Neutral Citation Number: [2018] EWCA Civ 2494

Case No: A3/2018/0397

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE KNOWLES
[2018] EWHC 143 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2018

Before :

THE SENIOR PRESIDENT OF TRIBUNALS
SIR ERNEST RYDER
LORD JUSTICE HADDON-CAVE
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

HAVEN INSURANCE COMPANY LIMITED	**Appellant**
- and -	
EUI LIMITED (T/A ELEPHANT INSURANCE)	**Respondent**

- -
- -

Mr Andreas Gledhill QC and Mr Alexander Wright (instructed by **Flint Bishop LLP**) for the **Appellant**
Mr Sa'ad Hossain QC and Ms Joyce Arnold (instructed by **Horwich Farrelly Solicitors**) for the **Respondent**

Hearing date : Tuesday 16th October 2018

- -

Approved Judgment

LORD JUSTICE HADDON-CAVE :

Introduction

1. This appeal concerns an application to extend time for bringing arbitral proceedings under s.12(3)(a) of the Arbitration Act 1996 ("AA 1996") and the relevant test to be applied.

The Parties

2. The Appellant ("Haven") and the Respondent ("Elephant") are both motor insurers, and members of the Motor Insurers Bureau ("MIB"). MIB is the fund of 'last resort' and was established to satisfy claims required to be covered by contracts of insurance pursuant to part VI of the Road Traffic Act 1988.

3. By virtue of s.33 of the Companies Act 2006, MIB's Articles of Association ("Articles") have contractual force as between MIB's members. Article 75 of the Articles provides for disputes between members to be resolved in the first instance by a Technical Committee of "*claims managers or persons with similar experience*" (see Article 67 below).

The Facts

4. The following summary of the facts is taken from the Appellant's skeleton argument and is largely common ground.

5. At a meeting on 13th February 2015, the Technical Committee determined a dispute between Haven and Elephant regarding who was liable to indemnify the victim of a road traffic accident which occurred on 8th April 2006. Representatives of both Haven and Elephant were present at the Technical Committee's meeting to argue their respective corners. The matter was resolved against Elephant and in favour of Haven. The details of the dispute and the traffic accident in question are immaterial for the purposes of this appeal.

6. MIB's Articles provide that a member can appeal a decision of the Technical Committee to an arbitrator, if the member gives written notice of appeal within 30 days of "*being notified of the decision of the Technical Committee*" (see Article 75(6)(a) below).

7. On 30th April 2015, Elephant gave written notice of appeal against the Technical Committee's said determination. A time-bar dispute arose which is the subject matter of this appeal. Haven contended that Elephant's appeal was out of time because Elephant had been "*notified of the decision of the Technical Committee"* in accordance with Article 75 more than 30 days before service of its written notice of appeal, either (a) by being physically present at the 13th February 2015 meeting, or (b) as the result of a 24th February 2015 email from MIB's secretariat to Elephant confirming in writing the decisions taken on that earlier date. Elephant contended that its appeal was in time because time for an appeal only ran from 31st March 2015, being the date at which the final draft minutes (generally referred to as the "final minutes") of the meeting were released to members of the Technical Committee by MIB's secretariat.

8. On 4th November 2015, Christopher Hancock QC was appointed arbitrator, following a reference to the chairman of the Bar Council under Article 75(6)(e) of MIB's Articles. His appointment was without prejudice to Haven's position that he had no substantive jurisdiction to determine an appeal brought out of time, which issue the parties agreed he should decide as a preliminary point.

9. On 3rd November 2016, Mr Hancock QC rejected Haven's jurisdictional challenge, holding that Elephant's appeal had been brought within time, because (as Elephant had argued) time for an appeal only ran from the date on which the final draft minutes had been circulated or posted on MIB's secure members' website.

10. Haven challenged the arbitrator's jurisdiction decision in the High Court under s.67 of AA 1996. Elephant thereafter cross-applied for an order under s.12 of AA 1996 extending time for commencing its arbitration, arguing that in the event the court should rule in Haven's favour on the time bar point, the "*circumstances*" were such as to be "*outside the reasonable contemplation of the parties when they agreed the provision in question* [*i.e.* Article 75]*, and that it would be just to extend the time*" under s.12(3). Elephant relied principally on what was said to be a settled practice by the MIB in calculating time for an Article 75(6)(a) appeal from the date the minutes of the relevant meeting were circulated.

11. On 31st January 2018, Knowles J handed down judgment on those issues. He allowed Haven's s.67 challenge, finding that Elephant's appeal had been out of time, but granted Elephant's s.12 application for an extension of time and remitted the matter to Mr Hancock QC for substantive determination. It is Knowles J's latter decision on the s.12 point granting Elephant an extension of time which is the subject of this appeal. There is no appeal against his finding that Elephant's appeal was lodged out of time.

Detailed chronology

12. The detailed chronological facts relevant to Elephant's failure to lodge its appeal in time is as follows.

13. At 15:15 hours on 19th February 2015, Mark Armstrong of MIB's secretariat emailed Elephant, purporting to summarise the decisions taken by the Technical Committee at its 13th February 2015 meeting. Elephant replied questioning the accuracy of that summary, sparking an exchange which culminated in an email from Mr Armstrong to Elephant of 15:59 hours the same day in which he suggested: "*...it might be best to await the minutes*".

14. On 24th February 2015, Mr Armstrong emailed Elephant again summarising the Technical Committee's decision correctly. As Knowles J held, Elephant's time for appeal ran from this date (see paragraph 26 of his judgment). On 27th February 2015, Elephant replied to Mr Armstrong, stating: "*we intend to appeal…*". On 18th March 2015, Elephant emailed Mr Armstrong again, reiterating that it was likely to appeal.

15. On 26th March 2015 (*i.e.* 30 days from the 24th February 2015 email), however, *selon* Knowles J, Elephant's appeal became time-barred because Elephant had failed to lodge an appeal by this time.

16. At 09:38 hours on 29th April 2015, Elephant emailed Paul Ryman-Tubb (MIB's Head of Technical) asking him to confirm by when its appeal had to be filed. At 09:44 hours on the same day, Mr Ryman-Tubb sent a non-committal reply: "*You can view Article 75 on our website. If you cannot locate it, I am sure Mark* [Armstrong] *will be able to assist*". At 09:55 hours, Mr Armstrong (who had been copied-in on that exchange) emailed the text of Article 75(6) to Elephant, followed by this one line comment: "*…the final minutes were released on 31st March 2015*". Elephant finally lodged its appeal on the following day, 30th April 2015.

17. None of the correspondence summarised above was copied to, or seen at the time by, Haven, whose evidence was that its understanding throughout was that Elephant was not going to appeal, and accordingly, on 26th March 2015, Haven released its reserve, in the (now established to be correct) belief that time for an appeal had by then expired.

18. On 30th April 2015, however, Haven was notified by MIB that Elephant had in fact appealed. Thereafter, on 6th July 2015, Haven served its response to Elephant's appeal, stating (at paragraph 5): "*Haven contends that this appeal is made out of time and should be dismissed regardless of any merits*". On 23rd July 2015, Haven emailed Mr Armstrong, querying the circumstances in which Elephant's appeal appeared to have been admitted by MIB, and reiterating: "*Haven believes that this case has been appealed out of time*". On 27th July 2015, Mr Armstrong replied, stating: "[I]*t has always been the Technical Committee's custom and practice to allow 30 days from date of final minutes. The final minutes were released to all members on 01 April 2015, allowing 30 days from that date*".

MIB's 'custom and practice'

19. On 6th June 2013, a meeting of the Technical Committee had received a report from a working group tasked to consider revisions to Article 75 of MIB's Articles, including a recommendation that Article 75(6) be amended to "*make it clear that the time for appeal starts to run upon the date the minutes are published*".

20. Elephant was a member of the Technical Committee. Haven was not. In its evidence to the Judge, Elephant's representative stated that whilst he did not attend the 6th June 2013 meeting, he "*was aware of the minutes*" of it, and that the working group "*had identified that the wording of Article 75(6) was insufficiently clear to show that time for appeal starts to run upon the date when the TC minutes are published*".

21. On 30th June 2015 (*i.e.* after Elephant lodged its appeal in this case and Haven challenged the appeal as out of time), a general meeting of MIB resolved to amend Article 75(6)(a) of MIB's Articles by special resolution to reflect the recommendations of the working group so that Article 75(6)(a) in future read as follows:

> "*Article 75(6)(a) …the Member wishing to appeal shall give to the Bureau written notice within 30 days of the issuing of the final version of the minutes of the Technical Committee making the relevant decision*".

22. The amendment had been circulated in draft by MIB's secretariat prior to the general meeting with the following marginal note: "*this* [*i.e.* time running from issue of the final minutes] *has been the practice and is changed just for the sake of clarity*".

23. Elephant's evidence before the Judge confirmed the existence of a practice or understanding that the time for appealing began 30 days from when the Technical Minutes were published. Haven's evidence was that, if there was such a practice or understanding, Haven was unaware of it and believed "*that the 30 days ran from the date of...* [the Technical Committee] *meeting*".

Judgment below

24. Knowles J acknowledged the strength of Haven's argument as to the need to respect "*party autonomy*" and only exercise the power under s.12 when it was fully justified (*per* Hamblen J in in *SOS v. Inerco Trade* [2010] 2 Lloyd's Rep 345 at [45]) but described the circumstances of the present case as "*quite exceptional*".

25. Knowles J's main findings and reasoning are to be found in paragraphs 33 to 40 of his judgment which it is convenient to set out in full below:

> *"33. In my judgment in the present case the points made by Haven are well met in the following quite exceptional circumstances. MIB itself (by its Mr Armstrong) wrote to Elephant shortly after the meeting of the Committee that "it might be best to await the minutes". Elephant believed, reasonably if wrongly, that to be in accordance with the procedure required by the Articles. Its belief was in line with a widely, if wrongly, accepted interpretation, shared by MIB itself, of the relevant time provision in Art 75. Indeed, as Mr Judd says, when Haven took the point that the appeal was out of time MIB wrote: "It has always been the [Committee's] custom and practice to allow 30 days from the date of final minutes. The final minutes were released to all members on 1 April 2015, allowing 30 days from that date." In the particular context it would not, in my judgment, have been within the "reasonable contemplation of the parties" "when they agreed" the Articles that the time for appeal would be other than that which MIB was, when asked, prepared to state.*
>
> *34. MIB employees were not lawyers, points out Haven. However they were the employees involved in administering the Article 75 process. And, in terms, Article 75 (which I do not set out in full) does not contemplate that lawyers will be engaged throughout the process.*
>
> *35. I do not overlook the fact that Mr Judd of Elephant accepts that he was aware from minutes of an earlier meeting of the Committee on 6 June 2013 that a Working Group had identified that the wording of the Articles was insufficiently clear to show that the time for appeal started to run upon the date when the minutes were published. Elephant therefore knowingly took some risk. But this knowledge is in my view eclipsed by the later encouragement from MIB to await the minutes.*
>
> *36. Haven also contends that it would not be "just" for time to be extended. On the facts of this case, Elephant could have*

taken legal advice long before it did, argues Haven. Elephant has long known, points out Haven, what the Committee had in fact decided and the discussions that led to the decisions that it was planning to appeal. There has been, says Haven, what it would term an inordinate delay by Elephant in making an application to the Court under section 12 of the Act.

37. Haven also draws attention to the fact that shortly after 15 March 2015, and apparently by 26 March 2015, Haven released its retention in good faith and based on the correct construction of Article 75(6)(a), and did so having confirmed with the MIB secretariat that no appeal had been filed.

38. On the other hand it is still material to keep in mind that the appeal was initiated within 30 days if measured from the date of the minutes, and that the minutes were little over a month after the 24 February 2015 email giving notice of the decision. The length of extension required is from 26 March 2015 (when the time in which to initiate an appeal expired) to 30 April 2015 (when the appeal was initiated). All this, again, against the backdrop of MIB's position on the time for initiating an appeal.

39. I take the development in relation to the release of retention into account but do not consider it should cause Elephant to lose the opportunity to appeal through an extension of time. The release of the retention at that early date was a judgment made by Haven at the time. It appears to have been made without allowing for the jurisdiction of the Court to extend time. No later than 35 days after the retention was released, Haven was clear that Elephant was seeking to appeal, and that has continued to be clear ever since. Elephant has long made clear that if needed it sought an extension of the time, even if that request was directed to the arbitrator and only more recently to the Court.

40. I do not overlook the time that has passed in this matter before the application to extend time was made to the Court, rather than the arbitrator. I have nonetheless reached the conclusion that in the present case it would be just to exercise to extend time in the limited degree required."

Parties' submissions

26. Mr Gledhill QC on behalf of the Haven submitted that the jurisdictional criteria in s.12(3) were not made out and there was no warrant for the Judge's finding that it was just to grant relief under the section.

27. Mr Hossain QC resisted the appeal on behalf of Elephant. In the event, we did not call upon him but were much assisted by his and Ms Arnold's able skeleton argument.

The Arbitration Act 1996

28. The AA 1996 brought about a sea-change in the world of arbitration: it gave full effect to the notion of 'party autonomy' and abandoned the idea that the courts enjoyed "*some general power of supervisory jurisdiction over arbitrations*" (see the Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law (February 1996), (especially at paragraphs 67 and 69)).

29. Post-1996, the world of arbitration entered a new era, in which the scope for interference by the court in arbitral decisions became highly circumscribed. This was made clear in s.1 of AA 1996:

> *"1. General principles.*
>
> *The provisions of this Part are founded on the following principles, and shall be construed accordingly—*
>
> *(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;*
>
> *(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;*
>
> *(c) in matters governed by this Part the court should not intervene except as provided by this Part."*

30. One of the rare circumstances in which the court may intervene is that provided by s.12 which grants power to extend time for the beginning of arbitral proceedings in the following terms:

> *"12. Power of court to extend time for beginning arbitral proceedings, etc.*
>
> *(1) Where an arbitration agreement to refer 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 dispute 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 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.*
>
> *(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.*
>
> *(5) An order under this section does not affect the operation of the Limitation Acts (see section 13).*
>
> *(6) The leave of the court is required for any appeal from a decision of the court under this section."*

31. The court may only intervene with an arbitration agreement and extend time if the criteria set out in s.12(3) are satisfied. Section 12(3)(a) has two limbs and gives rise, therefore, to two questions:

    i) Are the circumstances such as were outside the reasonable contemplation of the parties when they agreed the provision in question?

    ii) Would it be just to extend the time?

The Arbitration agreement

32. Article 75 of MIB's Articles contains the arbitration agreement and provides:

> *"THE DOMESTIC REGULATIONS*
>
> *Article 75. (1)* ***Background to Article 75***
>
> *(a) The objectives underlying Article 75 are:*
>
> *(1) to assist the victims of motor accidents;*
>
> *(2) to further the interests of motor vehicle insurance policyholders with a view to reducing the cost of premiums;*
>
> *(3) to fulfil the objectives in (1) and (2) in an efficient, economical and expeditious manner, having regard to the interests of Members as a whole.*
>
> *(b) This Article shall apply in respect of all cases, irrespective of the date of accident (with the exception of those that have already been concluded under the terms of the previous versions of this Article), which may be or have been settled under any agreements entered into by the Bureau for the purposes of satisfying Road Traffic Act Judgments (as defined below).*

> *(c) This Article shall be applied and interpreted impartially by the Technical Committee (or, where relevant, any arbitrator appointed pursuant to paragraphs (5) and (6) of this Article).*
>
> *(d) This Article shall be applied and interpreted in a pragmatic rather than a strictly legal manner, with a view to furthering the objective set out in paragraph (1)(a) of this Article. …*
>
> *(5) **Disputes***
>
> *All cases giving rise to a dispute involving the Bureau in relation to the interpretation, application or implementation of this Article 75 or any other matters falling within the powers of the Technical Committee as defied in Article 71 shall be dealt with under the following rules of procedure: […]*
>
> *(6) **Right of Appeal***
>
> *A Member affected by a decision of the Technical Committee under this Article 75 shall have a right of appeal against such decision in accordance with the following procedure.*
>
> *(a) The Member wishing to appeal shall give to the Bureau written notice within 30 days of the Member's MIB representative being notified of the decision of the Technical Committee.*
>
> *(b) The notice of appeal shall be signed by or on behalf of the appellant's MIB representative and shall set out the grounds for appeal. Written arguments and evidence upon which the appeal is based shall accompany the notice of appeal or follow within 30 days."*

The Authorities

33. It is common ground that the proper approach of the courts in relation to s.12 is laid down by Waller LJ in *Harbour and General Works Ltd v. Environmental Agency* [2000] 1 WLR 950 (at page 960 G):

> *"*[T]*he section is concerned not to allow the court to interfere with a contractual bargain unless the circumstances are 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."*

34. Waller LJ's approach has been followed and notably applied by Sir Andrew Morritt V-C in *Monella v. PizzaExpress (Restaurants) Ltd* [2004] 1 EGLR 43, Toulson J in *Korbetis v. Transgrain Shipping BV* [2005] EWHC 1345 (QB) and Hamblen J in *SOS v. Inerco Trade* (*supra*). The test has to be applied in the way which is "*commercially sensible*" (*per* Toulson J in *Korbetis, supra*, at paragraph 25).

35. There are two relevant questions under the first limb (*per* Hamblen J in *SOS, supra*, at paragraph [56]): (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 (*per* Hamblen J, *ibid*, paragraph [65]).

36. Waller LJ's construction introduces a slight gloss to the first limb of s.12. He explained that his approach was intended to avoid absurdity and injustice, *e.g.* a party who has wholly failed even to read the relevant provisions being entitled to an extension (*ibid*, at page 960 H). I agree, however, with Toulson J in *Korbetis* (*supra*, at paragraph [23]) that it is not clear that Waller LJ's gloss adds anything in practice because the second limb of the statutory test is specifically designed to provide the necessary protection against absurdity or injustice and the end result will invariably be the same.

37. Knowles J was, unfortunately, not specifically referred to *Harbour* and did not cite it. His analysis was, therefore, somewhat foreshortened but his essential approach and conclusion are consistent with the tenets of Waller LJ and, in my view, correct.

38. Knowles J was, however, referred to the following passage *obiter dictum* in the judgment of Mance J in *Grimaldi Compagnia di Navigazione SpA v Sekihyo Lines Ltd (the "Seki Rolette")* [1999] 1 WLR 708 in which Mance J left open the question of applying s.12(3)(a) in the case of a reasonable misapprehension as to the need to commence arbitration proceeding within a particular time (at pages 723H-724A) :

> *"I should like to reserve my judgment on the possibility of applying section 12[3](2)(a), both in a case of reasonable misapprehension about the scope of the circumstances falling within an arbitration agreement, and in a case of reasonable misapprehension about the need to commence arbitration within a particular time. The construction of a contract is a matter on which even courts can hold very different views, sometimes only resolved at the highest level. To take an example from legal history, if one supposes that, prior to the House of Lords decision in Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. [1959] A.C. 133, the generally accepted view in commercial circles was shown to have been that accepted by the Court of Appeal in that case, viz. that the Hague Rules were inapplicable to regulate the relations of owner and charterer under a clause like clause 43, or to have been (in common with Devlin J. and two members of the House of Lords) that the application of the Hague Rules must be confined to cargo-carrying voyages, it seems to me at least arguable that a party acting on that view might be able to show that the interpretation subsequently adopted was outside his reasonable contemplation within the meaning of the section."* (Emphasis added.)

Analysis

Judge's reasoning

39. Knowles J's reasoning can be summarised as follows. First, Elephant misunderstood Article 75, believing "*reasonably if wrongly*" that time for an appeal ran from publication of the minutes, rather than from the date on which the decisions of the meeting were notified to it. Second, Elephant's misunderstanding was in line with "*a widely, if wrongly, accepted interpretation, shared by MIB itself*" of the relevant time provision in Article 75. Third, MIB confirmed that its custom and practice had been *"to allow 30 days from the date of the final minutes"* for the commencement of arbitration proceedings. Fourth, it would not have been within the "*reasonable contemplation*" of the parties when they agreed the Articles that the time for appeal would be other than that what MIB stated it to be. Fifth, although Elephant "*knowingly took some risk*" (being aware that an MIB Working Group had previously expressed the view that the wording of Article 75 was insufficiently clear), Elephant were encouraged by MIB to await the minutes. Sixth, although Haven suffered some prejudice because it released its retention in the belief that Elephant's time for appeal had expired, Haven did so having failed to take account of the possibility of a time extension. Seventh, in all the circumstances of the case it would be just to extend time.

40. As to the first limb, Knowles J held:

> *"33. ... In the particular context, it would not, in my judgment, have been within the "reasonable contemplation of the parties" "when they agreed" the Articles that the time for appeal would be other than that which MIB was, when asked, prepared to state."*

41. As to the second limb, after considering questions of risk, delay and prejudice, Knowles J concluded:

> *"40. ... I have nonetheless reached the conclusion that in the present case it would be just to exercise [the discretion] to extend time in the limited degree required."*

Key findings of fact

42. Knowles J made three key findings of fact in paragraph 33 of his judgment which underpin his decision. First, that Elephant believed "*reasonably if wrongly*" that it had 30 days after receipt of the final minutes of the Technical Committee to lodge an appeal. Second, that Elephant's belief was in line with *"widely accepted"* interpretation of Article 75 shared by MIB itself. Third, 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*" (See Mr Armstrong's e-mail dated 27th July 2015).

43. These findings are not challenged by Haven and Mr Gledhill QC rightly accepted that he is bound by them.

44. In my view, the findings form a formidable obstacle to Mr Gledhill QC's appeal at the outset because, *prima facie*, they form a cogent basis for Knowles J's conclusions on both the first and second limb of s.12, namely as to the *"reasonable contemplation"* of the parties and whether it was *"just"* to extend time.

Appellant's arguments

45. Mr Gledhill QC's submissions in support of the appeal can conveniently be dealt with under seven headings.

(1) 'Unilateral mistake'

46. First, Mr Gledhill QC argued that 'unilateral' mistake was insufficient to trigger s.12. He submitted that the court could not grant relief under s.12 in the absence of proof of 'mutual' mistake by both parties, as opposed to a unilateral mistake by one party. He submitted that the present case was a case of unilateral mistake, namely Elephant's own misapprehension as to the construction of Article 75 which led to their demise in failing to lodge their appeal in time. This was not a misapprehension which was shared by Haven. Elephant were the authors of their own misfortune.

47. In my view, Mr Gledhill QC's point is misconceived. He is looking down the wrong end of the telescope. The s.12(3)(a) test is *prospective* not retrospective. Section 12(3)(a) is framed in terms of mutual *"contemplation"* of the parties, to be assessed at the time *"when they agreed the provision in question*". The test is broad and forward looking. Mutual contemplation is different temporally and conceptually from mutual mistake.

48. In my view, Knowles J's approach to applying the test was orthodox and correct. He placed himself in the shoes of the parties at the time of entering into the arbitration agreement and asked himself whether it would have been within their reasonable mutual contemplation at time they each agreed MIB's Articles that "*the time for appeal would be other than that which MIB was, when asked, prepared to state*" (paragraph 33 of his Judgment). In doing so, he rightly focussed on what was likely to be the broad contemplation of the parties at the time looking forward. He answered the question in the negative. In my view, he was entitled to do so on the evidence.

49. Further, applying Waller LJ's specific test in *Harbour* (*supra*) itself: if it had been drawn to the parties' attention when they agreed the MIB Articles, that the time for appealing would subsequently be held by the Court to be different from what was widely accepted to be the case (and MIB actually stated it to be), the parties might well have said that the strict terms of the Article 75 should not apply if one or other of them failed to lodge an arbitration appeal in time because of (quite understandable) reliance upon the widely held conventional view as to the time limit for appeals.

(2) 'Judge mis-interpreted the "Seki Rolette"'

50. Second, Mr Gledhill QC argued that Knowles J was wrong to rely upon the *"Seki Rolette"* (*supra*) and said that, properly understood, the decision should have led Knowles J to dismiss Elephant's application to extend time. Mr Gledhill QC submitted that the *obiter* passage in Mance J's judgment (*ibid* at p. 723H) supported his argument that s.12 does not operate in cases of unilateral mistake (see above).

51. In my view, Mr Gledhill QC's reliance on this passage is misplaced. Mance J expressly left open the question of whether *"a [single] party acting"* on a mistaken, but widely held, interpretation as to the time for commencement of arbitration proceedings might be able to show that "*the interpretation subsequently adopted was outside his reasonable contemplation within the meaning of the section*" was entitled to s.12 relief (*per* Mance J *supra* at p. 723H). To be faithful to the terms of s.12, Mance J's reference to *"outside his reasonable contemplation"* should strictly have been to *"outside the parties' reasonable contemplation"*. But the thrust of what Mance J was suggesting is clear. I agree with Mr Hossain that Mance J's *obiter dictum*, if anything, supports Elephant.

(3) 'Judge misunderstood MIB's e-mail of 19th February 2015'

52. Third, Mr Gledhill QC argued that the Judge erred in his understanding and treatment of the relevance of the e-mail from Mr Armstrong of MIB, timed at 15:59 hours on 19th February 2015, suggesting to Mr Judd at Elephant that "*it might be best to await the minutes*" (see above). He submitted that the e-mail was part of a brief exchange dealing with a narrow issue raised by Mr Judd as to the precise phraseology used by those at the Technical Committee meeting; and, in any event, the issue was 'resolved' without Mr Judd waiting for the minutes because, on 27th February 2015, Mr Judd e-mailed Mr Armstrong and said "*…we intend to appeal*". It was, therefore, Mr Gledhill QC submits, wrong for the Judge to state (in paragraph 35 of his Judgment) that Elephant's knowledge was "*eclipsed by the later encouragement from MIB to await the minutes*".

53. In my view, Mr Gledhill QC's argument ignores the essential backdrop against which these exchanges between Mr Judd and Mr Armstrong were taking place, namely MIB's widely accepted 'custom and practice' to allow 30 days from the date of the final minutes for appeal (see above). As Knowles J emphasised at the end of paragraph 38 of his judgment:

> *"All this, again, against the backdrop of MIB's position on the time for initiating an appeal."*

54. Further, Knowles J was right to judge the position from the parties' perspective at the time, rather than with hindsight. The reality was that Elephant, having indicated an intention to appeal to MIB, felt no real urgency in formally *lodging* its appeal because of MIB's widely acknowledged custom and practice of allowing 30 days from receipt of the final minutes.

(4) 'Elephant derived no benefit in waiting for final minutes'

55. Fourth, Mr Gledhill QC felt obliged to argue that there was 'no benefit whatsoever' in Elephant waiting for the final version of the minutes.

56. In my view, this was an untenable argument given that Article 75(6)(b) expressly requires a party appealing to "*set out the grounds for the appeal*" in its notice of appeal. Accordingly, it would be of benefit to a party appealing to have the final minutes detailing the basis upon which the Technical Committee arrived at its decision in order to have the clearest possible idea of the reasons for the decision under challenge.

(5) 'Negligent omission'

57. Fifth, Mr Gledhill QC argued that s.12 relief would never be granted where the applicant could be shown to have been guilty of a negligent omission. He relied upon a passage in *Harbour* (*supra* at p. 959H) where Waller LJ cited a passage from Colman J at first instance:

> *"[I]t would appear quite impossible to characterise a negligence omission to comply with the time bar, however little delay were involved, as, without more, outside their mutual contemplation."*

58. In my view, Mr Gledhill QC is wrong to seek elevate Colman J's observation into a prescriptive rule. 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.

(6) 'Elephant aware of problem with Article 75 wording'

59. Sixth, Mr Gledhill QC relied upon the fact that Elephant were well aware, as the Judge found, that an MIB Working Party considered the wording of Article 75 insufficiently clear and were proposing an amendment in order to clarify the wording. In my view, however, this does not serve to take his case further. The proposed amendment was to make clear what was already assumed to be the case; that time for appealing ran from the publication of the final minutes. As Mr Judd explained in his witness statement:

> *"This was a suggestion for an alteration to the wording to make clearer what was already the case – that the trigger for time for appeal was the publication of the minutes."*

(7) *'Unjust to grant extension'*

60. Finally, Mr Gledhill QC submitted that, in all the circumstances, the Judge was wrong to hold that it was just to grant an extension. He submitted that the present case was 'qualitatively different' from previous cases because (a) Elephant delayed in lodging arbitration proceedings notwithstanding they knew they were taking a risk and they were, therefore, the authors of their own misfortune and (b) Haven suffered prejudice because it released its retention in the belief that Elephant's time for appeal had expired.

61. As to (a), Knowles J came to the conclusion on the evidence before him that, whilst Elephant knowingly took "*some risk*", it did so against the 'backdrop' of MIB's widely accepted custom and practice, and it was, therefore, just in all the circumstances to extend time. In my view, this was a conclusion that Knowles J was entitled to reach on the particular facts and evidence before him.

62. As to (b), Knowles J held that Haven took some risk too by releasing its reserve because it did so having failed to take account of the possibility of a time extension. This was a factor which he was entitled to take into account when exercising his discretion.

Summary

63. In summary, none of Mr Gledhill QC's arguments serve to undermine the decision of Knowles J in granting an extension of time to Elephant under s.12 of the AA 1996.

Conclusion

64. For the above reasons, I would dismiss the Appellant's appeal.

LADY JUSTICE NICOLA DAVIES:

65. I agree.

SIR ERNEST RYDER, SENIOR PRESIDENT OF TRIBUNALS:

66. I also agree.