JUDGMENT : Mr Justice Moore-Bick: Commercial Court. 19th December 2002

1. On 14th February 2000 the defendant chartered the claimant's vessel *Vigour* for the carriage of a cargo of crude oil from one safe port Sudan to one safe port China. The charter was made on the 'ASBATANKVOY' form with various amendments and additions. Part I of that form contains a number of clauses identifying the principal aspects of the contract, including the description of the vessel, the loading and discharging ports and the nature of the cargo. Part II of the form contains detailed contractual provisions relating to these and other matters.

2. Clause E of Part I is intended to identify the cargo to be carried under the charter. The parties' obligations in relation to the loading and carriage of the cargo are set out in detail in clause 1 of Part II, but unlike some of the other detailed clauses, clause 1 makes no specific reference back to Part I and does not explain or add to what is found in clause E.

3. In the present case clause E as completed by the parties read as follows:

   *"**E. Cargo:** minimum 80,000 metric tons Charterer's option up to a full cargo, one/two grade(s) crude oil within vessel's natural segregation. Owners to be responsible for maintaining loaded temperature from 95 degrees fahrenheit and raising to minimum 125 degrees fahrenheit at discharge. Any heat beyond this to be for Charterers' account. Vessel can load about 86,000 metric tons on api of 32.3. **Charterer's Option**."*

   The final words "Charterer's Option" are part of the printed form. It was common ground that they were left in by mistake and can be ignored.

4. The vessel was ordered to Marsa Bashayer where she loaded a cargo of Nile Blend crude oil, a heavy, waxy crude with a high pour point which required heating during the voyage and additional heating for the purposes of discharge. The cargo was carried to Quangzhou where some difficulties were encountered in draining and stripping the cargo tanks at the completion of discharge. As a result a quantity of cargo remained on board when the vessel left Quangzhou.

5. In due course the owners commenced arbitration to recover a balance of freight said to be due under the charter and the charterers counterclaimed in respect of the short delivery of cargo. On 14th February 2002 the arbitrators published an interim final award in which they held that the owners' claim for freight succeeded and that the charterers' counterclaim also succeeded to a substantial extent. That led to an award in favour of the charterers in the sum of US$53,708.63.

The Award

6. In relation to the charterers' claim for short delivery the arbitrators made the following findings which are relevant to the present appeal:

   "15. The experts were agreed that there would have been a certain amount inevitable cargo remaining on board, part of which would be measurable and part of which would have been clingage. . . . . we find that the inevitable total quantity remaining on board on completion of discharge would have been 225 cubic meters.

   . . . . . .

   18 The voyage instructions given by the charterers were ambiguous. They were contained in various faxes and recaps and were eventually incorporated in the charterparty at Part I clause E quoted above. They required the master to maintain the loaded temperature of 95 degrees fahrenheit and to raise the temperature to a minimum of 125 degrees fahrenheit at discharge. Unfortunately, the temperature of the cargo when it was received into the vessel's cargo tanks was 31.7 degrees centigrade on average, 89.06 degrees fahrenheit. The cargo was therefore significantly cooler on loading than had been intended.

   19. In view of the fact that the pour point was stated to be 30°C both experts agreed that a significant deposit of wax crystals would have occurred before and at the time that the cargo was loaded into the vessel's tanks. They also agreed that it was impossible to estimate how much deposition would have occurred as a result of this and to what extent this would have influenced the vessel's ability to discharge the full cargo.

   20. Both experts also agreed that a crude oil such as this one, with such a high wax content and high pour point, should have been heated from the outset and steady heating should have been maintained throughout the whole of the voyage. However, on the assumption that heating had been carried out in this way, they were unable to agree whether any of the wax which had been formed as a result of the temperature at which the cargo had been loaded would have been re-dissolved. We concluded that at least some of the problems encountered with draining and stripping the cargo tanks towards the end of discharge at Quangzhou were caused by wax formed as a result of the temperature of the cargo when it was loaded.

   . . . . . .

   23. As noted above, both experts agreed that the failure of the vessel's crew to heat the cargo from the outset would have had a significant impact on the amount of wax deposited during the voyage. They also agreed that the low temperature at which the cargo was loaded would have had a similar effect. Neither of them could estimate by how much the cargo remaining onboard on completion of discharge was increased due to the low loading temperature or by how much it was increased as a result of the failure to heat the cargo from the outset."

7. It is implicit in the award that the arbitrators found that the cargo had not been heated during the first two weeks of the voyage. They found that 2,232 cubic metres of cargo that should have been discharged in fact remained on board, of which 217 cubic metres was lost as a result of malfunctioning of some of the vessel's tank suction valves. It follows from the findings to which I have just referred that a total of 2,015 cubic metres of oil was retained on board as a result of the deposition of wax caused partly by the temperature of the cargo on loading

and partly by the owner's failure to apply heating during the initial period at sea. However, the arbitrators were unable to make any finding as to how much each of those contributed to the loss.

8. It was common ground before the arbitrators that the owners were prima facie liable as bailees for failure to deliver the whole of the cargo (other than the small quantity that would inevitably have remained on board), but that if they could show that the loss had been caused in part by a breach of contract on the part of the charterers, the burden passed to the charterers to show how much of the loss was the result of some other cause for which the owners were responsible. This proposition, which is based on ***Government of Ceylon v Chandris*** [1965] Lloyd's Rep. 204 and C.*H.Z.* ***Rolimpex v Eftavrysses Compania Naviera S.A. (The 'Panaghia Tinnou')*** [1986] 2 Lloyd's Rep. 586, is not open to challenge on this appeal.

9. Since it was impossible to tell how much of the shortage was caused by wax deposited as a result of the temperature of the cargo on loading, the charterers' claim was bound to fail if they were in breach of contract in that regard. The critical question for the arbitrators, therefore, was whether the charterers were in breach of contract in loading the cargo at a temperature below 95°F.

10. The arbitrators decided this issue in favour of the charterers. They accepted the charterers' submission that clause E imposed no obligation in relation to the temperature of the cargo on loading but simply allocated the costs of heating between owners and charterers.

Irregularity

11. Mr. Baker submitted that the arbitrators' conclusion was correct and that the award should therefore be upheld. Before I come to consider the meaning of clause E, however, it is necessary to refer to an alternative ground on which he invited me to uphold the award if I were against him on the question of construction. This requires an explanation of the way in which the proceedings developed before the arbitrators.

12. The proceedings in this case were conducted in a formal manner with exchanges of written statements of case, disclosure of documents and the exchange of witness statements and experts' reports. An oral hearing was held at which each party was represented by counsel. Opening submissions were made both orally and in writing. Although the owners were the claimants, it was recognised that the main issue before the tribunal was the charterers' claim for short delivery and accordingly when it came to final submissions it was agreed that the charterers should address the tribunal first and have a right of reply. Since the time set aside for the hearing had by then been exhausted the arbitrators directed that closing submissions should be made in writing. The charterers served their submissions on 30th July 2001, the owners served their submissions in response on 2nd August and the charterers served their reply on 5th September.

13. In their submissions the owners put forward the argument that the charterers were in breach of contract in loading the cargo at a temperature of less than 95°F. That necessarily involved the contention that on its true construction clause E imposed such an obligation on the charterers. The owners argued that clause E as a whole contained a description of the cargo with which the charterers were bound to comply, but that regardless of whether the loading temperature was part of the description of the cargo the charterers were obliged to tender the cargo in a reasonable condition for carriage. Each of these obligations, they said, was broken by tendering the cargo at a temperature below 95°F.

14. In their reply the charterers took issue with the owners' construction of clause E. They submitted that the first sentence alone contained a description of the cargo and that the second and third sentences simply allocated the cost of heating between owners and charterers without imposing any obligation on either party. However, they also disputed the owners' right to rely on those arguments on the grounds that they had not been raised in time to enable them to explore the commercial background to the charter with the witnesses. On 7th September the owners' solicitors informed the tribunal that the charterers' submissions in reply did not contain any new points or issues that called for a response.

15. In their award the arbitrators dealt with the issue of the construction of clause E without adverting to the question whether the owners should be allowed to raise it at all, but since they decided it in favour of the charterers, it made no difference to the outcome.

16. The owners subsequently applied for, and obtained, permission to appeal on the question whether clause E gave rise to an obligation on the charterers to load a cargo at a temperature of not less than 95°F. Mr. Baker submitted that the arbitrators should never have allowed the issue of construction to be raised at all given that the charterers had been prevented from dealing with it in evidence. He submitted that if the court were to hold that they were wrong on that point and were to vary the award in favour of the owners, as it normally would in those circumstances, the charterers' position would be significantly affected and they would suffer a substantial injustice.

17. A complaint by one party to an arbitration that the tribunal has failed to give it a fair opportunity to present its case is one that should ordinarily be pursued under section 68 of the Arbitration Act 1996. However, a challenge to an award on the grounds of serious irregularity can only be made if there has been an irregularity that has given rise, or will give rise, to substantial injustice. In a case such as the present no injustice will arise unless and until the court, having decided on appeal that the arbitrators were wrong on the point of construction, varies the award in favour of the owners. It was for this reason that the charterers in the present case raised the issue of irregularity as an alternative ground on which they now seek to uphold the award if they fail on the issue of construction. Mr. Baker submitted that both the Arbitration Act itself and the rules of court governing appeals against arbitral awards allow for that course to be followed.

18. Section 69 of the Act provides that a party that wishes to appeal against an award on a question of law must first obtain the leave of the court which can only be granted if the criteria set out in section 69(3) are satisfied. One of these is

"(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."

This requirement was introduced for the first time in the 1996 Act and has no direct counterpart in the earlier legislation. The statute itself gives no further guidance on what factors the court should take into account when considering whether it is just and proper in all the circumstances for the court to determine the question in respect of which leave to appeal is sought; it is a matter to be determined having regard to all the circumstances of the case. It will usually be appropriate, therefore, for the defendant to file evidence in support of any contention that the requirement is not satisfied in any particular case.

19. The procedure governing arbitration claims is contained in CPR Part 62 and its associated practice direction. An arbitration claim (other than a claim to stay existing proceedings under section 9 of the Act) must be started by the issue of an arbitration claim form in accordance with the Part 8 procedure: see rule 62.3(1). Accordingly, any evidence on which the claimant relies must be served with the claim form in accordance with the requirements of Part 8. As far as the defendant is concerned, paragraph 12.3 of the practice direction supplementing Part 62 provides as follows:

"The written evidence filed by the respondent to the application must-

(1) state the grounds on which the respondent opposes the grant of permission;

(2) set out any evidence relied on by him relating to the matters mentioned in section 69(3) of the 1996 Act; and

(3) specify whether the respondent wishes to contend that the award should be upheld for reasons not expressed (or not fully expressed) in the award and, if so, state those reasons."

20. Mr. Berry Q.C. submitted that the right course for the charterers to take in this case was to begin proceedings under section 68 of the Act on a protective basis as soon as the award was published in case the owners obtained leave to appeal and were eventually successful in overturning the award. However, he said, it was now far too late for an application of that kind to be made and they must suffer the consequences of failing to act in time.

21. Mr. Baker submitted that it would make no practical or legal sense for the successful party to challenge an award in its favour, however unsatisfactory it might consider the basis or reasoning of that award to be, and that it was neither necessary nor appropriate for the charterers in this case to make an application under section 68. He submitted that section 69(7) of the Act gives the court a discretion following the hearing of an appeal to make whatever order it considers appropriate in the light of its decision on the question of law. That could include an order affirming the award despite the fact that the claimant had succeeded on the question of law in respect of which leave to appeal had been given. He pointed out that paragraph 12.3(3) of the practice direction provides machinery by which a defendant can contend that the award should be upheld for reasons other than those expressed in the award itself and submitted that the charterers were entitled to rely on an irregularity in the course of the proceedings for that purpose.

22. In my view neither of those submissions is correct. Section 69(7) of the Act forms part of the statutory code providing for appeals on questions of law and as such it sets out the remedies available to the court following the hearing of an appeal. No doubt the court has a measure of discretion when it comes to deciding what order is most appropriate to give effect to its decision. For example, following a successful appeal the court might decide to vary the award itself or remit it to the tribunal for reconsideration. However, section 69(7) must be read in the context of section 69 as a whole. The intention of the legislation is that the powers of the court under this subsection should be exercised in a manner that will best give effect to its conclusions on the issues of law that arise on the appeal, including any issues of law raised by the defendant under paragraph 6.12.(3) of the practice direction seeking to uphold the award. It does not, in my view, give the court a wider discretion or allow it to take into account matters outside the scope of the appeal itself. Thus if the court's decision on questions of law means that the award cannot be upheld, I do not think that it has a discretion under this subsection to affirm the award on extraneous grounds such as an irregularity in the conduct of the proceedings. Any complaint of irregularity must therefore be pursued by some other route.

23. The statutory provisions enabling a party to challenge an award on the grounds of irregularity are contained section 68 of the Act which requires the claimant to show that there has been serious irregularity that has caused or will cause him substantial injustice. In a case such as the present, however, that requirement cannot be satisfied unless and until there is a successful appeal against the award. Until that point has been reached there is no basis for challenging the award. On the other hand, where there are existing grounds for challenging the award the application must be pursued promptly and with diligence. Nothing in the Act, the rules or the practice direction lend any support to the suggestion that a party can make such an application on a contingent basis and the standard directions in paragraph 6 of the practice direction are designed to ensure that a challenge of this kind is heard as quickly as possible. On the other hand, I do not think that a complaint of irregularity can properly be regarded as a "reason not expressed in the award" within the meaning of paragraph 12.3(3) of the practice direction. An appeal is limited to questions of law arising out of the award; it does not enable the claimant to challenge the facts found by the arbitrators or the procedure leading up to the award. This paragraph only provides a procedure to enable the defendant to contend that on the facts found in the award the arbitrators' conclusion is correct in law, even if they are wrong on the particular question of law on which leave to appeal is

sought. The distinction is reflected in the different provisions of paragraphs 12.(3)(2) and 12.3(3) of the practice direction.

24. I think it is clear, both from the terms of section 69(3)(d) of the Act and the provisions of the practice direction, that the appropriate way in which to raise an argument of the kind advanced by the charterers in the present case is to oppose the application for leave to appeal on the grounds that it is not just and proper in all the circumstances for the court to determine the question of law in respect of which the claimant seeks leave to appeal. It will be necessary for the defendant to file evidence in support of that argument which, in a case such as the present, will be broadly the same as that which he would need to serve in support of an application under section 68. It may then be necessary to vary or supplement the standard directions contained in paragraph 6 of the practice direction to ensure that the claimant is given a sufficient opportunity to file evidence in response. It may also be appropriate to direct an oral hearing at which the issue can be determined after hearing argument.

25. In the present case the issue of irregularity was raised in the witness statement of Mr. Sam Tsui filed in opposition to the application for leave to appeal. In that statement Mr. Tsui submitted that because of the way in which the proceedings had developed the question of the construction of clause E was not one which the arbitrators were asked to determine within the meaning of section 69(3)(b). He also submitted that the question did not arise out of the award at all and that even if it did, it would not be just and proper for the court to determine the question. He therefore submitted that leave to appeal should be refused. In response to the statement of Mr. Tsui the owners filed a witness statement from their solicitor, Mr. Jonathan Goldfarb, in which he drew attention to other aspects of the proceedings and took issue with Mr. Tsui on whether there was any admissible evidence that the charterers could have called on the issue of construction.

26. All this material was available to the judge who considered the owners' application for leave to appeal. Neither party requested an oral hearing and the judge did not consider it necessary to direct one. On 9th July 2002 he gave the owners leave to appeal after having considered the matter on paper. He did not give reasons for his decision, as is customary in cases where leave is granted.

27. It can be seen from this description of events that the charterers did in fact follow what in my view was the correct procedure by raising the issue of irregularity in opposition to the owners' application for leave to appeal. In the event leave to appeal was given notwithstanding their objection and without there being any opportunity for oral argument. Section 69(3)(d) is very broad in its scope and is no doubt apt to encompass a great variety of situations. In some cases the court may be satisfied that the objection can be disposed of without the need for oral argument; in others it may be appropriate to direct an oral hearing. Since the Act provides that applications for leave to appeal are to be disposed of without a hearing unless the court orders otherwise, it would be wise for a defendant who wishes to be heard on a question of this kind to make that known to the court.

28. Mr. Baker's submissions suggested that the charterers may have been under the impression that provided they raised the issue of irregularity in the witness statements they would be entitled to address the court on that issue at the hearing of the substantive appeal, if leave to appeal were granted. If that is so, I think they were wrong, but it might explain why they did not seek an oral hearing of the application for leave to appeal. However, as matters now stand I think that the charterers' objection has effectively been disposed of by the order giving leave to appeal.

29. Although it is apparent from Mr. Tsui's statement that it was filed in opposition to the application for leave to appeal, Mr. Baker submitted that it would be unjust to deprive the charterers of the opportunity to argue their case on this point given that the issue had been fully canvassed in the evidence. This presupposes that the judge who considered the owners' application for leave to appeal did not consider the charterers' objection on its merits, but I can see no reason to think that is the case. Be that as it may, however, I do not think that the charterers can pursue their objection at this stage unless the decision giving leave to appeal is reopened.

30. Although I did not hear argument on the point, I am prepared to assume for present purposes that the court might be justified in reopening the decision giving leave to appeal if it were satisfied that there was no other way to avoid serious injustice: see ***Taylor v Lawrence*** [2002] EWCA Civ 90; [2002] 2 All ER 353 and ***Seray-Wurie v London Borough of Hackney*** [2002] EWCA Civ 909; [2002] 3 All ER 448. To have any chance of reopening the decision, however, the charterers would have to have a strong case for saying that the arbitrators had acted unfairly in a way which would cause them significant injustice if an appeal on the issue of construction were to be allowed.

31. The thrust of the charterers' complaint is that the arbitrators allowed the owners to put forward an argument that clause E gave rise to an obligation to load the cargo at a temperature of not less than 95°F despite the fact that they had not had an opportunity of investigating the matter with the witnesses. The suggestion was that if they had been able to do so they would, or might, have been able to adduce evidence of the commercial background to the charter that would have supported the conclusion that parties did not intend to impose an obligation of that kind on the charterers.

32. It is not uncommon, even in proceedings conducted with a degree of formality, for the arguments to undergo a certain amount of development as the proceedings progress and even for new points, or new ways of putting old points, to emerge at a relatively late stage. No tribunal likes to shut out genuine issues if it can avoid doing so, but it is necessary to ensure that the other party has a fair opportunity to deal with any new point that is put forward. Provided the arbitrators are satisfied that there will be no prejudice to the opposing party they are

entitled to allow new points to be raised at any stage of the proceedings, even in closing submissions. Raising a point at a late stage, however, may have repercussions when the tribunal comes to deal with costs.

33. The allegation that the charterers were in breach of an obligation imposed by clause E was certainly a new point, though it was a short point of construction and was quite closely related to other points that had been argued in relation to the meaning and effect of clause E. Although the charterers objected to the introduction of this new point on the grounds that they would "need to have explored with the witnesses" whether the charter was intended to guarantee a minimum cargo temperature of 95°F, it is clear that some important evidence of the commercial background to the contract was already before the arbitrators. The charterers themselves referred in their reply submissions to the fact that the owners were aware that cargoes of this kind were typically loaded at temperatures of 90-95°F. Moreover, no indication was given either in the charterers' submissions to the arbitrators or in Mr. Tsui's statement of what relevant evidence the witnesses might have been able to give. It appears from paragraph 18 of the award that the only direct communication between the parties concerning the temperature of the cargo was to be found in what the arbitrators describe as "ambiguous" voyage instructions that eventually found their way into the charter as clause E.

34. Mr. Baker submitted that, because the irregularity in this case consisted in the arbitrators' decision to allow the owners to raise a new argument, the court could only consider the material then before the arbitrators when deciding whether they acted unfairly or not. I am unable to accept that. In order to persuade the court that it would be unfair to give the owners leave to appeal the charterers would have to show that if the appeal were allowed they would suffer injustice as a result of having been denied the opportunity of calling evidence relevant to the issue of construction. It would not be enough for them to say they would have wished to explore the matter with the witnesses; they would have to show that they could have put before the tribunal relevant evidence which, if accepted, would be likely to have affected its decision. However, the charterers have failed to identify what evidence could have been given or by whom. In short, there is nothing in Mr. Tsui's statement to suggest that the charterers would have been able to put any relevant evidence before the tribunal bearing on this issue. In those circumstances there is no basis for thinking that the tribunal's decision to allow the issue to be raised is likely to have caused injustice to the charterers, whatever the outcome of the appeal. Nor is there any reason to think that the charterers have suffered injustice as a result of this question being disposed of without oral argument on the application for leave to appeal. In these circumstances the question of reopening that decision does not arise and the order giving leave to appeal must stand.

The construction of Clause E

35. I return, therefore, to the construction of clause E. Mr. Berry submitted that the clause falls into three parts: the first sentence describes the cargo to be loaded and in that respect defines the employment for which the vessel was chartered; the second and third sentences impose an obligation on the owners in relation to the heating of cargo and define which party shall bear the costs of doing so; the fourth sentence contains an undertaking concerning the vessel's cargo carrying capacity. The use of the expression "responsible for maintaining loaded temperature", he argued, necessarily implies an obligation on the charterers to load the cargo at that temperature.

36. Mr. Baker submitted that the expression "to be responsible for" maintaining the temperature of the cargo "from" 95°F when read in conjunction with the third sentence simply means that owners are to bear the cost of such heating as may be necessary to maintain the temperature of the cargo within the range from 95°F to 125°F without imposing any specific obligation as to the temperature at which the cargo should be carried. He also submitted that the court should be slow to depart from the conclusion of an experienced tribunal on the construction of a "one off" provision of this kind.

37. I recognise, of course, that the court should give considerable weight to arbitrators' decisions on issues of construction in cases where they are informed by a knowledge of commercial practice or the particular background to the contract. In the present case, however, there is nothing in the award to indicate that the tribunal's decision was influenced by matters of that kind. As far as one can tell, they simply construed the words of clause E as they stood and gave them what they considered to be their natural meaning. Accordingly, I do not consider that I need feel unduly constrained in this case by the conclusion expressed in the award.

38. The construction of a specially drafted clause of this kind is often as much a matter of impression as a matter of analysis, but in the present case impression and analysis point to the same conclusion. Mr. Baker's argument depends heavily on reading the third sentence, which does allocate liability for the costs of heating, in a way which reflects back onto the second sentence so as to read the word "responsible" as meaning "liable for the cost of". However, that involves taking the word "responsible" out of context and failing to read it in conjunction with the rest of the sentence. When a contract states that one of the parties is "to be responsible for" carrying out a certain act it usually means that he is under an obligation to do it or see that it is done and in my view that is the natural meaning of the phrase in this case. This part of clause E is concerned with the temperature of the cargo while on board the vessel and at the time of discharge and the arbitrators have found in paragraph 18 of the award that it was derived from the charterers' voyage instructions. It is quite natural, therefore, that it should give rise to an obligation on the part of the owners. That is more clearly so in relation to discharge, at which point it was intended that the cargo should be heated to a minimum of 125°F. If one simply takes the words "Owners to be responsible for . . . . . raising [loaded temperature] to minimum 125 degrees fahrenheit at discharge", with or without the following sentence, it is difficult to argue that the clause was not intended to impose on the owners an obligation to heat the cargo to that temperature at discharge. That is all the more so given the use of the word

"minimum" which suggests that owners must heat the cargo to whatever temperature is required to enable it to be discharged.

39. Mr. Baker submitted that clause E says nothing about the owners' obligations in relation to heating which are to be derived from other parts of the charter. The fact is, however, that although other clauses deal in general terms with the owners' duty towards the cargo, nowhere else does one find any other provision dealing in terms with heating requirements. One can see from the award that heating is an important factor in the carriage of a cargo of this kind and the absence of any other provision dealing expressly with heating provides powerful support for the conclusion that the second sentence of clause E was intended to impose an obligation on the owners rather than simply to be part of a regime allocating costs between owners and charterers. Moreover, it is difficult to see what might be the purpose of including the word "minimum" in a provision intended solely to allocate the costs of heating. I conclude, therefore, that the second sentence of clause E is intended to and does impose an obligation on the owners.

40. If one accepts that the second sentence of clause E imposes an obligation on the owners in relation the heating of cargo the next step is to determine its scope. That does not present too much difficulty: it is to "maintain" loaded temperature from 95°F and raise it to minimum 125°F at discharge. Mr. Berry submitted that the owners could not maintain the temperature of the cargo at 95°F unless it was loaded at that temperature and that if those words impose a duty on the owners to maintain the temperature of the cargo at 95°F, the duty of co-operation recognised by Lord Blackburn in ***Mackay v Dick*** (1881) 6 H.L.C. (Sc.) 251, 263 obliges the charterers to tender the cargo at that temperature.

41. I agree that it is implicit in the second sentence of clause E that the cargo will be loaded at a temperature of not less than 95°F - the use of the word "maintain" points clearly to that conclusion – and since the clause imposes an obligation on the owners to maintain the loaded temperature I agree that the charterers must be under a corresponding obligation to load the cargo at that temperature. If that were not so, the owners would not be able to perform that part of their obligation. Whether one reaches that conclusion simply as a matter of construction or through the application of the principle in *Mackay v Dick* does not matter. During the voyage the owners will have to heat the cargo to maintain its original temperature and will have to apply additional heat to ensure that by the time of arrival at the discharging port the temperature has been raised to 125°F, or higher if that is necessary for discharge. The combination of these obligations is sufficient in my view to explain the use of the word "from" which at first sight strikes one as rather odd. Given the particular characteristics of this cargo, in particular the risk of deposition of wax if the temperature falls significantly below 95°F, I do not find it surprising that the parties should have agreed that it would be loaded at what is, on the face of it, the temperature at which it should be maintained during carriage. For these reasons I am satisfied that the arbitrators' decision is wrong and that in loading the cargo at a temperature of 89.06°F the charterers were in breach of contract.

42. The appeal must therefore be allowed. It follows that the charterers' claim fails by reason of the application of the principle referred to in paragraph 8 above and it is common ground that in these circumstances the award should be varied so as to provide that the sum of US$310,925.15 be paid by the charterers to the owners.

Mr. Steven Berry Q.C. (instructed by Ince & Co.) for the claimant
Mr. Andrew Baker (instructed by Stephenson Harwood) for the defendant