JUDGMENT : Mrs Justice Gloster, DBE: Commercial Court. 15th May 2006.

1. This is an application by Gold Coast Limited ("the Buyer") pursuant to section 79 of the Arbitration Act 1996 ("the Act") for a retrospective extension of time so as to enable the Buyer to make an application to the tribunal in the underlying arbitration proceedings (Sir Christopher Staughton, sitting as a sole arbitrator) ("the Tribunal"), pursuant to section 57 of the Act, to invite the Tribunal to correct one of his interim awards. Because of time constraints, at the end of the hearing on 24 March 2006 I gave my ruling in this matter orally, with brief reasons, and indicated that I would give a full judgment if that were requested by the parties. On 30th March 2006, such a request was made by Holman Fenwick & Willan, solicitors for the respondent, Naval Gijon SA ("the Yard").

Factual Background

2. The arbitration proceedings arise out of the termination of a shipbuilding contract dated 19 December 1997 ("the Contract") made between the Buyer and the Yard for the construction of a 22,000 dwt chemical tanker known as Hull 553 ("the Vessel"), at a price of US$38 million. The Buyer is a single purpose company incorporated in the Isle of Man and associated with MT Maritime Management USA LLC ("MTMM") of Westport Connecticut, USA. The Yard is a Spanish shipbuilder whose shipyard is located in Gijon, northern Spain. The arbitration proceedings have been continuing since May 2000 and have involved numerous complex legal and factual issues. The arbitration agreement in the Contract (Article 15) is in typical form, although it excludes any right of appeal.

3. The Contract specified a delivery date of 1 October 1999. The Buyer became entitled to cancel the Contract for delay in the event that construction was delayed for a total of 240 days beyond the delivery date. By a series of notices, the first of which was issued on 19 June 2000, the Buyer sought to cancel the Contract for delay. The Yard rejected those notices, claiming the Vessel had been completed on 15 June 2000, before the cancellation date, as extended by permissible delay, had arrived. Eventually, the Yard issued its own cancellation notice on 11 September 2000, relying on the Buyer's continuing refusal as at that date to pay the delivery instalment of the contract price.

The arbitration proceedings

4. The only way in which the disputed question as to which party had validly cancelled the Contract could be determined was for the Tribunal to consider, and decide, each and every claim for permissible delay on the facts. There were also other factual issues, such as when the Vessel had been validly made ready and tendered for delivery, which need to be determined to ascertain when the ordinary delay time under the Contract stopped running. These issues took almost two years to determine. Eventually, the Tribunal found that, of the 168 days permissible delay claimed by the Yard, 21 days had been validly claimed. The Tribunal also found that the Vessel had been made ready and properly tendered for delivery on 20 June 2000. The effect of both those findings, taken together, was that the Yard had made the Vessel ready for delivery four days before the Buyer's right to cancel had accrued, given the 21 day extension for permissible delays. This meant that the Buyer's purported cancellation had been premature, and accordingly, the Tribunal upheld the Yard's cancellation.

5. Had the Buyer's cancellation been upheld, it would have been entitled to the refund of all of its advance instalments plus interest. It had paid 80% of the Contract price, i.e. US$30.8 million in advance instalments before issuing its cancellation notices. Had it won, it would have been entitled to a refund from the Yard's refund guarantors of approaching US$38 million. Given, however, that the Yard's cancellation was upheld, the Yard became entitled to pay itself the unpaid 20% of the Contract price (plus interest and its expenses of maintaining and reselling the Vessel) before accounting for the balance of the net proceeds of sale to the Buyer. This gave rise to issues about the circumstances of the resale of the Vessel by the Yard.

6. These quantum issues took a further year to be determined and formed the immediate background to this application. I deal with these below.

7. However, it is also relevant to refer to the manner in which the sums in dispute were secured. After issuing its cancellation notices in the summer of 2000, the Buyer commenced proceedings before this court against ten Spanish savings banks which had issued refund guarantees in its favour to secure refund of the 80% of the contract price, plus interest thereon, which would be due to the Buyer in the event that it were entitled to cancel the Contract. The Buyer's case was that the guarantees were payable on demand. The refund guarantors' defence was that the refund guarantees were payable only conditionally upon the Buyer's obtaining an arbitration award in its favour. The Buyer's case succeeded both at first instance before Thomas J, as he then was, who gave judgment on 2 May 2001 in the amount of approximately US$ 38 million, and in the Court of Appeal, which dismissed the refund guarantors' appeal on 12 December 2001; see ***Gold Coast Limited v Caja de Ahorros del Mediterraneo & Others*** [2002] 1 All ER (Comm) 142, CA.

8. On the day before the Court of Appeal gave judgment (the matter having been heard some weeks earlier) the parties entered into an Accounting and Security Agreement ("the ASA"), whereby the refund guarantors agreed to pay the judgment sum into an interest bearing account maintained by Lloyds TSB Bank plc on terms that the amount for which the Yard accepted it was obliged to account to the Buyer (i.e. some US$20.3 million) would be released to the Buyer forthwith, but the balance of some US$ 18 million would remain in the account until the conclusion of the arbitration to secure the parties' pending claims in that regard. That amount remained in the ASA at the date of the hearing before me.

9. The Tribunal's Sixth Interim Award dated 20 May 2005 ("the Award") determined the quantum issues. These related to the circumstances in which the Yard had resold the Vessel. The Buyer effectively contended that the Yard had acted in bad faith and had sold the Vessel at an undervalue. The Yard had resold the Vessel to a Gibraltar single-purpose company called Panaz International Services Limited ("Panaz"), for a resale price of US$33.5 million. Under the resale arrangements, the Vessel was delivered to Panaz, which was then a wholly-owned subsidiary of the Yard, on 12 January 2001 and was simultaneously bareboat chartered to an entity named Knutsen Kjemikalaie Tanker IV KS, an entity owned 25% by the Yard, and 75% by a Norwegian shipowner, Knutsen OAS Shipping AS ("Knutsen"). The resale purchase price was paid by Panaz on 12 July 2001, when Panaz's shares were transferred to Knutsen. Thereafter, the Yard failed to account for the net resale proceeds of the Vessel for a further five months until 11 December 2001 when it paid some US$ 20.3 million to the Buyer as part of the ASA arrangement referred to above.

10. In the arbitration, the Yard claimed that it had been entitled to act as it did in these resale arrangements, and claimed approximately US$ 4.7 million in interest and resale expenses. The Buyer claimed that the Yard had breached its duties to sell the Vessel "on such terms and conditions as [the Yard] reasonably and in good faith believes to be the best available at the time" as provided by Article 10.3(i) of the Contract. In particular, the Buyer relied on the fact that it (through its related company, MTMM) had made an offer for the Vessel of US$ 32 million in October 2000 which the Yard had unreasonably refused, and which would have saved a substantial part of the claimed interest and expense liability, had it been accepted. Further, the Buyer claimed that the Yard's failure to accept its offer, and to make any accounting to it for over a year afterwards, had caused it to incur financing charges of approximately US$ 2 million.

11. By the Award the Tribunal accepted the Buyer's contention that the Yard had not acted reasonably and in good faith in rejecting the Buyer's offer of October 2000 (see paragraph 11 of the Award). The Tribunal also found that, had the Buyer's offer been accepted, the Vessel would have been delivered by no later than 17 January 2001. The Tribunal allowed some, but disallowed others, of the Yard's claimed resale expenses, by reference to this notional resale date, as well as to other issues raised in relation to them on the merits.

12. In advance of publishing the Award, the Tribunal asked the parties, by fax dated 27 April 2005, to clarify precisely what issues they wanted him to decide. This was because there were a number of issues of principle requiring determination, and each of these had the potential to impact upon the way in which the final quantum calculations were carried out. The parties had made it clear to the Tribunal that they did not wish him to spend his time carrying out mechanical arithmetical calculations which could easily be agreed between the parties once the issues of principle had been resolved.

13. The parties agreed precisely what issues were to be decided, and these were set out in a letter to the Tribunal dated 13 May 2005. The letter addressed the points of principle about recoverability and the manner in which the Buyer's claim for financing charges were to be recovered. It then articulated the question: "in any event, from what date is it to be paid and what are the principles relevant to its determination". The letter further stated:

"**Issues not to be determined at this stage**

12. The amount of interest on any damages payable to either party (i.e. claims that fall outside the accounting regime of Article 10.3), should any such claim find favour with you.

13. The amount of interest due to the Yard on the unpaid 8th and 9th instalments of the price under the Shipbuilding Contract.

14. The amount of interest due on the ESP 16,200,404 that the Buyer's accept should be added to the 8th instalment of the contract price as the agreed cost of modifications to the vessel.

15. The amount of the Buyer's claim in respect of financing charges, should that claim find favour with you.

16. The amount of any interest under s.49 of the Arbitration Act 1996.

17. The precise financial consequences of any finding arising out of point 2 above, that the Yard did not properly perform its obligations under Article 10.3 of the Shipbuilding Contract."

14. It is clear from this letter that the Tribunal was specifically asked not to trouble himself with arithmetical calculations. By the Award published on 20 May 2005, the Tribunal determined the quantum issues. He agreed with the Buyer that the Yard had not acted reasonably and in good faith in rejecting the Buyer's offer. He allowed some, but disallowed others of the Yard's claimed resale expenses. He also made findings on some other aspects of the dispute about quantum, including in respect of the Buyer's claim for "financing charges". In particular, in relation to the Buyer's claim for financing charges, the Tribunal held as follows:

"32. Paragraph 29.3 of the Re-amended Defence and Counterclaim asserts that [the Yard is] obliged to give credit for, under point 29.3.4, the interest due to the Buyers in respect of the period between the date on which the Builders should have received the proceeds of sale of the vessel, or did in fact receive the proceeds, and the date when the money was actually received by the Buyers.

33. The closing submissions of the Buyers said, in paragraphs 101 and 102:

*'101(2) **However, on the Yard's case**, it owed the Buyer US$ 20 million from 12 July 2001.*

101(3) Thus the proper course was for the Yard to account for the US$ 20 million it owed, not fail to account at all on the basis that it might be liable for a greater sum.

102. No other explanation has been advanced for the Yard's refusal to pay this money until about 11 December 2001.

The financing charges referred to in paragraph 34.2 of the Buyers' Re-amended Defence and Counterclaim are said to be the loss borne by the Buyers ***because they did not receive the $20 million in the period from 12 July 2001 to 11 December 2001****. I hold that interest for that period should be charged to [the Yard] under Article 10.3 of the Contract. I am asked to say what are the principles relevant to the determination of this amount. I cannot answer that; but if I am allowed to say so, I would choose the rate of LIBOR plus 1.25% which was charged to the Buyers by their bank, and not compound interest. …*

42. ***Interest for the period of five months on $ 20 million*** *should be charged to [the Yard] under Article 10.3 of the Contract (paragraphs 32-33)."* [emphasis added]

15. Within a few days of the publication of the Award, the Buyer identified two aspects thereof which appeared to contain inadvertent errors by the Tribunal. The first is not of direct relevance to the present application. The second related to the Buyer's claim for "financing charges". As appears above, the Tribunal had awarded the Buyer interest for the period from 12 July 2001 (the date on which the Yard had been paid by Panaz/Knutsen) to 11 December 2001 (the date on which the Yard's payment had been remitted to the ASA account with Lloyds Bank). The Buyer considered that interest ought also to have been awarded for the period from 17 January 2001 (the date on which the Tribunal had found that the Yard ought to have delivered the Vessel to the Buyer) and 12 July 2001.

16. Accordingly, within the 28 day period prescribed by section 57 of the Act, the Buyer made an application to the Tribunal to correct the award. The Tribunal published an Addendum to the Award on 6 August 2005. In that Addendum the Tribunal made a correction to the Award in relation to the first point raised by the Buyer, but confirmed that he had decided only to award interest to the Buyer for the period from 12 July 2001 onwards, and hence that the Award did not contain any error in this latter regard.

17. Following publication of the Addendum to the Award, the parties' solicitors sought to reach agreement on the detailed arithmetical calculations (e.g. interest rates, interest periods and exchange rates). As part of this process, on 28 September 2005, solicitors for the Yard, Holman Fenwick & Willan, sent a fax which attached a schedule showing their calculations for the interest representing the Buyer's financing charges. The interest figures in the schedule had been calculated by reference to a principal amount of US$ 20 million. Mr Charles Buss of the Buyer's solicitors, Watson Farley & Williams, in his evidence before this court, said that he did not understand this approach when he saw the fax. As far as he was concerned, the interest figures should have been calculated by reference to the amount for which the Yard ought to have accounted, had it complied with its resale accounting obligations, as determined by the Tribunal, an amount which (although the precise figure has not been calculated) was going to be more than US$ 20 million. Mr Buss was informed by the Yard's solicitors, however, that the US$ 20 million was taken from paragraph 42H of the Award, and that the Yard were contending that the Tribunal had decided in this paragraph that interest should only be payable on this US$ 20 million sum.

18. However, this had never been Mr Buss's understanding of the Award. Mr Buss stated in his evidence that he believed that he had read and understood the reference to US$ 20 million in the Award to be no more than a convenient shorthand term for the actual amount to be accounted for, which had not yet been calculated – i.e. "about US$ 20 million", or "US$ 20 million-odd", rather than some arbitrary cap or notional round number. After consideration of its options, the Buyer decided to ask the Tribunal to decide the principal figure upon which interest was to be calculated, on the basis that the Tribunal had not yet made any decision about this figure (whatever the Yard might think), and hence, given that he had reserved all remaining issues, he still had power to do so. The Tribunal was therefore asked to address this issue at a hearing which had already been fixed for 8 November 2005.

19. Following that hearing, on Tuesday 6 December 2005, the Tribunal published his Seventh Award. In that Seventh Award he stated at paragraphs 4-11 as follows:

"4. Paragraph 32 of my Sixth Award has the heading "The Buyers financing charges". I do not know why the interest to be paid was described as financing charges; it is not an expression I would ordinarily use. It seems that I acted upon the passages which I quoted from the closing submissions of the Buyers, as set out in paragraph 33 of the Sixth Award. In particular, paragraph 101(2) stated:

'However, on the Yard's case, it owed the Buyers $20m from 12 July 2001.'

5. The Buyers maintain that interest should have been awarded on the larger principal amount than the $20 million which I adopted in paragraphs 33 and 42(H) of the Sixth Award. They say that the principal amount, on my findings, 'was closer to US$ 24,500,000' than the [Yard's] figure of $20.3 million. This would make a difference, I am told, of some $80,000. The Buyer's said that I was not asked to calculate the principal amount for this purpose, but to put the parties in a position where they could calculate. All I was required to do, the Buyer's say, was to state the period and the rate for interest. It is said to be common ground, now, that the amount owing to the Buyer's is $24 million; but I do not rely on that figure, as I was not required to reach it.

6. I can readily believe that I was not required to calculate the principal amount which would emerge from the paragraphs 42(A) to (H) in the Sixth Award. I did not attempt to do that. On the other hand I was told, under the

heading of the Buyers' financial charges, that the [Yard] admitted liability for interest on $20 million. I could see no harm in declaring that sum to be due.

7. An Addendum was requested by solicitors for the Buyers, by a letter dated 17th June 2005, under section 57 of the Arbitration Act 1996. Two points were raised. The first related to the figure of $480,000 in paragraph 42(A) of the Sixth Award, and is not relevant to the present problem.

8. The second point is relevant. It concerned the interest awarded on $20 million for the period from 12th July to 11th December 2001. The Buyers argued that it should have started to run from 17th January 2001. In the Addendum dated 5th August 2005 I rejected that argument. But what is or may be significant is that no request was made for reconsideration of the principal amount on which interest was awarded. It was not said that anything other than $20 million should be treated as the principal. Paragraph 9 of the Addendum stated that paragraphs 32 and 33 of the Sixth Award should not be altered.

9. Watson, Farley & Williams wrote on 31st October that I was expressly asked not to decide the amount of the Buyer's claim in respect of financing charges, in Holmans' letter of 13th May 2005 (which reflected the parties' agreement as to which issues fell to be decided). It seems to me that there was some ambiguity between paragraphs 10 and 12 of the letter. It may be that I regarded it as saying that I should not decide the rate of interest – hence the apologetic 'if I am allowed to say so' in paragraph 33 of the Sixth Award. Four days later, on 17th May, I wrote that the award was likely to be forthcoming the following week."

10. I now accept that it was an error on my part to quantify the so-called financing charges. But I cannot accept that, as the Buyers have argued, I was using the $20 million as shorthand instead of the actual amount owing. The figure I wrote was what I intended to write. ***But I should have added that other sums due to the Buyers should in due course be awarded interest at LIBOR plus 1.25% for the period from 12th January to 11th December 2001****.*

11. ***I believe that I could and would have altered the Sixth Award if the error had been pointed out in time. But it was not. Power to amend paragraphs 33 and 42H of the Sixth Award rests now only with the High Court."*** [emphasis added]

20. In the light of the Tribunal's decision in this regard, on 15 December 2006, the Buyer made:
    i) a formal application to the Tribunal pursuant to section 57 of the Act for correction of the error which the Tribunal had identified in the Seventh Award; and
    ii) the present application to the Court pursuant to section 79 of the Act for a retrospective extension of the time limit for the making of that section 57 application to the Tribunal until 15 December 2005. That was necessary because the 28 day period for applying to the Tribunal to correct the Award under section 57 had expired in June 2005.

21. Despite the Tribunal's statement in paragraph 11 of his Seventh Award that *"power to amend paragraphs 33 ad 42(H) of the Award rests now only with the High Court"*, it was agreed between the parties that in fact, the correct procedure under the Act was that if the court were to grant a retrospective extension of time on the Buyer's application pursuant to section 79, then it would be for the Tribunal, pursuant to section 57, to consider whether or not to correct his award, pursuant to the Buyer's application to the Tribunal dated 15 December 2005.

Principles governing the exercise of the Court's discretion under section 79

22. Section 57 of the Act provides arbitration tribunals with important powers to correct or clarify their awards or make additional awards. The section provides (at section 57(4)-(5)), however, that:
    i) any application by a party for the exercise of those powers must be made within 28 days of the award (or such longer period as the parties may agree); and
    ii) any correction is to be made by the tribunal within 28 days of the date on which the application was received (or such longer period as the parties may agree).

23. It is common ground between the parties that section 79 of the Act enabled the court to extend the time limits stipulated in section 57; see *Commercial Arbitration*, Mustill and Boyd, 2001 Companion Volume page 341; *Arbitration Law*, Merkin paragraphs 18-120.

24. Section 79(3) of the Act makes clear that the court shall not exercise its power to extend a time limit unless it is satisfied that available recourse to the Tribunal has been exhausted (as to which there is no issue in the instant case, since the time limit for making such application had expired) and that *"a substantial injustice would otherwise be done"*. There is no definition in the Act of "*substantial injustice*", either in the context of section 79 or the other sections where the expression is used (viz. sections 24(1)(d), 50 and 68(2). The editors of *Commercial Arbitration* suggest that the question of whether a "*substantial injustice*" would otherwise be done must *"… involve not only the question whether the failure to comply with the time limit was excusable, but also whether the application or other step for which a time was laid down had a substantial prospect of success"*. Whether the failure to comply with the time limit was *"excusable"* in my view will not only require consideration of the issue whether the delay can be satisfactorily explained, but also may required consideration of the issue whether it was causative of any prejudice.

25. The only authority directly concerning an extension of time in the context of section 57 of the Act is *R C Pillar v Edwards* (unreported 26 January 2001). Although in that case HHJ Thornton granted such an extension, there was only limited discussion of his reasons for doing so (see paragraphs 70-71). ***Equatorial Traders v Louis Dreyfus*** [2002] Lloyd's Rep 638 is a decision on section 79, although it was concerned with a very different type of time

limit. HHJ Chambers QC was able to decide that case by reference to a single consideration (namely that the applicant was unable to explain or justify its failure to make an application pursuant to section 79 at an early juncture; see paragraphs 37-39).

26. The phrase "substantial injustice" was considered by Morison J in ***ASM Shipping Ltd of India v TTMI Ltd of England*** [2005] EWCH 2238 (Comm) in the context of an application under section 68 of the Act to challenge an award on the grounds of bias. At paragraphs 22-25 he endorsed the extract from the report of the Departmental Advisory Committee on Arbitration as follows:

"*22. … to justify intervention under section 68, the serious irregularity must give rise to 'substantial injustice'. Not all irregularities will justify the court's intervention: some real and substantial injustice must result. Mr Croall relied upon dicta of Thomas J in* ***Hussman v Al Ameen*** *[2000] Lloyd's Rep 83 at paragraphs 49 and 50.*

23. This position reflects the policy behind the Act as set out in the Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill. Paragraph 58 of the Report (cited and relied upon in ***Hussman v Al Ameen and Petroships Pte Ltd v Petect Trading and Investment Corporation, The Petro Ranger*** *2001] 2 Lloyd's Rep 348) provides:*

> *'The court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this clause. The test of "[substantial] injustice" is intended to be applied by way of support for the arbitral process, not be way of interference with that 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 the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened cannot on any view be defended as an acceptable consequence of that choice.'*

24. In ***Groundshire v VHQ*** *[2001] BLR 395 the court considered further the meaning substantial injustice at page 400. HHJ Bowsher stated:*

'29. The 1996 Act was intended to change the law. It was not merely a codifying statute. The court may be required in some circumstances to enforce or not to disturb an arbitrator's decision, even when the court disagrees with that decision in law or in fact.

30. So also under the 1996 Act the court may be required to enforce or decline to disturb an arbitrator's decision even when the court discerns an element of unfairness.

31. Both sections 68 and 24 of the Act justify action by the court only when substantial injustice has been or will be caused to the applicant, not when a substantial injustice may be caused to the applicant. It follows that even unfairness does not of itself and without more vitiate an arbitral award.

32. It is more important to look at the decisions that the courts made after the 1996 Act came into force than to consider earlier decisions.

33. For example, counsel for GS relied on ***Interbulk Limited v Aiden Shipping Co Ltd, The Vimeira*** *[1984] 2 Lloyd's Rep 66, before the Act. In that case, at page 76, Lord Justice Ackner said:*

> *"Where there is a breach of natural justice as a general proposition it is not for the courts to speculate what would have been the result if the principles of fairness had been applied. I adopt, with respect, the words of Mr Justice Megarry in* ***John v Rees*** *[1969] 2 All ER 274 at page 309 where he said:*
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> > *'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'"*

34. Though entirely attractive as a general proposition, that is no longer the law as a result of the 1996 Act. The Act does not require the court to speculate what would have been the result if the principles of fairness had been applied, but the Act requires that the court is only to interfere if the court considers, not speculates, that the irregularity or unfairness has caused or will cause substantial injustice to the applicant. …

38. The policy of the 1996 Act is to make it more difficult to question the decisions of arbitrators, not to make challenges easier.

39. The word "substantial" appears in many contexts in our law. One simply cannot take a definition of the word from one context and apply it without question to another totally different context. I reject totally [counsel's] submission as to the meaning of the word "substantial". In the present context, I prefer such dictionary meanings as "having a real existence", "essential", "of ample or considerable amount, quantity or dimensions"

40. In the present context, Parliament plainly meant to refer to some injustice that had some real effect as opposed to a failure to deal with arguments that cause affront or disquiet without substantial effect. The highest requirements that justice should manifestly be seen to be done may require that a judicial decision be overturned because of the manner in which it was reached, without it being demonstrated that the result produced injustice. But that is not the system apply to arbitrations by the 1996 Act.'

25. Accordingly, as a matter of law, Mr Croall submitted that the requirements of section 68 are precise and exacting. Ordinary and foreseeable incidents of the chosen arbitration cannot found such a challenge."

27. Mr Lawrence Akka, counsel for the Yard submitted that there may be instances of injustice which are not substantial. It is not enough for the court to conclude, for example, that the result (in this case, of refusing the extension) is unfair to the applicant. He also submitted that the meaning of "substantial injustice", in the context of an extension of time for a section 57 application, must be affected by the fact that section 57 is premised upon there being a mistake in the award, yet nevertheless provides only a very short time limit of 28 days. The fact that there is a mistake in the award cannot by itself be sufficient to justify an extension of the time limit. I agree.

28. In ***Aoot Kalmneft v Glencore International AG*** [2002] 1 Lloyd's Rep 128, Colman J identified the relevant criteria applicable to the exercise of the court's discretion under section 80(5) of the Act to extend the time limits for the making of applications pursuant to sections 67 and 68 of the Act. His approach was approved by the Court of Appeal in ***Nagusina Naviera v Allied Maritime Inc*** [2002] EWCA Civ 1147.

29. As Colman J recognised, the approach to the exercise of the discretion under section 80(5) is different from that under section 79, since section 80(5) contains no such threshold requirement as is required in section 79(3) *"that a substantial injustice would otherwise be done"*. In this respect, therefore, a lower "unfairness threshold" must be presumed to have been intended in relation to applications under section 80(5); see paragraph 56 of Colman J's judgment. However, albeit that the court in granting an application under section 79 must be satisfied that, in the absence of an extension, a substantial injustice would otherwise be done, I consider nonetheless that the principles and criteria governing the approach to the court's discretion identified by Colman J **in *Aoot Kalmneft*** may be of assistance in the exercise of the court's discretion under section 79. At paragraphs 48 – 60, Colman J said as follows:

"48. The effect of section 80(5) is to introduce the broad discretionary approach under this rule into applications for the extension of the 28 days time limit under sections 67,68 and 69 of the 1996 Act.

49. It is therefore necessary to identify the criteria applicable to such applications under the Arbitration Act, for they may differ from those applicable under the CPR.

50. In determining the relative weight that should be attached to discretionary criteria the starting point must be to take into account the fact that the 1996 Act is founded on a philosophy which differs in important respects from that of the CPR.

51. Thus, the twin principles of party autonomy and finality of awards which pervade the Act tend to restrict the supervisory role of the court and to minimise the occasion for the court's intervention in the conduct of arbitrations. Nowhere is this more clearly demonstrated than in section 68 itself where there was superimposed upon the availability of a remedy for what used to be called "misconduct" by the arbitrator and was re-defined as "serious irregularity" a requirement that it had caused or would cause substantial injustice to the applicant. No longer was it enough to demonstrate failure by the arbitrator scrupulously to adhere to the audi alterem partem rule.

52. Section 12 also reflects this general approach by redefining the circumstances in which the court will extend the time for the commencement of arbitration fixed by the arbitration agreement: as explained in Harbour & General Works Ltd v. Environment Agency [1999] CLC 786 at page 793. Further, the relatively short period of time for making an application for relief under sections 67, 68 and 69 also reflects the principle of finality. Once an award has been made the parties have to live with it unless they move with great expedition. Were it otherwise, the old mischief of over long unenforceability of awards due to the tendency of supervisory proceedings would be encouraged.

53. At this point it is necessary to have in mind the general principles set out in section 1 of the 1996 Act:
'(1) 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.'

54. The reference to unnecessary delay is pertinent to identifying the relevant discretionary criteria.

55. The need for expedition in proceedings before the court is reflected in paragraphs 9 and 12 of Appendix 19 of the Commercial Court Guide. This states under the heading Arbitration Matters: Related Practice:
'Progress-
(9) In arbitration matters it is the particular duty of the Court to see that court proceedings are not a cause of delay.
(10) A hearing date must (where applicable) be applied for promptly after the issue of the required practice form (whether serving as an arbitration claim form or an application notice) or after obtaining permission to appeal under the Arbitration Acts 1979 and 1996.
(12) A failure to act with all deliberate speed founds the Court's discretion to strike out. When it comes to the attention of the Court that delay is occurring, the Court may itself direct that the matter be listed for hearing.'

56. It is however also to be remembered that the threshold requirement set out in section 79(3)(b) for extension of time limits to which section 79 relates - "that a substantial injustice would otherwise be done" is not expressed to

be applicable to extensions of time under section 80(5). In that respect, therefore, a lower unfairness threshold must be presumed to have been intended.

57. In approaching the identification of the applicable criteria it is also important to take into account the fact that, at least in international arbitrations, English arbitration is probably the most widely chosen jurisdiction of all. It is chosen because of the ready availability of highly skilled and experienced arbitrators operating under a well-defined regime of legal and procedural principles in what is often a neutral forum. Supervisory intervention by the courts is minimal and well-defined and the opportunities for a respondent with a weak case to delay the making of an award or to interfere with its status of finality are very restricted. Accordingly, much weight has to be attached to the avoidance of delay at all stages of an arbitration, both before and after an interim or final award. If the English courts were seen by foreign commercial institutions to be over-indulgent in the face of unjustifiable non-compliance with time limits, those institutions might well be deterred from using references to English arbitration in their contracts. This is a distinct public policy factor which has to be given due weight in the discretionary balance.

58. On the other hand it has to be recognised that because of the extremely wide international nature of the market for English arbitration many of the parties may be located in remote jurisdictions and may have little or no previous experience of international or English arbitration. When these relatively unsophisticated parties find themselves involved in such an arbitration, it is only to be expected that they move somewhat more tentatively than would an international trading house well experienced in this field. It would therefore be wrong to fail to make at least some allowance for this factor in evaluating the element of fault in failing to comply with time limits.

59. Accordingly, although each case terms on its own facts, the following considerations are, in my judgment, likely to be material:

(i) the length of the delay;

(ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;

(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;

(iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

(v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the court might now have.

(vi) the strength of the application;

(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

60. The relative weight to be given to these considerations in the discretionary balance in any given case is likely to be influenced by the general considerations relating to international arbitration to which I have already referred."

30. Obviously, each case under section 79 will turn on its own facts. Even once the court has decided that a substantial injustice would otherwise be caused to the applicant for an extension, it nonetheless may have to go on to consider some, or all, of the other matters identified by Colman J. And it will have to bear in mind that it is particularly important in arbitration proceedings that there is no unnecessary delay or expense, and, in particular, that such delay and expense should not be caused by the intervention of court proceedings.

Application of the principles to the facts

31. The first question I turn to consider is whether the Buyer would indeed suffer substantial injustice if the extension of time were not granted. Mr Akka submitted that there would be no substantial injustice if the application for an extension were refused. He submitted that, although the Tribunal does admit that he could and would have altered the Award to provide for interest on "other sums" to be paid to the Buyer for the period July to December 2001, had an application been made in time, the Tribunal does not identify what those "other sums" would have been. Although the Buyer argues that the sum in question would have been about US$4.5m (i.e. the difference between the US$20m already awarded and about US$24.5m being the amount which the Yard ought to have obtained had it resold on the best terms), in fact, submitted Mr Akka, it is entirely likely that the "other sums" on which the Tribunal would have awarded interest would have been US$331,600, being the difference between US$20m and the amount that the Yard did in fact receive on the actual resale. That, submitted Mr Akka, would improve the Buyer's position by only some US$6,000 (i.e. interest on that amount). Further, he submitted that there would be no substantial injustice because the Buyer's chances of success in correcting the award before the Tribunal were poor. He contended that the application which the Buyer seeks to make has already been rejected in paragraph 10 of the Tribunal's Seventh Interim Award. Alternatively, he contended that the Buyer is estopped from making the application because it should have done so, at the latest, at the same time as the first section 57 application to the Tribunal. The Buyer was not entitled to a second bite of the cherry.

32. I reject the Yard's submissions in relation to substantial injustice. In my judgment, the Buyer would indeed suffer substantial injustice if an extension of time were not granted. It appears to me that the Buyer has a substantial prospect of success in its application to the Tribunal for correction of the Award. First, the Tribunal has already indicated in its Seventh Interim Award that it was an error on his part to purport to quantify the so-called financing charges and that he should have added that other sums, also due to the Buyer, should, in due course, be awarded interest for the period from 12 July to 11 December 2001. Moreover, although he has not actually decided the precise principal amount in respect of which the Buyer should be additionally awarded interest, the strong implication of the Seventh Interim Award (see in particular paragraphs 10, 28 and 29) is that the Tribunal

does consider that he should have awarded interest on the full principal sum of approximately US$24,500,000, viz. an additional sum of interest in the approximate amount of US$83,000. The Yard's contention that interest should only be awarded on the amount in respect of which the Yard had agreed to account in December 2001 (i.e. US$20,331,600), rather than the full amount, appears flawed. As Mr Sean O'Sullivan, counsel for the Buyer, submitted, the Tribunal's reason for deciding that the Buyer should not have interest for the period from 17 January 2001 to 12 July 2001 was that the money had not actually been paid by the Buyer's parent company and the Tribunal did "… not see that the Buyers should have credit for what MTMC had not paid". But, on 12 July 2001, the Yard actually received (via Panaz) the remainder of the resale price of the Vessel. At that stage, it had received both the Buyer's advance instalments (US$30.8m) and the resale price of the Vessel (US$33.5m) and was thus required to account to the Buyer for the excess. By that time there was no question of paying interest to the Buyer in respect of a payment the Buyer had not had to make, or a payment which the Yard had not actually received. The greater part of the difference between the sum for which the Yard had agreed to account in December 2001, and the sum for which the Tribunal held it should have accounted, concerned deductions which the Yard had purported to make from the resale proceeds or other sums which the Yard had wrongly left out of the account. These were not notional sums which the Yard had never in fact received. As Mr O'Sullivan submitted, this was real money, which the Yard had received from Knutsen but was declining (as the Tribunal found, wrongly) to pay over to the Buyer. In my judgment, although this is a matter for the Tribunal, it must be arguable that there could be no good reason for refusing to award interest to the Buyer in respect of money which the Yard actually received in July 2001 but wrongfully refused to pay over to the Buyer.

33. Although, in the context of the amounts involved in this arbitration, US$83,000 is not a vast sum of money, it is nonetheless not an insignificant one. In my judgment it would be a substantial injustice to the Buyer if the Yard were to receive a windfall benefit and the Buyer were to lose the opportunity of putting forward what appear to be strong arguments for the correction of the Award to include interest in this amount.

34. I do not consider that the Tribunal has already decided the point adversely to the Buyer, as Mr Akka suggests. All that the Tribunal has decided in his Seventh Award is that he did indeed make an error in the Award and that it is not open to him to correct it without the intervention of the High Court. Nor, in my judgment, is the Buyer estopped on *Henderson v Henderson* [1843] 3 Hare 100 type principles from running the point that the Tribunal should correct his award once an extension of time has been granted.

35. The only application to the Tribunal to date was based on the argument that the Tribunal had not yet decided the amount in respect of which interest should be paid; that application failed – see the Seventh Award. But no application has to date been made to the effect that the Tribunal should correct its judgment in this respect pursuant to section 57.

Other considerations: the length of the delay, the reasons for the delay and whether the conduct of the Buyer was reasonable

36. In my judgment, it is understandable in all the circumstances, and in particular in the light of the correspondence, that the Buyer's legal advisors did not spot the error in the 14½ week period from 17 June 2005 (when the initial period of 28 days from the date of the Award expired) to 28 September 2005 (when the point about the Buyer's claim to interest being limited to interest on US$20 million was first raised by the Yard). The point was not raised or identified in correspondence by the Yard's solicitors during that period, despite the Buyer's previous application for clarification.

37. Once the point was raised by the Yard in late-September 2005, the Buyer had to make a choice. If it formed the view that this was an error in the award, it needed to make an application pursuant to section 57 (and to seek an extension of time for this purpose). If it formed the view that the Award simply had not decided on what principal amount interest was payable, it could ask the Tribunal to resolve this issue by a further award. In my judgment, as Mr O'Sullivan submitted, it was reasonable for the Buyer to ask the Tribunal to address this issue first, having regard to:
    i) the background to the making of the Award (and, in particular, the fact that the Tribunal had not been asked to calculate the principal sum on which interest was to be paid); and
    ii) the fact that it was never suggested by the Yard that the Tribunal had no jurisdiction to rule on whether that particular issue had already been decided or remained open. On the contrary, the Yard appeared to be encouraging the Buyer to seek a ruling from the Tribunal.

38. Thus, the delay in the period 29 September to 6 December, when the Tribunal published its Seventh Interim Award, was explicable and reasonable.

39. The very short delay in the period from 6 December 2005 to 15 December 2005, between publication of the Tribunal's Seventh Award and the making of the present application is explained by the fact that Mr Buss's wife had their first child on the morning of 7 December 2005, and he could not sensibly delegate the preparation of the application or the evidence in support to a colleague.

40. Accordingly, in my judgment, there was a reasonable explanation for the delay in all three periods. Although, as it turned out, the Buyer's legal team was wrong in its analysis of what the Tribunal had decided in relation to interest on the US$20m, and although the Buyer adopted the deliberate tactic of going back to the Tribunal for a determination, rather than immediately issuing an application under section 79, I do not consider that this should debar the Buyer from obtaining the extension of time sought.

Prejudice to the Yard

41. Mr Akka submitted that it is not necessary for the Yard to establish that it will suffer prejudice in order successfully to resist the application. I agree. However, having decided, as I have, that substantial injustice would be caused to the Buyer if the application were refused, it is appropriate for me, in the exercise of my discretion, then to consider whether any prejudice would in fact be caused to the Yard if I were to grant the extension of time. Mr Akka submitted that it will suffer some prejudice in that, quite apart from the delay caused by this application, which it is said, has led to a delay in the parties reaching agreement on costs and a payment out of the amount in the ASA account, the Yard will incur further delay and costs in dealing with the section 57 application before the Tribunal.

42. I do not find these arguments of sufficient weight to persuade me not to exercise my discretion in circumstances where I have held that a substantial injustice would be caused to the Buyer if no extension were granted. I am, of course, mindful that in arbitration cases the parties are concerned to achieve a speedy result, and that the court should not necessarily intervene in all circumstances where there has been an error on the part of arbitrators. However, in the present case I am not satisfied that any prejudice has been caused to the Yard by the past delay in resolving this issue, or will be caused by any future delay that may occur. As Mr O'Sullivan submitted, once an extension is granted, one would expect that the Tribunal would be able to determine the Buyer's application under section 57 relatively quickly. The Tribunal has already expressed the view that he has made a mistake. If he is minded to do so, which is, of course, entirely a matter for him, it is likely that he would be able to correct the Award without the need for any extensive further hearings or lengthy written submissions.

43. Moreover, the parties are still in the process of resolving issues over the costs of the arbitration proceedings following the Seventh Award. Those costs have nothing to do with the Buyer's section 57 application. Nor is there any credit risk as to whether the Yard will get paid, as the parties' respective claims, including interest and costs, remain fully secured by the ASA account. Although Mr Feeney, the Yard's solicitor, has complained that the Yard is very anxious to obtain the large amount of money, which, it claims, it is owed by the Buyer, the position in reality is that, leaving aside the Buyer's section 57 application, the parties cannot, under the terms of the ASA agreement, divide up the contents of the ASA account until all issues as to costs are resolved. Yet the Yard has not yet sought assessment of its costs, nor even stated on the record what these costs are alleged to be. Nor has the Yard responded on the record (although it has done so on a without prejudice basis) to the Buyer's offer to agree to an interim distribution from the ASA account, which would enable it to obtain the greater part of its money immediately. The Yard, asserts Mr O'Sullivan, chose to be difficult about the service of the application, which had the effect of delaying the fixing of the hearing before me by an estimated two months. The reality, as Mr O'Sullivan submitted, is that in the context of an arbitration which has been ongoing since 2000, the periods of delay in issue in the present application are not substantial.

Conclusion

44. For all the above reasons, as I stated in my oral ruling, I conclude that the Buyer's application under section 79 of the Act for a retrospective extension of time in which to make its section 57 application should be granted. I extend time until 31 March 2006. I assume that, in the light of this conclusion, the Yard will agree to any extension of time that may be necessary for the Tribunal to respond to the Buyer's application, but the parties may have liberty to apply if there is any difficulty in this respect. I duly made an order in these terms on 24 March 2006.

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