be [the reinsurers] strictly legal rights in relation to the disparity between the premiums developed and the estimates given, we are charged under the terms of the arbitration clause to settle this dispute according to an equitable rather than a strictly legal interpretation of the terms of the contract . . . we consider that it is reasonable in the circumstances for the reinsurers to question the validity of the reinsurance.

In the result, these operations of Mr. Delbourgo gave rise to so much trouble that Eagle Star parted company with him and his company Delbourgo Ltd. The arrangements between them were terminated so far as new business was concerned. It was widely noticed in the financial press. About the same time the

Yuval company terminated Ben-Zur's agency for them, also in regard to new business.

This gives rise to another point. Although the treaty was terminated in regard to new business, nevertheless it appears that in July, 1969 Ben-Zur, without any further communication with Yuval, renegotiated the 1967 treaty of reinsurance. They increased the retention of Eagle Star to 42½ per cent. and reduced the shares of the reinsurers proportionately. Yuval say they were told nothing of this renegotiation.

For some years Eagle Star submitted reinsurance accounts to Yuval. But in 1976 the losses greatly exceeded the income. Eagle Star claimed nearly £70,000 was due to them from Yuval.

On Dec. 3, 1976 Eagle Star issued a writ against Yuval. They ignored the arbitration clause and issued a writ on which was indorsed the statement of claim. It said:

> The plaintiffs claim is (1) for damages for breaches of contracts of reinsurance made between the plaintiffs and the defendants in or about 1967 (2) for a declaration that the defendants are liable to the plaintiffs under the aforesaid contracts. *Particulars.* The aforesaid damages amounted to £69,610.21 as at 10th November 1976, full particulars of which have been supplied to the defendants and exceed three folios.

That indorsement was very defective. There were several contracts of reinsurance in 1967. It does not specify which is the contract that is sued upon. It claims damages at large without giving the slightest indication of the nature of the breach or of the way in which the damages arise.

Seeing that the indorsement was so very defective, Yuval applied to strike it out. They took out a summons on Dec. 21, 1976 under R.S.C., O.18, r.19, and alternatively under the inherent jurisdiction of the Court, asked that:

> . . . the Statement of Claim herein be struck out or amended on the ground that it may prejudice embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the Court and that in the meantime all proceedings herein be stayed.

Faced with that application, Eagle Star themselves abandoned their very defective statement of claim. They replaced it by another in which they gave proper particulars. They specified several treaties and gave particulars of sums claimed amounting in all to £69,610.21. They took out a summons under O.14 for summary judgment against Yuval.

The Yuval company resisted that summons. They also took out a summons to stay the proceedings on the ground of the arbitration clause. Both summonses came before Mr. Justice Parker in the Commercial Court. He refused to stay the action. He held that Yuval had taken a "step" in the proceedings, and therefore it was not open to them to apply to have the matter sent to arbitration. So he gave judgment for the full amount with interest; but, pending an appeal, he gave a stay on £20,000 being paid into Court. Now there is an appeal to this Court.

I will deal first with the summons under O.14. It seems to me there are several triable issues. First the "fronting arrangement". Although Eagle Star did not know of it themselves, their brokers, Pearson, Webb, Springbett, did know, or may be deemed to have known, that there was a fronting arrangement. They knew that Yuval were only getting a small commission of 1 per cent.; and that the real principals (who were to take the premiums) were Bastion Ltd., a company with which Mr. Delbourgo was closely concerned, as were the brokers themselves. It is open to question whether Eagle Star can sue Yuval as principals on this treaty of reinsurance when, to the knowledge of their agents, Yuval were only front men for Bastion. Bastion are now in compulsory liquidation. So if Yuval are liable, they will have to pay the whole of the £69,000, in return for which they have only received the tiny commission.

The next triable issue is the effect of the representation about the estimated premium income. Instead of being £250,000 it turned out to be £1¼ million. The effect of that representation on the dealings between the parties seems to me to be a matter for serious consideration.

The third matter is the renegotiation in 1969. Yuval, through their director Mr. Kaplan, say they knew nothing whatever about it and they determined the agency of Ben-Zur some time before. This may again be a triable issue.

So it seems to me that, on the summons under O.14, there are several triable issues. It would not be right at this stage to enter judgment against Yuval.

I turn now to the question of arbitration. At one time the Courts used to be very jealous of arbitrations. They used to find all sorts of reasons for interfering with arbitrators and their awards. But the approach to arbitration has changed in modern days. The Courts welcome arbitrations in commercial disputes. They encourage references to arbitration by commercial men in the City of London. They do not lightly interfere with their awards.

It seems to me that if a defendant who is being sued in the Courts asks that a matter should go

to arbitration in accordance with their agreement, prima facie that agreement ought to be honoured: the action should be stayed and the matter should be allowed to go to arbitration. Subject to this statutory qualification: If the defendant has taken a "step in the proceedings", then he is too late. He can no longer apply for the Court proceedings to be stayed.

In order to ask for the Court proceedings to be stayed, the defendant must apply to the Court:

> . . . at any time after appearances and before delivering any pleadings or taking any other steps in the proceedings.

Those are the words of s.4 of the 1950 Act and s.1 of the 1975 Act. What then is a "step in the proceedings"? It has been discussed in several cases. On principle it is a step by which the defendant evinces an election to abide by the Court proceedings and waives his right to ask for an arbitration. Like any election, it must be an unequivocable act done with knowledge of the material circumstances. That is implicit in one of the earlier cases on the subject. It is *Ives & Barker v. Willans,* [1894] 2 Ch.478 where a defendant, by a formal document, applied for a statement of claim. It was held that it was not a "step in the proceedings". Lord Justice Lindley said (at p.484) that the defendant:

> . . . did not know from the writ what the particular breaches were in respect of which the plaintiffs were suing him; and until he did know that, at all events, how was he to form an opinion as to whether it would be desirable to apply for an order or not? He had not the materials before him to exercise his judgment in the matter . . . Before a man can make up his mind as to which of the alternatives he will take, he ought to know what the alternatives are, and ought to be in a position to exercise some kind of judgment in the matter.

Soon afterwards there was *Ford's Hotel v. Bartlett,* [1896] A.C.1 where the defendants thrice obtained the plaintiff's consent for further time for delivering their defence, and their fourth request being refused, took out a summons and got an order for a further 14 days. It was held to be a "step in the proceedings". Lord Shand said (at p.6) that the summons before the Master:

> . . . was unquestionably judicial and implied a statement to the effect that the defendants were to defend the action . . . this appears to me to have been in effect an abandonment of their proposal to have the subject of the case disposed of by arbitration.

Then there was *Parker, Gaines & Co. Ltd. v. Turpin,* [1918] 1 K.B.358 where the defendant applied for discovery of documents, obtained an order, and was given discovery in the action. That was held to be a "step in the proceedings". The defendant had forgotten or overlooked the arbitration clause in the contract and tried to use that as an excuse. Obviously he would not be allowed to do that. Obtaining an order for discovery was an unequivocable act which clearly evinced an election to abide by the Court proceedings. But applying for particulars would not have been. Mr. Justice A. T. Lawrence said (p. 361):

> I should have been disposed to look leniently upon the respondent's application for particulars, if that had been the only step alleged, because the particulars were not very ample. But an application for discovery is a very different matter.

On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a "step in the proceedings" must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.

Applying this principle, the defendants here were presented with a writ indorsed with a statement of claim which was very defective. They applied, quite properly, to strike it out. That was not an affirmation of the correctness of the proceedings. Quite the contrary. It was a disaffirmation of them. It was not a "step in the proceedings" such as to debar the defendants from applying for a stay.

There is one further point. It is of much importance. It is the clause which is common in treaties of reinsurance, providing that the arbitrators are not bound by the strict rules of law but are enjoined to decide:

> . . . according to an equitable rather than a strictly legal interpretation of the provisions of the agreement.

Such a clause was considered by Mr. Justice Megaw in *Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekgringeen,* [1962] 2 Lloyd's Rep.257. He was of opinion that such a clause was invalid and should be given no effect. Despite its presence, the arbitrators were to decide in accordance with the ordinary rules of law. If the arbitrators did not do so, their award could be set aside by means of a case stated. Alternatively he said at p.264 that:

> . . . if this provision has any effect at all, its effect, as I see it, would be that there would be no contract, because the parties did not intend the contract to have legal effect — to affect their legal relations. If there were no contract, there would be no legally binding arbitration

clause, and an "award" would not be an award which the law would recognise.

That dictum was treated as correct by Professor Ivamy in his book on Personal Accident Insurance. He said:

> Such a clause will be held to purport to oust the jurisdiction of the court and therefore be void and the treaty as a whole will not be considered to be a contract; for the parties would not consider it to have legal effect and any award under it would be unenforceable.

I cannot accept that view. I do not believe that the presence of such a clause makes the whole contract void or a nullity. It is a perfectly good contract. If there is anything wrong with the provision, it can only be on the ground that it is contrary to public policy for parties so to agree. I must say that I cannot see anything in public policy to make this clause void. On the contrary the clause seems to me to be entirely reasonable. It does not oust the jurisdiction of the Courts. It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators may properly do today under such a clause as this. Even under an ordinary arbitration submission, it was a mistake for the Courts in the beginning to upset awards simply for errors of law. See what Mr. Justice Williams and Mr. Justice Willes said in *Hodgkinson v. Fernie,* (1857) 3 C.B.N.S. 189 at pp. 202, 205. That mistake can be avoided by such a clause as this: for, as Lord Justice Scrutton said in *Czarnikow v. Roth, Schmidt & Co.,* (1922) 12 Ll.L.Rep.195; [1922] 2 K.B.478, the parties can, by express provision, authorise arbitrators to depart from the strictnesses of the law.

So I am prepared to hold that this arbitration clause, in all its provisions, is valid and of full effect, including the requirement that the arbitrators shall decide on equitable grounds rather than a strict legal interpretation. I realise, of course, that this lessens the points on which one party or the other can ask for a case stated. But that is no bad thing. Cases stated have been carried too far. It would be to the advantage of the commercial community that they should be reduced: and a claim of this kind would go far to ensure this.

Holding therefore that the arbitration clause is valid in all its parts, I think the action should be stayed and the matter referred to arbitration in accordance with the clause.

I would allow the appeal accordingly.

Lord Justice GOFF: I agree with the judgment which my Lord has just pronounced and with the reasons which he has given for his conclusions.

I think the first question we have to consider is the application for summary judgment under O.14 for if indeed the position were that there was no genuine dispute it would hardly seem logical to consider whether the alleged dispute should be determined by the Court or by an arbitrator; and indeed the new Act of 1975, which does not apply to this particular case, appears to provide in terms that there shall not be a reference if there be no genuine dispute. I say "appears to do so" because I think there is a question pending as to the construction of that Act which I do not wish to prejudice.

I therefore direct my mind to the O.14 aspect, and it is clear in dealing with a summons under that jurisdiction that one is not deciding the matter on the merits, and one is not even looking to see whether the defendant has a defence which is likely to succeed. The defendant is entitled to defend if he shows that there is a reasonably triable issue which is not merely fanciful or sham. In my judgment, there are at least three such triable issues in this case.

The first is as to the extent of the actual or ostensible authority of Yuval's London agents to enter into the original contract by acceptance of the slip in February, 1967; then, to enter into the formal treaty of the Dec. 7, 1967 and, more particularly, to enter into an affirmation with modifications of that contract which was done on the July 16, 1969.

The second is whether the agreement, which admittedly was a fronting agreement, was one made on terms that Yuval should not be personally liable unless put in funds by the ultimate reinsurers. If that was Yuval's intention, was it sufficiently brought to the notice of Eagle Star so as to preclude them from holding Yuval liable as between themselves and Eagle Star?

For that purpose one has to bear in mind that the transaction originated with a slip provided by Pearson, Webb, Springbett Ltd., who were Eagle Star's brokers and agents for the purpose, and it is endorsed, as was accepted on behalf of the Yuval company, with the words "Sub 100% R/I at 1% our credit", which means that they were agreeing that all they were going to get out of it was a 1 per cent. commission, which would be a very trifling amount indeed. I think it may well turn out — but it depends upon discovery and the evidence at the trial — that Pearson, Webb, Springbett did know and did bargain upon the footing that this was not to bind Yuval unless they were placed in funds by the Bastion company, and being the brokers of Eagle Star that may be held attributable to Eagle Star.

The third triable issue is whether the contract was liable to be set aside or whether liability under it was limited by the fact that the slip itself contained a statement that the estimated premium income was £250,000 for 100 per cent.

whereas it turned out to be vastly more; and it is conceded that the effect of that would be greatly to increase the liability of Yuval in the aggregate notwithstanding the limitations there might be on their liability in particular contracts, and it would do so although it would not materially increase their income because by reason of the note which I have mentioned they were not taking a share in the premiums but a very small 1 per cent. commission.

It is said: Well; in truth there are not any such triable issues at all because the London agents for Yuval accepted concessions which Eagle Star had negotiated with other reinsurers when it was discovered that the premium income had grown to so large an extent and they knew from information provided to them by Bastion that Bastion took the view that the liability was to be that of Bastion only and neither could nor would obtain any assurance from the Eagle Star not to hold Yuval liable.

But that still leaves the matter of a triable issue for two reasons, first, because the letter from Bastion was based upon what may well turn out to be an erroneous statement that Eagle Star were not parties to the original negotiations when the whole matter originated with their brokers' slip; and, secondly, because it is averred by the appellants that at any rate before the reaffirmation agreement of the July 16, 1969 the authority of the London agents Ben-Zur has been revoked, at any rate to such an extent as would disentitle them to enter into any such agreement so as to bind Yuval. I say nothing as to how those problems will in fact turn out: that is not my function or duty under O.14. All I do say is that it is perfectly clear to my mind that there are triable issues here and, with respect to the learned Judge below, it was wrong to award summary judgment to the plaintiffs.

I then turn to the arbitration clause, and the first problem which arises is whether the appellants have disentitled themselves to rely upon it in that they have taken a step in the action by issuing a summons to have the statement of claim struck out on the ground, using common form language, that it might prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the Court. It is clear from the authorities that it is not a step in the action if one merely asks for further and better particulars without actually applying to the Court for an order requiring the other party to give them. In *Ives & Barker v. Wilans* (1894) 2 Ch.478 at p.484 Lord Justice Lindley said:

> The authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.

Taking that out of its context, that would appear to be a complete answer to the appellants, but it is to be observed that in the previous paragraph his Lordship said:

> Quite apart from the case not being within the words, therefore, it is not within the spirit or the sense of the Act.

In the case of *Parker, Gaines & Co. Ltd. v. Turpin*, [1918] 1 K.B.355 the defendant did actually take out a summons asking for particulars of the statement of claim. There was a cross-summons for discovery. The two summonses were heard together, and the defendant himself sought an order for discovery. It was held in that case that that was a step in the action, but it is pertinent to observe that Mr. Justice A. T. Lawrence said obiter at p.361:

> . . . I should have been disposed to look leniently upon the respondent's application for particulars, if that had been the only step alleged, because the particulars were not very ample. But an application for discovery is a very different matter.

So where the particulars were not very ample, his Lordship took the view, although, as I say, obiter, that the summons asking for particulars would not be a step in the action and a fortiori neither would a summons to strike out for the same reason.

I also observe from Russell on Arbitration, 18th ed., p.147, that filing affidavits in reply to a plaintiff's affidavits in support of a motion for a receiver in a partnership action was held not to be a step in the proceedings.

The writ and so-called specially endorsed statement of claim in the present case was vague in the extreme and completely inaccurate. It failed to specify what contract or contracts were sued upon and it alleged that the claim was for damages whereas in truth it was for moneys due under the contract. Therefore, without committing myself to the proposition that a summons to strike out for want of particulars can never be a step in the action, I am satisfied on the facts that it ought not to be so regarded in this case, and the appellants have accordingly not precluded themselves by asking for a stay.

The last question then remains: Ought we to exercise our discretion by granting a stay? On that, particularly in view of the fact that the arbitrators by the express terms of the clause would be able to view the matter more leniently and having regard more generally to commercial considerations than would be done if the matter

were heard in Court, I agree that there ought to be a stay. That was the contract of the parties; and it seems to me that a position has arisen in which it is pre-eminently desirable that the dispute between them should be determined in that way.

Therefore, as I say, I agree with the order proposed by my Lord.

Lord Justice SHAW: I agree with both judgments. I would emphasise that I am by no means of the view that a summons to strike out a claim is not generally to be regarded as a step in the action to which it relates. A step may be in the direction of promoting the progress of the action or of impeding the action or of extinguishing it. But the circumstances of this case are peculiar. The claim is so vaguely formulated in what purports to be the statement of claim that the defendants could not know whether it referred to any or to which particular contract containing an agreement to submit disputes to arbitration. It is this consideration which satisfies me that in this case it is right to reject the submission that the defendants have taken a step in the action and to dismiss the application that the action should be stayed. I would allow the appeal.

[Order: Appeal allowed with costs.]

COURT OF APPEAL

Dec. 16, 19 and 20, 1977

B.P. BENZIN UND PETROLEUM A.G. AND ANOTHER

v.

EUROPEAN-AMERICAN BANKING CORPORATION AND OTHERS

Before Lord DENNING, M.R., Lord Justice ROSKILL and Lord Justice BROWNE

Charter-party (Time) — Procedure — Interpleader — Jurisdiction — Charter hire paid into joint account — Expenses incurred in operating vessels — Whether charter hire should be used to discharge liabilities — Whether Court had jurisdiction to order disposal of interpleaded moneys — R.S.C., O.17, r.8.

The defendant banking corporation loaned large sums of money to the Colocotronis companies to enable them to purchase ships for their fleet, the amount being guaranteed by four members of Colocotronis and secured by mortgages on ships belonging to Panamanian companies in which Colocotronis were shareholders.

The market fell in December, 1975 and the banking corporation demanded further security but left the running of the ships to Colocotronis or their agents. However disputes arose and in October, 1976, the banking corporation called in the loan and began to realize some of the securities.

Three of the ships, *Champion Colocotronis, Courageous Colocotronis* and *Topaz* were on time charter to the plaintiffs, and for a time the charter hire was paid to the banking corporation. The banking corporation used the proceeds to pay out current expenses on the ships and in reduction of part of the outstanding indebtedness.

Colocotronis protested, contending that the loans and all dealings with the banking corporation were void since the banking corporation was a moneylender and was not registered as such and they (Colocotronis) were entitled to the charter hire, since they owned the Panamanian companies.

The plaintiffs paid the charter hire on the three ships into a joint account and claimed interpleader relief.

Held, by ROBERT GOFF, J., that since the disbursements were disbursements which had been paid out in order to earn the charter hire, it was only fair and just that those disbursements and expenses should come out of the moneys which had been paid into the joint account.

Judgment for the banking corporation.

On appeal by Colocotronis:

Held, by C.A. (Lord DENNING M.R., ROSKILL and BROWNE, L.JJ.), that (1) the jurisdiction of the Court under R.S.C., O.17, r.8 was as