"Arbitrators should proceed in a similar fashion. If it is apparent, on the basis of the facts and contentions before them that the parties are in dispute to which an arbitration agreement relates, then they should seise themselves of that dispute and subsequently put the paperwork in order. It may become necessary for them or the parties to define the issues; but it is not necessary for them to be bound by some legalistic and hidebound approach to pleadings. Such procedure is to be rejected."

Extension of Time

FULL COURT OF VICTORIA

Kaye, Murphy & Tadgell, JJ
(1988) VR29

Australian Shipping Commission v Kooragang Cement Pty. Ltd.

The decision of the Full Court of the Supreme Court of Victoria arose from an appeal from an Order of McGarvie, J., in which, His Honour, extended the time within which the Respondent might commence arbitration proceedings, pursuant to Section 48 of the *Commercial Arbitration Act,* 1984.

THE LEGISLATION
Section 48 of the *Commercial Arbitration Act* provides that:—

(1) Subject to sub-section (3), the Court shall have power on the application of the party to an arbitration agreement or an arbitrator or umpire to extend the time appointed by or under this Act or fixed by the agreement or by an Order under this Section for doing any act or taking any proceeding in or in relation to an arbitration.

(2) The Court may make an Order under this Section although an application for the making of the Order was not made until after the expiration of the time appointed or fixed for doing the Act or taking the proceedings.

(3) An Order shall not be made under this Section extending the time within which arbitration proceedings might be commenced unless—

(a) The Court is satisfied that, in the circumstances of the case, undue hardship would otherwise be caused;
(b) The making of the Order would not contravene the provision of any enactment limiting the time for the commencement of arbitration proceedings.

THE FACTS

The Appellant was a ship owner, and the Respondent a charterer of the Appellant's ship. The Appellant and the Respondent entered into a charterparty in June, 1984 for a period of 7 days, for the Respondent to carry goods from Adelaide to Newcastle. On 6 July, 1984, the ship arrived in Newcastle and between 8 and 15 July, the cargo was discharged. The Respondent claimed that at some time seawater penetrated the cargo hole causing damage to the cargo, and that the Respondent thereby suffered loss estimated to the value of $77,146.55.

On 28 November, 1984, the Respondent made formal demand upon the Appellant for the payment of the sum in question. By telex dated 7 January, 1985, the Appellant's solicitors drew to the attention of the Respondent's solicitors the fact that the charterparty provided that all disputes were to be settled by way of arbitration.

On 19 July, 1985 the Respondent appointed an arbitrator pursuant to the arbitration clause of the charter party, and by telex dated 30 August, 1985 the Appellant's solicitors informed the Respondent the name of the Arbitrator appointed on behalf of the Appellant. However, the Appellant's solicitors stated that such an appointment was made without prejudice to the contention of the Appellant that the appointment of the Respondent's arbitrator was out of time.

On 6 December, 1985, the Respondent sought, by way of Summons, an Order from McGarvie, J. that the time for the appointment of the arbitrator be extended, which became the subject of the appeal.

THE CHARTER PARTY

Clause 35 of the Charter Party provided that:—

> "All of the terms, provisions and conditions of the *Carriage of Goods by Sea Act* 1924, and the Schedule thereto, are to apply to the contract contained in this charter party and the carrier is to be entitled to the benefit of all privileges, right and immunities contained in such Act, and the schedule thereto, as if the same were herein specifically set out. To the extend that any term or provision of this charter party is repugnant to, or inconsistent with, anything in such Act or Schedule, it shall be void."

The reference to the *Carriage of Goods by Sea Act* 1924 should be read as a reference to the *Sea Carriage of Goods Act* 1924 (Commonwealth). The Schedule referred to, is the schedule to the Commonwealth Act, which contains the Hague rules. The relevant provision of the Hague rules is Art III Rule 6 which states:—

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless a suit is brought within one year after delivery of the goods or the date when the goods should have been delivered".

THE PROCEEDINGS BEFORE McGARVIE, J.

As noted above, the Respondent, by way of Summons dated 6 December, 1985, sought an Order that the time limit within which arbitration proceedings might be commenced, as envisaged by Art III, Rule 6, be extended to allow for the appointment of the Arbitrator. In these proceedings, the Appellant contended that such an Order would operate to revise a cause of action which was otherwise time barred by the expiration of the one year period referred to in Art III, Rule 6.

McGarvie, J. granted the Order sought by the Respondent to allow the arbitration proceedings to continue and ratified the appointment of the Respondent's arbitrator by extending the time period allowed for the appointment of the arbitrator.

THE FULL COURT'S DECISION

The first question to be decided by the Full Court was whether an Order made pursuant to Section 48 of the Act is capable of reviving a right of action otherwise barred by operation of a contractural clause. Kaye, Murphy & Tadgell, J. J. all answered this question in the affirmative.

Counsel for the Appellant argued that Section 48 was a procedural, rather than a remedial provision, and thus incapable of reviving an otherwise barred cause of action. In this respect, Counsel for the Appellant argued that Section 48(1) only authorised orders extending the time for doing an act or taking a proceeding in, or in relation to an arbitration which has already otherwise been commenced.

Both Kaye and Tadgell, J. J. expressed the view that Art III Rule 6 led to the consequence that unless arbitration or legal proceedings are commenced within the one year period specified, the charterer's right of action is barred. In this respect, their Honours relied upon the House of Lords' decision in *Aires Tanker Corporation*—v—*Total Transport Limited* (The Aires) [1977] 1 WLR 185 which dealt with the incorporation of Art III rule 6 into a contract.

Tadgell, J. expressed the view that once it is concluded that Art III Rule 6 is a provision contained within an arbitration agreement, Section 48(1) confers upon the Court discretionary power to extend the time for the commencement of arbitration proceedings. In fact, Tadgell J. stated (at p. 36) that:—

> "One is driven, I think, to the conclusion that the section contemplates an interference with a contractual provision—and even one that, left undisturbed, would have the effect of distinguishing a claim".

On the question of whether Section 48 was capable of granting relief extending the time for commencing of arbitration proceedings in an otherwise barred cause of action, the Court had regard to Section 27 of the *Arbitration Act* (1950) (UK). The Court of Appeal in *Consolidated Investment & Contracting Co.*—v—*Saponaria Shipping Co. Ltd.* (The

Virgo) [1978] 1 WLR 986 held that Section 27 gave the Court the power to make an Order of such a nature extending the time for the commencement of arbitration proceedings. Section 27 is worded as follows:—

> "Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken with a time fixed by the agreement, and a dispute arises to which the agreement applies, the High Court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings, extend the time for such a period as it thinks proper."

Counsel for the Appellant argued that Section 48 of the Victorian Act is narrower in its terms than Section 27 of the United Kingdom Act. In this respect, Counsel noted that Section 27 expressly refers to claims that are otherwise barred by the provisions of the Arbitration agreement, whereas the terms of Section 48 are non-specific, being directed generally to procedural matters.

This argument was rejected by Tadgell, J. in light of the wording of sub-section (3) of Section 48. His Honour stated (at p. 36) that:—

> "Without sub-section (3) of Section 48, one might be left uncertain whether the words in sub-section (1) "doing any act or taking any proceeding . . . in relation to an arbitration" embraced the commencement of the arbitration proceedings themselves. The opening lines of sub-section 3, however, are sufficient to dispel any doubt and para (b) confirms that conclusion".

In reaching a similar conclusion, Kaye, J. had regard to the legislative history of Section 48, and concluded that Section 27 of the U.K. Act was the model for Section 48 of the Victorian Act, and that this is confirmed by sub-section (3)(b) of Section 48.

Counsel for the Appellant further contended, in the alternative, that McGarvie, J. wrongly exercised his discretion, in that he did not attribute sufficient weight to the limitation period fixed by Art III Rule 6. In this respect, Counsel argued that the parties contractually agreed as to the substance and form in which disputes were to be resolved under the Charter Party, and that section 48 should only be exercised where there were considerations outweighing the significance of this contractual agreement.

To this argument, Kaye, J. felt that in all the circumstances, and in particular, the fact that there was only nine days delay in the commencement of the arbitration proceedings, McGarvie, J. properly exercised his discretion.

Tadgell, J. considered whether there were any reasons as to why Art

III, Rule 6 should preclude the Court from exercising the power contemplated by Section 48. In this respect, His Honour, pointed out that the period fixed by Art III, Rule 6 could be extended by consent, by statue, or by operation of law, for example, by way of the doctrine of estoppel. Therefore, it was not necessary, in His Honour's view, to examine the situation from the perspective of a cause of action be revived or resurrected, and therefore, no distinction needed to be made between a contractual provision which merely bars the remedy as opposed to extinguishing the right of action. Nor is it relevant, whether the time bar is extended prior to or subsequent to its expiration.

Tadgell, J. noted (at p. 38) that Section 48 "is avowedly a provision which contemplated the variation of a contract to deprive a party of an entrenched right." His Honour went on to state that:—

> "No doubt the Judge acting under the Section will be correct only if he bears this fully in mind when exercising his discretions and takes into account the nature of the term he is asked to vary, and its derivation, and all the circumstances in which he is asked to extend the time and all the consequences of an extension."

All three members of the Full Court concluded that the appeal should be dismissed.

CONCLUSION

In conclusion, it is worth noting that the provisions of Section 48(3)(b) expressly provides that an order extending the time within which arbitration proceedings may be commenced, shall not contravene the provisions of any *enactment* limiting the time for the comencement of arbitration proceedings. Thus, if a right of action was barred by a Limitation of Actions statute, then it could not be revived by an Order made pursuant to Section 48. In contrast, the decision of the Full Court was concerned only with a contractual provision which gave rise to such a time bar.

Application for Security of Costs

SUPREME COURT OF VICTORIA

O'BRYAN J.

[1988] V.R. 94

Nasic v. Dimovski

THIS was an application for security for costs by Dimovski, the Owner/ Respondent to arbitration proceedings brought by Nasic the Claimant/ Builder.

The applications was brought pursuant to Section 47 of Commercial Arbitration Act 1984.