Bulfracht (Cyprus) Ltd. v Boneset Shipping Company Ltd. "MV Pamphilos" [2002] APP.L.R. 11/07

JUDGMENT : Mr Justice Colman : Commercial Court. 7th November 2002

Introduction

By an arbitration award made on 12 June 2002 the claimant shipowners recovered US$52,924.23 on their claim for the balance of hire and interest on it due under a trip time charter of MV PAMPHILOS on the New York Produce Exchange form but failed in their claim that the charterers were in breach of their contractual duty to re-deliver the vessel in like good order and condition. The arbitrators, appointed under an ad hoc arbitration agreement, were divided in their views. In his dissenting award Mr Christopher Moss, who is one of the most experienced maritime arbitrators in London, described the conduct of the parties before the hearing as "a complete travesty of the process of commercial arbitration" and "an exercise in mindless antagonism". He said that the way in which the case was conducted made it "impossible for the essentially straightforward issue to be determined fairly".

The arbitration agreement expressly provided that the arbitrators should be "commercial/shipping men".

The charterers now have two applications before the court:

1. for an order setting aside or remitting the award under section 68(2)(a) of the Arbitration Act 1996 on the grounds of serious irregularity affecting the proceedings or the award;

2. permission to appeal the Award under section 69(2)(b) of the 1996 Act on a question of law.

It has been agreed that if leave to appeal is given this court should go on to determine the substantive appeal at the same hearing.

The logical approach to multiple applications of this kind is almost invariably to determine the application to set aside or remit for serious irregularity first and to consider the question of permission to appeal once it has been decided whether the award can stand. Although applications for leave to appeal under section 69 are normally on paper without an oral hearing, the course adopted in the present case of hearing oral argument on the application for leave at the same hearing as for the section 68 application is a sensible and more cost efficient approach, particularly having regard to the fact that the underlying facts and legal submissions relevant to both applications are so closely related.

The underlying disputes may be summarised as follows.

Under the charterparty dated 28 January 2000 the charterers hired the vessel for one time charter trip with iron ore in bulk from Sepetiba in Brazil to Bourgas in Bulgaria.

It described the vessel as:- *"capable of steaming, fully laden, throughout the period of this Charter Party under good weather conditions about 13.0 knots on a consumption of about 36 mt IFO (180) cst plus 2.5 mts MDO see cl 54."*

The charterparty provided as follows:

"Clause 1: 'That the Owners whilst on hire shall throughout the period of this Charter Party……keep the vessel in a thoroughly efficient state in hull, cargo spaces, machinery and equipment….. for and during the service.'

Clause 4: 'that the Charterers shall pay for the use and hire of the Vessel at the rate of US$8,000…. daily, including overtime, or pro rata less commission …. Plus US$140,000 gross Ballast Bonus ….. hire to continue until the time of the day of her re-delivery in like good order and condition, ordinary wear and tear excepted, to the Owners …. On dropping last sea pilots Piraeus port after bunkering …'

Clause 15: 'That in the event of the loss of time from….damages to hull….machinery or equipment….or by any other cause preventing the full of (sic) working of the vessel, the payment of hire shall cease for the time thereby lost and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof ….. shall be deducted from the hire.'

Clause 54: '… <u>Speed and Consumption</u>

BALLAST: About 13.0 Kn on about 32 mt IFO (180 CST) + 2.5 mt MDO

LADEN: About 13.0 Kn on about 36 mt IFO (180 cST) + 2.5 mt MDO

IN PORT: About 2.5 mt MDO…

Vessel burns MDO for main engines when manouvering navigating in/out ports and in narrow/shallow waters, rivers, canals.

Speed basis Beaufort Scale 4 Douglas Sea State 3 – no negative influence by swell and adverse current.'"

The vessel was delivered under the charterparty at Sepetiba, Brazil at 18.30 on 16 February 2000 and it anchored off that port on the same day. It was the owners' case in the arbitration that the vessel was at that time "tight, staunch, strong and in every way fitted for the service" in accordance with the terms of the charterparty. The vessel lay at anchor for about 21 days awaiting the charterers' berthing instructions. On 8 March 2000 the vessel berthed. She departed on completion of loading at 10.30 on 11 March and proceeded to Bourgas on the Black Sea where she completed her laden voyage on 7 April. She was eventually re-delivered to the owners at Piraeus on 13 April.

In the meantime, on 6 April 2000, the charterers had sent to the owners a calculation of a remittance of charter hire dated 5 April in which they claimed that the vessel had underperformed by reason of her slow speed and excessive fuel oil consumption. The charterers made deductions from the charter hire to reflect this breach of the speed and consumption warranty.

The owners referred to arbitration their claim for unpaid charter hire. They also claimed as damages the cost of cleaning the vessel's hull and the time lost in so doing on the basis that the charterers had failed in accordance with clause 4 to re-deliver the vessel in "like good order and condition" as when she was delivered to them.

The owners' case was essentially that while the vessel was at anchor off Sepetiba her hull had become heavily fouled with marine growth and this had the effect of reducing her speed and increasing her consumption of fuel. Thus the vessel's failure to comply with the speed and consumption warranty was caused solely by her compliance with the charterers' instructions to lie at anchor for 21 days and accordingly the charterers were not entitled to make any deduction from the hire. The further consequence of these orders was the charterers' failure to comply with their re-delivery obligations.

The Arbitration

There was no dispute that in the course of the voyage from Sepetiba the vessel had under-performed. The main issues were whether the under-performance was solely caused by the fouling of the hull and, if so whether that fouling had occurred solely during the period at anchor off Sepetiba. If the answer to the first question was yes and to the second question was No, the charterers could have a defence to the whole or part of the claim for unpaid charter hire. If the answer to the second question was Yes, the charterers would have no defence to the whole or part of the claim, for the vessel would have been in proper condition when delivery to them took place.

In their Reasons the majority of the arbitrators, Mr I D Leftakis and Mr John Tsatsas arrived at their conclusions by the following route:

1. *The vessel was dry-docked in Greece in September 1999. Her hull was "suitably clean and prepared, as required" by the manufacturers of the anti-fouling paint, Akzo Nobel. Because this was an expensive procedure it would not have been in the owners' best commercial interests for the work to be skimped and accordingly the arbitrators were satisfied that at the end of September 1999 the vessel had a clean and painted hull free of any marine growth (Reasons para 6.5).*
2. *It was to be inferred from the attendance of the vessel's classification society at the dry-docking and their likely requirement for any indentation or damage to the bilge keel to be repaired and from photographs of the vessel in dry dock that there were no protrusions or significant indentations at the end of September 1999 that were likely to affect the vessel's speed (Reasons, para 6.6).*
3. *The anti-fouling paint supplied to the vessel and the scheme of application was designed for a service life of 12 months. The invoices from the shipyard suggested that the correct number of coats of paint, as evidenced by a letter from the manufacturers, had been applied and that the owners "had acted with due diligence and foresight when purchasing and applying the paint scheme" (Reasons, para 6.8). The scheme purchased had been "a perfectly adequate and customary plan for what are known in the industry as self-polishing coatings". I interpose that, as indicated in the letter from the manufacturers, the efficacy of the anti-fouling paint depended on its biocide loading and polishing rate. The biocide loading depended in turn on whether the vessel was in an area of high fouling activity and warm water (such as Brazil) and the polishing rate depended on whether the vessel when in such conditions was static or moving through the water. If the vessel were static for more than 12 days, the risk of fouling pick-up would be high.*
4. *The vessel did not have a record of underperformance during the period of trading between dry-docking and her delivery at Sepetiba under the time charter as was to be inferred from inter alia the absence of claims by charterers to make deductions from hire (Reasons, para 6.9).*
5. *It was to be inferred from that fact and from the vessel's performance on the ballast approach voyage from Piombino to Sepetiba via Algeceris that the vessel had been kept in a thoroughly efficient state in hull, machinery and equipment and was capable of complying with the speed and consumption warranty at the date of delivery (Reasons, para 6.10).*
6. *It was to be inferred that whatever adversely affected the vessel's performance under the charterparty must have occurred at Sepetiba and been either fouling of the hull or mechanical defect or a combination of the two (Reasons para 6.11).*
7. *Having regard to the evidence in the documents and given by the owners' expert Mr R B Millard, "a helpful and lucid witness", the arbitrators stated that:*

   "Although we were unable to absolutely exclude the possibility of a deficiency in the vessel's engines, we failed to discover and isolate an underlying mechanical cause justifying the vessel's poor performance. The charterers failed to point to a convincing fault, hence on the balance of probabilities we found for the owners in this respect."
8. *The vessel's performance "improved dramatically" after underwater cleaning afloat at Piraeus following re-delivery under the time charter (Reasons, para 6.15).*
9. *The expert evidence called on behalf of the owners was that the parameters recorded in the engine room logs clearly pointed to increased hull resistance which could only be attributed to fouling of the hull (Reasons para 6.16).*
10. *The vessel had spent a total of 24 days in warm tropical waters at Sepetiba Bay which were known to be notoriously conducive to marine fouling.*
11. *There was a genuine inspection of the underwater parts by divers at Piraeus following redelivery. The reports of that inspection and the photographs of the barnacles on the hull were genuine (Reasons, para 6.18). The arbitrators further observed:*

"Having said that, we did not understand why the charterers were not invited to appoint a representative to attend the inspection, alternatively why a more organised and comprehensive portfolio of photographic evidence had not been prepared, in their absence. It would have been in the owners' interest to do so. The charterers did not address us in any detail on the matter, save to say that the inspection was conducted unilaterally and that they were not invited to attend. The owners' response was that the charterers' complaint was unjustified. The only explanation that we were able to develop, was that at that point in time the owners did not anticipate the amount that the charterers intended to withhold from hire."

12. *The samples of the barnacles obtained in the course of that inspection did confirm that the main organism attached to the hull was Megabalanus Tintinnabulum and they also assisted the biological experts to an extent in the formulation of their views, (Reasons, para 6.19) but they observed:*

"As a result of the unilateral manner used by the owners in obtaining samples of the barnacles for analysis and the ensuing arguments between the parties in connection with their inspection, we did not attach more than nominal evidentiary value to them. They did, however, serve to confirm the photographic evidence, namely that the main organism, which attached to the ship's hull was Megabalanus Tintinnabulum and they also assisted the two experts to an extent in the formulation of the opinions with which they provided us.".

13. *The evidence of the owners' biological expert, Dr Bamber, who considered that the species could have grown to the size of the samples while the vessel was at Sepetiba, was to be preferred to that of the charterers' expert, Dr Yule who considered that the vessel's hull must already have been substantially fouled prior to arrival at Sepetiba (Reasons, paras 6.20-6.24).*

14. *From their experience as shipping men they understood that self-polishing anti-fouling paints such as that applied operated to protect the hull by reason of the fact that the marine organisms which attached to the paint during the first 12 days of static conditions and which were killed by its biocide qualities remained attached to the paint until the vessel began to move, whereupon they were polished off (by the movement through the water), whereas, if the vessel were stationary for more than 12 days, the biocide release rate ceased to operate efficiently and living organisms attached to and grew upon the dead ones and could not thereafter be polished off (Reasons para 6.25(d)).*

15. *The fact that the divers' inspection at Piraeus showed that fouling extended to a height above the height of the water line at Sepetiba did not lead to the inference that the fouling had occurred before arrival at Sepetiba or by reason of airborne particles. Such inference would have to be based on the assumptions that the draft at Sepetiba had remained unchanged over the whole of the time during which the vessel was anchored there, that the Piraeus draft readings were absolutely accurate and that the divers' statement that 100 per cent of the vessel's vertical sides were fouled was also absolutely accurate. In particular, given that the vessel was trimmed almost 2.74 metres by the stern, it was more than likely that during her stay the Master would have trimmed her to a more even keel by moving or increasing ballast.*

16. *The charterers were not in breach of their obligation to redeliver the vessel in like good order and condition because the fouling of the hull was, in the absence of an extraordinary event, such as serious fouling resulting from compliance with charterers' orders immediately or shortly after dry-docking, an 'occupational hazard' which therefore fell under the redelivery proviso 'ordinary wear and tear excepted' "* (Reasons, para 6.28)

In his dissenting reasons Mr Moss made the following points.

(i) The owners had failed to discharge the burden of proving that the admitted underperformance of the vessel had been caused by compliance with the charterers' orders to wait at anchor at Sepetiba.

(ii) There was no satisfactory evidence of the condition of the hull at Piraeus. The refusal of the owners to permit the charterers to take part in a joint hull survey following redelivery or to reveal the existence of samples of the organisms until several months after commencement of the arbitration meant that the case could not be tried fairly and satisfactorily.

(iii) Although there was evidence that the vessel had been treated with anti-fouling paint with a treatment that was warranted, subject to the manufacturers' approval, to provide 12 months' protection, there was no evidence whether the manufacturer had specifically approved the work done and given the usual guarantee.

(iv) The unsatisfactory nature of the evidence of the survey at Piraeus made it impossible to assess fairly the charterers' case that the physical evidence of the extent of marine growth on the hull at Piraeus suggested that some of that fouling must have existed prior to the vessel's arrival at Sepetiba.

(v) Although it was the duty of commercial arbitrators to make every effort to reach a firm conclusion even in cases where there were obvious deficiencies in the evidence, it was open to them to conclude that the party on whom the burden of proof lay had failed to discharge that burden. If one party to the arbitration embarked on a strategy which made it impossible for aspects of the dispute to be explored fairly and satisfactorily, that party must accept the consequences. The owners had for that reason failed to discharge the burden of proof.

(vi) the evidence suggested that there might well have been problems with the vessel's main engine or turbo charger unrelated to any fouling which had developed at Sepetiba.

The Charterers' Submissions

It is said by the charterers that there was (within section 68(1) of the 1996 Act) a serious irregularity affecting the proceedings or the award by reason of the failure of the majority to comply with section 33 in a manner which has caused substantial injustice to the Charterers.

Section 33 provides as follows:

"(1) 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, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

There are three aspects of the Reasons which are relied upon. It is submitted in relation to each that it was a finding of fact

(i) which had not at any time been the subject of evidence adduced by either party;

(ii) which the arbitrators were not specifically invited to make by either party; and

(iii) as to which no opportunity was given to either party to address the proposed finding either by way of evidence or submissions.

Firstly, it is submitted that in para 6.18 of the Reasons the Majority expressed the view that "the only explanation that (the arbitrators) were able to develop was that at that point in time the owners did not anticipate the amount that the charterers intended to withhold from hire". This was not an explanation which either party had put forward at the hearing or in their written submissions. This was an untenable explanation because, as appears from the evidence before the arbitrators, it was known to the owners a week before the underwater inspection took place that the vessel had under-performed on both speed and consumption and that a deduction from hire had already been made and notified to the owners. It is submitted on behalf of the charterers that, had they been given the opportunity of addressing the tribunal on this matter, they could have demonstrated that the arbitrators' explanation was untenable. The charterers submit that the thinking of the majority was probably materially influenced by this erroneous view in as much as they relied on the samples of the barnacles obtained in the course of the diving inspection as evidence which confirmed the photographic evidence to the effect that the main organism was Megabalanus Tintinnabulum and they also observed that the samples assisted the experts in formulating their opinions. If it had been brought home to them that there was no such innocent explanation as they postulated, the arbitrators might have accorded no weight to the samples and photographs and the divers' report.

Secondly, it is submitted on behalf of the charterers that the majority made a finding that the anti-fouling coating had been applied in accordance with the manufacturers' requirements. They then expressed their understanding "as shipping men" as to the way in which such self-polishing paints worked and for how long they provided protection in static conditions. On this basis they concluded that there had been no previous opportunity for fouling to have occurred between the dry-docking and arrival at Sepetiba. As observed by Mr Moss in his dissenting reasons, there was no evidence of the adequacy of the application or, specifically, of the manufacturers' approval of the application.

Thirdly, there was no evidence as to whether the vessel's trim had been changed after her arrival at Sepetiba to a more even keel. This was directly material to whether the hull had become fouled at Sepetiba because the diving inspection at Piraeus found fouling of parts of the hull which, according to the vessel's drafts recorded at the time of her arrival at Sepetiba, could not have been submerged there unless the vessel's trim by the stern had been substantially reduced. Had the arbitrators indicated that they proposed to make such a finding, the charterers' counsel (Mr Simon Croall) would have addressed them to the effect that there was no evidence of a change of trim. If this finding had not been made, the arbitrators could have concluded that at least some of the fouling could not have occurred at Sepetiba.

Section 68 of the 1996 Act

This provision replaced the supervisory power of the Court to set aside or remit an award for what was earlier referred to as misconduct or technical misconduct by the Tribunal and which, more recently, frequently came to be called procedural mishap. The introduction of section 68 reflects the emphasis of the 1996 Act both on the objective of finality and on the desirability of the courts having a residual power to protect the parties against the unfair conduct of the arbitration. It is for this reason that section 68 involves a two-stage investigation. The first stage involves asking whether there has been an irregularity of at least one of the nine kinds identified in sub-section (2)(a) to (i). The second stage involves asking whether the incidence of such irregularity has caused or will cause substantial injustice. In the present case the charterers rely on section 68(2)(a) – failure by the tribunal to comply with section 33 of the Act. In substance, their complaint is that the arbitrators made findings of fact of which they did not forewarn the parties and for which there was no evidential basis. They thereby unfairly deprived the charterers of the opportunity of addressing them on those matters and therefore failed to provide a fair means for the resolution of the matters in dispute.

The arbitrators' duty was to give the parties a fair opportunity of addressing them on all factual issues material to their intended decision as to which there had been no reasonable opportunity to address them during the hearings: see ***Interbulk Ltd v. Aiden Shipping Co Ltd (The Vimeira)*** [1984] 2 Lloyd's Rep 66, per Robert Goff LJ, at pages 74 to 75 and, in relation to section 33 of the 1996 Act, Russell on Arbitration 21st Edition para 5-060 to 061 approved in ***Pacol v. Rossakhar*** [2000] 1 Lloyd's Rep 109 at 114.

It has to be emphasised, however, that the duty to act fairly is quite distinct from the autonomous power of the arbitrators to make findings of fact. Thus, whereas it may normally be contrary to the arbitrator's duty to fail to give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings, it will not usually be necessary to refer back to the parties for further submissions every single inference of fact from the primary facts which arbitrators intend to draw,

even if such inferences may not have been previously anticipated in the course of the arbitration. Particularly where there are complex factual issues it may often be impossible to anticipate by the end of the hearing exactly what inferences of fact should be drawn from the findings of primary fact which have been in issue. In such a case the tribunal does not have to refer back its evidential analysis for further submissions. A typical situation is where arbitrators arrive at a conclusion on an issue of expert evidence which differs to some extent from that put forward by either opposing expert. In many cases, such as this, the arbitrators have been appointed because of their professional legal, commercial or technical experience and the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning. It needs to be emphasised that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process based on the arbitrator's power to make findings of fact relevant to the issues between the parties.

The second stage of the investigation required by section 68 is as to whether the irregularity has caused or will cause substantial injustice. In the report of the Departmental Advisory Committee, para 58, the following passage is material: *"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 by 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 simply cannot on any view be defended as an acceptable consequence of that choice.*

This passage shows that those who framed the bill contemplated that the courts' intervention would be engaged not merely in those cases where some injustice has been caused to the applicant by the incidence of the serious irregularity but where the substance and nature of the injustice goes well beyond what could reasonably be expected as an ordinary incident of arbitration.

I must now consider against this background the three respects in which it is said that an irregularity occurred in the present case.

The Explanation for the Owners' Failure to invite the Charterers to the Diver's Inspection (Reasons para 6.18)
There can be no doubt that it was never suggested to the tribunal that the owners' failure to hold a joint survey could be explained by the fact that they did not anticipate the amount that the charterers intended to withhold from hire. This conclusion can be shown to be wrong on the documents before the tribunal. By 6 April 2000, a week before the diving inspection, the owners had received from the charterers the Oceanroutes Preliminary Evaluation figures showing a calculation of the speed claim at 58.5 hours and of the over-consumption claim as 99.8 mt of fuel oil and 5.7 mt of diesel.

As appears from the evidence of Alison Shaw – Lloyd, the owners' solicitor, and from paragraph 6.18 of the Award, the charterers never made any submission to the tribunal as to the owners' motive in not arranging a joint inspection. As appears from the charterers' Final Submissions, there was no live issue as to whether the diving survey had taken place (paragraph 20) or as to whether the photographs of the barnacles taken on that inspection were genuine representations of what was found on the hull (paragraph 23). There was, however, an attack on the evidential value of the photographs because they did not indicate the location on the hull of the barnacles or the scale so as to gauge their size. The charterers' outline Opening Submissions submitted that for nine specific reasons little weight could be attached to the samples (as distinct from the photographs) of barnacles said to have been taken from the hull (paragraph 47).

In paragraphs 6.18 and 6.19 of their Reasons the majority did not address the question whether, the owners' motive in not inviting the charterers to the inspection was to conceal some lack of good faith or concoction of evidence. No such suggestion had been made by the charterers. The arbitrators merely observed that they could not understand the reasons for the owners' failure to invite the charterers and then put forward as the only explanation that occurred to them was that concerning failure to appreciate how much hire the charterers would withhold. They then went on to state that, because of the unilateral sample-taking and the ensuing arguments about inspection of the samples, they "did not attach more than nominal evidentiary value to them".

The submission that these observations involve serious irregularity within the meaning of section 68 is, in my judgment, completely untenable. Firstly, they do not amount to a finding of fact: the arbitrators were simply expressing a <u>possible</u> explanation for the failure to extend an invitation to the charterers. The substance of what they wrote was inconclusive. Secondly, they did not base any inference on that explanation. Thirdly, they expressly made the point that they only attached nominal evidential weight to the samples, treating them merely as confirmatory of the type of barnacles shown in the photographs. Therefore, although the arbitrators' possible explanation could be shown to be mistaken their expression of it involved no irregularity. Nor did it involve any substantial injustice. Their approach, mistaken as it was, exemplifies a fairly typical incident of commercial arbitration which comes nowhere near an eventuality so far removed from what could reasonably be expected of the arbitral process that the court should intervene.

The Effect of the Application of Anti-fouling Paint
In their opening submissions before the arbitrators the owners asserted that their contention that the fouling of the hull resulted from the charterers' order that the vessel should remain idle at Sepetiba for 21 days was supported by various evidence including the recent dry docking "at which effective anti-fouling was applied". The owners put in evidence a letter from Akzo Nobel dated 13 July 2000 which described how if the vessel was layed up for more than 12 days the

biocide release rate would fall to too low a rate to protect the hull against fouling, particularly in an area of high fouling such as Brazil.

In their opening submissions the charterers in support of their case that the barnacles could well have been present when the vessel arrived at Sepetiba emphasised the expert evidence of Dr Yule to the effect that at Sepetiba there was only 11-12 days during which the barnacles could grow and that for the following 33 days the vessel was moving relatively quickly through much less food rich waters. Accordingly, there was insufficient opportunity for the barnacles to grow to the size found on inspection. They referred to the opportunities for fouling prior to Sepetiba while the vessel was at other tropical ports.

In their closing submissions the owners relied on evidence which they said supported their contention that the barnacles probably did start and grow to the size in question exclusively at Sepetiba.

In their closing submissions the charterers reiterated that there were opportunities for prior fouling and that following expiration of the first 12 days idle at Sepetiba there was insufficient time for the development of such large scale fouling as was found. They questioned "whether the 12 days period should be accepted as absolute", relied on Dr Yule's evidence that anti-fouling paint might not provide even 6 months protection and an answer by the owner's expert, Dr Bamber, in cross-examination that vessels treated with anti-fouling paint might suffer fouling within 6 to 7 days in tropical waters.

On the basis of the evidence before them I have no doubt that it was open to the arbitrators to conclude that, if anti-fouling paint were properly applied, organisms would not get out of control of the paint in less than 12 days at anchor, that if the vessel was idle for more than 12 days in tropical waters such as those at Sepetiba, the accumulated growth would render the protection ineffective to prevent further growth and that, in accordance with Dr Bamber's evidence, there was sufficient time before the vessel left Sepetiba for growth of the extent and size found at the Piraeus diving inspection to have grown. Furthermore, the arbitrators were entitled to advance their explanation for the continuing efficacy of the anti-fouling protection within 12 days (Reasons, para 6.25(d)) and the lack of "polishing off" if the static period exceeded that. This added nothing of any substance to the contents of the Akzo letter and no positive evidence was advanced by the charterers to challenge the contents of that letter. In the context of the whole of the other evidence on which they relied in support of their conclusion that all the fouling occurred at Sepetiba, the arbitrators' explanation of the effect of lack of movement in tropical waters followed by "polishing off" of young growth was of minimal materiality. Moreover, it sprang from exactly the kind of background technical knowledge which doubtless led the parties to agree to refer their disputes to "commercial/shipping men".

There was, in my judgment, no reason for the arbitrators to forewarn the parties that they proposed to include this peripheral explanation in their Reasons. There was therefore no irregularity. In view of the relative evidential insignificance of this point, even had there been an irregularity in not giving the parties forewarning that this explanation was to be included, the omission to do so falls far short of substantial injustice: what happened was the ordinary incident of a shipping arbitration involving technical or scientific issues.

Whether anti-fouling Paint was properly applied

The majority found as a fact that while in dry dock at Piraeus in September 1999 the vessel's hull was "suitably cleaned and prepared, as required by the paint company" for the application of the anti-fouling paint (Reasons, paragraph 6.5), the anti-fouling paint scheme was appropriate for the vessel (Reasons, paragraph 6.7) and that the owners had acted with due diligence in purchasing and applying the paint.

There was no evidence specific as to whether the surface preparation or paint application had been properly carried out, a point raised by Mr Moss in his dissenting Reasons. The parties did not make any submissions about these matters. In particular the charterers' closing submissions are completely devoid of any mention of the possibility that the preparation of the hull surface or the application of the paint might have been deficient. This was clearly not a live issue. The arbitration was clearly conducted on the tacit assumption that there had been effective application.

In these circumstances, although the arbitrators had no need to refer to this matter in their Reasons, they very properly and conscientiously asked themselves whether the hull had been effectively treated. In concluding that if they had looked at the shipyard accounts which showed the periods of time spent cleaning and painting the hull and the number of coats applied and they looked at photographs of the hull, they observed that such application was an expensive procedure and that it would not have been in owners' interests for the work to be skimped. Their conclusion that the hull was effectively treated was therefore one which they arrived at on slender evidence but which was clearly open to them as a matter of commercial commonsense. They were under no duty to forewarn the parties of this intended finding. There are many arbitrations where arbitrators, like judges, have to do their best with very little evidence. If every time they proposed to make such a finding, particularly where the matter had not been specifically raised by submission, they had to invite further submissions from the parties, their awards would be delayed and the expense would be increased in circumstances not demanded by the general duty of fairness under section 33 and inconsistently with section 33(1)(b). In this respect, there was no irregularity, merely the ordinary process of evidence evaluation at any arbitration of this kind.

Changing the Vessel's Trim at Sepetiba

In paragraphs 57 to 61 of their Opening Submissions the charterers took the point that there must have been at least some fouling prior to arrival at Sepetiba because the diving inspection at Piraeus concluded that parts of the hull which were clear of the water at the drafts recorded on arrival at Sepetiba could only have been infested before her arrival there and not during the period of idleness there.

In paragraph 19(d) of their Closing Submissions the Owners argued that if there had been pre-Sepetiba fouling it would have died or fallen away at and above the waterline at which point it would have been exposed to air.

In paragraphs 87 to 89 of their Closing Submissions the charterers reiterated their point that, given that the divers had reported that fouling covered 100 per cent of the hull below the waterline at Piraeus, when the vessel was at a much greater draft than on arrival at Sepetiba, the additional band of fouling above the Sepetiba draft must have pre-existed the vessel's arrival there.

It is to be observed, therefore, that the charterers' point on comparative drafts was very explicitly advanced before the tribunal. It must have been perfectly obvious to anyone that the point only had substance if the vessel maintained its arrival draft at Sepetiba for long enough to preclude the growth of organisms on those additional parts of the hull below the waterline at the greater draft recorded at Piraeus. Accordingly the validity of that assumption would inevitably have to be tested by the tribunal.

The majority set out their approach to this argument at Reasons, paragraph 6.26, as follows:

"We were not persuaded by the argument put forth by the charterers that since, according to the divers' report, the vessel was found in Piraeus to have been fouled up to a height greater than that which was under water in Sepetiba, it followed that she had either suffered fouling prior to arrival there or had been subjected to infestation by airborne particles (!). This theory was founded on the assumption that her draft in Sepetiba remained unchanged over the entire 3 weeks there, that the draft readings at the anchorage in Piraeus were absolutely accurate and that no allowance should be made to the divers' literal statement that 100% of the vessel's underwater vertical sides were fouled. The ship on arrival at Sepetiba was almost 2.74 meters (or almost 9 feet) by the stern. It is more than likely that during her stay there, the Master would have trimmed her to a more even keel condition either by moving existing or taking on more ballast. Moreover, it was disingenuous to imply that a band of almost 2 meters (1.91 – or over 6 ¼ feet – to be precise) width along the length of the ship represented the perceived discrepancy. This figure emerged by deducting the forward draft on arrival at Sepetiba from the reported forward draft in Piraeus. The aft drafts of 7.66 meters and 7.90 meters respectively, differed by only 24 centimetres or 10 inches. The mean drafts were 6.29 meters and 7.36 meters respectively."

The arbitrators therefore used their experience as shipping men to investigate the validity of the assumption to which I have referred. They rejected it as improbable notwithstanding there was no specific reference to trim alterations in the vessel's logs. That was clearly open to them.

The arbitrators were also entitled to investigate the accuracy of the diver's report as to the precise extent to which the hull was infected by fouling at Piraeus. If the extent was or might be exaggerated less weight would be attached to the argument based on comparative drafts and the arbitrators would have to decide whether, having regard to all the other evidence before them, it was right to infer that there had been pre-existing fouling at the time of delivery at Sepetiba.

The arbitrators thus investigated the differences in draft between Sepetiba and Piraeus and considered whether it was likely that the diver's report that 100 per cent of the vessel's underwater vertical sides were fouled at Piraeus was accurate. It is clear from the passage which I have set out that they considered that the reference to 100 per cent fouling was intrinsically improbable. In so doing they were well within the scope of permissible findings of fact. The factual issues which had been left for their decision were such that they were entitled to test the substance of the charterers' submissions by this type of investigation and to do so fairly, without forewarning the parties.

There was no question here of the arbitrators introducing a completely new factual approach which could not have been anticipated on the basis of the submissions which were before them. What they were doing was testing the weight of the evidence that had been placed before them and deciding what to accept and what to reject. Their reasons were ancillary to their decisions on the main issue which was whether the fouling which interfered with the vessel's performance was caused at Sepetiba and not earlier.

There was therefore no irregularity serious or otherwise.

I further reject the submission that, even if none of these matters represented a serious irregularity, when taken in isolation, they do in aggregate amount to a serious irregularity. This argument is misconceived. Once it is concluded that none of the matters alone amount to an irregularity, it is logically untenable to derive an irregularity from those same matters in aggregate. Had I concluded that all of these matters taken separately represented an irregularity, albeit not a serious one, it is improbable that I should have concluded that there was an overall serious irregularity. However, it is not necessary to express a concluded view on this hypothesis.

Accordingly, the application under section 68 of the 1996 Act is dismissed.

The Application for Leave to Appeal

It is submitted that the decision of the majority was obviously wrong in law in as much as it appears from the Reasons that the arbitrators asked themselves the wrong question. They ought to have asked themselves whether the breach of the speed and consumption warranty had been proved to be solely caused by the vessel's compliance with charterers' orders (standing idle at Sepetiba) or by a breach of contract by the charterers. Instead, they asked themselves some other question, as appears from paragraph 6.28, in which the arbitrators rejected the owners' claim for breach of the charterers' redelivery obligation – to redeliver in the same good order and condition as on delivery – on the grounds that the fouling of the hull over time was fair wear and tear. They also rely on the way in which the arbitrators analysed the issue whether mechanical fault had caused under-performance, in particular that part of paragraph 6.12 already

quoted in this judgment. It is submitted that the arbitrators must have been assuming that the burden of proof lay on the charterers to prove that the under-performance was caused otherwise than by their orders.

There was no issue that an amount had been deducted from hire nor that the vessel had under-performed in respect of speed and consumption. If the matter rested there, owners' claim for hire would fail. Therefore, the burden of proof that under-performance was the sole consequence of the charterers' instructions rested on the owners.

However, when properly understood, the Reasons of the majority contain nothing to suggest that the arbitrators made any error in their approach to the evidence and shifted the legal burden of proof to the charterers.

Their conclusion that the owners' claim for breach of the re-delivery obligation failed because the fouling was fair wear and tear within the exception is in no way inconsistent with their conclusion that the under-performance was solely caused by charterers' orders.

The redelivery obligation was qualified by the fair wear and tear exception. The burden of proof of breach lay on the owners who had to establish at least a prima facie case that the barnacles had grown during the charter service and that their growth fell outside the exception. The arbitrators accepted that the barnacles had grown during the charter period but found that they were an ordinary incident of trading in accordance with charterers' lawful orders and the owners therefore failed to prove their claim.

The issue whether hire could justifiably be deducted by the charterers depended on the quite different point as to whether compliance with charterers' orders was the sole cause of the growth of the barnacles, regardless of whether that growth was fair wear and tear. The exception was not applicable to protect the charterers from the consequences of their orders having caused the vessel's under performance. The scheme of the contract involved that charterers bore the cost of under performance caused by their orders and the cost of restoration of the vessel to her on-delivery condition where the deficiency was due to compliance with their orders and was not fair wear and tear. If the latter, the owners bore the cost.

In my judgment, there is nothing in the Reasons to suggest that the arbitrators impermissibly reversed the burden of proof. The submission that in paragraph 6.12 the arbitrators were placing the burden of proof on the charterers is quite wrong. The arbitrators accepted on the balance of probabilities the *"plausible explanations"* advanced by the owner's expert engineer in rebuttal of most of the issues as to the engines raised by the charterers who failed to call an expert. In the face of owners' evidence the charterers had failed to point to a defect ("fault") which on the balance of probabilities caused underperformance. This is obviously a reference to the evidential burden – the burden of rebutting the technical evidence adduced by the owners. The arbitrators were thus entitled to treat as less likely than fouling of the hull, the possibility that there had been an unidentified deficiency in the engines. They were simply assessing the relative likelihood of fouling and such unknown mechanical deficiency but were not in any way misplacing the burden of proof.

It is submitted that, having misdirected themselves as alleged, the majority then proceeded to find against the charterers, when there was no evidence on which to base such findings, on the four matters raised in the section 68 application already covered in this judgment.

In relation to each of those four matters there is nothing in the Reasons to suggest that the arbitrators' conclusion was based on an error of law of the nature suggested on behalf of the charterers or in particular that their conclusion was the result of a reversal of the burden of proof. In each case the arbitrators were using such evidence as they had to work out the inferences to be drawn on the balance of probabilities. No conclusion was arrived at on the basis that in the absence of any evidence the charterers' case failed.

Accordingly, in my judgment, the decision of the arbitrators was not obviously wrong on any question of law and this application for leave to appeal therefore fails.

In conclusion I would add this.

The frustration expressed by Mr Moss in his dissenting Reasons is entirely understandable. If parties will not co-operate on matters such as inspection, the taking of samples and disclosure of documents, the resolution of their disputes by arbitrators becomes far more difficult and far more expensive. That, however, does not normally render inadmissible evidence which has been obtained unilaterally and without co-operation with the opposite side, although such evidence may be of little weight. The arbitrators, like a judge, may have to do their best with what little they have, using such commercial, technical and arbitral experience as they may have. While they may not create facts where there is no evidential basis whatever, they will no doubt strive to make positive findings on the balance of probabilities rather than giving up the task and determining material issues only on burden of proof. That said, there may be cases where so little evidence is put before them that sensible findings of fact are impossible and burden of proof is all that remains. An experienced arbitrator should be able to recognise the latter type of case without much difficulty, although sometimes, as happened in this arbitration, views may differ.

In the present case, the lack of co-operation between the parties is to be strongly deprecated, but the majority of the arbitrators deployed such evidence as they had in an entirely proper manner, bringing to bear on it their own commercial experience in an entirely fair and appropriate way in order to make positive findings of fact where they were needed. It would be extremely undesirable and totally contrary to the policy of the 1996 Act if arbitrators were discouraged from approaching issues in this way by the threat of applications under section 68.

Mr Simon Croall (instructed by Waterson Hicks) for the Claimant
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