[2020] EWHC 1983 (Comm)

Case No: CL-2020-000136

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: 23 July 2020

Before :

MR JUSTICE FOXTON

- -

Between :

NATIONAL BANK OF FUJAIRAH (DUBAI BRANCH)

Counterclaimant

- and –

TIMES TRADING CORP

Defendant to Counterclaim

- -
- -

Steven Berry QC and John Robb (instructed by **Campbell Johnston Clark Limited**) for the **Claimant**
David Lewis QC and Hannah Glover (instructed by **Reed Smith LLP**) for the **Defendant**

Hearing dates: 10 July 2020
Sent to Parties: 20 July 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 23 July 2020 at 10:30am

Mr Justice Foxton:

Introduction

1. This is the application of the Counterclaimant ("NBF") under section 12 of the Arbitration Act 1996 ("the 1996 Act") to extend the time for commencing arbitration proceedings against the Respondent ("Times").

2. NBF is said to be the holder of 27 bills of lading ("the Bills of Lading") issued in respect of cargo shipped on the MV "ARCHAGELOS GABRIEL" ("the Vessel"). Cargo from the Vessel was discharged without production of the Bills of Lading, against letters of indemnity ("LOIs"), over the period between 10 and 20 June 2018. NBF alleges that the discharge was wrongful, and that it is entitled to bring claims as the holder of the Bills of Lading in respect of what it alleges was a misdelivery. The Bills of Lading required all disputes to be submitted to arbitration in London.

3. NBF commenced an arbitration in London against the registered owners of the Vessel, Rosalind Maritime LLC ("Rosalind"). That arbitration was commenced within the one year limitation period arising under Article III Rule 6 of the Hague Rules which it has been held, at first instance, applies to actions for misdelivery where the cargo has been delivered other than against the presentation of bills of lading (Deep Sea Maritime Ltd v Monjasa A/S (The Alhani) [2018] EWHC 1495 (Comm)). However, it has since been suggested that the carrier under the Bills of lading was not Rosalind, but Times, to whom Rosalind is said to have bareboat chartered the Vessel. If NBF is required to bring its claims for misdelivery against Times, then an arbitration in respect of those claims was not brought within one year of the completion of delivery. It is to guard against the possibility that any claims against Times are time-barred that NBF brings this application.

4. In bringing this application, NBF does not admit that Times is the appropriate defendant to the claim for misdelivery or that, absent an extension of time, its claim is time-barred. However it is well-established that the Court is entitled to determine a 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, 646 (Mance J).

5. NBF has already commenced proceedings against Times in respect of the alleged misdelivery of the cargo before the High Court of Singapore. It is Times' position that those proceedings were commenced in breach of the binding agreement for London arbitration, and it applied to the Commercial Court for an anti-suit injunction to restrain those proceedings. That injunction was granted by Mrs Justice Cockerill, but only on terms that Times undertake not to take a limitation defence in the arbitration. Cockerill J's judgment is reported at [2020] EWHC 1078 (Comm). Permission to appeal against the judgment was refused by Flaux LJ.

6. Having failed in its attempt to challenge the condition imposed by Cockerill J, Times did not seek to maintain the injunction. Accordingly, it now falls to NBF to pursue its s.12 application.

The background facts

7. I have had the benefit of an agreed chronology, and of the summary of the facts previously given by Cockerill J, on which I have drawn in preparing this section of the judgment.

8. The Vessel was originally owned by Briza Holdings SA (“Briza”), with Times Navigation Inc (“Times Navigation”) as the Vessel’s ISM Manager. Briza time-chartered the Vessel to Atlantic Palaemon Shipping AG (“APS”) on 4 April 2018 (“the Time Charter”), who in turn entered into a sub-charter with Harmony Innovation Shipping Ltd (“Harmony Hong Kong”) on 24 April 2018 for a time charter trip. Another Harmony company, Harmony Innovation Shipping Pte Ltd (“Harmony Singapore”) entered into a voyage charterparty for the Vessel with Trafigura Maritime Logistics Ltd (“TML”), who in turn entered into a sub-voyage charter with Trafigura Pte Ltd (“Trafigura”) in connection with a contract of sale from Trafigura to Farlin Energy & Commodities FZE (“Farlin”). NBF provided finance to Farlin in connection with that contract of sale.

9. Times was incorporated on 16 April 2018, and Rosalind on 18 April 2018. Rosalind acquired the Vessel from Briza on 27 April 2018, and on the same date entered into a bareboat charter with Times (“the Bareboat Charter”), as part of a lease financing arrangement. The Time Charter was amended on 27 April 2018 to reflect the transfer of the Vessel from Briza to Rosalind and the bareboat charter of the Vessel by Rosalind to Times, and on 10 May 2018 Briza novated its interest under the Time Charter to Times.

10. On or about 11 May 2018, the Vessel loaded 55,100 MT of steam (non-coking) coal of Indonesian origin (the "Cargo") in bulk in East Kalimantan, Indonesia. The Bills of Lading were issued on the Congenbill 1994 form on or around 11 May 2018 on behalf of the master. As I have indicated, the Cargo was discharged between 10 and 20 June 2018 at Navlakhi Port, India without production of the original Bills of Lading against LOIs. The LOIs were given:

    i. by Farlin to Trafigura;

    ii. by TML to Harmony Singapore;

    iii. by Harmony Hong King to APS; and

    iv. by APS to Rosalind.

11. As a result, the 12 month period for bringing suit under Article III Rule 6 of the Hague Rules in respect of the cargo discharged at Navlakhi (if applicable) expired on 20 June 2019.

12. The Bills of Lading contain a General Paramount Clause and also incorporated an arbitration clause from a voyage charterparty between TML and Harmony Hong Kong dated 25 April 2018. That clause provides:

    "54 Law & Arbitration

54.1 This Charterparty, any question regarding its validity, existence or termination, and any non-contractual obligations arising from or connected with it shall be governed by and construed in accordance with English law.

54.2 Any dispute arising out of or in connection with this Charterparty (including any question regarding its validity, existence or termination and any non-contractual obligations arising from or connected with it) shall be referred to arbitration in London before three arbitrators in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof…".

13. NBF, through its Singapore solicitors, Rajah & Tann Singapore LLP ("R&T"), asserted a claim for misdelivery against the carrier, which was addressed to the Vessel's registered owner, Rosalind "c/o Times Navigation Inc", on 28 December 2018. The letter stated:

> "2. We are writing to you as the registered owners of the vessel "ARCHAGELOS GABRIEL"….
>
> 7. In the event the Cargo is no longer in your possession, our clients invite an urgent account from you on the present whereabouts of the Cargo. (…) In your response, our clients also invite you to state in writing with full supporting documents why you should not be liable to our clients for misdelivery and/or conversion of the Cargo. Please let us hear from you by 1800 h, today, 28 December 2018…"

14. The West of England ("the Club"), with whom Times, Rosalind and Times Navigation were all entered for FD&D cover on 19 October 2018, appointed the law firm of Waterson Hicks ("WH") to respond to the letter. WH understood those instructions to come "from both the Club (on behalf of its Members) and from Times Navigation". WH replied that day stating:

> "We act on behalf of the Owners of this vessel. Bearing in mind that the Bills of Lading were issued over seven months ago we are very surprised that your clients should purport to assert title to the cargo after such a long period of delay and without anything having been said previously. (…) Rather than our clients being called upon to explain what they did with the cargo, with respect we believe it is incumbent upon your clients to explain what they have been doing for the last seven and a half months."

15. On 2 January 2019 NBF issued an *in rem* Writ of Summons in the High Court of the Republic of Singapore under case number HC/ADM 2/2019 ("the Singapore Proceedings"). That writ was addressed in the familiar form to "Owners and/or Demise Charterers and/or other persons interested in …" the Vessel, and stated that it was issued by NBF as " lawful holders and/or indorsees of the Bills of Lading ".. It claimed "against the Defendants as carriers… (a) Damages for breach of the contract(s) of carriage contained in and/or evidenced by the Bills of Lading…" with alternative claims in tort and bailment.

16. On 1 January 2019, R&T were contacted by MFB Solicitors ("MFB") who acted for APS and the two Harmony companies. On 3 January, R&T told MFB that

> "As at the time of writing, we have not heard from Trafigura or indeed (in any meaningful sense) from Head Owners, save for what appears to be a holding message from Waterson Hicks for the latter. (…) Do please also extend to us a copy of the LOI presumably given to Head Owners."

17. R&T also sent an email to WH stating:

> "Our clients indeed are informed for the first time by your clients – through your email – that the subject cargo has been delivered to persons other than our clients. Your email gave no particulars despite our clients' clear queries conveyed on 28 December 2018. Your clients are invited to now be forthcoming with their answers. Please treat this message as a formal demand for security for our clients' principal claims against the Vessel…"

That email was passed down the LOI and charterparty chain to APS, Harmony and Trafigura.

18. Correspondence was exchanged between WH, MFB and Trafigura's solicitors Holman Fenwick Willan LLP ("HFW") about the need for security to be provided to prevent the arrest and detention of the Vessel, and between R&T and MFB on the same subject. On 9 January Harmony Singapore obtained an order requiring Trafigura to provide full security for NBF's claims. Security was provided on 11 February 2019 in the form of a bank guarantee from Sumitomo Mitsui Banking Corporation Europe Limited ("SMBC") in the sum of US$4.65m ("the Guarantee").

19. On 15 February 2019 Trafigura, Times, Rosalind and TML entered into a Claims Handling and Cooperation Agreement ("the Cooperation Agreement"), pursuant to which Trafigura became responsible for handling NBF's misdelivery claims on behalf of Rosalind and Times. Times is described in that agreement as the bareboat charterer of the Vessel.

20. On 4 June 2019, within the Hague Rules 12 month limitation period, NBF commenced London arbitration proceedings for misdelivery by a notice addressed to "Rosalind Maritime LLC, Owners of the Vessel 'Archagelos Gabriel' c/o Times Navigation Inc" . HFW replied to that notice, saying that they acted for Trafigura "who have the conduct of the defence of your clients' alleged claims". The letter did not identify exactly for whom Trafigura acted, nor did it mention the Bareboat Charter. The letter stated that HFW's clients proposed to appoint an arbitrator, and reserved rights generally in respect of the validity of the notice of arbitration.

21. After the 1 year time limit had expired, on 10 July 2019, Reed Smith appointed an arbitrator on behalf of the respondent to the arbitration proceedings which NBF had commenced, stating that they acted for "Owners". On 19 July 2019, Reed Smith sent NBF a letter stating that the Vessel was under a bareboat charter to Times when the Bills of Lading were issued. The letter stated:

> "We note that the Notice of Arbitration purports to commence an arbitration against Rosalind. However at the material time the Vessel was bareboat chartered to Times Trading Corp… The Bills of Lading were not issued by Rosalind but were issued by Times. Accordingly, we do not accept the validity of the Notice of

Arbitration and our client will contend that the Notice of Arbitration purports to start an arbitration against the wrong party."

22. NBF sought unsuccessfully in correspondence to obtain disclosure and particulars of the alleged bareboat charterparty. A copy of the alleged Bareboat Charter was ultimately disclosed on 9 March 2020 on Times' application for an anti-suit injunction

23. On 7 November 2019, at NBF's request, Reed Smith on behalf of Trafigura confirmed that the Guarantee was to be read such that "references to the word 'Owners' are a reference to the legal entity being the 'Carrier' (as determined by the competent Tribunal and/or on appeal by the competent Courts) under the Bills of Lading". On 9 November 2019, NBF served the *in rem* Writ of Summons in the Singapore Proceedings on the Vessel. A memorandum of appearance was subsequently entered by Resource Law LLP (an affiliate of Reed Smith, Times' solicitors in this jurisdiction) on behalf of both Rosalind and Times. The Guarantee was formally amended on 18 November 2019 to include "Demise Charterers" within the definition of "Owners". On 26 February 2020, NBF was paid out the full sum of US$4.65m under the Guarantee.

24. There were a series of pre-trial conferences ("PTCs") in the Singapore Proceedings, on 26 December 2019, 9 January 2020, 23 January 2020, 27 February 2020 and 19 March 2020. At the first PTC on 26 December 2019, NBF asked whether Resource Law acted for Rosalind or Times, and was told: "Our position for the Singapore proceedings is that we do not take any position". On 7 January 2020, ahead of the second PTC, Resource Law said that they acted for both Rosalind and Times.

25. So far as the London arbitration is concerned, the Tribunal is yet to be constituted. On 20 March 2020 NBF issued this application.

The applicable legal principles

26. Section 12 of the Act provides 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 […]".

27. The principles which govern s.12 applications have recently been summarised by Cockerill J in FIMbank Plc v KCH Shipping Co Ltd [2020] 1765 (Comm) at [73]-[83] and I gratefully adopt her summary, which in turn draws on the summary given by Haddon-Cave LJ in Haven Insurance v Elephant Insurance [2018] EWCA Civ 2494, [33]-[38].

28. In short, so far as the general approach is concerned:

i. S.12 was the result of 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.

ii. S.12 was intended to reflect the underlying philosophy of the 1996 Act of party autonomy.

iii. 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.

iv. 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.

29. So far as s.12(3)(a) and the "circumstances outside the reasonable contemplation of the parties" test is concerned:

i. The relevant threshold is 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".

ii. This imposes a double requirement. There must be both (i) circumstances outside the parties' reasonable contemplation and (ii) injustice.

iii. 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.

iv. Matters are within the "reasonable contemplation of the parties" if they are "not unlikely to occur".

v. 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. However, conduct which goes beyond mere negligence might be. 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.

30. I would add that just as negligence of the claimants' own representatives will not without more satisfy s.12(3)(a), nor will the presence of such negligence preclude the requirements of s.12(3)(a) being satisfied.

31. So far as s.12(3)(b) is concerned, and whether the respondent's conduct makes it unjust not to extend time:

i. A claimant must show some positive conduct on the part of a respondent that renders reliance on the time limit unjust.

ii. The respondent's behaviour does not have to be the sole or even the predominant cause of the failure to meet the deadline, but a causal nexus must exist.

iii. The respondent's conduct does not need to be wrongful or blameworthy. Unintentional conduct on the part of the respondent may suffice.

32. If the jurisdictional hurdle is surmounted, then the authorities establish that the court retains a discretion to refuse to extend time (although I should make clear that Mr Berry QC reserved his clients' right to challenge that conclusion before a higher court, if necessary).

33. Mr Berry QC put his case primarily on the basis of s.12(3)(b), relying on s.12(3)(a) only as a fall-back. I am going to consider the provisions in the same order.

Section 12(3(b)

What conduct, if any, is attributable to Times?

34. Mr Berry QC's case on attribution can usefully be considered in two phases.

35. The first phase concerns the period up to 18 January 2019, before WH learned of the existence of the Bareboat Charterparty and that it was Times and not Rosalind which was the carrier under the Bills of Lading. In relation to this period, Mr Berry QC contends:

    i. WH was generally appointed by the P&I Club for Times and Rosalind and the messages were sent pursuant to that general authority on behalf of Times; and

    ii. WH was specifically instructed by natural person(s) working for Times Navigation, Times Navigation was authorised to act only for Times, not Rosalind, and it is to be inferred that those persons on behalf of Times authorised the relevant messages.

36. Mr Lewis QC submits that WH was responding to a letter of claim addressed to "Rosalind Maritime LLC c/o Times Navigation" who were described as the registered owners of the Vessel, and that in replying "on behalf of the Owners of this vessel", WH were clearly acting, and only acting, for Rosalind.

37. On this issue I prefer Mr Berry QC's submissions:

    i. R&T's letter of 28 December 2018 was addressed to "Rosalind … c/o Times Navigation", but in its subject-matter it was clearly aimed at the carrier of cargo on the Vessel. This was clear from its heading ("carriage of 55,100mt of … coal: demand for delivery"), from the reference to R&T's clients being lawful holders of the Bills of Lading which were enclosed, the complaint that Cargo may have been delivered otherwise than against production of the Bills of Lading, the formal demand for delivery of the Cargo and the request for an explanation as to why the addressee of the letter was not responsible for misdelivery or conversion of the Cargo.

    ii. The broad target of that letter is reflected in the fact that the Club instructed WH in response to it not only for Rosalind, but for its members (Rosalind and Times). It is also consistent with the terms of WH's response. It too was headed "B/L's dated 11 May 2018 for discharge in India" and it identified the party for whom it was acting not as a named entity, but by reference to a function ("we act on behalf of the Owners of the Vessel"). It was written in terms which were suggestive that WH's clients were parties to the Bills of Lading (for example referring to the time which had passed since the Bills of Lading were issued) and suggested that WH's clients were the carrier through the words "our clients being called upon to explain what *they did with the cargo*".

    iii. Further, as Mr Berry QC pointed out, one of the immediate sources of WH's instructions was Times Navigation, an entity which had authority to act for Times under the Services Management Agreement of 1 April 2018 between Times and Times Navigation, but which on the evidence did not act for Rosalind. It appears to have been Times Navigation who provided relevant documents to WH, and in the absence of evidence to the contrary it is reasonable to infer that Times Navigation obtained those documents from Times. The fact that the immediate source of WH's instructions appears to have been an agent acting for Times provides further support for Mr Berry QC's

submission that Times falls within the circle of those on whose behalf WH's letter of 28 December 2018 is to be regarded as having been sent.

38. In relation to the period after 18 January 2019, NBF's case is *a fortiori*. For by this stage, there was not simply correspondence which was targeted at the carrier and responded to on that basis, but correspondence written at a time when WH knew that (at least on the basis of its instructions) the carrier was Times and not Rosalind. In circumstances in which it is common ground that WH was acting for Times as well as Rosalind, and when it knew that if Rosalind informed NBF that it was not the carrier, proceedings were likely to be commenced against Times, it would in my mind be artificial to regard correspondence written by WH in the interests of both its clients, with a view to not disclosing Times' involvement, as correspondence sent only on behalf of Rosalind and not on behalf of Times. The suggestion that the course of conduct is explained not by reference to the immediate benefit to one of WH's clients, Times, but the longer term contingent benefit to another client, Rosalind, is redolent of Hamlet's observation that "Imperious Caesar, dead and turn'd to clay, might stop a hole to keep the wind away".

39. Finally, Mr Berry is able to point to the fact that on 15 February 2019, Times, Rosalind and Trafigura entered into the Co-operation Agreement under which Trafigura took over the handling of NBF's claim "on behalf of [Rosalind] and/or Times" and was authorised to handle the claim on their behalf. I accept that communications by HFW after this date are attributable to Times to the extent that they involved implementing the strategy of not disclosing the existence of the Bareboat Charter or the involvement of Times until after the limitation period had expired.

40. However, I reject Mr Berry QC's submissions that correspondence between MFB and NBF/R&T should be regarded as conduct on behalf of Times merely because WH encouraged MFB's clients to arrange security to prevent NBF arresting the Vessel. It was in the interest of WH's clients that someone else provide security so as to minimise the risk of arrest or detention of the Vessel. The fact that WH urged MFB's clients to arrange security does not have the effect of making subsequent communications by MFB attributable to Times.

Did any conduct undertaken on behalf of Times give rise to circumstances which were outside the reasonable contemplation of the parties when they agreed on the provision in question?

41. Mr Berry QC relied on what were said to be six distinct areas of conduct in support of this aspect of his submissions, but I have found it more convenient to consider his argument under four headings.

42. The first is the fact that Times discharged the Cargo without itself receiving an LOI, apparently acting on the basis of the LOI issued by APS to Rosalind. I cannot see how this conduct can be said to be relevant to the application of the time bar. If Times was not properly indemnified in respect of the discharge of the Cargo without production of bills of lading, that may well have been commercially unwise, but was not a matter sufficiently connected to the time bar to be capable of satisfying s.12(3)(b). In any event, as Mr Lewis QC submitted, there are strong grounds for contending that Times

was able to enforce the various LOIs even though it was not a named addressee of them (The Laemthong Glory [2005] 1 Lloyd's Rep 688, [3]).

43. Further, while there might be circumstances in which the provision of the LOI between APS and Rosalind to NBF would carry with it an implication that there was no intermediate charterparty between Rosalind and APS (and hence no bareboat charterparty between Rosalind and Times), all that Mr Berry QC can point to in this case is the fact that MFB (who acted for APS and the two Harmony entities) provided the APS-Rosalind LOI to R&T on 9 January and stated "this has been received back to back from Harmony and then Trafigura in identical terms". As I have already held, MFB's letter is not attributable to Times.

44. The second ground concerns the period from 28 December 2018 to 17 January 2019:

   i. Mr Berry submits that the letter of 28 December 2018 implied that Rosalind was the carrier under the Bills of Lading. I accept this submission. As I have indicated, the letter stated it was being written for "owners" and responded to comments relating to the Bills of Lading and the delivery of the cargo without suggesting that the client on whose behalf the letter was written was not "the owner" for that purpose nor party to the Bills of Lading. It is scarcely surprising that the letter of 28 December 2018 gave this impression because Mr Hicks wrongly understood that there was no bareboat charter when he sent the letter, and therefore the impression which the letter gave reflected the understanding he had.

   ii. After the exchanges on 28 December 2018, R&T corresponded with WH on a basis which reflected their existing understanding that WH were acting for the carriers, repeating their request that WH explain to whom R&T's clients' cargo had been delivered.

   iii. On 10 January 2019, R&T asked WH for a copy of the charterparty incorporated into the Bills of Lading. WH responded the same date stating that the charterparty was governed by English law and that WH was "happy to exchange a copy of the Charterparty with you for the correspondence and documents upon which your clients' alleged claim is based". Correspondence followed about the basis of any exchange of documents, in which WH sought documents relating to NBF's title to claim under the Bills of Lading in exchange for the charterparty.

   iv. Against the background of the prior communications, WH's letters offering to provide the charterparty said to be incorporated into the Bills of Lading, and doing so in return for documents relevant to NBF's title to sue under the Bills of Lading, continued the impression that WH's clients were the party liable under the Bills of Lading to whom NBF's complaints about misdelivery of the cargo without production of the Bills of Lading were properly addressed.

45. The third matter Mr Berry QC relies on is the fact that WH's correspondence did not reveal that Times was the carrier in correspondence after 18 January 2019 once Mr Hicks became aware of the existence of the Bareboat Charter. As to this:

i. On 18 January 2019, WH became aware of the Bareboat Charter. In circumstances in which it had up to that point been corresponding on the understanding that it was acting for the carrier, that obviously put WH in a difficult position. However, the correspondence continued without any reference to WH's new understanding nor any attempt to clarify previous statements.

ii. In particular, on 21 January 2019 WH wrote summarising NBF's case as being "against Head Owners for misdelivery of the cargo named in the Bills", without indicating that this was intended to involve a distinction with the "Owners" under the Bills of Lading and the "Head Owners" for whom WH acted.

iii. On 22 January 2019, R&T repeated its request for a copy of the charterparty incorporated into the Bills of Lading, and stated "you are reminded that our clients have claims against your clients' vessel … for misdelivery of cargo shipped under the subject Bills of Lading".

iv. On 23 January 2019, WH sent R&T two pages of the charterparty which included the law and arbitration clause, but which did not reveal that Times was the disponent owner (which would have revealed the existence of a hitherto undisclosed additional charterparty). It is possible that one reason for disclosing only this extract was Mr Hicks' annoyance that R&T had not provided WH with the information he wanted. But, in circumstances in which it is clear that WH had decided not to reveal Times' involvement, another reason for disclosing a single page must have been the desire to avoid producing a document referring to Times. Mr Lewis QC accepted that to have produced the complete charterparty would have undermined the decision not to disclose Times' involvement. In any event, the provision by WH of an extract of a charterparty said to be incorporated into the Bills of Lading was once again suggestive that WH acted for a party to the Bills of Lading.

v. On 15 February 2019, WH wrote to R&T again referring to security for NBF's claims "against the Owners of the Archagelos Gabriel under the above-captioned Bills of Lading"

vi. Once again I accept Mr Berry QC's submission that the overall effect of WH's correspondence after 18 January 2019, against the background of the correspondence before that date, was to continue the impression that WH's clients were the party liable under the Bills of Lading to whom NBF's complaints about misdelivery of the cargo without production of the Bills of Lading were properly addressed.

46. Finally, there is the period after the conclusion of the Co-operation Agreement of 15 February 2019, as a result of which Trafigura appointed HFW to act for Rosalind and Times. In this period:

i. R&T wrote to WH and HFW on 9 May 2019 asking for a copy of the charterparty "that may have been purportedly been incorporated into the BLs", and then stating:

> "Without any admission whatsoever that our clients' Claims are in any way subjected to a one-year or such other limitation period under the Hague / Hague-Visby Rules … please confirm that the registered owners of the Vessel agree that our clients may have at least up to and including 16 December 2019 to commence suit".

ii. On 4 June 2019, R&T served a notice of arbitration addressed to Rosalind Maritime LLC c/o Times Navigation.

iii. On 17 June 2019, three days before time expired, HFW replied to that communication stating:

> "We understand that your client has commenced arbitration in order to preserve time. In order to allow the parties to discuss matters, we propose that the parties agree to an open ended discussion for the appointment of our client's arbitrator …without prejudice to any arguments that our client's may have in respect of any applicable time bar and the purported commencement of arbitration generally".

iv. Against the background of the prior communications, the email of 17 June 2019, particularly given its statement that it was understood that NBF had commenced arbitration "in order to preserve time", continued the impression that arbitration had been commenced against the carrier under the Bills of Lading.

47. In summary:

i. In relation to the period before 18 January 2019, Times (through WH) communicated in a manner which implied, and I find contributed to R&T's belief, that WH acted for the carrier liable under the Bills of Lading, and for the entity to whom the claims were appropriately addressed. While I accept that WH acted innocently (in that the impression they gave reflected their own understanding), Times (on whose behalf the communications were sent) knew the true position, and WH could have made more detailed enquiries to ascertain the correct position (once the initial urgency of responding to the 28 December email from R&T had passed).

ii. In relation to the period after 18 January 2019, the conduct of WH, and of Times, is open to more criticism. The attempt to avoid revealing Times' involvement, against the background of the communications sent when WH was unaware of Times' involvement, was an extremely challenging strategy. While I am sure WH tried hard to walk that difficult line without crossing it, the objective effect of the communications of WH and HFW which I have referred to was to convey an impression which did not accord with the facts as Times and the parties acting for them understood them.

48. It is then necessary to consider whether the effect of the conduct I have found is such as to render it unjust hold NBF to the strict terms of the time bar. Mr Lewis QC understandably places considerable emphasis on the fact that R&T should have explored the issue of whether there was a bareboat charterparty of its own initiative, and suggests that this was the predominant factor in NBF missing the time bar

(adopting the phrase "the causative burden" from Cockerill J's judgment in FIMBank). However, the effect of WH's communication was to reinforce R&T's erroneous understanding and to put R&T off its guard. This was not a case, therefore, of mere silence in the face of an insufficiently tested assumption by the claimant.

49. I am satisfied that the impression given on Times' behalf, in ignorance of the true position up to 18 January 2019 and with knowledge of it thereafter, was a significant factor in NBF missing the time bar, such that the requisite causative nexus is established which makes it unjust to hold NBF to the strict terms of the time bar. In this regard, the case has some similarities with the application considered and granted by Gross J in Lantic Sugar Limited v Baffin Investments Limited [2009] EWHC 3225 (Comm). He noted that "some of the responsibility" fell on the applicants ([47]), but that the conduct of the respondent, however inadvertent, was "misleading – and none the less so because its effect was to reinforce [the applicant's] own error" ([52]).

50. Accordingly the jurisdictional threshold of s.12(3)(b) is passed.

Section 12(3)(a)

51. I can deal with this issue more briefly. If Mr Berry QC's attribution argument had failed, I would not have regarded the effect of communications sent on behalf of persons other that Times to be matters outside the reasonable contemplation of the parties which the parties might have thought made it unjust for Times to rely on the Hague Rules time bar. The time bar takes effect as a term of the contract between Times and NBF. The parties would not regard conduct by a third party who was not acting on behalf of Times as a matter which might make it unjust for Times to rely on the time bar, thereby depriving Times of the benefit of one of the terms of the contract. This part of NBF's application fails for the same reasons as the similar argument in FIMBank at [92] and [95]-[96]: that would be a case which the parties to the contractual time bar would have regarded as falling "well within the ambit of circumstances where a time bar may bring a windfall to the owners".

Discretion and delay

52. It follows that I have jurisdiction to extend time. However, that is very far from the end of the matter. Times was on much stronger ground in arguing that the lengthy delay on NBF's part before bringing the present application, even after it had been notified by Reed Smith on 18 July 2019 that Rosalind was not the carrier, and that it was Times, should lead the Court to refuse to exercise its discretion in NBF's favour. No doubt for this reason, Mr Lewis QC's written and oral submissions began with the issue of discretion, before turning to the issue of jurisdiction.

53. It cannot be said that NBF has acted promptly seeking s.12 relief, and its delay in seeking such relief has not been mitigated by at least commencing an arbitration against Times (something it is awaiting the outcome of this application before doing). NBF's position is made all the more difficult by the fact that it did take some steps in relation to Times after receiving Reed Smith's email of 18 July 2019 stating for the first time that Times was the carrier, before bringing this application. In particular:

i. On 7 November 2019, NBF sought and obtained an amendment to the wording of the letter of guarantee with which it had previously been provided,

so that it covered any liability of the disponent owner as well as the registered owner; and

ii. On 9 November 2019, NBF served the Writ in Rem it had issued in Singapore on 2 January 2019, which, on the usual terms, was addressed to the disponent owner as well as the registered owner (a step which appears to have been taken as a means of ensuring that the letter of guarantee was extended to Times).

iii. NBF did not make (and has still not made) a precautionary appointment of an arbitrator, and did not serve a s.12 application until 20 March 2020.

54. Against that background, Mr Lewis QC is right to say that there has been significant culpable delay by NBF in failing to seek s.12 relief before it did – delay measured in months rather than merely weeks or days. He is also right to submit that the delay is particularly difficult to justify from early November 2019, when NBF does appear to have taken the possibility that Times might be the carrier seriously.

55. However, this is not a case in which it can be said that Times itself played no part in NBF's delay in the period after 18 July 2019. It is clear that by the time Reed Smith sent its letter of 18 July 2019, the belief on R&T's part that Rosalind was the carrier was firmly fixed and, as I have found, conduct attributable to Times had served to reinforce that impression.

56. Further, when on 18 July 2019 R&T asked Reed Smith for a copy of the Bareboat Charter which Reed Smith was now claiming existed, Reed Smith (it is to be inferred on Times' instructions) refused to provide a copy. That refusal continued even after R&T had stated on 19 July 2019 that if the Bareboat Charterparty was not produced, they would treat the alleged demise as "baseless and a contrivance", and after R&T repeated its request on 22 July 2019 and 19 August 2019, and referred once again to the refusal to produce the charterparty on 7 November 2019. In my view, that refusal was not an appropriate course – particularly when Times had now achieved its aim of concealing its involvement until after the one year time bar had expired. One effect of that refusal, whether intended or not, was to contribute to NBF's belief that the alleged involvement of Times was not a serious suggestion, and its failure to seek s.12 relief at an earlier point (as Reed Smith had been warned). While NBF can be criticised for not seeking a copy of the Bareboat Charter from the arbitrators, that criticism is mitigated to some extent by the fact that Reed Smith had been told (in effect) to "put up or shut up", and they did not put up. The refusal to provide the charterparty can be regarded as a continuation of the approach which had been adopted by or on behalf of Times before 18 July 2019, and which I have found made it unjust to enforce the strict time bar against NBF. Its clear contribution to NBF's delay in seeking s.12 relief is seen in the fact that, once the Bareboat Charter was produced for the purposes of Times application for an anti-suit injunction, NBF prepared and issued its application within short order.

57. The issue which then arises is whether culpable delay by NBF is of itself sufficient to preclude s.12 relief. Mr Lewis QC submits that it is, referring to Sir Richard Field's statement in P v Q [2018] EWHC 1399 (Comm) at [65] that:

> "… It will only be just to extend time under section 12 on the application of a party in a charter chain if the applicant has acted expeditiously and in a commercially appropriate fashion to commence proceedings once he (it) has become aware that a claim is being made against the applicant under the charterparty above or below in the chain".

However, that was a case in which the ground for seeking an extension was the need to pass up or down the chain a claim received from the other direction, rather than an extension where it was said the conduct of the other party had contributed to the time bar being missed. I do not accept it is authority for the wider proposition which Mr Lewis QC cited it for.

58. I accept Mr Berry QC's submission that culpable delay at this stage of the enquiry is a factor which is of obvious relevance to the exercise of the court's discretion, but it does not take the discretion away. I note that in SOS Corporacion Alimentaria SA v Inerco Trade SA [2010] EWHC 162 (Comm), Hamblen J referred to delay and fault as "factors which are likely to be relevant to whether it is just to extend time" (at [85]). Hamblen J did not regard the significant culpable delay as determinative of this issue, but rather he took "all these considerations into account" ([98]). Finally Cockerill J in FIMBank at [119] observed that the court's approach to the issue of delay might be impacted by "the exact nature of the jurisdictional hurdle, and the margin by which the relevant hurdle was cleared".

59. In this case, the jurisdictional hurdle was cleared because I have found that Times or those acting for it misled NBF into believing that they were dealing with the carrier under the Bills of Lading, and that in the period after 18 January 2019, the impression was continued even though those acting for Times were aware that NBF were acting on the basis of a mistaken understanding. That conduct cleared the jurisdictional hurdle by an appreciable margin. Moreover, it continued to have effect after 18 July 2019, because it contributed to NBF's firm belief that Rosalind was the carrier. Further Times contributed to NBF's failure to seek s.12 relief more promptly, by refusing to provide a copy of the Bareboat Charter even though Times or those acting for it must have appreciated that R&T might well discount the suggestion of Time's involvement for so long as no Bareboat Charter was produced. Finally, I accept that it is a relevant consideration here that Times was aware of the claim and arbitration, and the solicitors who were acting for Times were acting for Rosalind in the arbitration which NBF had commenced to enforce the same claim it now seeks an extension of time to bring against Times: see Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd [2010] EWHC 1529 (TCC), [51] per Edwards-Stuart J. Times' complaints now about having to meet a "stale claim" must be viewed in that context, and in the context of Times (through HFW on 17 June 2019) itself having suggested that the constitution of the arbitration tribunal in the arbitration commenced against Rosalind be put on hold "on an open-ended basis".

60. Taking all of these matters into consideration, I have concluded that it is appropriate to grant NBF the extension it seeks. The parties are asked to draw up an order to reflect this conclusion.