CA on appeal from QBD Commercial Court (The Hon Mr. Justice Tomlinson) before Lord Phillips, MR; Rix LJ; Dyson LJ. 18th December 2002.

Lord Phillips MR

Introduction

1. This appeal arises out of and relates to an award of three eminent commercial arbitrators, Sir Christopher Staughton, Mr Adrian Hamilton QC and Mr Kenneth Rokison QC. The arbitration raised the question of whether charterers of four vessels under the New York Produce Exchange ('NYPE') form of charter had validly cancelled those charters pursuant to the War Cancellation Clause. The arbitrators held that they had not. The charterers sought permission to appeal to the Commercial Court against that decision, contending that the arbitrators had erred in relation to seven issues of law. They did so pursuant to section 69 of the Arbitration Act 1996 ('the Act'). By Order dated 2 July 2002 Tomlinson J. refused permission to appeal. On 16 July 2002 he granted permission to appeal to this court against his decision in relation to four issues. So far as we are aware, this is the first time that permission to appeal to this court has been granted pursuant to section 69 of the Act. The appeal raises three issues: (1) Did Tomlinson J. apply the correct principles when granting permission to appeal to this court? (2) Did Tomlinson J. apply the correct principles when refusing permission to appeal against the Arbitrators' award? (3) Did Tomlinson J. correctly apply the latter principles?

2. The Respondents ('the Owners'), who were the claimants in the arbitration, are four German limited-liability partnerships each of which owns one container ship. They chartered these vessels under the NYPE form of time charter, with amendments up to June 12 1981, to a company of which the Appellants ('the Charterers'), who were the respondents in the arbitration, are the universal successor. Clause 31 of each of the Charterparties was a war cancellation clause which provided, so far as material, as follows: *"In the event of the outbreak of war (whether there be a declaration of war or not) between any two or more of the following countries: The United States of America, the United Kingdom, France, Russia, the People's Republic of China, Federal Republic of Germany and any country of the EEC or in the event of the nation under whose flag the vessel sails becoming involved in war (whether there be a declaration of war or not), either the Owners or the charterers may cancel this charter…."*

3. The charters were for lengthy terms and, from 1996 to 1999, container line rates fell. In September 1997 the charters were varied, to accommodate the Charterers. Notwithstanding this variation the Charterers had, in March 1999, a powerful commercial motive for terminating the charters. It was in March 1999 that a military operation began in Kosovo in which Germany participated as a member of NATO. In relation to this, the arbitrators found the following facts: *"The particular operation with which we are concerned started on 24th March 1999. Germany participated as a member of NATO. Under the German constitution, the German Bundestag approved German participation in the operation. From 24th March 1999, this participation involved the deployment of 10 Tornado ECR aircraft and 4 Tornado Recce aircraft of the German Air Force, initially mainly suppressing Yugoslav air defences, and reconnaissance, and later switching to other targets. During the second half of April the intensity of the operation, including Germany's participation increased considerably. We conclude, however, that the operation was one operation, starting on 24th March 1999, and the increase in Germany's participation was one of scale or tempo, rather than in the nature of Germany's involvement."*

4. By notice dated 29 April 1999 the Charterers purported to terminate each of the charterparties on the ground that Germany, under whose flag the vessels sailed, had become involved in war in Kosovo and Yugoslavia.

5. The arbitrators found that the cancellation of the charterparties was invalid for reasons which included the following: (1) [by a majority] that the events in Kosovo did not constitute 'war' within the meaning of that word in clause 31; (2) [by the same majority] that if events in Kosovo did constitute war, Germany was not 'involved' in that war within the meaning of that word in clause 31; (3) that under clause 31, the right to cancel a charter had to be exercised within a reasonable time of the event in question; (4) the Charterers had not given notice of cancellation within a reasonable time of the alleged involvement of Germany in the alleged war.

6. The issues in respect of which the charterers sought permission to appeal and which we shall have to consider, having regard to the terms upon which Tomlinson J. gave leave to appeal to us, are the following:

   "(i) Whether on a proper construction of clause 31 of the Charterparties, the expression "[a] nation … becoming involved in war" in that clause is apt to encompass circumstances in which a nation participates in a military operation as a member of NATO (or another international body)

   (ii) Whether the option to cancel given by clause 31 of the charterparties arose only in the event that the war in question, or the flag state's involvement in that war, had an impact on the trading or operations of the vessel or vessels concerned.

   (iii) Whether (a) there was implied into clause 31 the Charterparties any term to the effect that the right to cancel the Charterparties pursuant to that clause had to be exercised by the giving of a notice within a particular time frame or (b) there was no such implied term and the right to cancel could be lost only as the result of an election by the party concerned.

   (iv) If there was an implied term, whether the term in question was that the right to cancel had to be exercised (a) by notice given within a reasonable time of its accrual (and in particular within a few days thereof) or (b) before such time had elapsed as to make the other party believe that no such right would be exercised."

Section 69 and its history

7. The regime under which decisions of arbitrators were brought before the High Court by case stated was radically altered by the Arbitration Act 1979, section 1 of which provided, insofar as material:

"*(1) In the Arbitration Act 1950 … section 21 (statement of case …) shall cease to have effect and, without prejudice to the right of appeal conferred by subsection (2) below, the High Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.*

(2) Subject to subsection (3) below, an appeal shall lie to the High Court on any question of law arising out of an award on an arbitration agreement; and on the determination of such an appeal the High Court may … (a) confirm, vary or set aside the award …

(3) An appeal under this section may be brought by any of the parties to the reference –

(a) with the consent of all the other parties to the reference; or

(b) … with the leave of the court.

(4) The High Court shall not grant leave under subsection (3)(b) above unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement…

(7) No appeal shall lie to the Court of Appeal from a decision of the High Court on an appeal under this section unless –

(a) the High Court or the Court of Appeal gives leave; and

(b) it is certified by the High Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal…."

8. In ***Pioneer Shipping v B.T.P. Tioxide ('the Nema')*** [1982] AC 724 the House of Lords gave guidance as to the circumstances in which permission to appeal to the High Court from the decision of an arbitrator should be given. In relation to the construction of a 'one-off' clause, permission should not be given unless, in the opinion of the court, the arbitrator was obviously wrong. In dealing with the approach to standard clauses, Lord Diplock said this at p.743D: *"For reasons already sufficiently discussed, rather less strict criteria are in my view appropriate where questions of construction of contracts in standard terms are concerned. That there should be as high a degree of legal certainty as it is practicable to obtain as to how such terms apply upon the occurrence of events of a kind that it is not unlikely may reproduce themselves in similar transactions between other parties engaged in the same trade, is a public interest that is recognised by the Act particularly in section 4. So, if the decision of the question of construction in the circumstances of the particular case would add significantly to the clarity and certainty of English commercial law it would be proper to give leave in a case sufficiently substantial to escape the ban imposed by the first part of section 1 (4) bearing in mind always that a superabundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than to promote clarity in settled principles of commercial law. But leave should not be given even in such a case, unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction; and when the events to which the standard clause fell to be applied in the particular arbitration were themselves "one-off" events, stricter criteria should be applied on the same lines as those that I have suggested as appropriate to "one-off" clauses."*

9. Three years later, Lord Diplock had occasion to revert to this topic in ***Antaios Compania SA v Salen AB (the 'Antaios')*** [1985] AC 191 at p.203-4: *"My Lords, I think that your Lordships should take this opportunity of affirming that the guideline given in **The Nema** [1982] A.C. 724, 743 that even in a case that turns on the construction of a standard term, "leave should not be given … unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction", applies even though there may be dicta in other reported cases at first instance which suggest that upon some question of the construction of that standard term there may among commercial judges be two schools of thought. I am confining myself to conflicting dicta not decisions. If there are conflicting decisions, the judge should give leave to appeal to the High Court, and whatever judge hears the appeal should in accordance with the decision that he favours give leave to appeal from his decision to the Court of Appeal with the appropriate certificate under section 1(7) as to the general public importance of the question to which it relates; for only thus can be attained that desirable degree of certainty in English commercial law which section 1(4) of the Act of 1979 was designed to preserve."*

10. Section 69 of the Act has replaced the ***Nema*** guidelines with statutory criteria, as follows:

"*(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. ….*

(2) An appeal shall not be brought under this section except-

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court. ….

(3) Leave to appeal shall be given only if the court is satisfied-

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award-

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal."

11. The statutory criteria are clearly strongly influenced by the *Nema* guidelines. They do not, however, follow these entirely. We have concluded that they open the door a little more widely to the granting of permission to appeal than the crack that was left by Lord Diplock. We shall elaborate on this conclusion later in this judgment

12. Section 69(6) reproduces, in effect, section 1(6A) of the 1979 Act, which provided: *"Unless the High Court gives leave, no appeal shall lie to the Court of Appeal from a decision of the High Court – (a) to grant or refuse leave under subsection (3)(b)…"*

Lord Diplock, in a speech with which the other members of the House concurred, considered the principles to be applied under this subsection in **the *Antaios*** at p.205:

"….leave to appeal to the Court of Appeal should be granted by the judge under section 1(6A) only in cases where a decision whether to grant or to refuse leave to appeal to the High Court under section 1(3)(b) in the particular case in his view called for some amplification, elucidation or adaptation to changing practices of existing guidelines laid down by appellate courts; and that leave to appeal under section 1(6A) should not be granted in any other type of case. Judges should have the courage of their own convictions and decide for themselves whether, applying existing guidelines, leave to appeal to the High Court under section 1(3)(b) ought to be granted or not.

*In the sole type of case in which leave to appeal to the Court of Appeal under section 1(6A) may properly be given the judge ought to give reasons for his decision to grant such appeal so that the Court of Appeal may be informed of the lacuna, uncertainty or unsuitability in the light of changing practices that the judge has perceived in the existing guidelines; moreover since the grant of leave entails also the necessity for the application of **Edwards v Bairstow** [1956] A.C 14 principles by the Court of Appeal in order to examine whether the judge had acted within the limits of his discretion, the judge should also give the reasons for the way in which he had exercised his discretion."*

13. Nothing in section 69 of the Act affords any grounds for departing from these principles. On the contrary, the fact that, as we have indicated, section 69 opens a little more widely the door to granting permission to appeal from the award of an arbitrator is all the more reason why the Judge's decision on the application for such permission should be final.

Did Tomlinson J. apply the correct principles when granting permission to appeal to this Court?

14. Tomlinson J. refused the Charterers' application for permission to appeal to the Commercial Court because he was firmly of the view that the statutory criteria set out in section 69(3) of the Act precluded the grant of permission. He did so notwithstanding that he had identified issues in relation to the proper construction of a standard war cancellation clause, such as Clause 31, that were 'obviously of general public importance'. In granting permission to appeal to this Court in relation to his decision he explained why he did so: *"However, on the issues relating to the war cancellation clause, I grant leave to appeal from my decision pursuant to S.69(6) of the Act, in order that the Court of Appeal may consider whether I have misapplied the statutory criteria or have approached them inappropriately inflexibly given the general public importance of the underlying question of the proper approach to the construction of a standard war cancellation clause, and, if it thinks it appropriate, give guidance."*

15. The observations of Lord Diplock in the *Antaios,* which we have set out above in paragraph 12, fall to be applied, subject to this qualification. The guidelines are no longer judge made – they are statutory criteria. There is no scope for amplifying or adapting them in the light of changing practices. To the extent that there is scope for elucidation as to the manner of their application, it may be appropriate to grant permission to appeal. Subject to this, if the Judge decides that the statutory criteria for granting permission to appeal are not satisfied, he should not grant permission to appeal against that decision. His decision on the merits of the application for permission to appeal should be final.

16. Tomlinson J. did not identify any uncertainty as to the manner in which the statutory criteria should be applied. It was his clear view that they precluded the grant of permission to appeal. He did not point to any uncertainty in the criteria. He did not suggest any respect in which he might have misapplied the criteria. We detect that he hoped that this Court might find a way to ease the rigorous restriction that the criteria impose on review by the Commercial Court of important issues of law arising in arbitrations. Lord Diplock would not, we think, have approved the grant of permission to appeal for such a motive and nor do we. We shall, however, take advantage in due course of the opportunity to consider the extent to which some of Lord Diplock's observations in the *Antaios* can be reconciled with the statutory criteria.

Some comments on procedure

17. Before considering the principles applied by Tomlinson J. we wish to say a word about the procedure adopted in this case. In accordance with sub-sections 4 and 5 of section 69 the Charterers applied in writing for permission to appeal. The Claim Form in which they did so set out clearly and concisely, albeit over 10 pages, their grounds of appeal. This Claim Form was accompanied by a witness statement from Mr Deering, the Charterers' solicitor. This included three detailed pages of 'background to the dispute' for the alleged purpose of satisfying Tomlinson J. that determination of the questions in issue would substantially affect the rights of the parties – see section 69(3)(a). This was unnecessary and inappropriate. The rights of the parties are those at issue in the arbitration and section 69(3)(a) is designed to ensure that permission to appeal will not be given in relation to issues which have no substantial impact on those rights. What appears to have been a lengthy plea *'ad misericordiam'* as to the Charterers' financial plight was uncalled for.

18. Exhibited to Mr Deering's statement were 137 pages of exhibits, which included not merely the award but a considerable volume of background material, including the Charterers' skeleton argument at the arbitration (45 pages).

19. Mr Leir of the Owners' solicitors responded with 28 pages of argument against the grant of permission to appeal. Mr Deering felt it necessary to respond to this with a further 13 pages, including the assertion that his clients were not aware of their right to cancel the charters until two days before they did so – a statement which raises a number of questions but which, so it seems to us, was not likely to be of any assistance to Tomlinson J.

20. In ***North Range Shipping Ltd v Seatrans Shipping Corporation*** [2002] EWCA Civ 405; [2002] 1 WLR 2397 this Court held that a Judge, when refusing permission to appeal under section 69 of the Act, was required by virtue of section 6 of the Human Rights Convention to give sufficient reasons to enable the losing party to understand why the Judge had reached his decision, although the Court emphasised that such reasons could be very short. To this extent Lord Diplock's guidance in the *Antaios* is no longer followed.

21. Tomlinson J., in refusing permission to appeal, gave very adequate reasons for his decision in two and a half closely typed pages, which were faxed to the parties on 13 June 2002. On 20 June the Charterers' solicitors faxed to the Judge a three page 'application for further consideration', joining issue with some of the Judge's conclusions. Not surprisingly, this provoked a three page riposte from Owners' solicitors, to which the Charterers' solicitors responded.

22. Because his Order refusing permission to appeal had not yet been drawn up, the Judge considered it appropriate to consider this correspondence. He commented:

> *"I cannot think that the Court of Appeal envisaged that the giving of reasons should lead to a potentially never-ending process in which it is suggested that, for one reason, or another, the judge's decision is wrong. In the ordinary way the proper forum in which to debate the question whether a first instance judge has made an incorrect decision is in the Court of Appeal, not by way of application to the judge to reconsider his decision.*
>
> *I would accept that there may be cases in which it may be appropriate to draw to the attention of the court that it has apparently proceeded upon a misapprehension or otherwise failed to have regard to a relevant consideration. I do not however accept that the present is such a case."*

23. We sympathise with the Judge's comments. More fundamentally, we view the whole saga that we have just described with dismay. The statutory requirement that applications for permission to appeal should be paper applications unless the court otherwise directs must surely have been intended to simplify the procedure and to save the Court's time. That requirement reflects the fact that the criteria for the grant of permission to appeal are clear cut and easy to apply. They do not require the drawing of fine lines, nor will they usually give much scope for the Court to require assistance in the form of submissions or advocacy. If this case reflects current practice, and we apprehend that it may, then the procedure has got out of hand and is at odds with both the spirit of the legislation and the ethos of the Commercial Court. Any written submissions placed before the Court in support of an application for permission to appeal from findings in an arbitral award should normally be capable of being read and digested by the Judge within the half-hour that, under the old regime, used to be allotted for such applications.

Did Tomlinson J. apply the correct principles when refusing permission to appeal against the arbitrators' award?

24. For an appeal against the award to succeed, the Charterers would have to reverse three separate findings of the arbitrators in relation to Clause 31 of the charterparty: (1) that operations in Kosovo were not 'war'; (2) that Germany was not 'involved' and (3) that the Charterers had been required to give notice of cancellation within a reasonable time and had failed to do so.

25. In his reasons for refusing permission to appeal, Tomlinson J. observed that the first two issues involved mixed fact and law and that the proper approach to the construction of clauses such as Clause 31 was a question of general public importance. He did not, expressly, consider whether the majority decision of the tribunal on these two issues was at least open to serious doubt. This was perhaps because even if there were grounds for challenge in relation to these two issues, such challenge would not affect the result, or the rights of the parties, unless the unanimous decision of the arbitrators on the third issue could be attacked. As to that issue, the challenge that the Charterers sought to bring was to the finding of the arbitrators that, as a matter of law, the Charterers had to exercise any right to cancel that they enjoyed within a reasonable time.

26. Tomlinson J. held that this challenge was not open to the Charterers because the question was not 'one which the tribunal was asked to determine', - see section 69(3)(b). He further held that there were alternative bases upon which the time that elapsed before the Charterers gave notice of cancellation might have been relevant: (1) implied term, (2) waiver/election and estoppel. These latter alternatives were not explored before the arbitrators. As we understand his judgment, it was because questions of waiver/election and estoppel were not explored before the arbitrators that Tomlinson J concluded that it was not open to the Charterers to challenge the Arbitrators' finding that, by reason of an implied term, notice of cancellation had to be given within a reasonable time.

27. Given Tomlinson J's conclusion that the arbitrators were not asked to determine the critical question his decision that the application for permission to appeal must be refused was inevitable. He applied the correct principles, as laid down by section 69(3). Whether the manner of his application of those principles is open to attack remains to be considered.

Did Tomlinson J. correctly apply the principles governing permission to appeal from an arbitration award?

28. In the ***Antaios*** Lord Diplock observed, in the passage that we have quoted above, that in performing the task which confronts us, the Court of Appeal had to apply ***Edwards v Bairstow*** in order to decide 'whether the judge had acted within the limits of his discretion'. This demonstrates that our task is essentially one of judicial review. Insofar as Tomlinson J. has made findings of law, we can review them. Insofar as he has made findings of fact, or exercised a discretion, the familiar ***Wednesbury*** test falls to be applied [1948] 1 KB 223.

"The question is one that the arbitrators were asked to determine"

29. Section 69(3)(b) is an addition to the *Nema* guidelines, resolving a difference of view between the Commercial Court and the Court of Appeal in ***Petraco (Bermuda) Ltd v Petromed*** [1988] 2 Lloyd's Rep 357. In his decision giving permission to appeal to this Court, Tomlinson J. commented 'the critical question was not even raised faintly'. On behalf of the Charterers, Miss Hopkins, challenged this finding. It is first necessary to identify what Tomlinson J. considered to be 'the critical question'.

30. The issues that we have set out in paragraph 6 above were four of seven issues that the Charterers identified in their Claim Form in order to comply with section 69(4) of the Act. On analysis, we consider that the 'critical question' identified by Tomlinson J. was issue (iii). We so find having regard to the following passage from his reasons for refusing permission to appeal:

> *"I do not believe that it would be a proper exercise of my statutory discretion to give leave to appeal in circumstances where the arbitrators have unanimously concluded that any right to cancel which the charterers may have enjoyed was not exercised within a reasonable time and was thus lost. The applicants recognise that even were they successful on all issues relating to the war cancellation clause, there would have to be a remission to the arbitrators for them to consider whether CMA had waived or had elected not to exercise the option to cancel, that being a question which they had not been asked to determine at the hearing. The arbitrators find that CMA would have known of and been able to assess the well-publicised events within a few days. CMA adduced no evidence to lay a foundation for an argument that they could not be taken to have waived or elected not to exercise the option to cancel because they were unaware of the existence of that right, and they seem at the hearing to have argued only very faintly against the necessity to imply a term that the right must be exercised within a reasonable time. What was described by their counsel as "the more interesting question" was the nature of the term, a reflection of the debate whether the term should be formulated such that the right of cancellation is to be exercised within a reasonable time or before such lapse of time as would make the other party think that the right would not be exercised. That strikes me as an arid debate since I cannot think that the formulation of the term in these different ways can lead to a different outcome, and it would appear that CMA's Counsel came close to accepting this when he suggested that the latter, "Davenport" formulation, encapsulates the test for determining what is a reasonable time. Another way of putting the same point is that if within a reasonable time within which to ascertain that war had broken out and within which to decide the question whether, seeing that war had broken out, it was in their interests to continue to implement the contract or not, one party does not give to the other notice of cancellation, the other party is entitled to conclude that the existence of the war will not be relied upon as giving rise to the right to cancel.*
>
> *The short point is therefore that the arbitrators were not asked to analyse the matter in terms of waiver/election and evidence was not deployed before them concerning CMA's awareness or lack of awareness as to the existence of a right to cancel. The resolution of the question in fact left to the arbitrators was an objective determination of fact peculiarly within the province of the arbitrators. I conclude that it is inappropriate to give leave to appeal on the issues arising out of the war cancellation clause. The questions raised are either questions the determination of which will not substantially affect the rights of one or more of the parties or are questions which the tribunal was not asked to determine."*

31. Miss Hopkins' submissions on this point can be summarised as follows. (1) the arbitrators had held that Clause 31 was subject to an implied condition that the right to cancel had to be exercised within a reasonable time of its accrual; (2) Charterers had challenged before the arbitrators the existence of this implied condition; (3) it followed that the question of whether there was an implied term was one which 'the tribunal was asked to determine'; (4) it was the Charterers' case that mere inaction would not constitute an election, estoppel or waiver, however long it continued; (5) it was for the Owners, not the Charterers, to raise any averments of estoppel, waiver or election. They had not done so.

32. In support of her submission that the question of an implied term was before the arbitrators, Miss Hopkins relied upon:

    i) the Charterers' skeleton argument at the arbitration. This included in the issues to be determined: 'Did the option have to be exercised within any particular time? If so, did CMA exercise it within time?' The answer to these issues, suggested by the skeleton, was: 'It is not necessary to imply a term limiting the time during which the option has to be exercised. Wars wax and wane and are unpredictable'.

    ii) a passage of discussion between the Charterers' counsel and Sir Christopher Staughton in the course of the former's submissions:

    "MR HADDON-CAVE: *Question 3 on page 7, did the option have to be exercised within a reasonable time and if so was it exercised within a reasonable time? And his estoppel point. I see the force on why it might be thought that there was an implied term, but it's not necessarily so because, as Mr Hamilton pointed out yesterday, the character of the war changes and you may wish at some stage in the war to exercise the option, you may not.*

    SIR CHRISTOPHER STAUGHTON: *Are you allowed to wait and see what sort of war it is going to be?*

    MR HADDON-CAVE: *There is no reason why the parties could not have intended that to be the case.*

    SIR CHRISTOPHER STAUGHTON: *If it's established that you have to exercise the option within a reasonable time, why should you be allowed a licence to decide what's a reasonable time for you?*

    MR HADDON-CAVE: *That's the issue – is it necessary to imply a term? I quite see the force of that point as an option; I don't argue the point terribly forcefully, there is an authority to that effect, so I don't dwell on it or accept it. The more interesting question, perhaps, is what is the nature of that term, and I suggest that it is as Mr Davenport suggests on page 160 of his article, that the option "probably has to be exercised before such time has elapsed that will leave the other party to think that no notice of termination was going to be exercised."*

    iii) the Charterers' written closing argument, which simply repeated the matters in their skeleton argument to which we have referred at (i) above.

33. In their award the arbitrators made the following finding: *"An option to cancel a charterparty in the event of war must be exercised within a reasonable time of the event in question. In **KKKK v Belships Co** (1939) 63 L1.l.Rep 175, Branson J said, in respect of the Japan/China war, at p183: "…. the charterers and the shipowners would be entitled here to a reasonable time within which to ascertain that war had broken out and within which to decide the question whether, seeing that war had broken out, it was in their interests to continue to implement the contract or not.""*

34. We consider that in making this finding the arbitrators were determining a question which they had been *'asked to determine'*. It is true that Mr Haddon-Cave QC had virtually conceded the point, but we consider that he did enough to prevent being shut out under section 69(3)(b) from seeking to appeal against the arbitrators' finding on the point.

35. No doubt because Mr Haddon-Cave challenged the implication of a term so faintly, no questions of election, waiver or estoppel appear to have been explored at the arbitration, although the cryptic statement 'and his estoppel point' in the passage that we have quoted at 32(ii) above suggests that estoppel may have received at least a passing reference in the submissions made on behalf of the Owners. In these circumstances, we do not consider that the fact that issues of election, waiver or estoppel were not explored is a bar, by virtue of section 69(3)(b), to the grant of permission to appeal issue (iii) set out at paragraph 6 above.

36. All of this leads us to conclude, not without hesitation, that, insofar as Tomlinson J's refusal of permission to appeal was founded on section 69(3)(b), it was not well founded. Nonetheless, if the Charterers had intended to make a serious challenge to the implication of a term, we consider that they should have laid the ground for this more thoroughly. It may well be that Mr Haddon-Cave concluded that the arbitrators would feel obliged, or inclined, to follow ***KKKK v Belships***. Nonetheless we think that it would have been open to him to urge them strenuously not to do so in the light of subsequent developments in the law, so as to make it plain that this was a live issue and one that would, if necessary, form the basis of a challenge before the Commercial Court. Had he done so, this would almost undoubtedly have been met with alternative allegations of election, waiver and estoppel, and these matters would have been explored. As it is, were the Charterers to be given permission to appeal to the Commercial Court and there to succeed on the ground that the arbitrators were wrong to find an implied term and that issues of election, waiver and estoppel remained to be resolved, the matter would have to be remitted to the arbitrators for further consideration. This fact would, in our opinion, have justified Tomlinson J. in declining to give permission to appeal on the ground that section 69(3)(d) was not satisfied. There were, however, other considerations that, in our opinion, justified the Judge in refusing permission to appeal.

37. Before he could grant permission to appeal section 69 required that the Judge should find (1) that the decision of the arbitrators on the existence of an implied term was obviously wrong or that the point was one of general public importance and that the decision of the arbitrators was at least open to serious doubt and (2) that reversing the decision of the arbitrators on the point would substantially affect the rights of one or more of the parties. We turn to consider these criteria.

Was the decision of the arbitrators that there was an implied term obviously wrong?

38. As we shall show shortly, there is scope for argument as to whether the arbitrators were correct in finding that clause 31 was subject to an implied term that the right to cancel had to be exercised within a reasonable time,

but it cannot be said that the arbitrators were obviously wrong to follow the decision in *KKKK v Belships,* and Miss Hopkins did not submit to the contrary.

Was the decision of the arbitrators that there was an implied term open to serious doubt?

39. ***KKKK v Belships****,* which the Arbitrators followed, concerned a clause in a charterparty which gave owners and charterers the option of cancelling the charterparty if one of a number of specified countries became 'engaged in war' with any other of those countries. It was submitted to Branson J. that, so long as a state of war continued, the option given by this clause remained open. He rejected that submission. He held that there was a term to be implied that the option would have to be exercised within a reasonable time. In so finding he applied the test of whether, as a matter of business efficacy, it was necessary to imply such a term.

40. Cases dealing with the operation of war cancellation clauses are rare. More common are cases dealing with the right to withdraw a vessel from a charterparty for non-payment of hire. Those cases all agree that such a right has to be exercised within a reasonable time of the non-payment, but they do not agree on the juridical basis for such a requirement. As an alternative to an implied term, principles of election, waiver and estoppel have been advanced as the explanation. These principles can raise difficult theoretical questions as to the manner of their application – see ***The Scaptrade*** [1981] 2 Lloyds Rep. 425 at p.430, although they do not appear to have done so in practice. We believe that there is a good reason for this, as we shall explain. Having regard to the different theories to which we have referred above, it is at least arguable that there is a serious doubt as to whether the juridical basis of the requirement to exercise a right to withdraw from a charter within a reasonable time is an implied term. For the reasons which follow we do not need to express a final view on this matter.

Does it matter?

41. Is the question of whether the arbitrators were right to follow ***KKKK v Belships*** in implying a term *'a question of general public importance'*? If they were wrong, will this *'substantially affect the rights'* of the parties? Miss Hopkins submits that the answer to both questions is *'yes'*. This is because it is her case that the mere passage of time will not give rise to the implication of an election or a waiver or to an estoppel. Thus, she argues, it is only the implication of a term that can give rise to a requirement to give notice of cancellation within a reasonable time.

42. Miss Hopkins' submission echoes one which was advanced in the *Antaios*. Indeed, there are close parallels between this case and the *Antaios* which it is helpful to identify before proceeding further. In the present case there were two relevant issues before the arbitrators. The first was as to the true construction of the war cancellation clause in the NYPE charter. We shall call this issue 'the construction issue'. The second was as to whether the right to cancel the charter had been lost as a result of the passage of time. We shall call this issue 'the time issue'.

43. The *Antaios* also involved a purported cancellation of a time charter on the NYPE form. In that case it was the owners who had purported to terminate the charter by withdrawing their vessel. They relied upon clause 5, which provided *'on any breach of this charterparty owners shall be at liberty to withdraw the vessel…'*. There was an issue as to whether the words *'any breach'* meant 'any breach at all' or 'any repudiatory breach'. We shall call this 'the construction issue'. The arbitrators held that the words meant 'any repudiatory breach', that the breach relied upon by the owners was not repudiatory and that, therefore, the owners had had no right to withdraw the vessel.

44. Owners in the ***Antaios*** learned of the breach by the charterers on 7 May 1980 but did not purport to withdraw their vessel until 20 May. There was an issue as to whether this period of delay had resulted in the loss by the owners of their right (if right there was) to withdraw the vessel. We shall call this issue 'the time issue'. The arbitrators held in favour of the charterers on this issue also. The time issue in the ***Antaios*** raised precisely the same questions as the time issue in the present case. We turn to consider the treatment of those questions in the ***Antaios.***

45. An application for permission to appeal pursuant to the Arbitration Act 1979 was made to Staughton J., and the decision of the arbitrators on the time issue can be deduced from the report of his judgment – [1983] 2 Lloyd's Rep. 473. The arbitrators held that there was an implied term that the right to withdraw would be exercised within a reasonable time. A reasonable time would have been two days, and certainly not as long as 13 days, and thus any right to withdraw was lost. The arbitrators also held, however, that there was no conduct on the part of the owners that amounted to affirmation or election during that 13 day period.

46. In seeking permission to appeal to the Commercial Court, counsel for the Owners argued that the arbitrators had been wrong to imply a term. The right to withdraw would only have been lost by waiver, and on the arbitrators' findings there had been no waiver. Staughton J. examined the authorities and concluded that they demonstrated quite clearly *'that lapse of a reasonable time does deprive the owner of the right to withdraw',* - p.475. He went on to hold that what mattered was the arbitrators' conclusion that the right to withdraw was lost, not the manner in which they described that right. Once they had found as a fact that a reasonable time had expired, their conclusion was inevitable.

47. So far as the construction issue was concerned, Staughton J. observed that the arbitrators' finding was at odds with one, if not two, expressions of view by commercial judges. Had that been the only issue he would have been minded to give permission to appeal. As, however, he considered that the arbitrators' conclusion on the time issue was correct, and this was determinative of the result, permission to appeal would be refused. Subsequently Staughton J. gave permission to appeal against his decision for the sole purpose of permitting the Court of Appeal to consider whether his approach had been correct in principle.

48. The Court of Appeal were unanimous in holding that Staughton J. had acted correctly in principle in giving permission to appeal to the Court of Appeal against his own decision. By a majority they held that his decision to refuse permission to appeal to the Commercial Court against the award of the Arbitrators was also correct. They did so on the basis that the arbitrators had correctly held that the owners had to exercise their right (if right they had) to withdraw the vessel within a reasonable time and that, whatever the juridical basis for this requirement, the arbitrators' findings that a reasonable time had elapsed was inviolable.

49. The following are the material passages in the leading judgment of Sir John Donaldson MR [1983] 1WLR 1362 at pp.1370-1:

"*I now turn to the substance of the appeal. In* ***The Laconia*** *[1977] AC 850 Lord Wilberforce, with the agreement of Lord Salmon, said, obiter, that notice of withdrawal must be given within a reasonable time after the default and that what is a reasonable time is essentially a matter for the arbitrators. As a general proposition this is hardly open to challenge, but somewhat different views have been expressed on why this should be the case. Two theories in particular have been aired, namely that the rule stems from an implied term of the contract or that delay in exercising the right will amount to waiver or create an estoppel. In the present case the owners knew of the default on May 7, 1980, and indicated to the charterers that any delay in withdrawing the vessel would be without prejudice to their right to do so. The arbitrators took the view that such an indication prevented the owners' conduct amounting to a waiver of their rights of creating any estoppel. However they espoused the implied term explanation for the legal result declared in* ***The Laconia*** *and held that the owners had lost any right to withdraw the vessel. ….*

I know of no authority for the proposition, and I do not think that I have ever heard it suggested before, that a shipowner can extend the time for reaching a decision whether or not to withdraw beyond what is reasonable in all the circumstances by the simple device of announcing that his failure to decide is without prejudice to his rights…. If Mr Pollock is right, and the owner can extend his option to withdraw the vessel in this way, chaos would result. Ships would be hove to at sea or tied up in port, no one knowing whether they were going to perform the chartered service. Mr Pollock answers this by saying that when the next hire comes due, or when the owner has to accept or reject instructions from the charterers, he will have to make up his mind. I am not sure that this is necessarily so, because if Mr Pollock is right, I do not see why he should not continue to perform the charter-party in all respects while at the same time proclaiming that none of this was to be taken as being an election to affirm the contract. So far as accepting payment of hire is concerned, if this must inevitably amount to an affirmation of the contract, it must be remembered that hire is sometimes paid only monthly. An interval of nearly a month before the owners could be forced to elect would be wholly unacceptable commercially.

This is not to say that a declaration such as was made by the owners in this case can never have any effect. As Mr Justice Lloyd pointed out in ***The Scaptrade****, what time is reasonable may well be affected by matters known only to the owners. Being in ignorance of these matters, charterers might reasonably conclude after x days that the owners were not going to withdraw the vessel and in such circumstances I can well understand it being held that the owners had waived their right to withdraw or were estopped from asserting it. If on the other hand the owners made their problems known to the charterers or indicated that they were not abandoning their rights, they may thereby retain their right of withdrawal for a longer period than x days, being such period as was reasonable in all the circumstances, including the special problems which were afflicting them. Thus waiver or an implied term are not alternatives. The implied term may well set a limit on the owners' rights and waiver may cut down those rights, but the concept of waiver is only appropriate where the person "waiving" is giving up some right. In the instant appeal the owners are contending that by "waiver" they acquire something which they would not otherwise have had, namely a right to withdraw the vessel after the expiry of a reasonable time."*

50. In concurring with the result proposed by the Master of the Rolls, Fox LJ held, on the authority of the *Laconia* that there was no doubt as to the existence of the rule that a right to withdraw must be exercised within a reasonable time. He continued at p.1376:

"I do not think that the fact that doubt or dispute exists as to the basis of the rule is, by itself, a sufficient reason for giving leave to appeal to the High Court. If the decision was probably right, whatever the basis of the rule, it was proper to refuse leave. …

I turn then to consider what would be the consequence in this case of a resolution of the question of the basis of the rule as stated by Lord Wilberforce in The Laconia. Resolution in favour of the implied term theory would leave matters as they are since the arbitrators proceeded upon that basis. The question, therefore, is what would be the consequence of resolution in favour of the "election" theory.

As I understand the reasons of the arbitrators, the only materiality of the "election" basis is that, if it be right, the fact that the owners indicated that the delay after May 7 would be without prejudice to their right to terminate demonstrated that there was no election by the owners to affirm the contract.

I cannot see how the mere unilateral assertion of the owners that delay after May 7 was to be without prejudice to their rights can affect the matter. If the owners can do that, the rule, whatever its basis, is largely useless. I can see that there might be circumstances in which the owners could not reasonably be expected to make up their mind at once and that if they bring that to the notice of the charterers (who might not otherwise be aware of it) they could reserve their position. That, however, is a quite different matter and goes generally to the question of reasonableness. I would suppose that the question of reasonableness must be determined in the light of all the circumstances. One does not look at it exclusively from the point of view of either side. But, be that as it may, if the owners' right to withdraw must

be exercised within a reasonable time I do not see how they can extend the "reasonable time" simply by their own choice – though they could no doubt extinguish or reduce their rights by waiver.

Apart from the "without prejudice" point, the arbitrators, as I read the reasons, do not suggest that the juridical basis of the rule would have affected their finding of fact on the question of reasonable time and I do not think it would."

51. In the House of Lords Lord Diplock gave the following endorsement to the decision of Staughton J. and the majority of the Court of Appeal in a short passage at p.201H:

"Staughton J., however, indicated that but for the "reasonable time" point he would have been strongly minded to give leave to appeal on the construction of the N.Y.P.E. withdrawal clause since this was in a standard form which is widely used and conflicting judicial dicta are to be found as to the meaning which the arbitrators had ascribed to the expression "any other breach of this charter party" appearing in the clause. Staughton J., however, noted in his reasons for refusing leave that while there were alternative jurisprudential concepts from which the requirement that notice of withdrawal should be given within a reasonable time might be derived, i.e. "implied term" of the contract and "waiver", both of which concepts had been referred to indifferently by Lord Wilberforce in ***Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia (The Laconia)*** *[1977] A.C. 850 (a case which dealt only with withdrawal in default of punctual and regular payment of the hire), whichever concept were applied to the facts of the instant case it would lead to the same result; and although the arbitrators had plumped for "implied term" and excluded "waiver", the grounds which they said precluded the existence of waiver were in the view of Staughton J. and of the majority of the Court of Appeal (which is also shared by me) quite manifestly wrong."*

As the other members of the House of Lords agreed with Lord Diplock's speech, this passage would seem to determine that principles of waiver are capable of resulting in the loss of a right to withdraw from a charter through effluxion of time alone.

52. The passages that we have just quoted do not afford much assistance to identifying (1) how it is that the doctrines of election, waiver and estoppel are capable of producing a *'rule'* that a right to avoid a charter must be exercised within a reasonable time, nor (2) to identifying the considerations that are relevant to determining what is a 'reasonable time' and whether these are the same when considering an implied term as when considering election, waiver and estoppel. Our own conclusions are as follows.

53. A time charter party is a joint adventure. The shipowner provides the use of his ship in accordance with orders given by the charterer. The charterer pays hire for the services provided by the shipowner. The suggestion that such a charter may permit a prolonged period during which one or both of the parties remains at liberty to terminate the charter is in conflict with business efficacy, as so forcefully demonstrated by Sir John Donaldson. If circumstances arise giving rise to a right to terminate the charter business efficacy requires that the right be exercised promptly. If the shipowner continues to provide the services of his ship, or the charterer continues to make use of those services beyond such time as would reasonably be needed to react to those circumstances, the inference will normally be that he has decided not to exercise the right to terminate the charter. In such circumstances the principles of election, waiver and estoppel will normally preclude the party in question from thereafter terminating the charter. Thus the requirements of business efficacy that justify the implication of a term that the right to withdraw be exercised within a reasonable time will normally produce the same result as a consequence of the application of the principles of election, waiver, and estoppel.

54. Principles of election, waiver and estoppel can, however, sometimes be difficult to apply. Miss Hopkins has demonstrated that to us by an attempt to rely upon the difficult case of ***Peyman v Lanjani*** [1985] Ch 457, in support of the surprising submission that the charterers in this case could not lose their right to cancel the charter until they received legal advice that they had such a right. The *Antaios* provides another example of those difficulties, for it was not clear to Ackner LJ, who dissented in the Court of Appeal, that the owners' right to withdraw was barred by principles of election, waiver or estoppel. In the light of such potential difficulties, it seems to us that there is a strong case for the implication of the term found by Branson J. in ***KKKK v Belships***. As we stated earlier, however, this is not a question which it is necessary for us to resolve.

55. At the end of the day the question for us, applying the template of the ***Antaios,*** is whether, on the facts of this case, the decision of the arbitrators that the charterers were out of time for exercising a right to cancel the charter was *'open to serious doubt'*. We are in no doubt that it was not. The following are our reasons. A delay in purporting to cancel the charterparty for over a month from the date of the events alleged to have given rise to the right to cancel was only consistent with a determination to continue with the charterparty despite those events. Had the arbitrators applied the principles of election, waiver and estoppel we are confident that they would have concluded that these precluded the right to cancel the charterparty after so long a period of delay. Thus the juridical basis upon which the arbitrators found that the right to cancel had to be exercised within a reasonable time did not impact upon their decision.

56. For these reasons we do not consider that determination of the question of whether the arbitrators were right to imply the term which they applied would substantially affect the rights of the parties. Nor do we consider that the question is one which is of general public importance. It follows that this appeal must be dismissed.

57. Thus, in order to resolve this appeal, it has not proved necessary to decide whether, if the construction issue had stood alone, it would have been open to Tomlinson J. to have granted permission to appeal to the Commercial Court against the majority arbitrators' finding on that issue. This question raises, however, consideration of the

extent to which the criteria in section 69 of the Act have departed from the *Nema* guidelines and this is a matter upon which we believe it would be helpful to give guidance.

The departure from the *Nema* guidelines

58. In the ***Antaios*** Sir John Donaldson MR considered the question raised by Staughton J. of whether, where the Commercial Judge had formed the view that the arbitrators were probably right, the fact that the Court of Appeal might take a different view was any ground for granting permission to appeal to the High Court. He answered this question at pp.1369-70: *"My answer to this question is that it is not if his appreciation that the Court of Appeal might take a different view has no more solid a basis than that this is in the nature of appellate courts and that if the Court of Appeal did take a different view and the parties were sufficiently persistent his own view might equally well be affirmed by the House of Lords. It is quite different if there are known to be differing schools of thought, each claiming their adherents among the judiciary, and the Court of Appeal, given the chance, might support either the school of thought to which the Judge belongs or another school of thought. In such a case leave to appeal to the High Court should be given, provided that the resolution of the issue would substantially affect the rights of the parties (s.1(4) of the 1979 Act) and the case qualified for leave to appeal to the Court of Appeal under s.1(7) of the 1979 Act as no doubt it usually would. I add this additional qualification because there is no point in the judge giving leave when he has little doubt that the arbitrator is right and that, despite adversarial argument, he will affirm the award, unless he is also prepared to enable the Court of Appeal to resolve the conflict to judicial opinion."*

Fox LJ, at pp.1377-8, agreed with him.

59. In paragraph 9 above we have quoted what we have described as the gloss placed by Lord Diplock on his ***Nema*** guidelines. He went on at p.204B to explain his reasons for differing from the views of Sir John Donaldson:

"Decisions are one thing; dicta are quite another. In the first place they are persuasive only, their persuasive strength depending upon the professional reputation of the judge who voiced them. In the second place, the fact that there can only be found dicta but no conflicting decisions on the meaning of particular words or phrases appearing in the language used in a standard term in a commercial contract, especially if, like the N.Y.P.E. withdrawal clause, it has been in common use for very many years, suggests either that a choice between the rival meanings of those particular words or phrases that are espoused by the conflicting dicta is not one which has been found in practice to have consequences of sufficient commercial importance to justify the cost of litigating the matter; or that business men who enter into contracts containing that standard term share a common understanding as to what those particular words and phrases were intended by them to mean.

It was strenuously urged upon your Lordships that wherever it could be shown by comparison of judicial dicta that there were two schools of thought among commercial judges on any question of construction of a standard term in a commercial contract, leave to appeal from an arbitral award which involved that question of construction would depend upon which school of thought was the one to which the judge who heard the application adhered. Maybe it would; but it is in the very nature of judicial discretion that within the bounds of "reasonableness" in the wide ***Wednesbury*** *sense [1948] 1 K.B. 223 of that term, one judge may exercise the discretion one way whereas another judge might have exercised it in another; it is not peculiar to section 1(3)(b). It follows that I do not agree with Sir John Donaldson M.R. [1983] 1 W.L.R. 1362, 1369H-1370B where in the instant case he says that leave should be given under section 1(3)(b) to appeal to the High Court on a question of construction of a standard term upon which it can be shown that there are two schools of thought among puisne judges where the conflict of judicial opinion appears in dicta only. This would not normally provide a reason for departing from* ***The Nema*** *guideline [1982] A.C. 724 which I have repeated earlier in this speech."*

60. The reasoning in this passage would have precluded Tomlinson J. from giving permission to appeal on the construction issue unless he had formed the view that the arbitrators' decision on that issue was probably wrong. We do not, however, consider that this part of the ***Nema*** guidelines survives the provisions of section 69. The criterion for granting permission to appeal in section 69(3)(c)(ii) is that the question should be one of general public importance and that the decision of the arbitrators should be ***at least open to serious doubt***. These words impose a test which is broader than Lord Diplock's requirement that permission to appeal should not be given *'unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction'*. Section 69(3)(c)(ii) is consonant with the approach of Sir John Donaldson in the ***Antaios.***

61. The guideline of Lord Diplock which has been superseded by section 69(3)(c)(ii) was calculated to place a particularly severe restraint on the role of the Commercial and higher courts in resolving issues of commercial law of general public importance. This is because the likelihood of conflicting judicial decisions in relation to such issues, where they related to standard clauses in widely used charterparties containing arbitration clauses, was greatly reduced by the guideline itself. We consider that the facts of this case demonstrate that changing circumstances can raise issues of general public importance in relation to such clauses that are not covered by judicial decision.

62. The nature of international conflict has changed over the years. The changes underlie the construction issue. The reasoning of the majority arbitrators on this issue was as follows: (1) There is no technical meaning of the word 'war'. It must be construed in a common sense way – see ***KKKK v Bantham Shipping*** [1939] 2 KB 554 at 558-9. (2) 'War' is to be distinguished from 'warlike activities and hostilities short of war' dealt with in clause 23(a) of the charter. 'War' means a war between nation states. (3) A businessman applying common-sense in the context of clause 31 would not regard the NATO operation in Kosovo as a war. (4) Members of NATO participating in a NATO operation are not 'involved' in the operation as a nation.

63. The minority arbitrator, Sir Christopher Staughton, thought that the majority arbitrators had asked the wrong question. They should have asked whether a businessman would have said that there was a war in Kosovo in March and April 1999, to which the answer would have been 'yes'. Germany, in his view, was 'involved' in the Kosovo conflict.

64. The difference of view between the experienced arbitrators in this case provides, of itself, ground for contending that the decision of the majority is, 'at least open to serious doubt'. We conclude that, had it not been for the fact that the arbitrators' conclusion on the 'time' issue rendered the question academic, it would have been open to Tomlinson J. in accordance with section 69 of the Act, to follow his inclination and give permission to appeal.

65. For the reasons that we have given, this appeal will be dismissed.

Order: Appeal dismissed, No Order as to costs. (Order does not form part of the approved judgment)

Ms Philippa Hopkins (instructed by Ince & Co for the Appellant)
Mr Stephen Kenny (instructed by Holman Fenwick & Willan for the Respondent)