JUDGMENT : MR JUSTICE CHRISTOPHER CLARKE: Commercial Court. 17th October 2006.

1. This is an application by the claimants pursuant to section 68 (2) (a) of the Arbitration Act 1996 ("the Act") for an order that the Court should remit for reconsideration an award of an arbitral tribunal ("the Tribunal") consisting of Mr Lionel Persey, Q.C., Mr Nigel Teare, Q.C., and Mr Patrick O'Donovan, upon the ground that there has been a serious irregularity in the conduct of the arbitration in that the Tribunal failed to comply with its duty under section 33 of the Act. In order to explain how the irregularity is said to have come about it is necessary to set out the facts as found by the Tribunal and to chart some of the progress of the arbitration since the irregularity is said to arise from what happened on the last day of the hearing and thereafter.

The background facts

2. The claimants ("the Owners") are the owners of an ice-classed multi purpose Ro-Ro vessel, the "Magdalena Oldendorff" ("the vessel"). The vessel is an ice classed ship, not an ice breaker, that is to say she is a bulk carrier with an ice blade on a strengthened bow. The Owners chartered her to Intaari of St Petersburg, the respondents ("the Charterers"), under a charterparty on an amended Baltime form dated 2nd March 2002 ("the charterparty") for a period of 45 days plus up to 10 days for a voyage to and from Antarctica. The purpose of the voyage was to replenish supplies and transfer personnel at two Russian scientific stations namely Novolazerevskaya ("Novo") and Mirnyy. A charter in March is late in the season for navigation to the Antarctic. The hope was that the vessel would arrive at and leave Antarctica in the early part of the Antarctic winter. But the charterparty provided for hire to be payable, at a reducing rate, if the vessel was frozen in and unable to reach open waters before the end of the season. In the event this is what happened.

3. The charterparty contained in clause 26 (a) the following warranty: *"The vessel was constructed to operate independently in thick one year old ice with enclosed multi year old ice. The vessel is capable to break up to 1.2. metres of one year old fast level ice with both engines at the continuous speed of 3.5 knots and to break ridges of 7 metres in the running mode. The vessel has an ice knife on the stem for safe navigation of the vessel in Antarctica waters".*

4. The vessel was delivered at Cape Town on 10th April 2002. She was not redelivered until December 2002. This was because, although she crossed the "ice belt" which encircles the Antarctic on three occasions (on going to, and coming from, Mirnyy, and on going to Novo), when she departed Novo on 30th May she met with such adverse ice conditions that she had, eventually, to take shelter in Muskegbutka Bay where she spent the winter.

5. The Owners' claim in the arbitration was for US $2,672,981.81 unpaid hire. The Charterers said that they were not liable for such hire because they were entitled to set off a claim for damages for breach of the charterparty warranty as to the vessel's ice-breaking capability. The Owners admitted at an early stage in the oral hearing that the vessel was in breach of that warranty. It was their case that the breach was without causative significance.

The course of the voyage

Cape Town to Mirnyy

6. The vessel left Cape Town on 19th April. On 1st May she began to cross the ice belt towards Mirnyy. During 2nd May she was unable to make progress for a period. In the light of the evidence, including evidence that drilling tests on 3rd May showed an ice thickness of about 2 metres, it was not in the end suggested that the vessel's breach of warranty was a cause of her failure to break through the ice on 2nd May. The vessel was unable to enter Mirnyy because the previous year's multi-year fast ice barrier had unexpectedly survived the summer because of a lack of cyclone activity. On 4th May cargo operations (by helicopter) started off Mirnyy.

Mirnyy to Novo

7. On 12th May the vessel departed Mirnyy and during 12th and 13th May there were periods when she was unable to make progress through fast first year ice 40-50 cm thick with 5-10 cm of snow.

8. On 14th May the vessel managed to cross the ice belt outward bound from Mirnyy and began her sea passage to Novo. On 21st May she began to cross the ice belt on her inward passage towards Novo. On 22nd and 23rd May there were periods when she could not make progress and became jammed in ice conditions largely composed of first year ice of 30-60 cm with no more than 10 cm of snow. On 24th May when on her inward passage to Novo she encountered weather conditions which reached hurricane force. As a result she was unable to berth and she moved backwards and forwards in a west east east west movement. In the end she berthed on 27th May and commenced cargo operations.

Novo onwards

9. Thereafter she departed Novo on 30th May 2002 in order to return to the Cape. Contrary to expectations she went in a westerly direction (she had been expected to go east) and encountered severe ice conditions with an easterly force 9 wind, reducing to force 6-7, and then increasing on 31st May to force 7-8. She had turned west in order to provide shelter from the accommodation to the crew on the deck so that they could secure it. On 30th and 31st May the vessel was trapped in the ice and unable to turn back towards the east. On 1st and 2nd June she made very slow progress, on occasion to the north, but from late on 2nd June she was drifting in a westerly direction, only ceasing to do so on June 10th when she was able to make progress towards Muskegbutka Bay. She reached there on 14th June and stayed there until November. She did this in order to avoid the vessel being dragged westwards into the Weddell Sea,[1] from which she might well not have escaped.

[1] In which Shackleton's "Endurance" was trapped and crushed.

The Charterers' case

10. The Charterers' case, as pleaded in their Defence of 21st November 2003 was as follows:

> *"8 Had the vessel performed in accordance with the charterparty she would have returned to Cape Town on or about 30th May 2002 and/or she would not have been trapped in ice on or about 30th May 2002 and would not have needed to seek refuge in Muskegbukta.*
>
> *9. As a result of the matters set out above:*
> (i) *Between 2nd May and 30thMay 2002 there was 5.8 days loss of time or delay.*
> (ii) *Time lost from 19th April 2002 until 30 May 2002 due to the inefficiency of the vessel was properly deducted by the Respondents under clauses 11 (A) and/or 13 of the charterparty.*
> (iii) *The vessel was off hire from 30th May 3002 and/or the Claimants are responsible for any delay thereafter pursuant to [the same clauses].*
> (iv) *Further or in the alternative, during the 5.8 days referred to above and/or from 30th May 2002 the Respondents were deprived of the use of the vessel and the Respondents were entitled to deduct any hire during those periods."*

11. By a letter of 28th May 2004 the Charterers gave further information of the makeup of the 5.8 days. They claimed that, on a conservative estimate, they had lost about 140 hours until 30th May, of which 59.1 hours were on account of slow steaming and the remainder were hours lost on 2nd, 12th/13th, 22nd/23rd, 30th May and 30th May/1st June when the vessel was jammed.

12. By an Amended Defence of 5th September 2005 the Charterers added an alternative plea that had the vessel performed in accordance with the charterparty she would have been able to leave the Antarctic and head for Cape Town at about the end of July/beginning of August. They relied on the fact that a ship called the "Almirante Irizar" had reached the vessel on 22nd July and returned to open waters on 7th August without problem (having tried unsuccessfully to rescue the vessel, which was not able to follow her out). The ice breaking capacity of the "Almirante Irizar" was said to be inferior to that of the vessel.

13. It was thus apparent that the Charterers were saying that if the vessel had complied with the warranty:
(a) She would not have lost 5.8 days time, some of which was time lost in May;
(b) She would have returned to Cape Town by about 30th May. This obviously meant that she would have left Novo before 30th May. If she was to arrive on 30th May her departure could not have been later than about 23rd May at best;
(c) If she was still at Novo on 30th May she would not have been trapped there, i.e. having departed Novo on her actual date of departure she would then have crossed the ice bar and reached Cape Town without difficulty;
(d) In any event she would have returned to open waters in July/August.

14. By the time of the hearing the Charterers had received an expert report from Mr John Gibson. In that report (at paragraph 8.5.7) he calculated that, using the charterparty speed and consumption figures, and assuming that the times alongside at Mirnyy and Novo were as set out in the charterparty the voyage from Cape Town and back should have lasted 35.4 days (of which 6.87 days would be from Novo to Cape Town) such that the vessel should have returned to Cape Town by 24th May. I call this "the Gibson calculation".

The Charterers' opening submissions

15. In the Charterers' opening submissions the claim was repeated, in paragraphs 7 (7) and (8) of the "Overview", that had the warranty been complied with the vessel would have returned to Cape Town at the end of May/beginning of June; and that the Charterers were not liable to the Owners for any hire over and above that which the Charterers would have been obliged to pay for the 35 days that the vessel should have taken to complete the voyage. The 35 days figure was derived from the Gibson calculation. A subsequent paragraph of the submission identified the five main issues of which the fifth was: *"If the vessel had complied with her ice breaking capacity and/or if the vessel had been seaworthy would she have been able to break through the ice and if so when?"*

Mr Timothy Young, Q.C., for the Owners agreed with the formulation of the issues, including this one, by Mr Luke Parsons, Q.C. for the Charterers.

16. In relation to the fifth issue paragraph 113 of the submissions referred to a calculation by Professor Riska of the ice-breaking capability of the "*Almirante Irizar*". This calculation purported to show that that vessel's ice breaking capability was inferior to the capability of the vessel as warranted.

17. Paragraph 114 then said: *"Given that the ALMIRANTE IRIZAR was able to make it through the ice, Professor Riska's figure 9 clearly demonstrates that the Vessel, had she been seaworthy and had she been able to perform in accordance with the charterparty ice-breaking warranty would have been able to leave the ice and return to Cape Town in good time (Gibson calculates that the Vessel should have returned by 24th May 2002, see Gibson paragraph 8.5.7)."*

18. If the vessel was to arrive in Cape Town by 24th May she would have departed Novo in mid May. Exactly when that would be would depend on how long it would take to get from Novo to Cape Town. Mr Gibson's calculation of 6.87 days[2] would mean a departure on about 17th May. If so, the vessel would have left Antarctica at a date

[2] In their Award the Tribunal decided that the voyage from Novo across the ice belt to Novo would have taken about 18 days.

when no one suggested she would have become ice bound. So, if the case based on the Gibson calculation was right, the vessel would, but for the breach of warranty, have avoided wintering in the Antarctic.

The Owners' opening submissions

19. The Owners' case was that the conditions that the vessel met were such that she would have become ice bound even if she had answered to the warranty. Their expert, Captain Pahl, had observed in his report that the Gibson calculation was "*purely theoretical*" and that it had not taken into account the actual conditions at Mirnyy, the time it took for cargo discharge, and the ice and weather conditions on the expedition. This observation was correct. The calculation was simply a division of distance by speed. No alternative case was put forward by Owners to the effect that, if the breach of warranty had caused any loss of time prior to 30th May, it was much less than that claimed by the Charterers.

The evidence

20. The evidence at the hearing was principally directed to (i) the actual state of the ice on the relevant dates, which had not been the subject of agreement, (ii) the defects in the vessel's engines, and (iii) the extent of her reduced ice breaking capability. Whilst the Owners had admitted breach of warranty they had made no admissions as to the extent or consequence of that breach. In the middle of the arbitration a version of the log made by Mr Khromov, a Russian scientist who was on the vessel, was agreed. This was a very detailed contemporaneous record of the state of the ice on the relevant days, upon which the tribunal understandably placed much reliance.

21. The Master, whom the Tribunal did not find an impressive witness, was not asked what the position would have been, or what he would have done, if the vessel had arrived at Novo, not in mid May, but a day or two before she in fact did so. Mr Parsons told me that, in circumstances where the Owners had put forward no alternative case on damages, he did not regard it as incumbent on him to cross examine on the consequences of the various different periods of delay that the Tribunal might find. In addition to the evidence of the Master evidence was given by (a) the Chief Engineer, (b) Mr Khromov, (c) Mr Martyanov, (d) two ice experts – Professor Riska and Mr Hellmann, (e) two engineering experts – Mr Gordon and Mr Gibson (who was not cross-examined on his paragraph 8.5.7), and (f) Captain Pahl, Owners' ice navigation expert.

Closing submissions

22. The opening and evidence lasted from 21st November to 2nd December 2005. The Tribunal ordered an exchange of written closing submissions on Friday 9th December to be followed by an oral hearing, at which Counsel were to be subject to a two hour guillotine, on Saturday 10th December. The hearing for 10th December was fixed despite the objection of Mr Timothy Young, Q.C., for the Owners, who was heavily pressed with other professional commitments.

The Charterers' written closing submissions

23. The Charterers' written closing submissions included the following:

> *"1. Following the oral evidence the shape of the Charterers' case has not significantly altered since the Charterers served their Opening Skeleton Argument ("the Charterers' Opening") with the possible development that the unseaworthiness of the vessel and its effect on performance in the ice encountered is now in sharper focus. These Closing Submissions are served as a supplement to the Charterers' Opening in order to comment on the evidence and are designed to be read with that Opening."*
>
> And, later:
>
> *"3. The Charterers invite the Tribunal to make the following findings: … …….*
>
> *(9) The delays to the vessel and the need for the vessel to remain over winter were caused by the breach of warranty and unseaworthiness of the vessel. If the vessel had been seaworthy and/or had been able to perform in accordance with the ice breaking warranty, the vessel would have returned to Cape Town by end May/beginning of June.*
>
> *(10) Accordingly, the Charterers are not liable to Owners for more than the 35 days the Vessel should have taken to complete the voyage ……*
>
> *(5) WHAT WAS THE CAUSE OF THE VESSEL WINTERING IN THE ANTARCTIC?... …*
>
> *"59 The first issue the tribunal needs to consider on this point is whether the vessel could have broken through the ice and returned to open water if she had complied with her ice breaking warranty and/or been seaworthy.*
>
> *"62 Had the Vessel been able to generate full power on her engines and engage her ice-breaking mode, she would have been able to cross the ice-belt and return to open waters* (further particulars were then given).
>
> *"68 The Charterers ask the Tribunal to find that the vessel would have returned to Cape Town by 24th May (see Gibson paragraph 8.5.7…) if there had not been a breach of charterparty.*"

24. As is apparent from that citation the Charterers' closing submissions included both the original claim that the vessel would have reached Cape Town by the end of May/beginning of June[3] and the more favourable specific contention that she would have returned by 24th May. The submissions did not include any reference to the vessel beginning her return from Novo a day or so before 30th May.

25. But under the section of the submissions headed "*(3) Did the vessel comply with the charterparty warranties and/or description*" and the sub-heading "*What ice was the Vessel unable to break?*" the Charterers contended that it was

[3] Originally pleaded as "on or about 30th May 2002".

clear from Mr Khromov's log that the vessel was never asked to break ice of more than 60 cm and despite this got stuck in the ice on several occasions i.e. on 2nd May, 12th /13th May and 22nd May, and 30th May onwards.

The Owners' written closing submissions

26. The Owners' closing submissions stressed that causation was the critical question, and that the Charterers had to show that, but for the breach of warranty, the vessel "*could, should and would*" have escaped from the Antarctic. The submissions referred to the fact that the vessel jammed on various occasions, including 12th/13th May and the delay encountered going into Novo, but submitted that this was not uncommon in the Antarctic or the result of breach. In relation to getting into Novo paragraph 29 read as follows: *"The delay encountered going into Novo, after crossing the Ice Belt was due to the onset of a hurricane, she plainly could not either berth (or stay at berth) in such a wind*[4] *and hence she "tacked" for two days, as she would have done with or without ice-breaking capacity".*

Oral closing submissions

Owners

27. On Saturday 10th Mr Young was the first to speak. In the course of commenting on the Charterers' written closing submission he said this:

> *"*[quoting from the submissions] '*If the Vessel had been seaworthy and/or been able to perform in accordance with the ice breaking warranty, the Vessel would have returned to Cape Town at the end of May, beginning of June'. I have put a big no against that and you can see why. That is where my case lies. And he really does not have any evidence"*
>
> Given that the Charterers' submission was based on the Gibson calculation this broad brush approach was understandable. As Mr Young rightly surmised the Tribunal was not going to regard Mr Gibson's theoretical calculation as justifying the conclusion for which the Charterers sought to deploy it. His oral submissions addressed the Charterers' contentions that, but for the breach of warranty, the vessel would have got back from the Antarctic without having to winter there if she had left on 30th May or thereafter.

Charterers

28. Mr Parsons then spoke. Having referred to the five issues, he submitted: *"And in any event what we submit is that that this vessel is unseaworthy ---and that that is the root cause of all the problems that they encounter when they meet the ice on the 12th May, the 23rd May, the 30th to the 19th June and is the root cause of the decision that is made to winter in Muskegbutka.."*

29. A number of passages in the transcript of what he said have been subjected to much scrutiny. At one point he is recorded as saying this:

> " *77*
> *13 So it [the Khromov log] helps you on that basis. It also -- we will*
> *14 come back to it -- helps you on the question of*
> *15 causation. Because Mr Khromov's log records the*
> *16 conditions in the Ice Belt, that this vessel went*
> *17 through three times and on the balance of probabilities,*
> *18 are the conditions that the vessel would have had to*
> *19 encounter when she went back the fourth time.*
> *20 MR TEARE: And for the purposes of causation, the relevant*
> *21 period to look at the log is what?*
> *22 MR PARSONS: Well, there are two different bases of thinking*
> *23 that.* ***Because of course if she had not been delayed on***
> ***24 the 12th and 13th, and the 22nd and 23rd, she might have***
> ***25 been coming through that bit earlier anyway****. …*
>
> 78 ...
> *10 So it would have been earlier, possibly than the*
> *11 figures show in this diary.* ***But for the purposes of***
> ***12 calculating the conditions on our worst case, you would***
> ***13 be looking at the 30th May to the 10th June****. When the*
> *14 conditions are described as 20 to 30 centimetres."*[5]

30. Whilst some of the language could be clearer it seems to me that the point that Mr Parsons was making was that if the warranty had been fulfilled the vessel would not have been delayed on 12th / 13th and 22nd/ 23rd; she would have been coming through the ice belt at an earlier date than she did; and she would have returned without having to winter in the Antarctic. But, on the Charterers' worst case, she would have been coming through the ice belt between 30th May and 10th June.

31. At a later stage there was an exchange with Mr Persey as follows:

> *"17 MR PERSEY: There are two aspects to it. One is by how much*
> *18 was she in breach. And then secondly whether, given her*

[4] The Charterers contend that there is no evidence to that effect and that the tenor of the evidence is that, if the vessel had been in the condition warranted by the charterparty, she would have been able to remain at berth during the hurricane.

[5] The emboldening in this and other citations is not in the original transcript.

19 stated capacity, could she have broken the ice which she
20 in fact did face?
21 MR PARSONS: Yes, I agree. Those are the two issues."

The reference to "*the ice which she in fact did face*" is a reference to the actual situation that the vessel faced and not the hypothetical situation which would have arisen if the vessel had left Novo earlier than she did. But since it was apparent that, on any view, the Charterers were saying that the vessel, if warranty conforming, would have left before 30th May, I cannot accept that Mr Persey thought that no case was being made that the vessel ought to have been able to break through such ice as in the event she would have faced, if she had not become jammed as a result of a breach of warranty.

32. At a later point there was a further exchange:

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16 So the question then is: when would the vessel have
17 returned? There are on this basis a number of
18 possibilities. She could have gone ***straight back from***
19 the 30th, *is one possibility. She might have been going*
20 back ***a few days earlier*** *because she was delayed, so she*
*21 would have been going back from****, say, the 27th****. Or she*
22 might have been going back ***after the ice abated****. Those*
23 are the three possibilities. I did them in the wrong
24 order.
25 MR TEARE: Tell me which month you are talking about.

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1 MR PARSONS: Yes, sorry. Either you could find that she was
2 trying to turn back ***a few days before the 30th May****; from*
3 Novo, because she would have got to Novo a little bit
4 early if she had not got stuck. That is my first case.
5 Second case is --
6 MR PERSEY: She would have gone straight north then because
7 there would have been no hurricane --
8 MR YOUNG [sc. PARSONS]: That is what I am saying. She would have gone
9 straight north. The second one is: that she would have
10 done that on the ***28th*** *instead of the 30th because she*
11 got delayed getting there.
12 The second one is she would have gone ***straight north***
13 from the 30th.
14 My third case is that she would have gone, if she
15 started going to the west, she would have broken out at
16 some stage or at the latest, once the pressure abated
17 from say the ***6th or 7th*** *she would have gone back. Those*
18 are the three possibilities.
19 And Mr Gibson -- I have given you the reference --
20 has calculated the length of the route and it is
21 a question of taking that and applying that to one of
22 those dates effectively.
23 MR TEARE: And that is the reference you have taken us to,
24 is it?
25 MR PARSONS: Yes."

33. This passage, also, is not as plain as it might be. But in the context in which it occurred and in the light of what had already been said it seems to me tolerably clear that what Mr Parsons was saying was that, if the vessel had complied with the warranty, she would have begun her return from Novo to Cape Town on either:
(a) a few days earlier than the 30th May – 27th or 28th;
(b) the 30th May;
(c) 6th/7th June.

34. The first difficulty with the passage arises because Mr Parsons originally put those dates in the wrong order causing Mr Teare to inquire which month Mr Parsons was talking about (I infer that Mr Teare was particularly questioning Mr Parsons' reference to the 27th). Secondly, Mr Persey's reference to the absence of a hurricane raises the question whether he was referring to the hurricane which undoubtedly developed on 24th May, when the wind was force 12, or, as it seems to me must have been the case, the conditions close to that on 30th May.[6] Thirdly, taking the transcript literally the second case is specified as being one of departure from Novo on both 28th and 30th May. I am quite satisfied that what happened is as described in the evidence namely that the words "*that she would have done that on the 28th instead of the 30th because she got delayed getting there*" were an

[6] Mr Young's submission at Day 10, page s 144-5, lines 24-1 show that he thought so too.

apostrophe made by Mr Parsons at dictation speed to assist Mr Teare, who was taking a note but who was behind with it at that point, as to what the first case was and not an exposition of the second case. The exposition of the second case, preceded by a repetition of the words "*The second one*", came thereafter.

35. Mr Parsons was sitting on the same side of the room as Mr Teare. Mr Parsons knew what he meant. Mr Teare, I am sure, understood what he meant. Mr Young, however, told me that he did not understand Mr Parsons to be putting forward any case to the effect that, but for the breach, the vessel would have left Novo before her actual date of departure - 30th May – other than the case which had been pleaded and re-stated in the charterers' closing submissions namely that the vessel would have arrived in Cape Town on or about 24th, or by the end of, May.

36. When it came to the exposition of the second case the position was, he submitted, thoroughly confusing. As between Mr Parsons and Mr Teare the exposition following the first "*The second one*" may have been an exposition of the first case; but what it appeared, or may have appeared, to others was that the second case had been inaccurately stated the first time and was then repeated so as to explain that it meant departure on the 30th.

37. Very shortly thereafter there came a passage which reads as follows:

"24 MR TEARE: Just going back to paragraph 68.[7] When
25 you say the charterers asked the Tribunal to find the

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1 vessel would have returned to Cape Town by the 24th May,
2 your first case, as you gave me a moment ago, that she
3 might turn back a few days before the 30th May, she is
4 going to arrive back in Cape Town by the 20th Ma[18]. So
5 I am ignoring -- ***Mr Gibson says she would get back to***
6 Cape Town by the 24th May but that is not your primary
7 case.
8 MR PARSONS: I better just think about that. The problem is
9 I was trying to do this while quantum was being
10 discussed and I had thought we would actually have
11 figures for different dates. Could you bear with me --?
12 MR YOUNG: A ten day ...
13 MR PARSONS: I am afraid I did not grapple with this because
14 I had thought quantum was being dealt with.
15 MR YOUNG: I have some sympathy with my learned friend.
16 MR TEARE: What we need to know in relation to your three
17 cases is an agreed figure for the number of days it
18 would take to get back to Cape Town."
19 MR YOUNG: After getting out of the Ice Belt.
20 MR TEARE: I am looking at page 229 and I cannot find an
21 answer on that page.
22 MR YOUNG: There is not one. I think it was 10 to 15 days.
23 MR PERSEY: Surely you could agree on that and let us know.
24 MR TEARE: Add to date to whatever date you think she would
25 have returned back, if you think that is the case.

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1 THE CHAIRMAN: As Mr Persey says, this is not something that
2 needs to be done now and certainly not something that
3 should be done in a rush.
4 MR PERSEY: I think you should agree and send us a letter.
5 If you cannot then set out the parameters and identify
6 where you disagree.
7 MR YOUNG: I agree.
8 MR PARSONS: I agree. Having said those are our three cases,
9 because Mr Gibson has got had a (inaudible)[9] I just need
10 it to see if I have missed something because it sounds
11 as though I have.
12 MR YOUNG: Yes. If it is of any consolation, I think the
13 problem that my learned friend has with Mr Gibson,
14 I think it is why it does not matter, is that the

[7] *The Charterers ask the Tribunal to find that the vessel would have returned to Cape Town by 24th May (see Gibson para.8.5….)7 if there had not been a breach of charterparty*."

[8] No case had ever been made that the vessel would have arrived at Cape Town by 20th May. It seems to me likely that was Mr Teare said or meant to say was "*she is not going to arrive back in Cape Town by the 24th May*".

[9] The word may well be "calculation".

15 discharging at Mirnyy, because of the thickness of the
16 ice, had to be done by helicopter which then had to be
17 stopped at various times because of weather or
18 visibility. And his calculations did not factor that in
19 at all, nor did he factor in the fact that ***if the vessel***
20 had got into Novo earlier, the hurricane, the first of
21 the two hurricanes, would have hit *earlier and so she*
22 would have put off the berth then. So I suspect we
23 can -- we can ... well, I suspect we can probably agree
24 things once you have produced your award. No, we
25 cannot. That will not work."

38. This passage also raises difficulties. Taken literally Mr Parsons appears to think that Mr Gibson's calculation may still be his primary case or, at least, in doubt as to whether it was not. If that was or appeared to be so, then, as Mr Young submitted, he could scarcely be expected to be any better informed.

39. I regard it as most implausible that Mr Parsons was at this stage in doubt as to what his primary case was. He had just explained it. What it seems to me Mr Teare was seeking to know was the date by which, on Mr Parsons' three propositions as to the date of departure from Novo, the vessel would have arrived at Cape Town, given that Mr Parson's primary case was no longer that supported by the Gibson calculation with its return date of 24th May.

40. The discussion that followed was as to the time it would take to get from Novo allowing for the time necessary to traverse the ice belt. It took place against the background of a rather inconclusive agreement between the solicitors as to quantum, which was in the following terms: *"In relation to the sums claimed by the claimant and counterclaimed by the respondents and/or adjustment to final hire statements they cannot be agreed until the tribunal has ruled in relation to, inter alia, commencement of the charter, ending of the charter and any off-hire periods that the tribunal may find. In these circumstances, it is agreed between the parties that the decision of the tribunal will be discussed between the parties with a view to then presenting to the tribunal agreed claim or counterclaim figures (as appropriate)".*

41. Mr Parsons did not, in his oral submissions, submit, in relation to paragraph 29 of Mr Young's submissions (see paragraph 26 above), that the effect of the hurricane on the 24th would not have had any impact on 23rd May.

42. At the very end of his oral submissions Mr Parsons invited the Tribunal to make a finding as to exactly when, but for the breach, the vessel would have turned back.[10]

Owners' reply submissions

43. Mr Young's reply submissions (for which he was allowed half an hour) said nothing about the position if the arbitrators should find that, but for the breach, the vessel would have arrived at Novo earlier than she did. He dealt with the allegations that, but for the breach of warranty, the vessel could have escaped if she left on or after 30th May.

The Award

44. In paragraph 48 of their Award the Tribunal characterised the Charterers' case in the following terns*: "The Charterers' primary case, as clarified in their closing written submissions, was that the vessel would have returned to Cape Town by 24 May had she complied with her ice breaking warranty. In this regard reliance was placed upon a calculation of voyage time by their expert marine engineer Mr Gibson … Their secondary case was that if the vessel would have left Novo on 30 May in any event she would have been able to reach the open sea had she complied with her warranty … . Their third case was that she should have been able to follow the channels created by the ALMIRANTE IRIZAR in July 2002 and thereby reach the open sea. (In their closing oral submissions the third case was put on the basis that the vessel would have broken out of the ice on 6 or 7 June and no mention was made of following the ALMIRANTE IRIZAR in August 2002).*

45. This summary is correct if regard is had to the position up to, but not beyond, the Charterers' closing written submissions. But, as Mr Teare had himself observed, return to the Cape Town by 24th May was not, when Mr Parsons addressed the Tribunal in closing, the Charterers' primary case.

46. The Tribunal found that the vessel's ice breaking performance was "*substantially*" below that which was warranted. They did not accept Mr Gibson's estimate that the length of the voyage should have been 35.4 days partly because the Charterers' voyage instructions given to the Master had an estimated duration of 42 days. The difference arose because Mr Gibson had allowed less time for crossing the ice belt and for cargo operations than did the Charterers themselves. Further those calculations did not take account of the difficulties encountered on the voyage. The arbitrators examined the course of events since the vessel's departure from Cape Town and came to the conclusion that the following delays were attributable to a breach of warranty:
(a) 5 hours on 12th May;
(b) 10 hours on 22nd May
(c) 2 hours on 23rd May

[10] The invitation was couched in terms which anticipated that Owners would be replying to his point that the vessel would, but for the breach, have left a few days earlier ("*That is my primary case. If however you are persuaded by anything Mr Young says in reply to find a later one …*"): Day 10, page 140, lines 18-20.

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These were hours lost on the journey from Mirnyy *to* Novo. The arbitrators concluded that, but for the breach, the vessel would have been able to depart about 17 hours earlier than the time of her actual departure *from* Novo. If so, she would have cast off her lines at about 1200 on 29th May (and not on 30th May). The Tribunal found that, on that hypothesis, the Master would have set off east instead of west because the conditions then were markedly better than those of the morning of 30th May, when she did in fact leave; and that she would have emerged from the ice belt on 2nd or 3rd June and arrived in Cape Town on 17th June 2002. As a result they concluded that the Owners' substantial breach of the ice breaking warranty was an effective cause of the vessel wintering in the Antarctic.

47. The arbitrators rejected the Charterers' alternative cases that, if the vessel had answered to the warranty, she would have escaped the Antarctic after she actually left Novo on 30th May, or that she would have done so because she would have been able to get through the ice belt had she gone north on 6th or 7th June. They also considered the decision made by the Master not to attempt to cross the ice belt on 11th June. They concluded that when he made that decision he had well in mind the limitations of his vessel's engines and the consequential damaging effect on her ice-breaking capability. But they concluded that that was only one factor in his mind, and that it had not been established that but for that he would have taken a different decision. Finally they rejected the submission that had the vessel complied with her warranty she would have reached open sea in July by successfully following the "Almirante Irizar". They considered that the reason for the successful exit of the latter vessel lay in her increased manoeuvrability.

48. Accordingly the Charterers succeeded, but upon a very narrow ground. 17 hours delay made all the difference between escaping the Antarctic and spending six months there. I call the ground of their success "the 17 hours point". I refer to 17 hours because that is the period of delay that the Tribunal found. But the description should be taken as embracing the contention that, but for the breach, the vessel would have left up to one, two or three days earlier – Mr Parsons in his oral submissions had referred to both 27th and 28th May.

The Owners' contentions

49. Section 33 (1) of the Act provides that the tribunal shall:

"(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent"

50. Section 68 of the Act provides that :

"68 (1) A party to arbitral proceedings may … apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award…

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);"

The Owners' submissions

51. Mr Young submits that in this case there has been a serious irregularity in that the Tribunal failed to give him and, thus, the Owners, a reasonable opportunity of dealing with the 17 hours point, to which there was a good answer. This has caused substantial injustice because it has enabled the Charterers, who failed on everything else, to succeed in a $ 2.5 million claim without the Owners being able to put forward their answer to it.

52. That there was no reasonable opportunity afforded to the Owners appears, so he submits, from the sequence of events that I have described. The Charterers' pleaded case, insofar as it relates to matters prior to 30th May, was that the vessel would have arrived in Cape Town on 24th May or on or about 30th May, implying that she would have departed in mid May at a time when, as was not in dispute, she would not have been prevented by the condition of the ice from reaching the open sea. That was the case that he came to meet. He met it by treating Mr Gibson's calculation as nothing more than what it was, namely a distance over speed calculation which ignored whatever was actually happening during the voyage. In this he rightly anticipated the approach which the Tribunal itself would take. It was scarcely surprising that he put forward no alternative calculation, since it was his case that, despite the (admitted) breach, the vessel would not have left Novo before 30th May and would not have escaped a winter in Antarctica if she left then. The Charterers' case was not put forward on the basis that each hour of delay found to be attributable to a breach of warranty would accelerate by an hour the time of the vessel's departure from Novo; nor did that appear to be so by necessary implication (as would be the case if the complaint was of detention at a loading port from which a vessel could depart whenever loading was complete).

53. Nothing in the evidence alerted or should have alerted him to the possibility of the 17 hours point. If the Master had been cross examined on the basis that, if there had not been a breach of warranty the vessel would have arrived at Novo a few days earlier and thus departed earlier, the Tribunal might not have placed much credence in his answers, but he, Mr Young, would have been alerted to the point.

54. Thus, when he came to draft his closing written submissions and make his oral submissions, he had no inkling of the 17 hours point and did not address it. This must have been the Tribunal's view as well, at any rate before Mr Parsons spoke, because, when they came to write their award, their summary in paragraph 48 made no reference to the point.

55. Mr Parsons' oral reply was, he submits, insufficient to put him on notice that the 17 hours point was being raised. The reference in the passage set out at paragraph 29 to "*coming through that bit earlier*" was wholly inadequate for that purpose and the passage set out at paragraph 32 was obscure. The first case expounded – that the vessel would have gone back "*a few days earlier*" than 30th May - was consistent with the Charterers' pleaded case that she would have arrived back in Cape Town on 30th May, which, if Mr Gibson's 6.87 days was right, would mean a departure on 23rd May. The second case appeared, from the words used, to be expounded and then corrected, unless you had understood that which was not clear, namely that the first apparent exposition of the second case was in truth a re-statement of the first. The passage set out at paragraph 37 was confusing and appeared to indicate that even Mr Parsons was not sure what his primary case was.

56. Mr Young further relied on the fact that during the course of his oral reply he did not deal with the 17 hours point and, although asked questions on other topics, he was not asked by the Tribunal what he said in relation to it. It would have been normal in a London maritime arbitration for the arbitrators to ask him what he had to say on the point, which he had not addressed, not least because in the circumstances that had arisen it was entirely possible, as was the case, that he had not realised that it was being made.

57. Had he been alive to the point, or asked about it, he would have submitted that even if the vessel had arrived at Novo a day or so before she did she would still have been unable to leave Novo any earlier than she did. According to the diary of Mr Martyanov, the Charterers' expedition leader, when the vessel reached the polynya at Novo at 0130 to 0230 on 24th May the wind was reaching 25 metres per second, approaching hurricane force. On that account she could not reach Novo. If she had arrived 17 hours earlier i.e. at about 0830 – 0930 on 23rd May she would not have been in a materially better position.

58. The same log records[11] that at 0800 – 0900 on 23rd May the wind was 8-12 m/s with poor visibility. It also records that between 0900 and 1000 the helicopter was left on the deck because it could not be assembled due to the wind. Accordingly the premise upon which the arbitrators' award must necessarily rest, namely that, if the vessel had arrived at Novo 17 hours earlier than she did, she would have left Novo 17 hours earlier than she did was not established. Such a conclusion must assume that she could, on arrival at Novo, have engaged in cargo operations and/or the discharge of personnel which would have saved her 17 hours of work after the 24th May hurricane had abated. Such a conclusion could not be justified and, because the point was never raised before them, the Tribunal did not consider the point.

59. Mr Young did not complain that the Tribunal's decision to sit on a Saturday and to impose a guillotine was an irregularity. But he did submit that, if such expedients were to be used, it was a matter of particular importance (a) that the issues were adequately identified in the written closing submissions and (b) that the Tribunal should ensure that each side had a proper opportunity to deal with points raised for the first time during the guillotined period. He also pointed out, as I accept, that, under such a regime, Counsel who has to reply is, when listening, engaged in the twofold task of having to understand and note what is being said and to prepare an instantaneous response. In those circumstances he or she, Mr Young submits, may well fail to spot that a new point has arisen when it is unheralded and expressed in an obscure manner.

The authorities

60. In ***AAB AG v Hochtief Airport GmbH*** [2006] 2 Lloyd's Rep 1 Tomlinson, J helpfully referred to the many judicial pronouncements to the effect that an applicant under section 68 faces a high hurdle and that the jurisdiction is intended to deal with extreme cases. Reference was made in that case, as in many others, to paragraph 280 of the Departmental Advisory Committee's report on the Arbitration Bill where they said: *"The test of "substantial injustice" is intended to be applied by way of support to the arbitral process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that parties have agreed to arbitrate not litigate. Having chosen arbitration, the parties cannot complain of substantial injustice unless what has happened cannot on any view be defended as an acceptable consequence of that choice. In short clause 68 is really designed as a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."*

61. Valuable though that paragraph is as an indication of the draftsman's envisaged purpose, I remind myself that Parliament has enacted what appears in section 68 of the Act and not what appears in paragraph 280 of the report. The power to intervene arises if there has been a failure to comply with section 33 that causes substantial injustice. Some of the phraseology of paragraph 280 ("*so far removed from what could reasonably be expected*", "*cannot on any view be defended as an acceptable consequence*", "*only available in extreme cases*") seems to add something of a gloss on the words of the statute. I do not intend by these observations to imply that the courts should readily intervene in cases of asserted irregularity (the reverse is true); only to sound a note of caution on treating paragraph 280 of the Report as if it was the statute itself.

62. In ***Bullfracht (Cyprus) Ltd v Boneset Shipping Co Ltd ("The Pamphilos")*** [2002] 2 Lloyd's Rep 681 Colman, J., distinguished the arbitrators' duty to act fairly from their duty to make findings of fact. In relation to the former

[11] There is, however, a problem with the use of this or any log for this purpose. It is possible to consult the log in order to see the weather conditions that it recorded 17 hours earlier than any given moment. The record will be of the weather conditions where the vessel actually was at that earlier time. But, if she had not had 17 hours of delay she would not have been at that spot.

he held that it was normally incumbent on the arbitrators to give the parties the opportunity to address them on proposed findings of major areas of material primary facts which had not been raised during the hearing or earlier in the arbitral proceedings. But it was not usually necessary to refer back to the parties for further submission on inferences of facts from the primary facts which the arbitrators intended to draw, even if such inferences had not been previously anticipated in the course of the arbitration. Mr Parsons accepted that a conclusion as to what would have happened if the vessel had not been in breach of warranty was not an inference from primary fact but submitted that it was akin to that. In my opinion a decision as to what would have happened in the case of a breach is closer to a material primary fact.

63. I was also referred to the decision of Collins, J., and of the Court of Appeal, in *Warborough Investments v Robinson* [2003] 2 EGLR 149. In that case the judge refused to intervene when the arbitrator in a rent review arbitration had taken an approach adopted by neither surveyor and of which neither surveyor was aware, because the issues in question had been "*put into the arena*". Mr Parsons submitted that the 17 hours point had come into the arena.

Conclusion

64. I have not been persuaded that, applying an objective test, the Owners did not have a reasonable opportunity to deal with the 17 hours point. From as early as the Defence the Charterers had contended that between 2nd May and 30th May 2002 there had been a loss of time. The further information indicated that those 5.8 days included time lost on 2nd, 12th/13th and 22nd/ 23rd May. Although the Charterers' then claim was that the vessel would have arrived back in Cape Town on 30th, and later 24th May, and would thus have left in mid May, the express averment of days or hours lost on 2nd, 12th/13th and 22nd/23rd May left open the possibility that they might only succeed in proving a loss of time on these days or some of them, in which case the arbitrators would have to determine what causative significance, if any, that had. Since, as the Owners rightly forecast, the Gibson calculation was never going to commend itself to the arbitrators as a realistic assessment of the time that the vessel should have taken, that possibility was far from remote.

65. The Charterers did not in their opening and written closing submissions, or in cross examination, specifically canvass the possibility that all that they could establish, in respect of the period prior to 30th May, was that the vessel would have arrived a few days earlier at Novo than she did and then left Novo commensurately earlier in consequence. But in their written closing submissions they invited the Tribunal to find that the delays to the vessel (which included getting jammed on 2nd, 12th /13th and 22nd May) and the need for the vessel to remain over the winter were caused by a breach of warranty; and the Owners in their written closing submissions claimed that they were not. Both these submissions begged the question as to what the result would be if the Tribunal rejected the case based on the Gibson calculation but accepted that there were a few days, or less, of delay attributable to a breach of warranty before 30th May.

66. In his concluding oral submissions on behalf of the Charterers Mr Parsons specifically raised the contention that, but for the breach, the vessel would have left Novo a few days before she did. In the passage set out at paragraph 28 he referred to Charterers' "*worst case*" as being one of departure on 30th May. A worst case of itself implies a better case, which is what had been referred to in the immediately preceding passage ("*if she had not been delayed on the 12th and 13th, and the 22nd and 23rd, she might have been coming through that bit earlier anyway*").

67. In the subsequent exchange set out in paragraph 32 above, looked at objectively, Mr Parsons was stating as his first case that, but for the breach, the vessel would have gone back a few days earlier than the 30th, say the 27th (or the 28th). That was something different to the former contention that she would have arrived in Cape Town by 24th or 30thMay. An arrival then would, even using Mr Gibson's optimistic 6.87 days, have meant a departure on 17th or 23rd May. Neither of those, particularly the former, seem to me "*a few days earlier*" than 30th. Moreover at this point Mr Parsons was not relying on the Gibson calculation. He was saying that, if the warranty had not been broken, the vessel would have left earlier than she did "*because she was delayed*". That in context must have meant that she had been delayed on the occasions to which he had shortly before referred. This was not a case based on an assumed maximum time for the voyage for a warranty complying vessel (the Gibson calculation) from which was to be deducted the actual time taken, but a case based on specific days of delay and their consequence. Mr Teare's later question made it plain that he was treating the Charterers' primary case as no longer based on the Gibson calculation.

68. I do not regard the exchange contained in the passage set out in paragraph 37 as indicating, to use Mr Young's phrase, that by now the Charterers' case was a "shambles". In the context of what had gone before Mr Teare was plainly considering what a change from a case based on the Gibson calculation to a case based on the effect of identified days of delay would mean in terms of when the vessel would arrive in Cape Town. The Gibson calculation had supplied its own answer to that question - 24th May. The new primary case did not, although part of the Gibson calculation – the 6.87 days – could be used for that purpose: hence Mr Teare's question.

69. In addition, Mr Young's intervention at line 12 on page 136 of the original transcript, seems to me to indicate that he had understood that what was being said was that the vessel would, but for the breach of warranty, have got into Novo earlier by a day or so since he observed that Mr Gibson's calculations did not factor in: *"..the fact that if the vessel had got into Novo earlier, the hurricanes, the first of the two hurricanes, would have hit earlier and so she would have put off the berth then .."*

70. The reference to "*the first of the two hurricanes*" must be a reference to the 24th May. The wind conditions on that day were of hurricane force and it was, in parlance that Mr Young himself had used[12] the first of two "hurricanes", although the second, on the 30th involved winds of only force 9. The submission that, if the vessel had got into Novo earlier, she would have met earlier a hurricane which in the event she met at a later date was a submission that, if the vessel had got into Novo a little earlier, as suggested, she would still have encountered the hurricane conditions which she actually encountered on the day (24th May) when she actually got to Novo and would have put off the berth then.

71. I am conscious of the fact that in the course of the hearing of this application the passages which I have cited have been rehearsed several times and analysed, in relation to the critical parts, line by line; an exercise that can only be performed with hindsight. That has been necessary in order to explain matters to someone with no prior familiarity with the case. But those who heard the words when they were spoken would have been fully familiar with the facts of the case, the evidence, and the shorthand (in particular the reference to two hurricanes).

72. Looking at the matter as a whole I do not regard the case as one in which it is only with the perfect vision of hindsight that one can say that the Owners had a reasonable opportunity to deal with the 17 hours point. The delays found by the Tribunal had been pleaded from the outset as being caused by a breach of warranty. The Owners denied that any breach had any relevant causative effect. That joinder of issue may itself be said to have put the consequence of any delay the Tribunal found to have been caused by the breach *"into the arena"*. The Charterers had put forward a much more extensive claim that, but for the breach, the vessel would have left the Antarctic in mid-May. But for a large claim to whittle down to a much smaller one is not unusual.

73. Further, in their closing written submissions the Charterers, although not specifically referring to the 17 hours point, had claimed that delays on 12th/13th and 22nd May were caused by a breach of warranty and invited the Tribunal to find that the delays and the need to remain over the winter were caused by such breach. In their closing written submissions Owners had contended that the Charterers had failed to establish that the need to winter in the Antarctic was the result of any breach of charterparty and had addressed the question whether the jamming relied on was a result of breach, although they had not addressed the separate question whether the outcome would have been different without such delay as, contrary to their contention, the Tribunal might find was caused by the breach.

74. In their closing oral submissions the Charterers explained what, in the light of the evidence, they were contending for so far as delays before 30th May were concerned. The Owners had an opportunity to reply to those submissions. Indeed, in the course of a passage dealing with the utility or otherwise of Mr Gibson's calculation, Mr Young had, albeit very briefly, made, in the words I have quoted in paragraph 69 his essential point on the Charterers' contentions. It was, moreover, always open to the Owners to submit that, unless the vessel reached Novo by a particular date and time, she could not have lessened the time by which she could depart Novo after the first hurricane had abated.

75. The Tribunal did not ask Mr Young when he made his reply whether he had any submissions in relation to the primary case. Nor did they ask him that question after the hearing but before publishing their award. I do not regard the Tribunal's failure to take either of these course as meaning that the Owners did not have a reasonable opportunity to deal with the point, particularly when Mr Teare had summarised the Charterers' primary position: see paragraph 37 above

Substantial injustice

76. Mr Parsons contends that even if there has been a serious irregularity it has led to no substantial injustice for the following reasons. There was evidence from Mr Khromov that the first hurricane only hit the vessel after she had passed through the ice belt and reached a polynya and open water on the other side of it; and that the polynya where the vessel tacked during the hurricane was right next to where the vessel wanted to make fast for cargo operations. Accordingly, if the 17 hours delay had not occurred, it would have been possible for the vessel to arrive at Novo, make fast and start the discharge operations. At any rate there was no evidence to the contrary.

77. Had I come to the conclusion that there was a serious irregularity I would not have declined to refer the award to the tribunal for reconsideration on this ground, since I do not feel able to say that there was plainly no prospect of Mr Young's submission being right; and whether it was would be for the Tribunal to decide. The Tribunal have found that a 17 hours earlier arrival would have led to a commensurately earlier departure. Whether that is so may be debatable. But an application under section 68 is not to be used as a means of appealing the tribunal's decision of fact: *Claire v Thomas Water Utilities Ltd* [2005] 1 BLR 366,372.

78. Accordingly, whilst I am not without sympathy for the Owners, who lost on so narrow a point, and despite Mr Young's cogent submissions, I decline to remit the award to the arbitrators for reconsideration.

Mr Timothy Young QC & Mr Michael Collett (instructed by More Fisher Brown) for the Claimant
Mr Luke Parsons QC & Mr Christopher Smith (instructed by Ince & Co) for the Defendant

[12] "*Well, we were entirely seaworthy. We withstood hurricanes twice*": Day 10, page 4, line 21. See, also, Day 10, page 136, lines 20-21.